

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

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

**In the Matter of**

**BEAR CREEK MINING CORPORATION,**

**Claimant,**

**v.**

**THE REPUBLIC OF PERU,**

**Respondent.**

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**CLAIMANT'S MEMORIAL ON THE MERITS**

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May 29, 2015

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## Glossary of Terms Employed

<b>Amparo Decision</b>	Amparo Decision No. 28 rendered by the Lima First Constitutional Court on May 12, 2014 declaring Article 1 of Supreme Decree 032 inapplicable and confirming Bear Creek’s rights over the Santa Ana Project
<b>Antunez Statement</b>	Witness Statement of Elsiario Antunez de Mayolo—Chief Operating Officer of Bear Creek and General Manager of Bear Creek Peru—dated May 28, 2015
<b>Bear Creek or the Company</b>	Claimant, Bear Creek Mining Corporation, together with its wholly-owned Peruvian branch Bear Creek Peru and subsidiary Bear Creek Mining S.A.C.
<b>Bear Creek Exploration</b>	Bear Creek Exploration Company Ltd., a wholly owned Canadian subsidiary of Bear Creek Mining Corporation
<b>Bear Creek Peru</b>	Bear Creek Mining Company Sucursal Del Perú, the Peruvian branch of Bear Creek Exploration
<b>Bullard Expert Report</b>	Expert Report of Professor Alfredo Bullard dated May 26, 2015
<b>Corani or the Corani Project</b>	Bear Creek’s Corani silver mining project located 350 kilometers of Santa An in the Puno Region of Peru
<b>Corani Feasibility Study</b>	Form NI 43-101 F1 Technical Report Feasibility Study for the Corani Project dated December 2011
<b>DCF</b>	Discounted Cash Flow
<b>DGAAM</b>	<i>Direccion General de Asuntos Ambientales Mineros</i> , the General Direction for Environmental Mining Affairs of the Ministry of Energy and Mines
<b>EPCM</b>	Engineering, Procurement and Construction Management contract for the construction of the Santa Ana Mining Project
<b>ESIA</b>	Environmental and Social Impact Assessment, the socio-environmental approval process required for mining projects under Peruvian law
<b>EV</b>	Enterprise Value, the sum of a firm’s interest bearing debt and equity components
<b>FMV</b>	Fair Market Value
<b>Frente de Defensa</b>	<i>Frente de Defensa de los Recursos Naturales de la Zona Sur de Puno</i> , a political organization led by Walter Aduviri opposing natural resources projects in the Puno Region of Peru

<b>Canada-Peru FTA or the FTA</b>	Free Trade Agreement between Canada and the Republic of Peru signed May 29, 2008 and entered into force on August 1, 2009
<b>FTI Expert Report</b>	Expert Report of FTI Consulting, Inc. dated May 29, 2015.
<b>INACC</b>	<i>Instituto Nacional de Concesiones y Catastro Minero</i> , the Peruvian national register of mineral properties, now part of the <i>Instituto Geológico Minero y Metalúrgico</i> or INGEMMET
<b>IRR</b>	Internal Rate of Return; the rate of return used in capital budgeting to measure and compare the profitability of investments
<b>Karina Villavicencio</b>	Jenny Karina Villavicencio Gardini; an employee of Bear Creek who claimed the Santa Ana Concessions on her own behalf and entered into option agreements with Bear Creek for the transfer of the Santa Ana Mining Concessions
<b>MINEM</b>	The Peruvian Ministry of Energy and Mines
<b>MINEM Lawsuit</b>	The civil lawsuit commenced by MINEM against Bear Creek and Karina Villavicencio seeking to nullify the Santa Ana Concession and their transfer to Bear Creek
<b>Mineral Reserve</b>	The economically mineable part of a Measured or Indicated mineral resource demonstrated by at least a preliminary feasibility study. The study must include adequate information on mining, processing, metallurgical, economic, and other relevant factors that demonstrate, at the time of reporting, that economic extraction can be justified. A mineral reserve includes diluting materials and allowances for losses that might occur when the material is mined. Mineral reserves are categorized as proven mineral reserves or probable mineral reserves as follows on the basis of the degree of confidence in the estimate of the quantity and grade of the deposit.
<b>Mineral Resource</b>	A concentration or occurrence of diamonds, natural solid inorganic material, or natural solid fossilized organic material including base and precious metals, coal and industrial minerals in or on the Earth's crust in such form and quantity and of such a grade or quality that it has reasonable prospects for economic extraction. The location, quantity, grade, geological characteristics and continuity of a mineral resource are known, estimated or interpreted from specific geological evidence and knowledge.
<b>NAV</b>	Net Asset Value, the value of an entity's assets minus the value of its liabilities
<b>NI 43-101</b>	National Instrument 43-101, the national instrument for the Standards of Disclosure for Mineral Projects applicable to Canadian mining companies or foreign mining companies listed on a Canadian stock exchange

<b>NPV</b>	Net Present Value; the sum of the present values of incoming and outgoing cash flows over a period of time
<b>Option Agreements</b>	The two option agreements between Bear Creek and Karina Villavicencio for the purchase of Santa Ana concessions, dated November 17, 2004 and December 5, 2004 respectively
<b>PEA</b>	Preliminary Economic Assessment; an early-stage detailed study on the economics of a mining project based on assumptions and estimated costs, which is used for determining if a more costly feasibility study is warranted
<b>Peru or the Government</b>	Respondent, the Republic of Peru
<b>PPC</b>	<i>Plan de Participacion Ciudadana</i> , Bear Creek's Community Participation Plan for the Santa Ana Project approved by MINEM on January 7, 2011
<b>Purchase and Sale Agreement</b>	Agreement between Bear Creek and Rio Tinto for the purchase and sale of a 30% participating interest in the Corani Project dated March 6, 2008
<b>RPA Expert Report</b>	Expert Report of RPA, Inc. dated May 29, 2015
<b>Santa Ana or the Santa Ana Project</b>	Bear Creek's Santa Ana mining project
<b>Santa Ana Concessions</b>	The mining concessions (Karina 9A, Karina 1, Karina 2, Karina 5, Karina 6 and Karina 7 Mining Concessions) comprising the Santa Ana Project
<b>Santa Ana Feasibility Study</b>	The Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report dated Oct. 21, 2010; a feasibility study is a comprehensive technical and economic study of the selected development option for a mineral project including all relevant elements necessary to demonstrate at the time of reporting that extraction is reasonably economically justified
<b>Santa Ana Revised Feasibility Study</b>	The Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report Update to the Oct. 21, 2010 Technical Report dated April 1, 2011
<b>SPCC</b>	Southern Peru Copper Corporation
<b>SUNARP</b>	<i>Superintendencia Nacional de los Registros Públicos</i> , the Peruvian Public Registry
<b>SUNARP Decision</b>	Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Registry Tribunal No. 1 on November 7, 2005, confirming the validity of the Option Agreements between Bear Creek and Karina Villavicencio

<b>Swarthout Witness Statement</b>	Witness Statement of Andrew T. Swarthout—President, Chief Executive Officer and Director of Bear Creek—dated May 28, 2015
<b>Supreme Decree 032</b>	Supreme Decree No. 032-2011-EM dated June 25, 2011 revoking Bear Creek’s rights to own and operate the Santa Ana Project
<b>Supreme Decree 083</b>	Supreme Decree No. 083-2007-EM dated November 29, 2007 authorizing Bear Creek to acquire, own and operate the Santa Ana Project
<b>Transfer Agreements</b>	The two mineral rights transfer agreements for the Santa Ana Concessions between Bear Creek and Karina Villavicencio dated December 3, 2006
<b>TSXV</b>	Toronto TSX Venture Exchange
<b>Valuation Date</b>	June 23, 2011, the day prior to the issuance of Supreme Decree 032
<b>WACC</b>	Weighted Average Cost of Capital; the rate that a company is expected to pay on average to all its security holders to finance its assets
<b>Walter Aduviri</b>	Walter Aduviri Calizaya, a politician who organized the Frente de Defensa as a platform to achieve political notoriety in the Puno Region of Peru

## CLAIMANT’S MEMORIAL ON THE MERITS

Claimant Bear Creek Mining Corporation (“Bear Creek” or the “Company”)<sup>1</sup> hereby submits its Memorial on the Merits in this arbitration proceeding against Respondent the Republic of Peru (“Peru,” or the “Government”) pursuant to the Free Trade Agreement between Canada and the Republic of Peru (the “FTA” or “Canada-Peru FTA”).

### I. INTRODUCTION

*[T]here is no justified purpose for bringing an action by the State to reverse the rights granted to Bear Creek Mining Company Sucursal del Perú, which were granted in fulfillment of the corresponding procedures and complying with the necessary requirements.*

\* \* \*

*In this case, as there is no reasonable motive in Supreme Decree No. 032-2011-EM, this principle [of legal security] has been violated by this clearly arbitrary act; all the more so, because upon its issuance, the claimant was not provided with the opportunity to accredit that the circumstances relating to its assumed obligations had not been neglected. As such, it can be verified that the cited supreme decree violates the principle of the prohibition of arbitrariness, given that, as observed therein, there is no imputation whatsoever attributable to the claimant that allows the derogation of the supreme decree under which the mining rights of Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6 and Karina 7 were granted.*

**First Specialized Constitutional Court of Lima, Decision No. 28 dated May 12, 2014.**<sup>2</sup>

1. This case is an unusual one. It is unusual for a respondent State to acknowledge that its own actions violate the fundamental tenets of legal security, due process, and prohibition against arbitrariness. It is even more unusual for a respondent State to acknowledge that there

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<sup>1</sup> Throughout this Memorial on the Merits and unless indicated otherwise, “Bear Creek” or the “Company” refers to the Claimant Bear Creek Mining Corporation together with its wholly-owned Peruvian branch Bear Creek Mining Company Sucursal Del Perú (“Bear Creek Peru”) and subsidiary Bear Creek Mining S.A.C.

<sup>2</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

was no justified purpose or reasonable motive for its taking of a claimant's investment – here a large silver mining project. Indeed, it is more unusual still for high-level Peruvian officials to confirm, in public, that what Peru did to Bear Creek was wrong and must be made right. Nevertheless, these are the circumstances of the present case. Unfortunately, for all of its rhetoric, Peru has not returned Bear Creek's Santa Ana Mining Project ("Santa Ana," the "Project" or the "Santa Ana Project") nor has it paid compensation, or even offered to pay compensation, for its unlawful taking. Thus, while unusual for the reasons mentioned, this is a straightforward case of expropriation without compensation by the Peruvian Government and of serious violations of additional obligations under the Canada-Peru FTA and international law.

2. On June 25, 2011, the Peruvian Government published Supreme Decree No. 032-2011-EM ("Supreme Decree 032") expropriating Bear Creek's rights over the Santa Ana Project. Supreme Decree 032 purported to repeal an earlier Supreme Decree No. 083-2007-EM ("Supreme Decree 083") issued by the Government in 2007, which authorized Bear Creek to acquire the mining concessions comprising the Santa Ana Project (the "Santa Ana Concessions" or the "Concessions") and move forward with the Santa Ana Project. Contrary to Peru's ostensible motivations, the sole purpose of Supreme Decree 032 was to placate a minority of political activists in the remote region of Puno (where the Santa Ana Project is located) in the wake of the presidential elections held less than a month earlier. These activists were led by Walter Aduviri, a politician who campaigned against natural resource projects in the region, for the sole purpose of achieving political notoriety in a bid to unseat the incumbent leadership of the regional government. Prior to issuance of Supreme Decree 032, on June 1, 2011, Peru arbitrarily suspended Bear Creek's Environmental and Social Impact Assessment ("ESIA") process, even after Bear Creek's plan had been approved and was significantly advanced.

3. Shortly *after* taking the Santa Ana Project, the Government commenced unfounded and abusive legal proceedings against Bear Creek asserting that Bear Creek acquired the Santa Ana Mining Concessions improperly. However, contrary to the Government's assertions, Bear Creek acquired the Santa Ana Concessions through a lawful and transparent process and after obtaining the Government's authorization to do so. Because Bear Creek is a foreign company, it needed the Government's authorization to acquire and operate a mining project located within fifty kilometers of the Peruvian border – which is the case for Santa Ana. After extensive vetting of Bear Creek's application, Peru issued Supreme Decree 083 in 2007, declaring the Santa Ana Project a public necessity which posed no threat to national security and authorizing Bear Creek to acquire the Santa Ana Concessions and to operate the Santa Ana Project. Supreme Decree 083, which was signed by the President, Alan Garcia, as well as the President of the Council of Ministers, the Minister of Energy & Mines and the Minister of Defense, was motivated by the substantial socioeconomic benefits that the Project would bring to the surrounding communities and the region as a whole. Indeed, the Santa Ana Project is located in one of the most remote and destitute regions of Peru, where it would have created approximately 1,000 direct and 1,500 indirect jobs for the local inhabitants and generated hundreds of millions of dollars in tax revenues for the State.

4. After Bear Creek had acquired the Santa Ana Concessions, Bear Creek engaged in extensive and costly exploration and development efforts, which resulted in the identification of significant economic silver mineralization in the area. Bear Creek spent many millions of dollars preparing, with the assistance of world-class mining consultants:

- a 2009 Preliminary Economic Assessment (“PEA”), which is a detailed study on the economics of the Santa Ana Project;
- an even more detailed and comprehensive 2010 Feasibility Study and Technical Report (“Feasibility Study”) involving additional

drilling, metallurgical and engineering studies (which enabled Bear Creek to raise \$ 130 million in equity financing to be used in part to bring Santa Ana into production by the end of 2012);

- an ESIA plan, which was approved by the Peruvian Government in early 2011 and which would include, among other things, comprehensive consultation and education of the local communities in and near the project area; and
- a revised Feasibility Study and Technical Report (the “Revised Feasibility Study”) in April 2011.

5. Based upon the results of these comprehensive geological and engineering studies, and based on the estimated capital and operating costs and potential revenue from production Bear Creek concluded that it could profitably mine the Santa Ana Deposit. In fact, the Santa Ana Project was scheduled to enter production in the fourth quarter of 2012, and the future of the Santa Ana Project was bright, that was, until the Peruvian Government took away Bear Creek’s mining rights to the Santa Ana Project by issuing Supreme Decree 032. This governmental act resulted in the total stoppage of Bear Creek’s activities at Santa Ana as Bear Creek no longer has the right to build an operating mine and has lost total control over its investment.

6. It is increasingly rare that a treaty claim concerns outright expropriation without compensation, except in a few cases where the parties are unable to agree on compensation owed and decide to leave that task to the arbitral tribunal. Here, the Peruvian Government abruptly, without notice, explanation or an opportunity to be heard, expropriated Bear Creek’s Santa Ana Project by illegally revoking all rights previously granted to Bear Creek to own and operate its project, over three and a half years and millions of dollars after Bear Creek acquired those rights and with production approximately one year away.

7. Tellingly, the Peruvian Government has repeatedly confirmed that the taking of the Santa Ana Project was wrong and needs to be corrected.

8. First, as described by Andrew Swarthout (President, Chief Executive Officer and Director of Bear Creek, and a witness in this arbitration) and Elsiario Antunez de Mayolo (Bear Creek's Chief Operating Officer, also a witness in this arbitration), high-ranking executives and directors from Bear Creek met with the Peruvian Government over forty times, from President Ollanta Humala on down, over many months following the issuance of Supreme Decree 032. Numerous Government representatives repeatedly assured them that the Government intended to resolve its dispute with Bear Creek and that Bear Creek would be able to get back to work at Santa Ana. On more than one occasion, President Humala suggested to Mr. Swarthout that Bear Creek focus instead on its larger Corani silver mining project ("Corani" or the "Corani Project") some 350 kilometers away. Mr. Swarthout had to make clear that the two projects were so closely linked that the expropriation of Santa Ana would make it extremely difficult for Bear Creek to obtain financing for the development of Corani unless the Government returned Santa Ana to the Company.

9. Second, key high-ranking Peruvian officials, including two Ministers of Energy and Mines, Jorge Merino and Eleodoro Mayorga, and Minister of Economy and Finance, Luis Castilla, stated publicly that the Peruvian Government wanted to resolve the issue as soon as possible, avoid international arbitration, and permit Bear Creek to recommence operations at Santa Ana. Shortly after Bear Creek filed its Notice of Dispute, then Minister of Energy and Mines Jorge Merino confirmed on February 8, 2014 that the Government had the "best will" to reach an "amicable solution" to resolve the issue as soon as possible to allow the company to "exploit those silver reserves."<sup>3</sup>

10. Finally, on May 12, 2014, a Constitutional Court in Peru determined that the revocation of Supreme Decree 032 was unconstitutional and held that "therefore the issuance of

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<sup>3</sup> **Exhibit C-0014**, *Minera Bear Creek amenaza con millonaria demanda a Perú*, NO A LA MINA, Feb. 8, 2014.

Supreme Decree No. 032-2011-EM is an action by the State that is not found within the margins of reasonability and proportionality, required to not violate the principle of legal security.”<sup>4</sup> The Court confirmed the validity of Bear Creek’s rights over the Santa Ana Concessions. However, Peru appealed this decision and Bear Creek had to desist from the underlying *amparo* action against Supreme Decree 032 in order to comply with the waiver requirements when commencing this arbitration under the FTA. After more than forty meetings with the Peruvian Government but no amicable resolution in sight, Bear Creek had no choice but to commence this arbitration in order to protect its right to seek full reparation for Peru’s unlawful conduct.

11. As set forth fully in this submission, Peru’s actions, particularly its failure to pay Bear Creek any compensation, constitute violations of the FTA and international law. Peru’s actions and omissions with respect to the Santa Ana Project constitute an unlawful expropriation of Bear Creek’s investment and, at a minimum, constitute serious violations of Peru’s other obligations under the FTA. Most egregiously, Peru’s actions and omissions violated the fair and equitable treatment standard set forth in the FTA, and resulted in the total deprivation of Bear Creek’s mining rights over the Santa Ana Project and likewise caused significant damages to the Corani Project. To that end, both the FTA and customary international law require full reparation for the expropriation. For Santa Ana, a significant silver mining project on the verge of commencing production, with Proven and Probable Mineral Reserves of 63.2 million ounces of silver and Measured, Indicated and Inferred Resources of 101.8 million ounces of silver, compensation should be based on the fair market value (“FMV”) of the expropriated investment. Bear Creek should be awarded the FMV of its Santa Ana Project as of the date immediately preceding the expropriation (June 23, 2011, the “Valuation date”). Peru should also be required to compensate Bear Creek for damage to the Corani Project resulting from Peru’s illegal acts,

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<sup>4</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

plus pre- and post-award interest on all amounts awarded at the rate reflective of the unlawful and uncompensated nature of the taking.

12. To calculate the FMV of Santa Ana on the date of expropriation and the damage to the Corani project resulting from Peru's actions against Santa Ana, Bear Creek has retained FTI Consulting, Inc. ("FTI") and RPA, Inc. ("RPA") which are among the most renowned and respected independent experts in the world for this type of valuation. With the assistance of RPA, FTI estimated the FMV of the Santa Ana Project at US\$ 224.2 million as of June 23, 2011 using the discounted cash flow analysis ("DCF), excluding interest. FTI also estimated the damage to Bear Creek's Corani Project resulting from Peru's expropriation of the Santa Ana Project at US\$ 170.6 million, excluding interest.

13. With respect to interest, by not paying compensation for the taking of the Santa Ana Project, Peru has in effect given itself an interest-free loan for several years while simultaneously depriving Bear Creek of the funds to which it is rightly entitled. In order to avoid incentivizing States to engage in this type of conduct, Bear Creek submits that an appropriate rate of interest would be the cost to Peru had it been required to obtain a loan equivalent to the compensation amount in the international markets.

14. The table below shows FTI's and RPA's calculations of total damages owed for the expropriation of Bear Creek's Santa Ana Project, and other treaty violations, including fair and equitable treatment, based on the FMV of the Santa Ana Project as well as damages to compensate Bear Creek for harm to its Corani Project. Accordingly, Bear Creek requests that the Tribunal award it the sum of **US\$ 522.2 million**. In addition, Bear Creek respectfully requests that the Tribunal award it its attorneys' fees, expenses, and all costs of this proceeding, together with post-Award interest, compounded semi-annually, on all the foregoing amounts.

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

**Fig. 1: Summary of Damages Calculations.<sup>5</sup>**

## **II. BEAR CREEK ACQUIRED THE SANTA ANA CONCESSIONS ON DECEMBER 3, 2007**

15. Bear Creek acquired the Santa Ana Concessions from Ms. Jenny Karina Villavicencio Gardini on December 3, 2007.<sup>6</sup> Bear Creek had obtained the right to acquire the Concessions from Ms. Villavicencio pursuant to two option agreements dated November 17, 2004 and December 5, 2004 (individually, an “Option Agreement” and, together, the “Option Agreements”), both of which were registered with the Peruvian public registry (the *Superintendencia Nacional de los Registros Públicos* or “SUNARP”).<sup>7</sup> These Option Agreements conditioned Bear Creek’s right to acquire the Concessions on obtaining the Government’s authorization to do so because the concession area was within 50 kilometers of the Peruvian border with Bolivia.<sup>8</sup> Bear Creek held the right to purchase the Santa Ana Concessions from Ms. Villavicencio at a pre-determined price pursuant to the Option Agreements, if, and

<sup>5</sup> Expert Report of FTI Consulting, Inc., May 29, 2015 (*hereinafter*, “FTI Expert Report”) Fig. 2, ¶ 2.13.

<sup>6</sup> **Exhibit C-0015**, Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 3, 2007 (*hereinafter*, “Transfer Agreements”).

<sup>7</sup> **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004 and Dec. 5, 2004 (*hereinafter*, “Option Agreements”).

<sup>8</sup> *Id.* at Art. 2.4.1.

only if, Bear Creek obtained the Government's authorization to do so within sixty months of entering into the Option Agreements.<sup>9</sup> Bear Creek also agreed to cover all expenses incurred by Ms. Villavicencio in connection with the Santa Ana Concessions while the Option Agreements were pending.<sup>10</sup> Bear Creek disclosed the existence of the Option Agreements and their content when applying to the Peruvian Ministry of Energy and Mines ("MINEM") for a supreme decree authorizing the Company to acquire the Santa Ana Concessions from Ms. Villavicencio.<sup>11</sup>

16. After a lengthy application process, on November 29, 2007, the Government issued Supreme Decree 083 declaring the Santa Ana Project a public necessity and authorizing Bear Creek to acquire the Santa Ana Concessions.<sup>12</sup> After the Government issued Supreme Decree 083, Bear Creek notified Ms. Villavicencio that it elected to exercise its options to acquire the Santa Ana Concessions.<sup>13</sup> On December 3, 2007, Bear Creek and Ms. Villavicencio executed two mineral rights transfer agreements for the Santa Ana Concessions (the "Transfer Agreements"), which they confirmed before a notary (*escritura publica*) on December 6, 2007.<sup>14</sup> Bear Creek then requested SUNARP to register the Transfer Agreements,<sup>15</sup> which SUNARP did on February 1, 2008 (for the Karina 9A, Karina 1, Karina 2 and Karina 3 Concessions) and February 28, 2008 (for Karina 5, Karina 6 and Karina 7).<sup>16</sup>

17. The following sections recount the circumstances of Bear Creek's discovery and subsequent acquisition of the Santa Ana Concessions.

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<sup>9</sup> **Exhibit C-0016**, Option Agreements at Arts. 1.2 and 2.4.1.

<sup>10</sup> *Id.* at 3.2.

<sup>11</sup> **Exhibit C-0017**, Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, Dec. 4, 2006 (*hereinafter*, "Supreme Decree Application"), Annex IX.

<sup>12</sup> **Exhibit C-0004**, Supreme Decree No. 083-2007-EM adopted Nov. 29, 2007 (*hereinafter*, "Supreme Decree 083").

<sup>13</sup> **Exhibit C-0018**, Letter from M. Grau Malachowski, Bear Creek, to J. Karina Villavicencio Gardini, Nov. 30, 2007.

<sup>14</sup> **Exhibit C-0019**, Notarized Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007.

<sup>15</sup> **Exhibit C-0020**, SUNARP Notice of Registration of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008; **Exhibit C-0021**, SUNARP Notice of Registration of the Transfer Agreement for Santa Ana Concessions 5, 6 and 7, Feb. 28, 2008.

<sup>16</sup> *Id.*

**A. Bear Creek Has Been Involved in the Peruvian Mining Sector Since 2000**

18. In June 2000, a group of senior geologists and mining executives led by Andrew T. Swarthout formed a limited partnership in Arizona for the purpose of acquiring, exploring, developing and selling mineral properties located principally in Peru.<sup>17</sup> The limited partnership was named Peru Exploration Ventures LLP (the “Partnership”). Most of the fourteen limited partners, including Mr. Swarthout, had substantial experience in the Peruvian mining sector, having held various senior positions at Southern Peru Copper Corporation (“SPCC”), then one of the largest copper mining companies in the country.<sup>18</sup> From 2000 to 2002, the Partnership acquired two newly-discovered gold prospects (Lomo de Camello and Santa Rosa) and four base metal prospects in Peru.<sup>19</sup>

19. On May 29, 2002, the Partnership initiated the process of becoming a public company listed on the Toronto TSX Venture Exchange (“TSXV”), the most prominent venue for junior mining companies seeking to raise capital.<sup>20</sup> As part of this process, the Partnership converted into a corporation of British Columbia (Canada), Bear Creek Mining Corporation.<sup>21</sup> Bear Creek’s listing on the TSXV allowed the Company to raise US\$ 7 million, an above-average amount for junior mining companies at that time.<sup>22</sup> Most of that capital came from prominent mining industry figures and first-tier institutional investors. Prominent mining

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<sup>17</sup> **Exhibit C-0022**, Press Release, Bear Creek Mining Corporation, TSX Venture Exchange, *EVEvolution Ventures to acquire Peru Exploration Ventures LLLP*, May 30, 2002.

<sup>18</sup> *Id.* See also Witness Statement of Andrew T. Swarthout, May 28, 2015 (*hereinafter*, “Swarthout Witness Statement”) ¶ 10.

<sup>19</sup> Swarthout Witness Statement ¶ 10. A prospect is a mineral occurrence that is being, or has been, explored; often restricted to mineral occurrences that have been drilled.

<sup>20</sup> **Exhibit C-0022**, Press Release, Bear Creek Mining Corporation, *EVEolution Ventures to acquire Peru Exploration Ventures LLLP*, May 30, 2002; Swarthout Witness Statement ¶ 11. A junior mining company is a mining company focused primarily on discovering mineral properties and developing (or “advancing”) mining projects. Conversely, major mining companies focus primarily on producing minerals at developed mines, and rely principally on junior mining companies to discover and advance mining projects.

<sup>21</sup> Swarthout Witness Statement ¶ 11. See also **Exhibit C-0023**, Bear Creek Mining Corporation Annual Information Form for year ended Dec. 1, 2013, Apr. 3, 2014 (*hereinafter*, “Bear Creek AIF”) at 1.

<sup>22</sup> Swarthout Witness Statement ¶ 11.

industry figures joined Bear Creek’s Board of Directors, including David Lowell – who discovered over fifteen major mines, including the world-class Pierina gold mine in Arequipa, Peru – and Catherine McLeod-Seltzer, who founded and led many large mining companies in Latin America, including Pacific Rim Mining Corp. and Arequipa Resources Inc.<sup>23</sup> During the course of subsequent years, Bear Creek continued to acquire and explore additional gold prospects in Peru (including the Estrella, Niñobamba, La Pampa, Ataspaca, la Yegua, Cotahuasi and Pichacani Norte projects).

20. In 2004, Bear Creek learned of the existence of potential silver ore deposits in Santa Ana, a remote, mountainous area located near the small town of Huacullani, 135 kilometers south of the larger city of Puno and approximately 45 km west from the border between Peru and Bolivia.<sup>24</sup> Cesar Rios, one of the geologists employed by Bear Creek, visited the area and collected rock chip samples from the ground, which after testing revealed elevated concentrations of silver (referred to as an “anomaly”).<sup>25</sup> This was unexpected since Santa Ana was outside of the principal mineralized zones in Peru. After confirming the silver anomaly through additional sampling, Bear Creek conducted a mineral title search for the Santa Ana area.<sup>26</sup> The Company’s research revealed that the area was available for mineral rights acquisition because no one else held those rights.<sup>27</sup> This circumstance where no one held

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<sup>23</sup> **Exhibit C-0022**, Press Release, Bear Creek Mining Corporation, *EVEvolution Ventures to acquire Peru Exploration Ventures LLLP*, May 30, 2002; Swarthout Witness Statement ¶ 11.

<sup>24</sup> **Exhibit C-0003**, Ausenco Vector, Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Oct. 21, 2010 (*hereinafter*, “Santa Ana Feasibility Study”) at 15.

<sup>25</sup> Swarthout Witness Statement ¶ 15. An anomaly refers to any departure from the geological norm in a particular area, which may indicate the presence of mineralization in the underlying bedrock.

<sup>26</sup> *Id.* Specifically, Bear Creek reviewed the mineral rights records filed with the *Instituto Nacional de Concesiones y Catastro Minero* (“INACC,” now part of the Instituto Geológico Minero y Metalúrgico or “INGEMMET”), the government institution that handles recording of mineral rights and applications. While in the United States property of mineral rights generally follows the property of the land under which the minerals are found, mineral rights and surface rights are dissociated in most other jurisdictions, including Peru. Thus, while land owners hold rights over the surface of the land, any mineral rights corresponding to that land remain the property of the State. The State can in turn assign these rights to private individuals or companies, most often by granting these rights through a concession mechanism.

<sup>27</sup> *Id.*

mineral rights over the Santa Ana area was relatively unusual in a prominent “mining country” like Peru, where mining rights over mineralized areas have generally long been acquired.<sup>28</sup>



**Fig. 2: View of the Santa Ana Mining Project.**<sup>29</sup>

21. While Bear Creek generally entered into option agreements with mineral rights holders when exploring other prospects in Peru,<sup>30</sup> it could not do so with Santa Ana because no one held those rights. In addition, the Peruvian Constitution prohibited foreign mining companies from acquiring or possessing mineral rights located within 50 kilometers of the Peruvian borders, as was the case with Santa Ana. As such, Bear Creek needed to obtain the Government’s authorization in order to acquire mineral rights over Santa Ana.

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<sup>28</sup> *Id.*

<sup>29</sup> Photograph taken at the Santa Ana Mining Project on May 10, 2007.

<sup>30</sup> Mining companies rely heavily on option agreements when acquiring mineral rights in Peru and abroad. Bear Creek used option agreements to acquire the vast majority of its other prospects in Peru. *See also* Swarthout Witness Statement ¶¶ 17, 19.

## **B. Article 71 of The Peruvian Constitution**

22. Article 71 of the Peruvian Constitution provides, in relevant parts, that foreigners cannot acquire or possess mines, lands, forests, waters, or energy sources located within 50 kilometers of any Peruvian border, under any title, either directly or indirectly, unless the President of the Republic, supported by the Council of Ministers, declares it a public necessity by way of a supreme decree:

[...], within a distance of fifty kilometers from the borders, aliens may not acquire or possess under any title, directly or indirectly, mines, lands, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. Sole exceptions are cases of public need expressly determined by executive decree approved by the Cabinet in accordance to the law.<sup>31</sup>

23. The origins of Article 71 can be traced back to the Peruvian Constitution of 1920, which included for the first time a limitation on the rights of foreigners to acquire or possess assets in border areas.<sup>32</sup> The 1920 Constitution was the first Constitution enacted after the War of the Pacific (1879-1883) between Chile, Peru and Bolivia, during which Peru lost significant territory near its southern border. The drafters of the Constitution included that provision to prevent threats to national security due to foreign influence in the border area, which could have led to armed conflicts between Peru and its southern neighbors.<sup>33</sup> The President of the 1993 Constitutional Congress, which enacted the Peruvian Constitution currently-in-force, and the Peruvian Constitutional Court both confirmed that the purpose of Article 71 was to avoid conflicts with neighboring countries.<sup>34</sup> Professor Bullard – a leading authority on Peruvian

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<sup>31</sup> **Exhibit C-0024**, Political Constitution of Peru Enacted on Dec. 29, 1993, Official Edition and English Translation, Art. 71.

<sup>32</sup> **Exhibit C-0025**, Political Constitution of Peru Enacted on Jan. 18, 1920, Art. 39.

<sup>33</sup> **Exhibit C-0026**, Marcial Rubio Correa, Estudio de le Constitución Política de 1993 381 (Vol. 3, 1999).

<sup>34</sup> **Exhibit C-0027**, Constitutional Debate – 1993, *Comisión de Constitución y Reglamento*, Vol. IV, at 1966; **Exhibit C-0028**, Constitutional Court Decision, Exp. 04966-2008-PA/TC, Apr. 13, 2009.

constitutional law and an expert witness in this arbitration – confirms that the purpose of Article 71 is to protect the Peruvian territory against external threats.<sup>35</sup>

24. Bear Creek thus needed the Government’s authorization to acquire mineral rights for the area that it had identified as particularly promising. The application, prepared by leading Peruvian mining counsel at Estudio Grau, required the Company to present a comprehensive program of future investments in the area, in order to demonstrate that the Santa Ana Project would yield benefits to the region and communities surrounding the Project.<sup>36</sup> Bear Creek was advised by Estudio Grau that the administrative process to obtain a supreme decree declaring Santa Ana a public necessity could last a year or longer.<sup>37</sup>

**C. Ms. Villavicencio’s Requested Mining Concessions Over The Santa Ana Area**

25. In early May 2004, Mr. Rios and Ms. Villavicencio – a Peruvian citizen – discussed the opportunity for Ms. Villavicencio to acquire mining claims over Santa Ana and enter into an option agreement with Bear Creek.<sup>38</sup> Ms. Villavicencio was free to accept or refuse to do so.<sup>39</sup> Nevertheless, she expressed her interest in that opportunity.<sup>40</sup> Bear Creek also considered this arrangement to be beneficial because, as advised by counsel, it would allow the Company to have a legally binding option agreement in place pending the Government’s decision on its application for a supreme decree.<sup>41</sup>

26. On May 26, 2004, Ms. Villavicencio submitted an application to the *Instituto Nacional de Concesiones y Catastro Minero* (“INACC”, now part of the *Instituto Geológico Minero y Metalúrgico* or “INGEMMET”) seeking to acquire four mining concessions (Karina

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<sup>35</sup> Expert Report of Professor Alfredo Bullard, May 26, 2015 (*hereinafter*, “Bullard Expert Report”) ¶¶ 18.b, 85, 90, 93, 102, 113.i, 113.j.

<sup>36</sup> **Exhibit C-0017**, Supreme Decree Application, Annex IV.

<sup>37</sup> Swarthout Witness Statement ¶ 16.

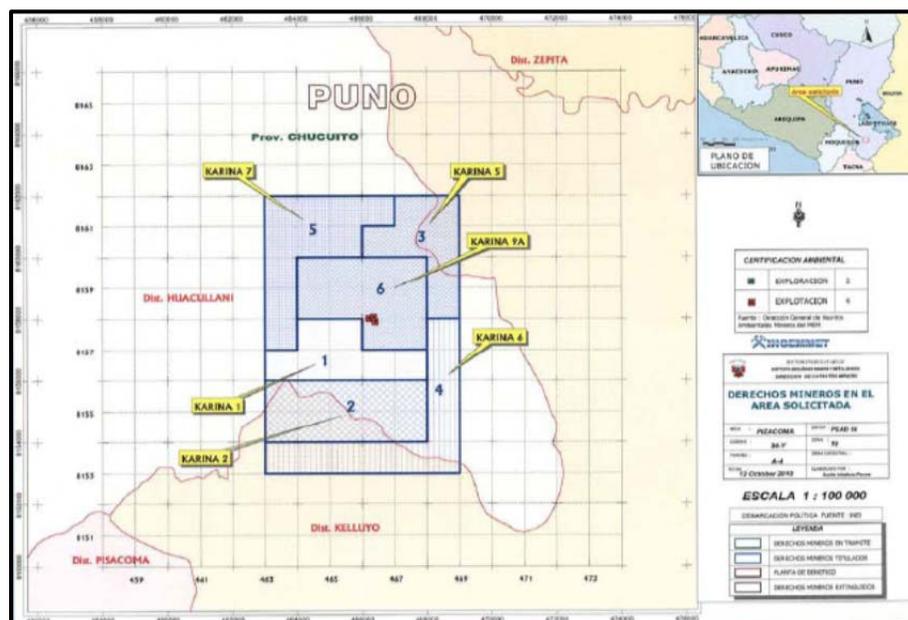
<sup>38</sup> *Id.* at ¶ 18.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at ¶ 17.

9A, Karina 1, Karina 2 and Karina 3).<sup>42</sup> Miners refer to this process as “staking” a mineral claim. On November 29 of the same year, Ms. Villavicencio applied for three additional concessions (Karina 5, Karina 6 and Karina 7) covering an area adjacent to the four original concessions.<sup>43</sup>



**Fig. 3: Santa Ana Mining Project Concessions.<sup>44</sup>**

27. INACC initially rejected Ms. Villavicencio’s mining claims because they fell within a large area of the country known as the *Zona Reservada Aymara Lupaca*,<sup>45</sup> which then-President Fujimori had declared to be of protected “scenic interest” in 1996. Ms. Villavicencio appealed INACC’s decision before the Mining Council on the grounds that the boundaries of the reserve had been updated and, as a result, the mining claims in question were no longer within the boundaries of the reserve.<sup>46</sup> The Mining Council granted Ms. Villavicencio’s appeal,<sup>47</sup> and

<sup>42</sup> **Exhibit C-0029**, Application for the Attribution of Santa Ana Concessions, 9A, 1, 2, and 3 submitted by J. Karina Villavicencio Gardini to INACC, May 26, 2004 (*hereinafter*, “Application for the Karina 9A, 1, 2, and 3 Concessions”).

<sup>43</sup> **Exhibit C-0030**, Application for the Attribution of Santa Ana Mining Concessions, 5, 6, and 7 submitted by J. Karina Villavicencio Gardini to INACC, Nov. 29, 2004 (*hereinafter*, “Application for the Karina 5, 6, and 7 Concessions”).

<sup>44</sup> **Exhibit C-0003**, Santa Ana Feasibility Study at 16.

<sup>45</sup> **Exhibit C-0031**, Resolutions Nos. 2056, 2057 and 2058-2005-INACC/J, May 12, 2005, Canceling Mining Claims.

<sup>46</sup> **Exhibit C-0032**, Appeal Petition filed by J. Karina Villavicencio Gardini with the Mining Council, Jun. 6, 2005.

INACC thus registered Ms. Villavicencio's mining concessions on July 5, 2006 (for Karina 2 and Karina 3), August 8, 2006 (for Karina 1), September 26, 2006 (for Karina 9A) and February 28, 2008 (for Karina 5, Karina 6 and Karina 7).<sup>48</sup>

**D. Bear Creek Entered Into Two Option Agreements With Ms. Villavicencio**

28. On November 17, 2004, Ms. Villavicencio and Bear Creek entered into an Option Agreement for the Karina 9A, Karina 1, Karina 2 and Karina 3 mining Concessions, which Ms. Villavicencio had staked on May 26, 2004.<sup>49</sup> On December 5, 2004, Ms. Villavicencio and Bear Creek entered into a second Option Agreement for the three additional Concessions (Karina 5, Karina 6 and Karina 7) that Ms. Villavicencio had staked a few days earlier, on November 29, 2004.<sup>50</sup> Under the Option Agreements, Bear Creek would be able to exercise the option to acquire the Santa Ana Concessions only if it successfully obtained a declaration of public necessity, as required by Article 71 of the Peruvian Constitution.<sup>51</sup>

29. Bear Creek entered into these Option Agreements in part to ensure that it would be able to acquire mining rights over the Santa Ana Concessions if and when it obtained a supreme decree authorizing it to do so.<sup>52</sup> As Mr. Swarthout testifies in this arbitration, option agreements are widely used in the mining industry throughout the world, including in Peru.<sup>53</sup> In

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<sup>47</sup> **Exhibit C-0033**, Decision by the Mining Council regarding Appeal Petition filed on Jun. 6, 2005 by J. Karina Villavicencio Gardini, Aug. 1, 2006.

<sup>48</sup> **Exhibit C-0034**, Notice of Registration of the Karina 2 and Karina 3 Concessions, Jul. 5, 2006; **Exhibit C-0035**, Notice of Registration of the Karina 1 Concession, Aug. 8, 2006; **Exhibit C-0036**, Notice of Registration of the Karina 5, Karina 6 and Karina 7 Concessions, Feb. 28, 2008. Karina 3 laid outside the project area, and was thus abandoned when it was clear that Bear Creek would not develop this area. Bear Creek requested the cancellation of the mining registry for the Karina 3 Concession on June 8, 2010, which INGEMMET granted on June 25, 2010. **Exhibit C-0037**, Notice of Cancellation of Mineral Rights, Jun. 25, 2010.

<sup>49</sup> **Exhibit C-0016**, Option Agreements.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at Art. 2.4.1.

<sup>52</sup> Swarthout Witness Statement ¶ 17.

<sup>53</sup> *Id.* at ¶ 19.

fact, Mr. Swarthout negotiated and concluded well over a hundred option agreements throughout his career, including dozens of option agreements in Peru alone.<sup>54</sup>

30. Option agreements generally provide for a specific option period (a few months to several years) and for the payment of pre-determined amounts by the recipient of the option (the “optionee”) to the grantor of the option (or “optionor”), either at intervals during the option period or at the time when the optionee exercises its option.<sup>55</sup> Option agreements do not entail any ownership rights for the optionee before exercising the option.<sup>56</sup> Instead, option agreements merely confer the right to acquire the mineral property of interest at a future date and a determined price.<sup>57</sup>

31. Pursuant to the Option Agreements between Ms. Villavicencio and Bear Creek, Ms. Villavicencio would retain ownership over the Santa Ana Concessions until Bear Creek exercised its purchase option after, and only after, receiving the required Government authorization.<sup>58</sup> If Bear Creek did not obtain the necessary supreme decree within 60 months of executing the Option Agreements, then the options would lapse and Ms. Villavicencio would be free to sell the Concessions or develop them, at her discretion.<sup>59</sup> Bear Creek also agreed to assume all costs associated with staking and maintaining the Santa Ana Concessions.<sup>60</sup>

32. Thus, if Bear Creek failed to receive the necessary supreme decree or declined to exercise the options, the Company would abandon any right whatsoever related to Santa Ana.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Professor de la Puente y Lavallo, perhaps the most authoritative figure on Peruvian contract law, defines an option agreement as the “agreement by virtue of which one of the parties irrevocably undertakes to keep in force, for a certain time and under specific conditions to be set out, an exclusive offer in favor of the other party for which, though a facultative (enabling) decision by such party to enter into a future final agreement under such conditions, it shall remain as perfected by the sole timely acceptance of the offer.” **Exhibit C-0038**, Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Tribunal Registral, Nov. 7, 2005 (*hereinafter*, “SUNARP Decision”).

<sup>57</sup> *Id.*

<sup>58</sup> **Exhibit C-0016**, Option Agreements, Art. 2.4.1.

<sup>59</sup> **Exhibit C-0016**, Option Agreements, Arts. 2.3.1. and 2.5.

<sup>60</sup> **Exhibit C-0016**, Option Agreements, Art. 3.5; Swarthout Witness Statement ¶ 22.

Conversely, if Bear Creek decided to exercise its options after obtaining the required declaration of necessity, Ms. Villavicencio would receive a payment of US\$ 14,000 from Bear Creek upon exercise of the options.<sup>61</sup>

33. Although not required to do so by Peruvian law, Bear Creek took the additional step of registering the Option Agreements with SUNARP, the national registry. By registering a contract with SUNARP, parties to that contract obtain confirmation of the validity of their agreement under Peruvian law and put all interested parties on notice of the existence and validity of that contract.<sup>62</sup>

34. On June 28, 2005, Ms. Villavicencio and Bear Creek requested SUNARP to register the November 17, 2004 Option Agreement covering Concessions Karina (subsequently renamed Karina 9A), Karina 1, Karina 2 and Karina 3.<sup>63</sup> SUNARP initially responded that it would not proceed with registering the Option Agreement because the Option Agreement provided for the transfer of mineral rights to a foreign company within 50 kilometers of the Peruvian borders and thus required that Bear Creek obtain a declaration of public necessity under Article 71 of the Peruvian Constitution.<sup>64</sup>

35. Bear Creek challenged that initial decision before the SUNARP Registry Tribunal on September 14, 2005, arguing that the Option Agreement did not transfer any mineral rights and hence was not subject to the restrictions imposed by Article 71.<sup>65</sup> On November 7, 2005, the SUNARP Registry Tribunal rendered a final decision confirming that in an option agreement for

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<sup>61</sup> **Exhibit C-0016**, Option Agreements, Art. 2.2.

<sup>62</sup> As Professor Bullard explains: “[t]he legality of these contracts was confirmed by the Resolution by the Registry Tribunal No. 193-2005-SUNARP-TR-A, published on December 22, 2005 in the official Gazette *El Peruano*.” Bullard Expert Report ¶ 19.

<sup>63</sup> **Exhibit C-0039**, SUNARP Notice of Observation No. 2005-00041200, Jul. 5, 2005.

<sup>64</sup> *Id.*

<sup>65</sup> **Exhibit C-0040**, Appeal to the Notice of Observation No. 2005-00041200 to the President of the 5<sup>th</sup> Chamber of the Registry Tribunal, Sept. 14, 2005.

the transfer of mining rights, the transfer of those rights does not take place with the execution of the agreement but rather at a subsequent date when the optionee exercises the option:

[...] in a transfer option agreement, the transfer will not take place with the execution of such agreement, but rather at a subsequent time, when the optionee decides to, during the option term, use the right it has to require the grantor (assignor)—party which is obligated to execute the final agreement—to fulfill the agreed provision, which is to transfer the asset in favor of the optionee in accordance with the conditions established in the option agreement.

The option agreement does not have transferring effects, it does not have real effects, it creates obligations of a personal nature, pursuant to which the optionee finds itself in the eventual possibility of requiring the grantor to fulfill what it has undertaken.<sup>66</sup>

36. Regarding the specific circumstances of the Option Agreement, the SUNARP

Registry Tribunal concluded that the Option Agreement did not violate Article 71:

Therefore, according to the legal nature of the option agreement, as well as its normative regulation and that agreed to by the parties, one cannot conclude that with the execution of such agreement the transfer of mining rights Karina, Karina 1, Karina 2 and Karina 3 was produced, and, because of this, that established in Article 71 of the Political Constitution of the State must be fulfilled, which shall be demandable when the property or possession thereof has been acquired.<sup>67</sup>

37. The SUNARP Registry Tribunal also recognized that the option was conditioned upon Bear Creek obtaining the governmental authorization and that the Option Agreement did not violate Article 71:

Moreover, in the option agreement submitted for registration, the limitation established by Article 71 of the Political Constitution of the State has been taken into account, as it was agreed that, for Bear Creek's exercise of the option right or the exercise of whomever replaces it, it must be proven that the authorization for foreigners necessary for the acquisition was obtained, of mining

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<sup>66</sup> Exhibit C-0038, SUNARP Decision § VI.5 (emphasis added).

<sup>67</sup> *Id.* at § VI.6.

rights located within 50 kilometers of the borderline, namely, when Bear Creek exercises its option right it must prove that it met the condition agreed to in the option agreement, which, in any event, must be verified in a registry branch when the title in which the option is being exercised is presented.<sup>68</sup>

38. Thus, the SUNARP Registry Tribunal concluded that Bear Creek and Ms. Villavicencio had complied with the legal requirements applicable to their Option Agreement, and ordered SUNARP to register that agreement.<sup>69</sup> Exceptionally, SUNARP published the Registry Tribunal's decision in the Peruvian Official Gazette, *El Peruano*, on December 22, 2005.<sup>70</sup> In publicizing its decision, SUNARP put the world on notice of its decision regarding these important issues. Following the SUNARP Registry Tribunal decision, SUNARP registered the Option Agreement on August 9, 2006.<sup>71</sup>

**E. The Government Granted Bear Creek's Application to Acquire Ownership of the Santa Ana Concessions**

39. On December 5, 2006, again with the assistance of experienced Peruvian mining counsel at Estudio Grau, Bear Creek applied to MINEM for a supreme decree authorizing Bear Creek to purchase the Santa Ana Concessions from Ms. Villavicencio.<sup>72</sup> Bear Creek's application enclosed: (i) a complete description of the mining rights at issue;<sup>73</sup> (ii) a detailed description of Bear Creek's programmed investments in the area;<sup>74</sup> (iii) a socio-economic impact assessment of the proposed exploration program at Santa Ana;<sup>75</sup> (iv) a complete set of corporate documentation and certificates of good standing for Bear Creek;<sup>76</sup> (v) a complete set of documentation for Bear Creek Mining Company Sucursal Del Peru ("Bear Creek Peru") and its

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<sup>68</sup> *Id.* at § VI.7 (emphasis added).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at § VII.

<sup>71</sup> **Exhibit C-0041**, SUNARP Notice of Registration of Mineral Rights, Aug. 9, 2006.

<sup>72</sup> **Exhibit C-0017**, Supreme Decree Application.

<sup>73</sup> *Id.* at Annex II.

<sup>74</sup> *Id.* at Annex III.

<sup>75</sup> *Id.* at Annex IV.

<sup>76</sup> *Id.* at Annex V.

corporate representatives;<sup>77</sup> (vi) a detailed cadastral map for the Santa Ana Concessions;<sup>78</sup> (vii) copies of Ms. Villavicencio's claims for mineral rights and proof of registration for Santa Ana;<sup>79</sup> (viii) copies of the Santa Ana Option Agreements, as amended;<sup>80</sup> (ix) proof of registration of the Santa Ana Option Agreements;<sup>81</sup> and (x) consolidated financial statements for the two years prior to the application.<sup>82</sup>

40. On February 8, 2007, MINEM confirmed that it was reviewing Bear Creek's application and requested that the Company submit additional information regarding the location and access roads to the Project, as well as Bear Creek's incorporation and nationality.<sup>83</sup> Bear Creek addressed the Ministry's queries in a letter dated February 16, 2007, which included a comprehensive description of how the Company's contemplated investment in Santa Ana would benefit the local population and a complete set of Bear Creek's corporate documents.<sup>84</sup>

41. After conducting an internal assessment of the validity of Bear Creek's application, MINEM transmitted it to the Ministry of Defense.<sup>85</sup> This step was in line with the national defense purpose of Article 71. On July 26, 2007, after a thorough inspection of the proposed site and vicinity, the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces opined in favor of Bear Creek's application.<sup>86</sup> On September 26, 2007, the Vice-minister

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77 *Id.* at Annex VI.

78 *Id.* at Annex VII.

79 *Id.* at Annex VIII.

80 *Id.* at Annex IX.

81 *Id.* at Annex X.

82 *Id.* at Annex XI.

83 **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007.

84 **Exhibit C-0043**, Letter from M. Grau Malachowski, Bear Creek, to MINEM, Feb. 26, 2007.

85 **Exhibit C-0044**, Resolution issued by MINEM to the Ministry of Defense for the Authorization to Acquire Mineral Rights filed by Bear Creek Mining Company, Mar. 12, 2007.

86 **Exhibit C-0045**, Letter from the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces to the Secretary General of the Ministry of Defense, Jul. 26, 2007.

Secretary General of External Relations also rendered a favorable opinion on Bear Creek's application to MINEM.<sup>87</sup>

42. On November 28, 2007, with the President of Peru and all key ministries in favor of Bear Creek's application, the Government finally issued Supreme Decree 083 authorizing Bear Creek to acquire and possess the Santa Ana Concessions and to move ahead with the Santa Ana Project. Supreme Decree 083 provides, in relevant parts:

Declare the private investment in mining activities is a public necessity, for BEAR CREEK MINING COMPANY SUCURSAL DEL PERU to acquire and possess concessions and rights over mines and supplementary resources for the better development of its productive activities, within the fifty (50) kilometers from the southern border of the country, in areas in which the mining rights detailed in Article 2 of this supreme decree are located.

The mining authority shall grant the authorizations for the mining activities in the mining rights referred to in Article two, in favor of the enterprise BEAR CREEK MINING COMPANY SUCURSAL DEL PERU, previously complying with the applicable provisions and legal requirements and in strict compliance with Peru's international obligations.<sup>88</sup>

President Alan Garcia, the President of the Council of Ministers, the Minister of Mines and the Minister of Defense all signed Supreme Decree 083.<sup>89</sup> Bear Creek was now free to acquire title to the Santa Ana Concessions from Ms. Villavicencio.

43. As described above in this narrative, Bear Creek and Ms. Villavicencio executed the Transfer Agreements on December 3, 2007, which they confirmed before a notary (*escritura publica*).<sup>90</sup> SUNARP registered these Transfer Agreements on February 1, 2008 (for the Karina

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<sup>87</sup> **Exhibit C-0046**, Letter from the Vice-minister Secretary General of External Relations to the Ministry of Mines, Sept. 26, 2007.

<sup>88</sup> **Exhibit C-0004**, Supreme Decree 083.

<sup>89</sup> *Id.*

<sup>90</sup> **Exhibit C-0015**, Transfer Agreements; **Exhibit C-0019**, Notarized Contracts for the Transfer of Mineral Rights between J. Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Dec. 6, 2007.

9A, Karina 1, Karina 2 and Karina 3 concessions) and February 28, 2008 (for Karina 5, Karina 6 and Karina 7).<sup>91</sup>

**F. Bear Creek Developed World Class Mining Projects at Santa Ana and Corani**

**1. The Santa Ana Mining Project**

44. As described above, the Government published Supreme Decree 083 on November 29, 2007 and Bear Creek acquired the Santa Ana Concessions from Ms. Villavicencio on December 3, 2007.<sup>92</sup> At that point in time, Bear Creek had concluded that preliminary exploration and drilling results looked promising. From that date onward, exploration activity at Santa Ana increased substantially. As of June 17, 2010, Bear Creek's exploration campaign included 393 holes having been drilled in Santa Ana.<sup>93</sup> Bear Creek also commissioned Vector Engineering, a highly-respected mining consultancy, to perform several engineering studies at Santa Ana to plan and establish the cost of the heap leach operation and infrastructure components of the Santa Ana Project.<sup>94</sup>

45. Bear Creek announced the results of a positive PEA on April 20, 2009.<sup>95</sup> A PEA, also referred to as "Scoping Study" pursuant to National Instrument 43-101("NI 43-101"), is an early-stage detailed study on the economics of a mining project based on assumptions and estimated costs, which is used for determining if a more costly feasibility study is warranted.

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<sup>91</sup> **Exhibit C-0020**, SUNARP Registration Notice of Transfer Agreements for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008; **Exhibit C-0021**, SUNARP Registration Notice of Transfer Agreements for Santa Ana Concessions 5, 6 and 7, Feb. 28, 2008.

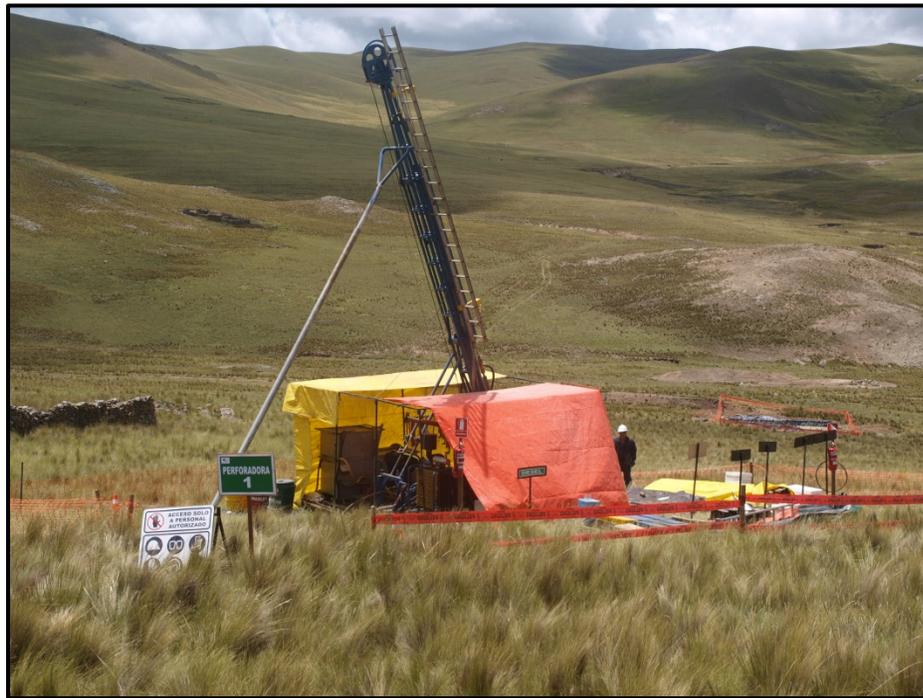
<sup>92</sup> **Exhibit C-0004**, Supreme Decree 083; **Exhibit C-0015**, Transfer Agreements.

<sup>93</sup> **Exhibit C-0047**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Drilling Continues To Intersect High-Grade Silver, Mineralized Footprint Expands, And Metallurgical Testing Continues To Show High Leach Recoveries at Santa Ana, Peru*, Jul. 21, 2008; **Exhibit C-0048**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Infill Results At Its Santa Ana Silver Deposit; Mineralization Remains Open to North And At Depth*, Jun. 17, 2010.

<sup>94</sup> **Exhibit C-0049**, Press Release, Bear Creek Mining Corporation, *Bear Creek's Santa Ana Drilling Continues To Expand Silver Mineralization Including High-Grade Intercepts On The Perimeters Of The Open Footprint*, Dec. 18, 2007.

<sup>95</sup> **Exhibit C-0050**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Positive Scoping Study and Updated Resource Estimate at Santa Ana Deposit*, Apr. 20, 2009.

The PEA provided for measured and indicated silver resources of 97.7 million ounces and silver inferred resources of 41.4 million ounces.<sup>96</sup> The PEA contemplated silver production averaging 4.6 million ounces per year over 11.8 years, and a net present value of US\$ 115 million at then-current silver prices.<sup>97</sup>



**Fig. 4: Diamond Drilling in Santa Ana on March 17, 2010.<sup>98</sup>**

46. Drilling, metallurgical testing and engineering studies intensified between 2009 and 2010 in preparation for a Feasibility Study for the Santa Ana project.<sup>99</sup> A feasibility study is a comprehensive technical and economic study assessing whether a mineral deposit can be mined profitably by estimating the capital and operating costs of a mine and the potential

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<sup>96</sup> **Exhibit C-0050**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Positive Scoping Study and Updated Resource Estimate at Santa Ana Deposit*, Apr. 20, 2009. Measured and Indicated lead resources totaled 481 million oz (202 million oz inferred). Measured and indicated zinc resources totaled 838.7 million oz, 291.8 inferred.

<sup>97</sup> *Id.*

<sup>98</sup> Photograph taken at the Santa Ana Mining Project on March 17, 2010.

<sup>99</sup> **Exhibit C-0048**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Infill Results At Its Santa Ana Silver Deposit; Mineralization Remains Open to North And At Depth*, Jun. 17, 2010; **Exhibit C-0051**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Updated Santa Ana Leachable Silver Resource; M&I Increased 39%*, Jul. 12, 2010; **Exhibit C-0052**, Press Release, Bear Creek Mining Corporation, *Bear Creek Provides Project Updates; Key Surface Rights To Be Acquired At Corani And Santa Ana Silver Deposits, Peru*, Sept. 16, 2010.

revenues from production. Ausenco Vector completed a Feasibility Study and Technical Report for Santa Ana on October 21, 2010.<sup>100</sup> Highlights of the Feasibility Study included:

- Proven and Probable Mineral Reserves containing 63.2 million ounces of silver, with additional Measured and Indicated Resources of 72.8 million ounces and Inferred Resources of 28.2 million ounces;<sup>101</sup>
- 11 year mine life producing 44.2 million ounces of silver with an average annual salable silver production of 4.6 million ounces per year for the first six years;<sup>102</sup>
- At then-current silver prices of US\$ 22.92 per ounce, Santa Ana would have a pre-tax internal rate of return of 70.2 % and a net present value of US\$ 341 million at a 5% discount rate (on an after tax basis the internal rate of return (or “IRR”) would be 52.6% and the net present value (or “NPV”) US\$ 232 million);<sup>103</sup>
- Free cash flow estimated at US\$ 46 million per year for the first six years with a 1.4 year recoupment of capital costs consisting of US\$ 68.8 million (at then-current silver prices);<sup>104</sup> and
- Significant upside opportunities and extended mine life plan to include an additional 35.7 million ounces of silver.<sup>105</sup>

47. Mr. Swarthout explained at that time how Santa Ana had become a critical component of Bear Creek’ development strategy:

We are very pleased with the results of the Santa Ana Feasibility Study as this is the next major step in Bear Creek becoming a preeminent silver mining company. With the development of Santa Ana followed by the larger Corani project, Bear Creek has the assets to become a 20 million ounce per year silver mining company by 2014, which would place the Company within the top five pure silver mining companies in the world. As Santa Ana moves towards final permitting and detailed engineering, we will be investigating the opportunities we have identified with regard to

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<sup>100</sup> **Exhibit C-0003**, Santa Ana Feasibility Study at 16.

<sup>101</sup> **Exhibit C-0003**, Santa Ana Feasibility Study § 1.1; **Exhibit C-0053**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Robust Santa Ana Feasibility Study; Over 63 Million Ounces Of Silver Converted To Reserves*, Oct. 7, 2010.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

improved metal recovery and mine expansions to maximize the value of this very robust project.<sup>106</sup>

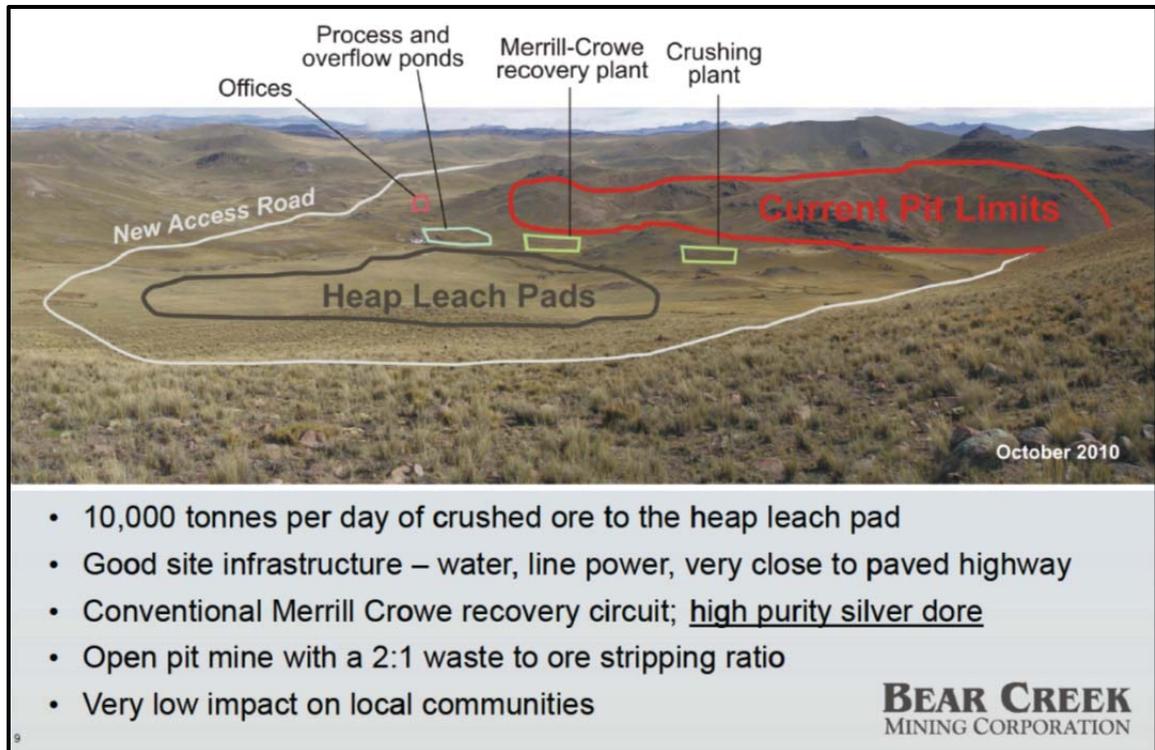
48. Following the outstanding results of the Santa Ana Feasibility Study, Bear Creek was able to raise \$ 130 million in equity financing on November 5, 2010, less than a month after it announced the results of the Feasibility Study.<sup>107</sup> Again, prominent mining investors and institutional investment funds comprised the majority of Bear Creek's equity offering, which was twice oversubscribed during that period.<sup>108</sup> Bear Creek intended to use the net proceeds of that equity financing primarily to develop Santa Ana and bring it to production within two years.

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<sup>106</sup> **Exhibit C-0053**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Robust Santa Ana Feasibility Study; Over 63 Million Ounces Of Silver Converted To Reserves*, Oct. 7, 2010.

<sup>107</sup> **Exhibit C-0054**, Press Release, Bear Creek Mining Corporation, *Bear Creek Mining Announces Closing of \$130 Million Bought Deal Financing*, Nov. 5, 2010.

<sup>108</sup> **Exhibit C-0055**, Press Release, Bear Creek Mining Corporation, *Bear Creek Mining Corporation – Announces Bought Deal Financing*, Oct. 18, 2010; **Exhibit C-0056**, Press Release, Bear Creek Mining Corporation, *Bear Creek Mining Corporation – Announces Increase To Previously Announced Bought Deal Financing to C\$113 Million*, Oct. 19, 2010; **Exhibit C-0057**, Press Release, Bear Creek Mining Corporation, *Bear Creek Mining Announces Intention to Exercise Over – Allotment Option*, Nov. 2, 2010.



**Fig. 5: Santa Ana Mine Site and Proposed Infrastructure Under the feasibility study.<sup>109</sup>**

49. The design for the mining and recovery of precious metals at Santa Ana was based on practices utilized safely for approximately 40 years.<sup>110</sup> Traditional open pit mining methods are used to extract the ore, which is then sent to an on-site rock crushing plant.<sup>111</sup> The crushed ore is placed on an impermeably lined pad where a dilute cyanide solution is then applied, which dissolves the silver into the leaching solution.<sup>112</sup> The silver-bearing solution drains by gravity to collection reservoirs, which are lined with impermeable clay and high-density polyethylene. As Mr. Swarthout explains: “The system is designed as a closed-circuit, zero-discharge, facility, meaning that no solution would be released into the environment. Instead, the silver-bearing solution is processed in what is called a Merrill-Crowe Plant where

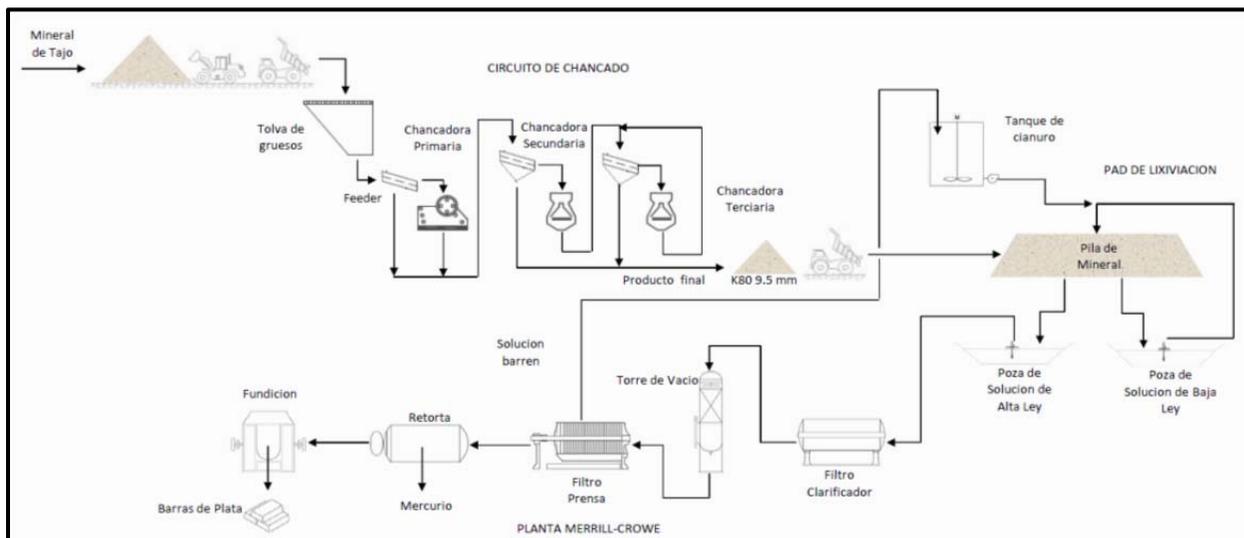
<sup>109</sup> **Exhibit C-0058**, Bear Creek Corporate Presentation, Oct. 7, 2010, at 9.

<sup>110</sup> Swarthout Witness Statement ¶ 36.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

silver is precipitated and collected before the solution is recirculated to the leaching pad. The integrity of the zero-discharge system is continually tested throughout the life of the mine. The silver precipitate is melted and poured into doré bars (a mixture of iron, silica and approximately 80% silver), which are then shipped off-site to a silver refinery to produce pure silver.”<sup>113</sup>



**Fig. 6: Diagram of the Heap-Leach Mineral Treatment Process at Santa Ana.**<sup>114</sup>

50. The design of the Santa Ana project is a very conventional design for a bulk tonnage, heap leach facility.<sup>115</sup> The Santa Ana mine site is favorably-suited to building a heap leach project because of its flat terrain, remote location, geological composition and lack of surface water flowing through the project area.<sup>116</sup>

51. As the leading mining consultancy RPA opines in this arbitration, the Santa Ana Project was designed to meet high industry environmental standards:

The Santa Ana Project has been designed to meet industry standards of environmental compliance. The heap leach and solution ponds have been designed to industry standards of containment and stability. The waste rock storage facilities are

<sup>113</sup> *Id* at ¶ 37.

<sup>114</sup> **Exhibit C-0059**, Bear Creek Santa Ana Project Environmental Impact Assessment Presentation, Feb. 2011, at 35.

<sup>115</sup> Swarthout Witness Statement ¶ 38.

<sup>116</sup> *Id.*

designed to capture and manage any flows that may originate from the waste rock. Finally, an initial closure plan has been developed that will provide covers for both the heap leach and waste rock facilities that will result in safe and environmentally compliant closure of the mine. The laboratory tests conducted on samples of spent ore and waste rock have shown that the site has a very low potential to produce acid rock drainage (ARD).<sup>117</sup>

52. On January 19, 2011, Bear Creek released additional metallurgical test work results showing that the silver leaching recovery process was being achieved at double the initial speed and that silver recovery rates were improving from 70% to 75%.<sup>118</sup> In April 2011, Ausenco Vector released a Revised Feasibility Study prepared on the basis of that additional testing data.<sup>119</sup> Using very conservative estimates (US\$ 14.50 per ounce silver), the Revised Feasibility Study ascribed a pre-tax IRR of 29.9% to Santa Ana, with a net present value of US\$ 106.9 million at a 5% discount rate and earnings before interest, taxes, depreciation and amortization (EBITDA) of US\$ 173 million over the 11-year life of the mine.<sup>120</sup> Applying then-current silver prices of US\$ 28.19 per ounce to the improved recovery process, Santa Ana would have a net present value of US\$ 554 million at a 5% discount rate and a pre-tax internal rate of return of 103.4%.<sup>121</sup> The Revised Feasibility Study also included the following highlights:

- 11-year mine life producing 47.4 million ounces of silver with an average annual salable silver production of 5.0 million ounces per year for the first six years;<sup>122</sup>
- Free cash flow estimated at US\$ 68 million per year for the first six years with a 1.1 year recoupment of capital costs consisting of US\$ 70.8 million (at then-current silver prices);<sup>123</sup> and

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<sup>117</sup> RPA Technical Review of the Santa Ana Project and Corani Project, Puno, Peru, May 29, 2015 (*hereinafter*, “RPA Expert Report”) 10-1.

<sup>118</sup> **Exhibit C-0060**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Increased Silver Recoveries To 75% From Recent Column Tests And Official Filing Of The Project “Esia” At Santa Ana, Peru*, Jan. 19, 2011.

<sup>119</sup> **Exhibit C-0061**, Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, Apr. 1, 2011 (*hereinafter*, “Santa Ana Revised Feasibility Study”).

<sup>120</sup> *Id.* at § 1.1.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

- Significant upside opportunities and extended mine life plan to include an additional 35.7 million ounces of silver and to continue exploring and expanding the project area.<sup>124</sup>

53. Based on these very positive geological and metallurgical results, the Revised Feasibility Study reiterated the Feasibility Study’s recommendation to proceed with detailed engineering and permitting. In particular, the Revised Feasibility Study noted: (i) Santa Ana’s positive economics with excellent exposure to up-side silver prices; (ii) the existence of well-defined mineral resources open to expansion and potential conversion to reserves; (iii) the Project’s favorable infrastructure including power, access and available local water supply; (iv) a well-defined permitting path; and (v) demonstrated acceptance by the local communities.<sup>125</sup>

54. With the Revised Feasibility Study complete and the ESIA process geared towards completion and final approval, Bear Creek announced on February 28, 2011 the awarding of an Engineering, Procurement and Construction Management (“EPCM”) contract for the Santa Ana Project to *Graña y Montero Ingenieros Consultores* (“GMI”), a Peruvian company with substantial experience planning and building mining and infrastructure projects in the country.<sup>126</sup> Bear Creek specified that the EPCM work, to commence immediately, would proceed on a fast-track basis for the completion of detailed engineering and lead-time equipment procurement in order for construction to start on schedule in the second half of 2011.<sup>127</sup> The engineering work would be organized and overseen by GMI’s offices in Lima. Bear Creek targeted silver production at Santa Ana to begin no later than in the second-half of 2012.<sup>128</sup>

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123 *Id.*

124 *Id.*

125 *Id.* at § 1.15.

126 **Exhibit C-0062**, Press Release, Bear Creek Mining Corporation, *Bear Creek Awards EPCM Contract and Completes Milestone Public Hearing for Permit Process*, Feb. 28, 2011.

127 *Id.*

128 *Id.*

## 2. The Corani Mining Project

55. At the same time, Bear Creek was also making substantial progress at its wholly-owned Corani Project located approximately 350 kilometers north of Santa Ana. Bear Creek entered into a Letter of Understanding to acquire a 70% interest in Corani from Rio Tinto Mining and Exploration Ltd. (“Rio Tinto”) in January 2005. Bear Creek and Rio Tinto subsequently entered into an option agreement to acquire that 70% interest (the “Corani Option Agreement”).<sup>129</sup> Bear Creek exercised the option to acquire the 70% of the Corani Project in January 2008 and agreed in June 2008 to acquire the remaining 30%, which it did in February 2011.<sup>130</sup> Bear Creek performed extensive exploration, drilling and testing works at Corani, which quickly revealed the existence of massive silver mineralization.<sup>131</sup> Bear Creek’s exploratory efforts at Corani culminated with the release of a Feasibility Study on November 9, 2011.<sup>132</sup> The Feasibility Study for Corani defined a significant undeveloped silver deposit containing proven and probable mineral reserves of 270 million ounces of silver (more than four times the silver reserves at Santa Ana), 3.1 billion pounds of lead and 1.7 billion pounds of zinc.<sup>133</sup> At then-current metals prices (US\$ 34.64/oz silver, US\$ 0.89/lb zinc, US\$ 0.90/lb lead on November 8, 2011), Corani had an after-tax net present value of approximately US\$ 1.5 billion at a 5% discount rate and a 38% internal rate of return (US\$ 2.7 billion NPV and 60% IRR on a pre-tax basis).<sup>134</sup> Under the conservative assumptions used in the Corani Feasibility Study, the Corani Project had an after-tax IRR of 17.6% and a NPV of US\$ 463 million at a 5%

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<sup>129</sup> **Exhibit C-0063**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Corani Silver-Gold-Copper Acquisition*, Jan. 20, 2005.

<sup>130</sup> **Exhibit C-0064**, Press Release, Bear Creek Mining Corporation, *Bear Creek and Rio Tinto Amend Agreement to Consolidate 100% of Corani Silver Deposit; Extension of US\$15 Million Payment to Sept 2009*, Jun. 11, 2008.

<sup>131</sup> Swarthout Witness Statement ¶ 43.

<sup>132</sup> **Exhibit C-0065**, Press Release, Bear Creek Mining Corporation, *Bear Creek Announces Corani Feasibility Study: Positive Economics Including Low Cash Costs*, Nov. 9, 2011.

<sup>133</sup> **Exhibit C-0066**, M3 Engineering, Corani Project Form NI 43-101F1 Technical Report Feasibility Study, Dec. 2011 (*hereinafter*, “Corani Feasibility Study”) § 1.14.

<sup>134</sup> *Id.*

discount rate based on metal prices of US\$ 18/oz silver, US\$ 0.85/lb lead and US\$ 0.85/lb zinc.<sup>135</sup> In short, the Feasibility Study confirmed Corani as one of the largest undeveloped silver mining projects in the world.

56. Santa Ana and Corani have always been closely intertwined.<sup>136</sup> With Corani shaping up to become a substantially larger project than Santa Ana, Bear Creek decided to bring Santa Ana to production before commencing construction at Corani.<sup>137</sup> Developing the smaller Santa Ana Project before Corani would allow Bear Creek to obtain the credibility and lower cost of capital associated with “producer” status before tapping the equity and debt markets to finance Corani.<sup>138</sup> More importantly, Bear Creek would be able to use the substantial cash flows generated by Santa Ana during the first years of production (estimated at US\$ 68 million per year in the Santa Ana Revised Feasibility Study) to cover or finance part of the US\$ 574 million initial capital cost to bring Corani up to production.<sup>139</sup> With this understanding of the interdependence of the two projects, any delay or stall at Santa Ana would necessarily impact Corani. Furthermore, the close geographic proximity between Santa Ana and Corani meant that Bear Creek’s success or failure with either project would strongly impact its ability to raise capital for the other.<sup>140</sup>

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135 *Id.*

136 Swarthout Witness Statement ¶ 46.

137 *Id.*

138 *Id.*

139 **Exhibit C-0066**, Corani Feasibility Study § 1.11.

140 Swarthout Witness Statement ¶ 54.

### III. PERU UNLAWFULLY EXPROPRIATED THE SANTA ANA PROJECT

#### A. Bear Creek's ESIA Process and the Communities' Support for Santa Ana

57. Bear Creek has been active in Peru for more than a decade and has always been proud to be part of its vibrant mining community.<sup>141</sup> An important objective of the Company's corporate social responsibility ("CSR") and sustainable development strategy is to build positive working relationships with communities near its active projects and thereby gain a "social license" to operate.<sup>142</sup> Towards this end, Bear Creek invests in community programs that directly involve citizens in their conception, delivery and management.<sup>143</sup> This "good neighbor" policy ensures that the Company's role is supportive and encourages citizen engagement in building stronger and more sustainable communities.<sup>144</sup>

58. Once Bear Creek identifies a project with economic potential, it retains independent consultancies to conduct detailed studies in order to assess and document the state of the environment encompassing the project in great detail beginning at the earliest stages of exploration and continuing through the advanced exploration and development stages.<sup>145</sup> These environmental baseline studies are the foundation of planning for any proposed mine.<sup>146</sup> The data is also used to support the permitting process and environmental assessment reports, which examine potential environmental risks and how they can be prevented or otherwise minimized, mitigated or remediated.<sup>147</sup>

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<sup>141</sup> **Exhibit C-0067**, Bear Creek Mining Corporation, *Community Engagement*.

<sup>142</sup> *Id.*

<sup>143</sup> **Exhibit C-0068**, Bear Creek Mining Corporation, *Community Initiatives*.

<sup>144</sup> *Id.*

<sup>145</sup> **Exhibit C-0069**, Bear Creek Mining Corporation, *Environmental Stewardship*.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

59. The principal request from the neighboring communities to the Company related to the lack of sustainable jobs in the area.<sup>148</sup> To this end, Bear Creek established a large-scale rotational work program allowing the Company to employ over 100 local community members to assist with the exploration activities, particularly with infrastructure building and drill sites reclamation work.<sup>149</sup>

60. The benefits of Santa Ana for the neighboring communities and the region in general cannot be overstated. Santa Ana would have provided approximately 1,000 direct positions and 1,500 indirect jobs to local communities during the construction and production phases of the Project.<sup>150</sup> The Project also would have generated more than US\$ 330 million of taxes for the Peruvian Government, a significant portion of which would have been collected and redistributed at a local and regional level.<sup>151</sup> Bear Creek was also in the process of negotiating a “life-of-mine” agreement whereby local communities would be entitled to a portion of Santa Ana’s revenues throughout the life of the mine.<sup>152</sup> As Andrew Swarthout explains in this arbitration, Bear Creek was able to implement successfully a similar framework with the Communities surrounding Corani:

We successfully negotiated and implemented a “life-of-mine” agreement whereby local communities would be entitled to a portion of Corani’s revenues throughout the life of the mine and with payments beginning pre-production. We negotiated land occupation and purchase agreements with these communities in order to acquire the footprint of the project. We also invested in community programs that directly involve citizens in their development, delivery and management. These programs included the creation of a highly-successful independent cooperative to improve alpaca fiber quality and reach consumer markets directly,

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148 Swarthout Witness Statement ¶ 40.

149 *Id.* See also Witness Statement of Elsiario Antunez de Mayolo, May 28, 2015 (*hereinafter*, “Antunez Witness Statement”) ¶ 7.

150 **Exhibit C-0070**, Bear Creek Mining Corporation, *Santa Ana Update: Setting The Record Straight*.

151 *Id.*

152 Swarthout Witness Statement ¶ 45.

the construction of three schools. Our sensitivity to these communities' life and needs ensured that our role remains supportive and encourages citizen engagement in building stronger and more sustainable communities.<sup>153</sup>

61. Peruvian law requires that mining companies produce an ESIA as part of the overall socio-environmental permitting process required to build and operate a mine in the country. To that end, Bear Creek had retained Ausenco Vector in early 2009 to prepare a detailed ESIA for Santa Ana.<sup>154</sup> Bear Creek also conducted opening workshops (*talleres de apertura*) with local communities in August 2009, informational workshops (*talleres informativos*) in November 2010, and other consultations with communities located within the Project's "area of influence."<sup>155</sup> In August 2009, Bear Creek conducted opening workshops in the communities of Huacullani, Ingenio, Challacolo, Condor de Aconcagua and Ancomarca – all of them in the District of Huacullani where Santa Ana is located.<sup>156</sup> In November 2010, Bear Creek held additional informational workshops in these communities as well as in Arconuma, a neighboring community located in the Kelluyo District.<sup>157</sup> In total, Bear Creek held over 130 meetings with local communities since the Project's inception.<sup>158</sup> The communities repeatedly expressed their support for the Santa Ana Project.<sup>159</sup> After spending over a year conducting exhaustive environmental and social studies at Santa Ana, Ausenco Vector issued a detailed ESIA report in December.<sup>160</sup>

62. On December 23, 2010, Bear Creek requested that MINEM's General Direction for Environmental Mining Affairs (*Dirección General de Asuntos Ambientales Mineros* or

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153 *Id.*

154 **Exhibit C-0071**, Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010.

155 *Id.*

156 **Exhibit C-0071**, Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, Dec. 2010.

157 *Id.*

158 Antunez Witness Statement ¶ 9.

159 *Id.*

160 *Id.* at ¶¶ 8-9.

“DGAAM”) approve the ESIA, including a participation plan (*Plan de Participacion Ciudadana* or “PPC”), in order for the Company to be in a position to convene a public hearing with the local communities, a pre-requisite for the commencement of construction at Santa Ana.<sup>161</sup> DGAAM approved Bear Creek’s PPC on January 7, 2011, and instructed Bear Creek to move forward with a public hearing.<sup>162</sup> This approval was significant because it confirmed that Bear Creek had implemented adequate community relationship programs and maintained good relationships with the communities, and that no social conflicts or issues existed in connection with the Santa Ana Project.<sup>163</sup> As requested by DGAAM, Bear Creek publicized notices about the public hearing in various national and local newspapers, posted notifications in public spaces and Government offices located in the Santa Ana Project’s area of influence, and ran radio announcements on the stations covering the area of influence.<sup>164</sup>

63. The public hearing took place on February 23, 2011 in a Government building in Huacullani.<sup>165</sup> A total of 729 individuals, including local governmental officials and community members assisted with and participated in the hearing that lasted for 5 hours.<sup>166</sup> Bear Creek responded to more than twenty oral questions and MINEM collected 83 additional written queries.<sup>167</sup> Kristiam Veliz Soto, an attorney for DGAAM, presided over the public hearing on behalf of MINEM. Jesus Obed Alvarez of the Puno’s Regional Direction of Mines acted as

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<sup>161</sup> **Exhibit C-0072**, Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010.

<sup>162</sup> **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

<sup>163</sup> **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011; Antunez Witness Statement ¶ 12.

<sup>164</sup> **Exhibit C-0074**, Services Agreement entered into by Radio Wayra – Huacullani and Bear Creek Mining Company, Jan. 13, 2011; **Exhibit C-0075**, Notices by Bear Creek published in various newspapers inviting communities to participate in the public hearing on Feb. 23, 2011.

<sup>165</sup> **Exhibit C-0076**, Minutes of the Public hearing – Mineral Subsector No. 007-2011/MEM-AAM – Public Hearing for the ESIA of the “Santa Ana” Project, Feb. 23, 2011.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

secretary. Community members present at the hearing demonstrated their strong support in favor of the Santa Ana Project.<sup>168</sup>



**Fig. 7: Public hearing in Huacullani on February 23, 2011.<sup>169</sup>**

64. Elsiario Antunez de Mayolo, Bear Creek’s Chief Operational Officer, observed firsthand that local communities overwhelmingly embraced the Company’s Santa Ana Project:

I attended the public hearing in Huacullani. I sat among the community members in attendance to get a direct sense of their reaction to the ESIA and their expectations and potential concerns about the project. I observed firsthand that the immense majority of the individuals present strongly supported the project because they wanted Bear Creek to invest and bring economic activity and development to the local communities. I also sensed that some of the participants had some discrete concerns about the environmental aspects of the Santa Ana project, which we addressed in the ESIA. I was confident that we addressed these

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<sup>168</sup> **Exhibit C-0077**, *Comunidades de Huacullani dan luz verde a Proyecto minero Santa Ana*, EL GRAN SUR, LA REPÚBLICA, Mar. 18, 2011.

<sup>169</sup> Photograph taken at the Huacullani Government Building on March 17, 2010.

concerns and would be able to address them in greater details during the upcoming weeks.<sup>170</sup>

Mr. Antunez de Mayolo also noted that some anti-mining activists and politicians came from other parts of the region and the country to the hearing in order to voice their anti-mining agenda and gain political exposure prior to the upcoming presidential elections in the Country.<sup>171</sup>

## **B. Political Climate in the Puno Region Prior to the June 2011 Presidential Elections**

65. The communities that attended the February 23, 2011 public hearing demonstrated unambiguous support for the Santa Ana Project.<sup>172</sup> On or about the same time, however, Walter Aduviri, a political operative based elsewhere in the Puno Region, formed the “*Frente de Defensa de los Recursos Naturales de la Zona Sur de Puno*” (the “*Frente de Defensa*”) to run against the incumbent Regional President, Mauricio Rodriguez.<sup>173</sup> Because of his political savvy, Aymaran roots (Aymara people make up an important part of the electorate in the Puno region) and affiliation with the left-wing movement *Raices*, Mr. Aduviri quickly gained the support of a handful of local communities throughout the Puno region.<sup>174</sup> In a bid to destabilize Mr. Rodriguez, Mr. Aduviri decided to target natural resources projects in the region.<sup>175</sup> These natural resources projects largely constitute the economic lifeblood of the Puno Region.<sup>176</sup> In order to further his political goals, Mr. Aduviri prepared and circulated a draft ordinance declaring Puno a mining free area.<sup>177</sup>

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170 Antunez Witness Statement ¶ 15.

171 *Id.* at ¶ 16.

172 *Id.* at ¶ 15.

173 Swarthout Witness Statement ¶ 47; Antunez Witness Statement ¶ 16. *See also Exhibit C-0078, Puno: prueba de fuego, REVISTA PODER 360*, Jun. 2011.

174 *Id.* Regional governments in Peru are only competent over individual “artisanal” miners located within their regions, not large-scale mining projects such as Santa Ana.

175 *Id.*

176 *Id.*

177 *Id.*

66. On March 22, 2011, the *Frente de Defensa* gave Mr. Rodriguez an ultimatum to sign that ordinance by March 30 or massive protests would ensue.<sup>178</sup> This proved to be a clever political maneuver since regional governments in Peru only have competence over small artisanal miners within their region and, therefore, lack jurisdiction over mining projects.<sup>179</sup> Mr. Rodriguez had no choice but to reject the *Frente de Defensa*'s demands since such an ordinance would have no legal basis.<sup>180</sup>

67. One day later, on March 23, 2011, the Governor of Huacullani, Mr. Juan Luna Vilca, issued a strongly-worded statement condemning the *Frente de Defensa*'s tactics, pointing out the fact that the Huacullani population had nothing to do with the *Frente de Defensa*'s ultimatum, and rejecting this attempt by outsiders to interfere with the affairs and life of the Huacullani population.<sup>181</sup> Mr. Vilca also pointed to threats made by the *Frente de Defensa* against the Huacullani population.<sup>182</sup> Angered by Mr. Rodriguez's refusal to yield to the *Frente de Defensa*'s pressure, Mr. Aduviri decided to organize a march in Puno (about 135 kilometers north of Santa Ana) on March 30, 2011.<sup>183</sup> While members from various communities further away from the Santa Ana area participated in the protests, inhabitants of Huacullani declined to participate.<sup>184</sup> The Governor of Huacullani confirmed again that the local population had nothing to do with the protests.<sup>185</sup> Meanwhile, Puno inhabitants, including students of the

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178 **Exhibit C-0079**, *Comuneros dan plazo a presidente regional - firma ordenanza o lo revocan*, LA REPÚBLICA, Mar. 23, 2011.

179 **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011. Regional governments in Peru are only competent over individual "artisanal" miners located within their regions, not large-scale mining projects such as Santa Ana.

180 **Exhibit C-0080**, *Presidente Regional de Puno afirma que la movilización de Aymaras no tiene fundamento*, Mar. 25, 2011.

181 **Exhibit C-0081**, Press Release, Los Andes, *La Opinion Pública*, Mar. 23, 2011.

182 *Id.*

183 **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011.

184 **Exhibit C-0082**, *Alcalde del distrito de Huacullani ratificó que no participarán en la movilización de mañana*, ONDA AZUL, Mar. 29, 2011; **Exhibit C-0083**, *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, Mar. 29, 2011.

185 *Id.*

National University of Puno, demonstrated peacefully in support of mining and natural resources projects in the Puno region.<sup>186</sup>

68. Since the March 30, 2011 protests had failed to produce any tangible result, the *Frente de Defensa* decided to increase the pressure on Mr. Rodriguez and declared a 48-hour protest against mining projects in the Puno region on April 25, 2011.<sup>187</sup> This time, Mr. Rodriguez promised that he would request MINEM to suspend the mining activities in the area, in an effort to appease the *Frente de Defensa*'s constituency.<sup>188</sup> On April 28, 2011, he delivered a letter requesting MINEM to suspend new and pending petitions for mining concession in the Puno region, but did not request the suspension of Bear Creek's activity at Santa Ana, something that Mr. Aduviri was advocating as well.<sup>189</sup>

69. Realizing they were gaining momentum, Mr. Aduviri and the *Frente de Defensa* declared an indefinite strike in May, and called on their supporters to block major roads in the Puno region (including at the border with Bolivia).<sup>190</sup> Responding to the *Frente de Defensa*, the Peruvian Vice-Minister of Mines, Fernando Gala, confirmed on May 20, 2011 that it would be unconstitutional to annul mining concessions by means of a regional ordinance (or a supreme decree, for that matter), and that the proper way to do so would require a judicial procedure or a legislative bill.<sup>191</sup>

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<sup>186</sup> **Exhibit C-0084**, *Estudiantes rechazan ordenanza regional que prohíbe concesiones mineras y petroleras*, Mar. 25, 2011; **Exhibit C-0085**, Memorial from the School of Mining Engineering of the National University of Puno to Mauricio Rodriguez Rodriguez, Mar. 29, 2011; **Exhibit C-0086**, *Universitarios de Puno se movilizaron a favor de las concesiones mineras*, Mar. 30, 2011.

<sup>187</sup> **Exhibit C-0087**, *En Puno suspenden mesa de diálogo hasta el lunes 09 de mayo*, RADIO ONDA AZUL, Apr. 26, 2011; **Exhibit C-0088**, *Pobladores cerrarán al frontera por el paro de los días 25 y 26 de abril*, Apr. 25, 2011.

<sup>188</sup> *Id.*

<sup>189</sup> **Exhibit C-0089**, Letter No. 521-2011-GR-PUNO/PR from M. Rodriguez, Regional President of Puno to P.E. Sánchez, Minister of Energy and Mines, Apr. 28, 2011.

<sup>190</sup> *Id.* See also, **Exhibit C-0090**, "Esperan que haya alguna victima," EL COMERCIO, May 25, 2011.

<sup>191</sup> **Exhibit C-0091**, *Se rompió el diálogo con los Aymaras*, May 21, 2011.

70. On May 18, 2011 the Prime Minister, Rosario Fernandez, issued a statement condemning the politically-motivated protests against mining projects in the Puno region and the roadblocks set up by the *Frente de Defensa*.<sup>192</sup> At the same time, Clara Garcia Hidalgo, an advisor to the Minister of Energy and Mines, confirmed that there were no legal grounds to rescind legally-granted concessions, and that the Santa Ana Project strictly complied with applicable laws and regulations.<sup>193</sup> The Vice-minister of Mines at that time, Fernando Gala, also confirmed on at least two occasions that annulling mining concessions would be illegal and that Bear Creek had lawfully acquired Santa Ana.<sup>194</sup>

71. Mr. Aduviri and his supporters staged violent protests in Puno on May 26, 2011, which resulted in acts of looting and violence.<sup>195</sup> Importantly, none of these violent acts took place in or near the project area, and members of the communities located near Santa Ana did not take part in these violent protests.<sup>196</sup> Instead, the *Frente de Defensa*'s violent actions principally took place in the city of Puno, 135 kilometers north of Santa Ana.<sup>197</sup> As Rosario Fernandez, Peru's then-Prime Minister, explained at that time, *Frente de Defensa* supporters looted the buildings of the customs and tax authorities in Puno and burned the archives contained in these buildings, including those related to ongoing criminal investigations against some of the leaders of the movement.<sup>198</sup> Ms. Fernandez leaves no doubt as to the opportunistic and political nature of the *Frente de Defensa*'s actions:

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<sup>192</sup> **Exhibit C-0092**, Press Release, Presidencia del Consejo de Ministros, *Premier califica de inadmisibile bloqueo de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011.

<sup>193</sup> **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011.

<sup>194</sup> **Exhibit C-0094**, *Huelga antiminera en Puno sigue sin solución*, LA REPÚBLICA, May 21, 2011; **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May, 26, 2011.

<sup>195</sup> **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* See also, **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

<sup>198</sup> **Exhibit C-0097**, *Interview of Prime Minister Rosario Fernandez*, MIRA QUIÉN HABLA, WILLAX TV, May 31, 2011.

**Journalist:** The leaders who incited residents to burn state institutions in the city of Puno, have they been identified?

**Prime Minister Fernandez:** They are already reported. They are already reported and we are confident that both the national prosecutor's office and the judiciary will act in accordance with the circumstances. Not only by admitting for procedure and processing [the charges], but also ordering the appropriate measures. It is not fair...it is not fair that Peruvians have to bear the cost of the destruction of our public institutions. The regional president told me yesterday, and has publicly stated, Cecilia, that day on which the customs office was raided and they took the seized goods, those same goods later turned up on trucks bound for Desaguadero. That is, to the place where they were seized because . . . because of smuggling. This is a mixed bag of issues, an obscure cocktail of interests, right? This is all mixed up, a mix between the agenda of a leader who, it seems to me, has very bad intentions, deceives people, and on the other hand the people who have their own economic interests in the matter, and finally some political passion that also transcends this situation, right?

**Journalist:** Listen, the Comptroller has said that all the corruption cases under investigation in the region are back to square one because everything was burned.

**Prime Minister Fernandez:** So yes, who benefits from that, ultimately? Does it benefit the people? No, the people call for justice, call for sanctions, call for a direct fight against corruption. So, who is interested in going to those places to [vandalize] them? It is very symptomatic, Cecilia, the two institutions in particular that have been vandalized were the Comptroller's Office and the SUNAT.

**Journalist:** The SUNAT, where precisely the cases and the records were, right? The cases for smuggling and tax evasion.

**Prime Minister Fernandez:** That's correct, cases linked to smuggling and tax evasion. So, who, who is interested in [vandalizing] those [institutions]? Basically, those persons who were processed and investigated and questioned for those acts, right? [...] <sup>199</sup>

72. At that point in time, the *Frente de Defensa's* primary target was the Inambari dam and hydroelectric power project (sponsored by Brazilian construction conglomerate OAS), which was pursuing approval of the legally-required permits from the Government. In a

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<sup>199</sup> **Exhibit C-0097**, *Interview of Prime Minister Rosario Fernandez*, MIRA QUIÉN HABLA, WILLAX TV, May 31, 2011 (emphasis added).

desperate bid to appease the *Frente de Defensa*, the Government announced on June 14, 2011 that it “canceled” the Inambari project.<sup>200</sup>

73. On May 27, 2011, Minister of Energy and Mines Pedro Sanchez condemned the violence in Puno and confirmed that the *Frente de Defensa*’s request to annul mining concessions in the Puno area was unconstitutional.<sup>201</sup> Nevertheless, on May 30, 2011, the DGAAM issued Resolution 162-2011-MEM-AAM suspending the Santa Ana ESIA for a period of 12 months.<sup>202</sup> The DGAAM’s decision was not based on environmental concerns, but rather on the violent strike and protests staged by Mr. Aduviri’s political contingent.<sup>203</sup> This was not a permissible ground to suspend the ESIA process because Bear Creek had nothing to do with the violent protests in the area. Bear Creek thus immediately appealed that decision.<sup>204</sup>

74. In addition to leading the violent protests and strikes roiling the area, Mr. Aduviri and the *Frente de Defensa* resorted to outright fabrications in order to advance their politically-motivated anti-foreign investment and anti-mining agenda.<sup>205</sup> Notably, they asserted that Bear Creek was currently producing silver in Santa Ana and contaminating local lands in the process.<sup>206</sup> This was utterly false: Bear Creek had yet to produce any silver at Santa Ana, and the exploratory work performed in the area had never resulted in environmental pollution of any kind.<sup>207</sup> To the contrary, the Project design incorporated the highest international standards of environmental safeguards.<sup>208</sup>

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*Id.*

201 **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

202 **Exhibit C-0098**, DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011.

203 *Id.*

204 Swarthout Witness Statement ¶ 48.

205 *Id.* at ¶ 49.

206 *Id.*

207 *Id.*

208 *Id.* at ¶¶ 36-39; Antunez Witness Statement ¶¶ 9-11.

75. Continuing with its strategy of deception, the *Frente de Defensa* then claimed that Santa Ana would “contaminate” Lake Titicaca on the border of Peru and Bolivia.<sup>209</sup> This contamination of Lake Titicaca was also a misconception as Lake Titicaca is located within an entirely separate water-drainage basin than the Santa Ana Project.<sup>210</sup> It would thus be hydrologically impossible for an hypothetical water discharge from Santa Ana to reach Lake Titicaca.<sup>211</sup> Furthermore, development of Santa Ana was based on a “zero-discharge,” heap-leach project design, which means there would not have been any discharge of water from the proposed mine into the surrounding environment.<sup>212</sup>

76. Then, on June 1, 2011, Mr. Aduviri announced a suspension of the strike until June 7.<sup>213</sup> At the same time, he urged the government to issue a supreme decree revoking Supreme Decree 083.<sup>214</sup> Numerous press reports revealed that this unexpected decision was motivated by political calculations.<sup>215</sup> The runoff presidential election opposing Ollanta Humala to Keiko Fujimori was to take place on June 5, 2011 and Mr. Humala crucially needed votes from the Puno region, an area of the country that traditionally would vote in favor of his political party.<sup>216</sup> Mr. Aduviri supported Mr. Humala and thus agreed to suspend the protests for a week in order to allow voters to go to the polls *en masse*.<sup>217</sup> As Ricardo Uceda, a Peruvian journalist well known for his award-winning coverage of military and government corruption, explains:

Around that time he [Aduviri] held a secret meeting with Ollanta Humala’s representatives, the candidate who could lose the

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<sup>209</sup> Swarthout Witness Statement ¶ 49.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360°, Jun. 2011.

<sup>214</sup> **Exhibit C-0099**, *Huelga de aymaras termina en “cuarto intermedio”*, LOS ANDES, June 1, 2011.

<sup>215</sup> **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360°, June 2011; **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

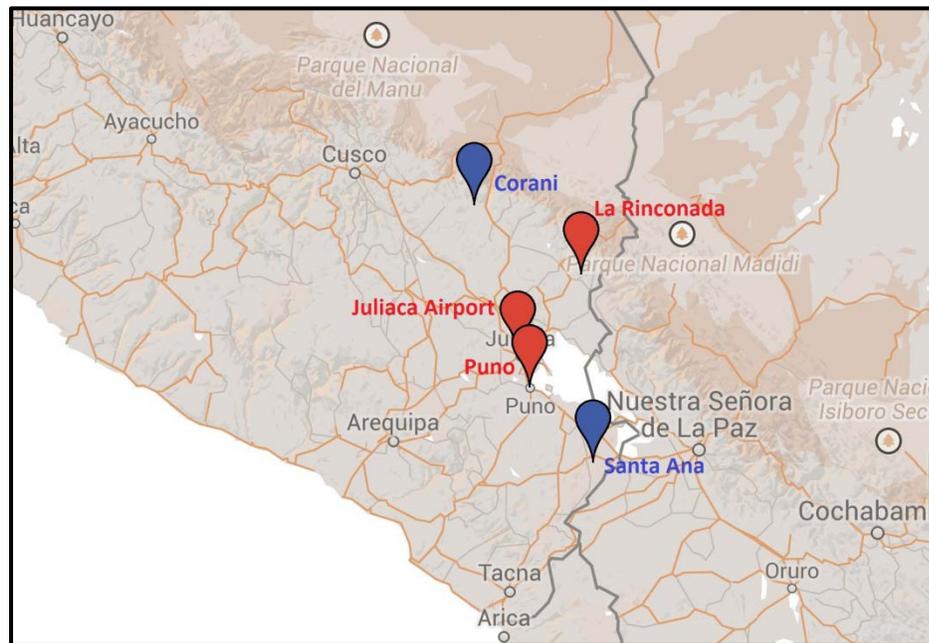
<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

elections if Puno did not vote. The outcome was that the strike was lifted and the region's votes contributed to Humala's victory.<sup>218</sup>

77. On June 7, 2011, only two days after the presidential elections, Mr. Aduviri ordered the strikes and protests to resume.<sup>219</sup> On June 14, 2011, a delegation of Aymara people led by Mr. Aduviri gathered before the Peruvian Congress to request a ban on mining in the Puno region and the abrogation of Supreme Decree 083.<sup>220</sup>

78. On June 19, 2011, MINEM proposed to hold consultations with the Puno population to discuss these issues, but Mr. Aduviri rejected MINEM's proposal.<sup>221</sup> On June 24, 2011, Aduviri supporters marched towards the Juliaca airport, located 185 kilometers northwest of Santa Ana.<sup>222</sup>



**Fig. 8: Santa Ana is Located 135 Kilometers from Puno and 185 Kilometers from the Juliaca Airport.<sup>223</sup>**

218 *Id.*

219 *Id.* See also, **Exhibit C-0100**, *Volvió tensión con huela aimara*, LA REPÚBLICA, June 9, 2011.

220 **Exhibit C-0101**, *Aimaras de Puno marchan hasta el Congreso*, June 14, 2011

221 **Exhibit C-0102**, *Walter Aduviri rechaza propuesta del gobierno de consulta a población*, RPP NOTICIAS, June 20, 2011.

222 **Exhibit C-0103**, *Peruvian Unrest at Juliaca Airport Occurring 160KM from Project Site*, PR NEWSWIRE, June 25, 2015.

223 Source: Google Maps, May. 29, 2015.

79. The protests in Juliaca had nothing to do with the Santa Ana Project. Instead, the protesters in Juliaca demonstrated against the illegal gold mining activity that was taking place at *La Rinconada*, where illegal gold miners used mercury to extract gold and poisoned the water flowing further north from Juliaca.<sup>224</sup> Fighting with police forces ensued and several protesters were shot by the police.<sup>225</sup> The Government knew that Mr. Aduviri would exploit this tragic incident as part of his cynical campaign to gain political leverage by opposing mining and natural resources projects in the Puno region.<sup>226</sup> Eventually, Mr. Aduviri and some of his supporters were prosecuted for their role in the violent protests that took place in the area.<sup>227</sup> The criminal proceedings remain pending.<sup>228</sup>

### C. Peru Enacted Supreme Decree 032 Expropriating the Santa Ana Project

#### 1. The Government enacted Supreme Decree 032 without notice to Bear Creek or an opportunity for Bear Creek to be heard

80. On Friday June 24, 2011, Prime Minister Fernandez announced that the Government would publish different measures aimed at resolving the protests in Puno, including a supreme decree revoking Supreme Decree 083.<sup>229</sup> On June 25, 2011, without notice or an opportunity for Bear Creek to be heard, MINEM issued Supreme Decree 032, revoking Supreme Decree 083. Supreme Decree 032 did not provide any motivation for the decision to reverse the declaration of public necessity that allowed Bear Creek to acquire Santa Ana.<sup>230</sup> Rather than providing any motivation for the reversal of the declaration of public necessity, Supreme Decree

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<sup>224</sup> Swarthout Witness Statement ¶ 50; Antunez Witness Statement ¶ 19.

<sup>225</sup> **Exhibit C-0104**, *Quitan concesión a minera en Perú; inversionistas en alerta*, EL ECONOMISTA, Jun. 26, 2011; **Exhibit C-0105**, *'Juliacazo': seis muertos por protestas*, PERÚ 21, June 25, 2011; **Exhibit C-0106**, *Cinco muertos y 25 heridos en el intento de toma de aeropuerto en el sur del Perú*, IBEROAMÉRICA, June 25, 2011; **Exhibit C-0107**, *Al menos un muerto en intento de toma de aeropuerto en Perú*, EXTRA.EC, June 24, 2011.

<sup>226</sup> **Exhibit C-0078**, *Puno: prueba de fuego*, REVISTA PODER 360°, June 2011.

<sup>227</sup> Antunez Witness Statement ¶ 17.

<sup>228</sup> *Id.*

<sup>229</sup> **Exhibit C-0108**, *Elaboran cinco normas legales que resuelven crisis en Puno*, Jun. 24, 2011.

<sup>230</sup> **Exhibit C-0005**, Supreme Decree No. 032-2011-EM, Jun. 25, 2011 (*hereinafter*, "Supreme Decree 032").

032 refers to new circumstances “that would imply the disappearance of the legally required conditions for the issuance” of Supreme Decree 083, and adds that “the purpose of safeguarding the environmental and social conditions in the areas of the Huacullani and Kelluyo districts, ..., dictates provisions for the purpose of prohibiting mining activities in the aforementioned areas.”

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81. Pedro Martinez, the Chairman of the Peruvian National Society for Mining, Oil, and Energy aptly summarized the circumstances of the Government’s dismal capitulation: “The government chose the easy way to solve Puno’s problem. We elected the current administration to keep order, not only legal but also the security. Unfortunately almost at the end of its mandate it demonstrated weakness and was influenced by demonstration and extreme violence.”<sup>232</sup>

82. On May 31, 2011, the Prime Minister of Peru Rosario Fernandez explained on national television that expropriating Santa Ana would be the worst possible outcome for the country and the communities surrounding the project:

**Journalist:** So be it, and we also hope that the government is not only capable of resolving conflicts, but also of guaranteeing investments.

**Prime Minister Fernandez:** Yes, of course.

**Journalist:** Because without investment, there are no jobs.

**Prime Minister Fernandez:** Well, that is guaranteed.

**Journalist:** And when there are no jobs, there are poor people.

**Prime Minister Fernandez:** That’s right, because if we had conceded to cancelling the concessions...that was the easy way out, right, how easy to say, ‘It’s over!’

**Journalist:** You can leave now!

**Prime Minister Fernandez:** No, that was the most difficult thing to do, because it would have been throwing away something that

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231 *Id.*

232 **Exhibit C-0109**, *Sobre cancelación de concesión a Bear Creek*, EL COMERCIO, Jul. 8, 2011.

took five years to build. I'm a lawyer, and I know that legal security comes first, and without that, there is nothing.<sup>233</sup>

A few weeks later, however, the Government did precisely that: cancel the Santa Ana Concessions, and “throw away” a project that took five years to build without paying any heed to the legal security to which Bear Creek was entitled.

83. Shortly after the Government enacted Supreme Decree 032, Bear Creek filed a request with MINEM to obtain a copy of all public records connected with the issuance of Supreme Decree 032, and particularly, to determine what could possibly have constituted new “circumstances” justifying the revocation Supreme Decree 083.<sup>234</sup> After consulting with its mining, environmental and legal directorates, MINEM responded that no documents or records existed in connection with the issuance of Supreme Decree 032.<sup>235</sup>

## **2. The Peruvian Constitutional Court confirmed that Supreme Decree 032 violates the Peruvian Constitution**

84. On July 12, 2011, Bear Creek filed a constitutional *amparo* action against the Government, requesting that Article 1 of Supreme Decree 032 be declared inapplicable because it violated Bear Creek’s fundamental rights to legal security, freedom of industry and the prohibition against arbitrariness.<sup>236</sup> Bear Creek also requested that the court declare (i) that its private investment in Santa Ana is a public necessity and (ii) that its title over the Santa Ana

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<sup>233</sup> **Exhibit C-0097**, *Interview of Prime Minister Rosario Fernandez*, MIRA QUIÉN HABLA, WILLAX TV, May 31, 2011 (emphasis added).

<sup>234</sup> **Exhibit C-0110**, Letter from E. Antunez, Bear Creek Mining Company, to the Secretary General of MEM, Aug. 10, 2011.

<sup>235</sup> **Exhibit C-0111**, Letter from R. Wong, Secretary General of MEM, to E. Antunez, Bear Creek Mining Company, Aug. 19, 2011. The only document related to Supreme Decree 032 provided by MINEM was a one-page long *exposición de motivos* paraphrasing the language of Supreme Decree 032 without adding any meaningful precision or justification.

<sup>236</sup> *Amparo* actions are generally applicable to protect constitutional rights of individuals, and exceptionally applicable to companies. Bear Creek gained access because it was the only available procedural avenue to obtain redress from Supreme Decree 032, which, as later confirmed by the Constitutional Court of Lima, was issued arbitrarily, without granting Bear Creek the opportunity to present its case, and contained no explanation of its motivation. The First Specialized Constitutional Court of Lima first dismissed Bear Creek’s *amparo* action on July 18, 2012. Following Bear Creek’s challenge, the Third Civil Chamber of the Superior Court of Lima instructed the First Specialized Constitutional Court of Lima to admit the action.

Concessions remains in force.<sup>237</sup> The Government responded that Supreme Decree 032 has been motivated by the Government's desire to protect the environmental and social conditions existing in the Santa Ana Concessions area.<sup>238</sup>

85. On May 12, 2014, after three years of proceedings and numerous interlocutory appeals filed by the Government, the Constitutional Court issued a ruling (the "Amparo Decision") that completely vindicated Bear Creek's claims in the *amparo* action. The Amparo Decision stated unequivocally and unconditionally that:

- Peru had violated Bear Creek's constitutional rights;<sup>239</sup>
- The Company's rights over Santa Ana are unconditionally returned as stipulated under Supreme Decree 083;<sup>240</sup>
- Bear Creek lawfully holds title over the Santa Ana Concessions and, therefore, is allowed to exercise all rights associated with these concessions;<sup>241</sup> and
- The Santa Ana Project is a public necessity for Peru.<sup>242</sup>

86. The Constitutional Court found that Supreme Decree 032's sole motivation based on "circumstances that would imply the disappearance of the legally required conditions for the issuance of Supreme Decree No. 083-2007-EM" (i) was not imputable to Bear Creek; and (ii) lacked proper legal motives.<sup>243</sup> Likewise, it concluded that: "the issuance of Supreme Decree No. 032 is an action by the State that is not found within the margins of reasonability and proportionality required not to violate the principle of legal security."<sup>244</sup>

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237 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

238 *Id.*

239 *Id.* at 20.

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.*

87. Also, Professor Bullard has concluded Supreme Decree 032 breaches Peruvian law. He explains that, although the decree purports to “derogate” Supreme Decree 083, unlike provisions of general application, provisions that have particular effects, such as an authoritative decree under Article 71 of the Constitution, are not subject to derogation but revocation.<sup>245</sup> In light of the constitutional relevance of principles such as legal security and private property under the Peruvian Constitution, the grounds for revocation are limited. Professor Bullard analyzed Supreme Decree 032 in light of those requirements and concluded that it “does not fit into any of the grounds for revocation provided by article 203.2 of Ley 27444.”<sup>246</sup> In addition, he concluded that, in any event, proper procedure for revocation (which includes providing an opportunity for defense and payment of compensation) was not followed, and thus, Supreme Decree 032 was improper.<sup>247</sup>

88. The Peruvian Government subsequently appealed the Amparo Decision. Soon afterwards, Bear Creek had to request the court to discontinue the proceedings in order to comply with the waiver requirement set forth at Article 823 of the Canada-Peru FTA.<sup>248</sup> The Court of Appeal approved Bear Creek’s voluntary dismissal by Decision 33, issued on October 23, 2014, declaring the *amparo* proceeding concluded.<sup>249</sup>

#### **D. MINEM Improperly Filed a Civil Lawsuit Against Bear Creek**

89. On July 5, 2011, two weeks after Peru enacted Supreme Decree 032, MINEM commenced a civil lawsuit (the “MINEM Lawsuit”) against Bear Creek and Ms. Villavicencio

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<sup>245</sup> Bullard Expert Report, ¶¶ 201-05.

<sup>246</sup> *Id.* at ¶ 18.q.

<sup>247</sup> *Id.* at ¶¶ 18.s, 175-200.

<sup>248</sup> **Exhibit C-0009**, Voluntary dismissal writ filed by Bear Creek requesting the court to discontinue the *amparo* proceeding challenging the issuance of Supreme Decree 032-2011-EM, Aug. 11, 2014.

<sup>249</sup> **Exhibit C-0011**, Decision 33 declaring the first *amparo* proceeding concluded, Oct. 23, 2014.

before the Civil Court Lima.<sup>250</sup> MINEM's only claim was to seek annulment of Bear Creek's title over the Santa Ana Concessions, and to seek their reversion to the State, by attacking the validity and registration of: (i) the validity of the Option Agreements; (ii) the recording of such Option Agreements in the Peruvian Public Registry; and (iii) the administrative acts through which the concession titles were granted to Bear Creek.<sup>251</sup>

90. The first instance civil judge in the MINEM Lawsuit dismissed all of MINEM's claims against Bear Creek on December 27, 2012, holding that MINEM had improperly combined administrative and civil claims, in direct contravention of the Peruvian Code of Civil Procedure.<sup>252</sup> MINEM appealed to the Superior Court of Lima.<sup>253</sup> On June 17, 2013, the Superior Court decided to separate the claims and directed the first instance judge to proceed with MINEM's civil claims.<sup>254</sup> Bear Creek filed a constitutional action of *amparo* against the Superior Court on November 18, 2013 for a declaration that its decision splitting the claims was unconstitutional.<sup>255</sup> Bear Creek requested the Court to discontinue the *amparo* proceeding challenging the Superior Court's decision directing the first instance court to proceed with MINEM's civil claims.<sup>256</sup> The first instance judge approved Bear Creek's dismissal and declared the proceeding concluded on September 17, 2014.<sup>257</sup>

91. On May 19, 2014, the first instance civil judge decided to proceed with MINEM's claims relating to (i) the Option Agreements; and (ii) the recording of Option Agreements in the

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<sup>250</sup> **Exhibit C-0112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, Jul. 5, 2011.

<sup>251</sup> *Id.*

<sup>252</sup> **Exhibit C-0113**, Decision 20 issued by the 28<sup>th</sup> Civil Court of Lima, Dec. 27, 2012.

<sup>253</sup> *Id.*

<sup>254</sup> **Exhibit C-0114**, Decision 6 issued by the Sixth Civil Chamber of Superior Court of Lima on June 17, 2013.

<sup>255</sup> **Exhibit C-0115**, Constitutional Action of Amparo filed by Bear Creek against the Superior Court of Lima, Nov. 18, 2013.

<sup>256</sup> **Exhibit C-0012**, Voluntary Dismissal of the appeal filed by Bear Creek against the first instance ruling which rejected Bear Creek's claim, Aug. 11, 2014.

<sup>257</sup> **Exhibit C-0013**, Decision 33 declaring the second *amparo* proceeding concluded, Sept. 17, 2014.

Peruvian Public Registry.<sup>258</sup> Bear Creek filed formal defenses (objections) in the MINEM Lawsuit based on lack of jurisdiction, expiration of the statute of limitations and lack of standing to file the claim. The civil judge recently rejected Bear Creek's defense and the proceeding remains currently pending.<sup>259</sup>

**E. The Peruvian Government Repeatedly Assured Bear Creek that it would Restore Bear Creek's Rights but Failed to do so**

**1. After the Government issued Supreme Decree 032, local communities consistently requested that the Government permit Bear Creek to return to Santa Ana**

92. Since the issuance of Supreme Decree 032, local communities near Santa Ana have repeatedly stated their desire to see Bear Creek return to Santa Ana and see the Project finally move forward.<sup>260</sup> On May 15, 2013, local authorities, community leaders, and community members from the Huacullani District sent a memorandum to the Prime Minister, MINEM and Bear Creek, expressing their support for the Santa Ana Project and requesting that the Project be resumed.<sup>261</sup> In particular, they insisted on the fact that Bear Creek's investments at Santa Ana were the driving force behind the communities' own economic development plans, which had been frustrated by the suspension of the Project:

Our plans and desires were directed to develop the livestock, agriculture, craftwork and commercial potential for which we counted with the engine that meant the Santa Ana mining project which deposit is located in Huacullani and that would also help for the development of our neighboring brothers, such as the province of Chucuito and the region of Puno, both for the sharing of the mining tax and the royalties and for the developments plans that

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<sup>258</sup> **Exhibit C-0116**, Decision No. 26 issued by the First Instance Civil Judge which proceeded with MIMEM's claims, May 19, 2014.

<sup>259</sup> **Exhibit C-0117**, Decision No. 30 issued by the First Instance Civil Judge which rejected Bear Creek's defense, Mar. 25, 2015.

<sup>260</sup> Antunez Witness Statement ¶ 28.

<sup>261</sup> **Exhibit C-0118**, Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarrollo y La Inclusión*, May 15, 2013.

would for now be already under development with the Santa Ana mine.<sup>262</sup>

93. In the same memorandum, the communities and authorities of Huacullani explained that they could not understand the Government's reason for suspending the Santa Ana Project, since the Company had provided the community with social programs, activities, workshops and had conducted a public hearing with a majority of the community expressing its support for the Project:

We know that the development of a project such as Santa Ana signifies resources for the State, which at the same time justifies that the State may come closer and be present with training programs and social, development and infrastructure projects in the Aymaran province of Chucuito and its districts and therefore we do not understand why the development of the Santa Ana mining project was suspended that had been doing social programs and planning activities for the communities, and likewise it had developed workshop and the public hearing with an attendance of the majority of the community.<sup>263</sup>

94. On October 27, 2013, Huacullani district authorities and community leaders sent another request to MINEM to allow the Santa Ana Project to resume.<sup>264</sup> In that memorandum, the communities confirmed that they rejected Mr. Aduviri's politically-motivated opposition to mining projects in the area:

The lack of knowledge from the population with respect to the economic investments were led by anti-mining messages taking to an extreme the mining operations as a fatal pollution making it confusing with the INFORMAL mines without being clear that the Santa Ana mining project is formal and counts with environmental impact studies EIA.

Two years have passed until today and the alleged environmentalist [Mr. Aduviri] has not solved the poverty problem in conclusion it led to worse cases and still the agricultural activity

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> **Exhibit C-0119**, Memorandum from Members of the Huacullni District to MINEM, *Reactivación del Proyecto Santa Ana*, Oct. 27, 2013.

is a failure; in that sense, we, the inhabitants have come to realize that the leader [Mr. Aduviri] was only after political and personal interests.<sup>265</sup>

95. On January 24, 2014, the local authorities, community leaders, and community members from the Huacullani District reiterated their request for MINEM to allow Bear Creek to return to Santa Ana.<sup>266</sup> These repeated efforts by the local communities and authorities demonstrated again that no changed “circumstances” existed that could have justified rescinding Bear Creek’s authorization to operate in the area. To the contrary, the Communities’ repeated pleas to the Government confirmed their strong support for Bear Creek’s Santa Ana Project.

## **2. Numerous Government officials assured Bear Creek of the Government’s desire to resolve the situation**

96. Meanwhile, the Company’s executive management held numerous meetings with various Government officials in an effort to resolve the situation and restart operations at Santa Ana.<sup>267</sup> From July 2011 (immediately after Peru enacted Supreme Decree 032) to February 2014 (when Bear Creek delivered a Notice of Intent to the Government under the FTA), Bear Creek representatives met 44 times with Government officials, including three times with President Humala, three times with Prime Minister Jimenez, eleven times with the Minister of Energy and Mines and fourteen times with the Vice-minister of Mines.<sup>268</sup> President Humala and his Ministers repeatedly confirmed their desire to amicably resolve the situation at Santa Ana, but never implemented any concrete step towards that end.<sup>269</sup>

97. As Mr. Antunez de Mayolo explains, in December 2013 Minister of Energy and Mines, Jorge Merino went so far as to provide Bear Creek’s executives with a document

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<sup>265</sup> *Id.*

<sup>266</sup> **Exhibit C-0120**, Memorandum from Members of the Huacullani District to Prime Minister of Perú, MINEM and Bear Creek Mining, *Reiterativo Por El Desarrollo y La Inclusión*, Jan. 24, 2014.

<sup>267</sup> Swarthout Witness Statement ¶ 58; Antunez Witness Statement ¶¶ 26-27, 29.

<sup>268</sup> *Id.*

<sup>269</sup> Swarthout Witness Statement ¶¶ 54-56; Antunez Witness Statement ¶¶ 25-33.

outlining the Government's proposed steps to return the project to Bear Creek.<sup>270</sup> During the same meeting, Minister Merino instructed Mr. Antunez de Mayolo to draft a letter on Bear Creek's letterhead outlining the Government's proposed framework and send it back to MINEM and the Ministry of Justice, which Bear Creek did:

As part of our effort to work with the Government in order to resolve the situation at Santa Ana, Alvaro Diaz and I met with Minister Merino on December 13, 2013. During that meeting, Minister Merino told us that he had "received the order to resolve the Santa Ana case from the highest authorities in the Government." He added that MINEM officials, in conjunction with Ministry of Justice officials, had devised a legal framework to resolve the issue and return the Santa Ana Concessions to Bear Creek. He handed us a document outlining the procedure to resolve the issue, starting with a formal request from Bear Creek to the Government and culminating with the issuance of a Supreme Decree reinstating Bear Creek's rights over Santa Ana. He advised us to propose a formal request containing the points he outlined in the draft letter he gave us. This document contained precise dates and timeframes for the completion of these steps. We thanked Minister Merino for this initiative and told him that we would act as instructed by the Government. We were hopeful that this would allow resolving the situation.<sup>271</sup>

Days after, on December 17, 2013, as instructed by Minister Merino, Bear Creek sent the requested letter to the Government.<sup>272</sup> However MINEM never responded to that communication.<sup>273</sup>

98. The Government repeatedly assured Bear Creek of its desire to resolve the issue, both during meetings and in press interviews. Congressman Juan Carlos Eguren declared on November 29, 2013 that a potential claim by Bear Creek would be very serious because it could lead to an international arbitration claim against Peru, considering that the "government lost

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<sup>270</sup> **Exhibit C-0121**, Draft letter Remitted by Minister J. Merino to E. Antunez de Mayolo outlining the Government's proposed steps to resolve Bear Creek's situation at Santa Ana, Dec. 11, 2013; **Exhibit C-0122**, Letter from E. Antunez de Mayolo, Bear Creek, to J. Merino, Minister of Energy and Mines, and D. Figallo, Minister of Justice, Dec. 17, 2013.

<sup>271</sup> Antunez Witness Statement ¶ 32.

<sup>272</sup> Swarthout Witness Statement ¶ 57; Antunez Witness Statement ¶ 33.

<sup>273</sup> *Id.*

authority and yielded to social pressure.”<sup>274</sup> He added that a claim by Bear Creek would be justified “simply because the Peruvian State failed to fulfill the obligations it assumed [under the FTA]” and that the State had an obligation to assure investors that any project that it authorized would be viable and realized.<sup>275</sup> Shortly after Bear Creek filed its Notice of Dispute, the then Minister of Energy and Mines, Jorge Merino confirmed on February 8, 2014 that the Government had the “best will” to find an “amicable solution” to resolve the issue as soon as possible to allow the company to “exploit those silver reserves.”<sup>276</sup> The Minister of Economy and Finance, Luis Miguel Castilla confirmed on March 19, 2014 the Government’s desire to reach an agreement that would prevent this arbitration. He mentioned that there was “desire from the Government [...] to overcome the issue to resolve it as soon as possible and avoid an arbitration.”<sup>277</sup>

99. On August 15, 2014, after Bear Creek filed its Request for Arbitration, the Minister of Mines at that time, Eleodoro Mayorga, stated that the government was optimistic that Bear Creek would reach an agreement with the *aymaran* communities and that it was in the interest of the government that such agreement be reached.<sup>278</sup> He acknowledged that otherwise, the Government “would be required to compensate the company.”<sup>279</sup> In spite of these repeated assurances, the fact is that the Government never took any measures to reinstate Bear Creek’s rights over Santa Ana or to compensate Bear Creek for the loss of its investment.

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<sup>274</sup> **Exhibit C-0123**, *Gobierno busca evitar demanda millonaria de minera canadiense*, DIARIO EXPRESO, Nov. 29, 2013.

<sup>275</sup> *Id.*

<sup>276</sup> **Exhibit C-0014**, *Minera Bear Creek amenaza con millonaria demanda a Perú*, NO A LA MINA, Feb. 8, 2014.

<sup>277</sup> **Exhibit C-0124**, *Perú dice tiene voluntad de llegar a acuerdo con Bear Creek para evitar arbitraje internacional – RTRS*, THOMPSON REUTERS, Mar. 19, 2014; **Exhibit C-0125**, *El gobierno quiere evitar el arbitraje con Bear Creek*, EL COMERCIO, Mar. 21, 2014.

<sup>278</sup> **Exhibit C-0126**, *Gobierno peruano y Bear Creek avanzan en negociaciones con comunidades por Santa Ana*, GESTIÓN, Aug. 15, 2014.

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

100. As recently as May 15, 2015, almost a year after Bear Creek commenced these arbitration proceedings, President Ollanta Humala made the following proclamation during a public address regarding the *Tia Maria* mining project located roughly 250 kilometers from Santa Ana:

Today, many voices call for the Executive to suspend the project, despite fully knowing that we cannot suspend what hasn't even started, and, worse still, knowing that the State cannot adopt a unilateral decision that is not governed by the legal framework, because an arbitrary decision would expose it to international litigation for failure to comply, leading to important economic losses for the entire society.

No subnational authority, no political force has declared the mechanisms for suspending this project, which complies with all the requirements established by law.

They have used their right to express their opinion, but they have assumed no liability, taking into account that an action such as this, unilaterally decided by the State, would have nefarious effects, both legal – for violating the Constitution – and economic, because it would set a negative precedent that could be replicated in the country's future projects. This is why we state this is a national matter and not just another project.<sup>280</sup>

### **3. The Government's actions caused Bear Creek to suffer substantial losses at Santa Ana and Corani**

101. It is not in dispute that the issuance of Supreme Decree 032 has caused Bear Creek to be removed from the Santa Ana project area and to abandon any activity undertaken in connection with the Santa Ana project. Bear Creek no longer has any control over the Santa Ana Project, and has been deprived of any economic value associated therewith. With respect to the Corani Project, the interconnected nature of the Santa Ana and Corani project means that the Government's expropriation of Santa Ana has had and continues to have serious economic

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<sup>280</sup> **Exhibit C-0127**, *Ollanta Humala reitera que Tia Maria "cumple con todos los requisitos exigidos por la ley"*, LA REPÚBLICA, May 15, 2015.

repercussions on Corani by compromising Bear Creek's ability to use cash flows from Santa Ana to develop Corani.<sup>281</sup> As Mr. Swarthout testifies in this arbitration:

The expropriation will undoubtedly make it extremely difficult for Bear Creek to obtain financing for Corani, which resulted in a significant delay in the Corani Project's development schedule pending resolution of the Santa Ana situation. Furthermore, the Government's expropriation of Santa Ana has substantially raised the risk profile associated with Corani in the eyes of mining investors because Corani is located approximately 350 kilometers away from Santa Ana where the Government demonstrated its willingness to sacrifice an advanced mining project to appease political activists.<sup>282</sup>

#### **IV. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE**

102. As explained above and in the Request for Arbitration, Bear Creek is a Canadian enterprise with protected investments in Peru. Bear Creek and Peru have both consented to the arbitration of this dispute and all requirements under the FTA and the ICSID Convention for the submission of this dispute to arbitration have been fulfilled. This Tribunal is therefore competent to decide the present dispute.

##### **A. Bear Creek is a Protected Investor Under the FTA**

103. The FTA protects "investors of a Party" against adverse actions by the other Party. Article 847 defines investors of Canada as "... a national or enterprise of Canada, that seeks to make, is making or has made an investment."<sup>283</sup> Article 847 provides that an "enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there."<sup>284</sup>

104. Bear Creek is a Canadian company incorporated under the British Columbia Business Corporations Act (the "BCA") on August 31, 1999 under the name "4271 Investments

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<sup>281</sup> Swarthout Witness Statement ¶ 46.

<sup>282</sup> *Id.*

<sup>283</sup> **Exhibit C-0001**, Chapter Eight of the Free Trade Agreement between Canada and the Republic of Perú signed May 29, 2008 and entered into force on Aug. 1, 2009, Art. 847 (*hereinafter*, 'Canada-Peru FTA').

<sup>284</sup> *Id.*

Ltd.”<sup>285</sup> On September 30, 1999, it changed its name to “EVEolution Ventures Inc.”<sup>286</sup> On April 11, 2000, the Company obtained the right to be listed on the TSXV as a capital pool company.<sup>287</sup> On November 14, 2002, the Company “continued” to Yukon (a Canadian Territory), where it was renamed “Bear Creek Mining Corporation.”<sup>288</sup> On April 22, 2003, the Company acquired the U.S. Partnership previously formed by Mr. Swarthout and his partners in June 2000 and listed on the TSXV.<sup>289</sup> On July 16, 2004, the Company “continued” to British Columbia, where it is domiciled and has been in good standing ever since.<sup>290</sup> Bear Creek is therefore an enterprise of Canada pursuant to Article 847 of the FTA and thus qualifies as a protected investor under the FTA.

#### **B. Bear Creek has Made Qualifying Investments in Peru**

105. The FTA defines the term “investment” to include, *inter alia*, “an enterprise,” “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes,” and “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under: (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, ... .”<sup>291</sup> The Santa Ana Project and Corani Project fit squarely within the FTA’s broad definition of

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<sup>285</sup> **Exhibit C-0023**, Bear Creek AIF at 1.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* Under the Canada Business Corporation Act, a continuance (import) allows an incorporated business to effectively re-incorporate under another act. Because it is already incorporated, the legal process is called continuance. Instead of incorporating again, the incorporated business continues from one act into another so that it is governed by that other act as though it were incorporated under it. The process results in the corporation being exported out of one act and being imported into another.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* See also **Exhibit C-0008**, Certificates of Continuation and Good Standing of Bear Creek Mining Corporation, Sept. 17, 2013.

<sup>291</sup> **Exhibit C-0001**, Canada-Peru FTA, Art. 847.

investment. The Santa Ana Project comprises, *inter alia*, the Santa Ana Concessions and the legal rights associated therewith.

106. The FTA also provides that “investment” covers both direct and indirect investment: “investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such party.”<sup>292</sup> It is thus irrelevant whether an investor of one country owns a protected investment in another country directly or indirectly, that is, through one or more other intermediary corporate entities.<sup>293</sup> These intermediary corporate entities can be registered or incorporated in the investor’s country of origin, in a foreign country that is not a party to the treaty in question, and in the country where the investment is located.<sup>294</sup> In the latter case, the protected investments will consist of the investor’s shares in the local company as well as the assets of that local company.<sup>295</sup>

107. As described below, Claimant, Bear Creek owned at the time of the expropriation, and continues to own, 100% of the Santa Ana and Corani Projects, through subsidiaries and branches in Canada, Peru and the British Virgin Islands (for the Corani Project only).

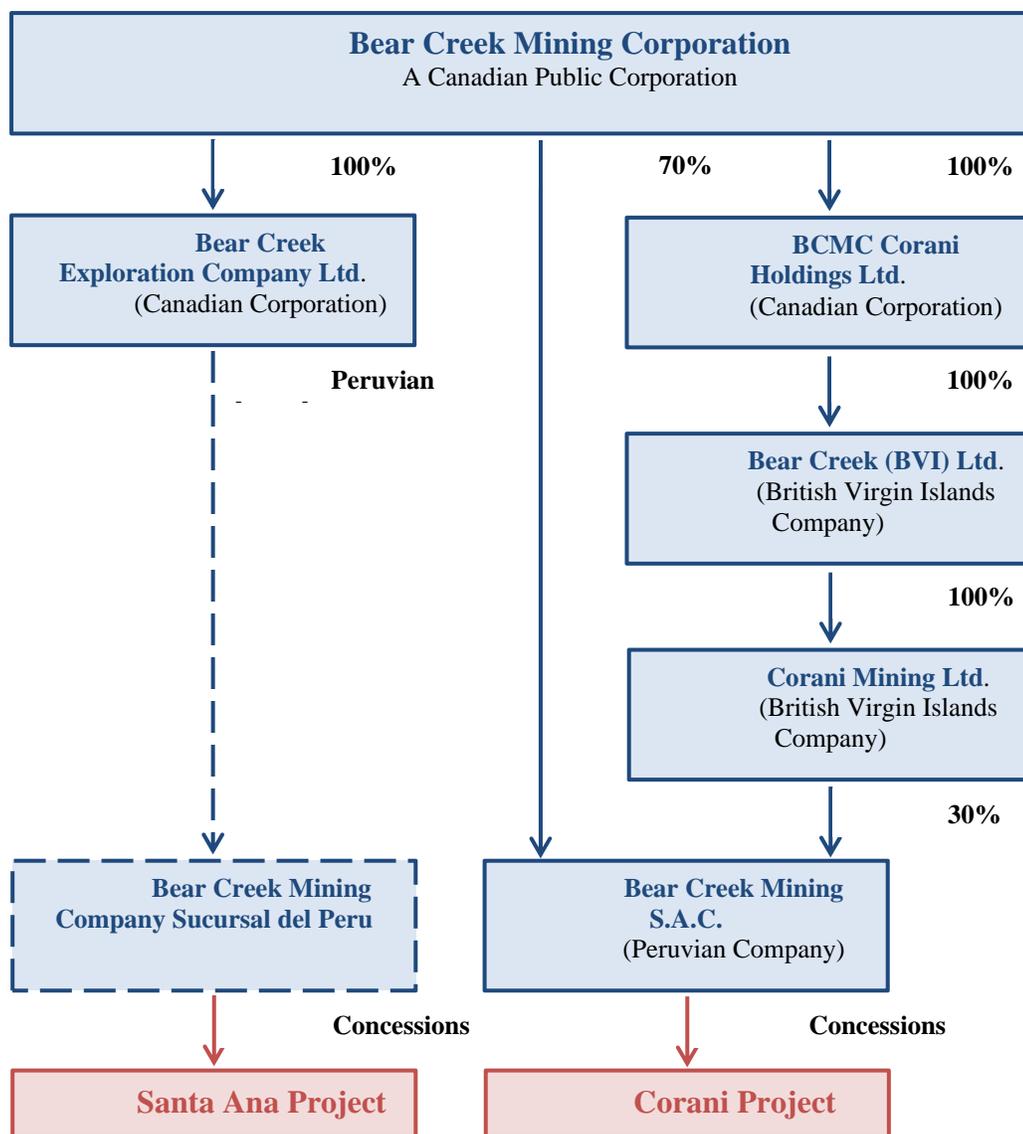
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<sup>292</sup> *Id.*

<sup>293</sup> **CL-0031**, *Siemens A. G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, Feb. 6, 2007 (“*Siemens Award*”) ¶ 205; **CL-0032**, *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, Mar. 3, 2010 (“*Kardassopoulos Award*”) ¶ 2; **CL-0033**, *BG Group Plc v. Argentine Republic*, UNCITRAL Award, Dec. 24, 2007 (“*BG Award*”) ¶ 138.

<sup>294</sup> *Id.*

<sup>295</sup> **RLA-010**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 (“*CMS Award*”) ¶ 124; **CL-0033**, *BG Award* ¶ 125; **CL-0034**, *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, November 15, 2004 (“*GAMI Award*”) ¶ 33; **CL-0035**, Abby Cohen Smutny, State Responsibility and Attribution/When is a State Responsible for the Acts of State Enterprises? ‘Emilio Agustín Maffezini v. The Kingdom of Spain’ in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW 17 (Todd Weiler ed., Cameron May 2005).



**Fig. 9: Bear Creek’s Investments in the Santa Ana and Corani Projects.**

108. Effective April 20, 2006, Bear Creek’s wholly-owned subsidiary, Bear Creek Mining Company (previously “EVEolution Ventures (USA) Inc.”), continued from the State of Arizona to the Province of British Columbia under the BCA and changed its name to “Bear Creek Exploration Company Ltd.” (“Bear Creek Exploration”).<sup>296</sup> Bear Creek Exploration also has a branch office registration in Peru under the name “Bear Creek Mining Company Sucursal

<sup>296</sup> **Exhibit C-0023**, Bear Creek AIF at 1; **Exhibit C-0128**, Certificate of Good Standing *Bear Creek Exploration Company Ltd.*, May 1, 2015; **Exhibit C-0129**, Central Securities Register *Bear Creek Exploration Company Ltd.*, May 1, 2015.

del Peru” (referred to as Bear Creek Peru).<sup>297</sup> Bear Creek Peru is a registered branch of Bear Creek Exploration and does not have a separate legal personality from Bear Creek Exploration.<sup>298</sup> Bear Creek also owns the following (wholly-owned) subsidiaries: BCMC Corani Holdings Limited, a British Columbia company; Bear Creek (BVI) Limited, a British Virgin Islands company; Corani Mining Limited, a British Virgin Islands company; Bear Creek Mining S.A.C., a Peruvian company; as well as other subsidiaries not directly related to the Santa Ana and Corani Projects.<sup>299</sup>

109. As explained in detail at Section II. above, the Santa Ana Concessions are held by Bear Creek through Bear Creek Peru following their purchase from Ms. Villavicencio on December 6, 2007.<sup>300</sup> The Corani Concessions are held by Bear Creek Mining S.A.C, following the acquisition of the Corani Project from Rio Tinto.<sup>301</sup> As illustrated by Fig. 9 above, Bear Creek owns 100% of Bear Creek Mining S.A.C., directly (70%) and through its wholly-owned subsidiaries BCMC Corani Holdings Ltd., Bear Creek (BVI) Ltd. and Corani Mining Ltd (30%).<sup>302</sup>

110. Bear Creek and Rio Tinto entered into a Letter of Understanding on January 19, 2007 and subsequently executed the Corani Option Agreement on March 17, 2007. On January 15, 2008 Bear Creek exercised its option and made a final payment of US\$ 3 million to Rio

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<sup>297</sup> **Exhibit C-0130**, Registro de Personas Jurídicas – Libro de sociedades Mercantiles/Sucursales – Vigencia de Persona Juridica *Bear Creek Mining Company, Sucursal del Peru*, Apr. 28, 2015.

<sup>298</sup> *Id.*

<sup>299</sup> **Exhibit C-0131**, Certificate of Good Standing *BCMC Corani Holdings Ltd.*, May 1, 2015; **Exhibit C-0132**, Central Securities Register *BCMC Corani Holdings Ltd.*, May 1, 2015; **Exhibit C-0133**, Certificate of Good Standing and Register of Members *Bear Creek (BVI) Limited*, Apr. 22, 2015; **Exhibit C-0134**, Certificate of Good Standing and Register of Members *Corani Mining Limited*, Apr. 22, 2015; **Exhibit C-0135**, Registro de Personas Jurídicas – Libro de sociedades Mercantiles/Sucursales – Vigencia de Persona Juridica *Bear Creek Mining S.A.C.*, Apr. 28, 2015.

<sup>300</sup> **Exhibit C-0015**, Transfer Agreements.

<sup>301</sup> **Exhibit C-0023**, Bear Creek AIF at 1-4.

<sup>302</sup> *Id.* at 2.

Tinto for 70% of the Corani Project.<sup>303</sup> On March 6, 2008 Bear Creek and Rio Tinto entered into an agreement for the purchase and sale of the remaining 30% not owned by Bear Creek (the “Purchase and Sale Agreement”).<sup>304</sup> Under the Purchase and Sale Agreement, Bear Creek would pay US\$ 45 million to Rio Tinto and issue Rio Tinto 3,871,000 common shares of Bear Creek stock.<sup>305</sup> Bear Creek and Rio Tinto amended the terms of their Purchase and Sale Agreement on July 17, 2008, February 27, 2009 and February 3, 2011 to reflect changes in the schedule and conditions of Bear Creek’s payments to Rio Tinto.<sup>306</sup> The February 3, 2011 amendment reflected Bear Creek’s final payment to Rio Tinto in full satisfaction of its obligations under the Purchase and Sale Agreement.<sup>307</sup> From that date onwards, Bear Creek has owned outright 100% of the Corani Project.

111. Therefore, at all relevant times in this arbitration, Bear Creek has owned significant investments in Peru that fall within the definition of “investment” under the FTA and are thus protected by the FTA.

**C. The Parties Have Consented to Arbitration of this Dispute and all Requirements Under the FTA and the ICSID Convention Have Been Fulfilled**

112. Both Parties unequivocally consented to resolve this dispute through international arbitration. By filing its request for arbitration, Bear Creek consented to the arbitration of this dispute in accordance with the procedures set out in the FTA.<sup>308</sup> Over six months have elapsed between the events giving rise to Bear Creek’s claims and the submission of these claims to

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<sup>303</sup> **Exhibit C-0023**, Bear Creek AIF at 3.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* at 3-4.

<sup>307</sup> *Id.* at 4.

<sup>308</sup> Claimant’s Request for Arbitration, Aug. 11, 2014, ¶ 45.

international arbitration,<sup>309</sup> Bear Creek validly delivered a Notice of Intent to Peru,<sup>310</sup> and the parties held consultations during the six-month period following the submission of that Notice of Intent.<sup>311</sup> Bear Creek has not alleged before Peruvian courts or administrative tribunals that Peru has breached any of its obligations under the FTA, and Bear Creek withdrew the two *amparo* proceedings it initiated before Peruvian courts.<sup>312</sup> Bear Creek also waived its right to initiate judicial or administrative proceedings before Peruvian or Canadian courts and tribunals with respect to Peru's measures alleged to constitute a breach of the FTA.<sup>313</sup>

113. Having satisfied these conditions precedent, on August 11, 2014, Bear Creek submitted its claims to arbitration pursuant to Article 819 of the FTA, which concern Peru's breaches of its obligations set forth in Articles 804, 805 and 812 of Section A of the FTA and Bear Creek's substantial losses and damages arising out of those breaches.<sup>314</sup>

114. Peru has consented to arbitrate disputes under the FTA and, in particular, to arbitrate such disputes under the ICSID Convention. Article 825 of the Canada-Peru FTA memorializes Canada's and Peru's consent to the arbitration of claims by an investor of one Party against the other Party to the FTA.<sup>315</sup> Article 824 grants the investor the right to choose among different arbitral mechanisms and rules under which to submit its claims against the other Party to the FTA.<sup>316</sup> In its Request for Arbitration, Bear Creek elected to submit its claims against Peru – which it has not brought before any other forum – to arbitration under the ICSID

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309 *Id.* ¶ 46.

310 *Id.* ¶ 48. *See also* **Exhibit C-0007**, Notice of Intent to submit a Claim to Arbitration under the Free Trade Agreement between Canada and the Republic of Peru, Feb. 3, 2014.

311 Claimant's Request for Arbitration, Aug. 11, 2014, ¶ 51.

312 *Id.* ¶¶ 56, 52-54.

313 *Id.* ¶¶ 52-54.

314 *Id.* ¶¶ 43-44.

315 **Exhibit C-0001**, Canada-Peru FTA, Art. 825.

316 *Id.* at Art. 824 and Annex 824.1.

Convention.<sup>317</sup> Peru accordingly consented in the FTA to resolve the dispute by international arbitration before ICSID and under the ICSID Convention, which Canada and Peru have both signed and ratified.<sup>318</sup>

115. Finally, Bear Creek's claims meet the requirements for ICSID jurisdiction. This dispute is a legal dispute involving whether Peru has violated its obligations under the Canada-Peru FTA, and the legal remedies available to Bear Creek as a result.<sup>319</sup> At all relevant times, Bear Creek directly or indirectly owned investments in Peru, including the Santa Ana Project, within the meaning of the ICSID Convention and the Canada-Peru FTA.<sup>320</sup> Peru is a Party to the ICSID Convention, and Bear Creek is a national of Canada (another Contracting Party) under Article 25 of the ICSID Convention.<sup>321</sup> Both Peru and Bear Creek consented in writing to the jurisdiction of ICSID.<sup>322</sup> Accordingly, this dispute is validly submitted to arbitration under the ICSID Convention pursuant to Article 825 of the FTA.

## V. THE FTA AND INTERNATIONAL LAW GOVERN THIS DISPUTE

116. Bear Creek's claims are based on FTA provisions, as supplemented by international law. Article 837 of the FTA expressly provides that the FTA itself and international law govern this dispute:

A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.<sup>323</sup>

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<sup>317</sup> Claimant's Request for Arbitration, Aug. 11, 2014, ¶ 41.

<sup>318</sup> *Id.* ¶¶ 42-57.

<sup>319</sup> *Id.* ¶ 59.

<sup>320</sup> *Id.* ¶¶ 60-61. *See also* **Exhibit C-0008**, Certificates of Continuation and Good Standing of Bear Creek Mining Corporation, Sept. 17, 2013.

<sup>321</sup> Claimant's Request for Arbitration, Aug. 11, 2014, ¶¶ 62-64.

<sup>322</sup> *Id.* ¶ 65.

<sup>323</sup> **Exhibit C-0001**, Canada-Peru FTA.

117. Article 837 makes no mention of the domestic laws of Peru and Canada. As is customary for investment treaty disputes, the domestic legal orders of Peru and Canada do not govern this dispute and are not binding on this Tribunal.

118. International jurisprudence is clear regarding the applicable law in investment treaty cases: tribunals apply the treaty itself, as *lex specialis*, supplemented by international law if necessary.<sup>324</sup> Investment treaties grant foreign investors direct access to arbitration in order to allow investors to invoke the substantive protections afforded by the relevant treaty itself. Thus, the substantive standards of treatment and protections of the FTA must primarily govern this case.

119. The Vienna Convention on the Law of Treaties (the “Vienna Convention”) provides that “treaties are governed by international law” and must be interpreted in light of “any relevant rules of international law.”<sup>325</sup> The Vienna Convention further consecrates the primacy of international law over domestic law in the area of State responsibility: “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>326</sup> The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (the “ILC Articles”) confirm that: “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”<sup>327</sup> Therefore, the FTA supplemented as necessary by international law governs this dispute.

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<sup>324</sup> **CL-0036**, *Asian Agric. Prods., Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, Jun. 27, 1990, 30 I.L.M. 580, (1991) (“*AAPL Award*”) ¶ 54; **CL-0037**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, Apr. 12, 2002 (“*Middle East Cement Award*”) ¶¶ 85-87; **CL-0038**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ICSID Case No. ARB/97/3, Award, Aug. 20, 2007 (“*Vivendi II Award*”) ¶ 8.2.2 – 8.2.5.

<sup>325</sup> **CL-0039**, Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 2(1)(a) and 31(3)(c).

<sup>326</sup> *Id.* Art. 37.

<sup>327</sup> **CL-0030**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, art. 3; **CL-0040**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID

## **VI. PERU VIOLATED ITS OBLIGATIONS UNDER THE FTA AND INTERNATIONAL LAW**

### **A. Peru Expropriated Bear Creek's Santa Ana Project**

120. Article 812.1 of the FTA prohibits Peru from expropriating protected investments unless it meets stringent conditions and requirements:

Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation.<sup>328</sup>

121. Peru unlawfully expropriated Bear Creek's investment in Santa Ana by issuing Supreme Decree 032 – which takes away Bear Creek's legal rights over the Santa Ana Concessions – without meeting any of the aforementioned requirements and, particularly, without paying any compensation to Bear Creek. In doing so, Peru breached the FTA and international law.

#### **1. Peru expropriated Bear Creek's rights over the Santa Ana Concessions**

122. The FTA does not specifically define "nationalization" or "expropriation" but makes clear that these terms may be used interchangeably and should be broadly understood to cover measures having an effect equivalent to nationalization or expropriation. The concepts of nationalization and expropriation are sufficiently clear and well-defined under international law and domestic legal orders so as to be self-explanatory and obviate the need for a specific situation in treaties or similar instruments. As noted by leading commentators, international law recognizes that an investment can be expropriated regardless of the vocabulary used to describe

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Case No. ARB(AF)/00/2, Award, May 29, 2003 ("Tecmed Award") ¶ 120 (quoting, James R. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 84 (2002)).

328 **Exhibit C-0023**, Bear Creek AIF.

the expropriating government's action: "seizure, confiscation, nationalization, sequestration, condemnation – and an even larger number of ways that property can be expropriated. Expropriation can be direct, indirect, regulatory, creeping, de facto, or a government act may be 'tantamount to,' 'equivalent to,' or 'have similar effects as' expropriation."<sup>329</sup>

123. There is a broad consensus in scholarly writings relating to expropriation that protection relates not only to tangible property or physical assets, but also to a broad range of rights that are economically significant to the investor.<sup>330</sup> As Judge Rosalyn Higgins has noted: "[...] the notion of 'property' is not restricted to chattels. Sometimes rights that might seem more naturally to fall under the category of contract rights are treated as property."<sup>331</sup> Likewise, the *Tecmed v. Mexico* tribunal defines direct expropriation as "a forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect."<sup>332</sup>

124. Investment tribunals also recognize that concession rights are subject to expropriation.<sup>333</sup> In the *Phillips* Case, the Iran-US Claims Tribunal dealt with rights arising from a concession agreement, which it held were subject to expropriation:

As the Tribunal has held in a number of cases, expropriation by or attributable to a State of the property of an alien gives rise under

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<sup>329</sup> **CL-0041**, C. Dugan & D. Wallace, et al., *INVESTOR-STATE ARBITRATION* 450 (Oxford University Press, 2008).

<sup>330</sup> See, e.g., **CL-0042**, G.C. Christie, What Constitutes a Taking of Property under International Law?, 38 BRIT. Y.B. INT'L L. 305, 311 (1962); **CL-0043**; B.H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation," 16 VIR. J. INT'L L. 103, 112-13 (1975) (who uses the term "wealth deprivation" in this context); **CL-0044**, T. Waelde & A. Kolo, Environmental Regulation, Investment Protection and Regulatory Taking in International Law, 50 INT'L COMP. L.Q. 811, 835 (2001); **CL-0045**, G. H. Sampliner, Arbitration of Expropriation Cases Under US Investment Treaties - A Threat to Democracy or the Dog That Didn't Bark?, 18 ICSID REV.—F.I.L.J. 1, 14 (2003); **CL-0046**, J. Paulsson & Z. Douglas, Indirect Expropriation in Investment Treaty Arbitrations, *ARBITRATING FOREIGN INVESTMENT DISPUTES* (N. Horn, S. Kroll eds.) 145, 152 (Kluwer 2004); **CL-0047**, S. Alexandrov, Breaches of Contract and Breaches of Treaty, The Jurisdiction of Treaty based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*, 5 J. WORLD INV. TRADE 555, 559 (2004).

<sup>331</sup> **CL-0048**, R. Higgins, The Taking of Property by the State: Recent Developments in International Law, 176 REC, DES Cours 263, 271 (1982-III).

<sup>332</sup> **CL-0040**, *Tecmed* Award ¶ 113.

<sup>333</sup> **CL-0049**, *Phillips Petroleum Company Iran v. Islamic Republic of Iran, Iran-U.S. Claims Trib.*, Case No. 39, Chamber 2, Award No. 425-39-2, Jun. 29, 1989 ("*Phillips* Award") ¶ 105.

international law to liability for compensation, and this is so whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or intangible, such as contract rights involved in the present Case.<sup>334</sup>

125. Investment tribunals similarly recognize that a State's interference with an investor's rights may constitute an expropriation. In *Tippetts*, the Iran-US Claims Tribunal stated: "a deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected."<sup>335</sup> In *Tecmed*, the tribunal similarly concluded that "under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary."<sup>336</sup>

126. It is uncontroversial on the facts of the case that Peru expropriated Bear Creek's rights over the Santa Ana Concessions. Supreme Decree 083 authorized Bear Creek "to acquire and possess concessions and rights over mines and supplementary resources for the better development of its productive activities" at Santa Ana.<sup>337</sup> Supreme Decree 032 took these rights away from Bear Creek by revoking Supreme Decree 083.<sup>338</sup> As a result of Supreme Decree 032, Bear Creek is no longer authorized to operate the Santa Ana Concessions and to conduct any

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<sup>334</sup> **CL-0049**, *Phillips Award* ¶ 76, (citing e.g., *Starrett Housing Corporation and The Government of the Islamic Republic of Iran*, Interlocutory Award No. ITL 32-24-1 (19 December 1983), reprinted in 4 IRAN-U.S. C.T.R. 122, and Award No. 314-24-1 (14 Aug. 1987), reprinted in 16 Iran-U.S. C.T.R. 112; **CL-0050**, *Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2 (29 Jun. 1984), reprinted in 6 IRAN-U.S. C.T.R. 219 at 3; **CL-0051**, *Phelps Dodge Corp. and Overseas Private Investment Corp. and The Islamic Republic of Iran*, Award No. 217-99-2 (19 Mar. 1986), reprinted in 10 IRAN-US. C.T.R. 121, ¶¶ 11-16; **CL-0052**, *SEDCO, Inc. and National Iranian Oil Company*, Interlocutory Award No. ITL 55-129-3 (28 October 1985) ("*SEDCO* Interlocutory Award"), reprinted in 9 IRAN-U.S. C.T.R. 248 and Award No. 309-129-3 (7 Jul. 1987), reprinted in 15 IRAN-U.S. C.T.R. 23), ¶ 30; *See also* **CL-0053**, *Amoco International Finance Corp. v. Islamic Republic of Iran, Iran-U.S. Claims Trib*, Case No. 56, Chamber 3, Award No. 310-56-3, Partial Award, Jul. 14, 1987, 27 I.L.M. 1314 ("*Amoco* Partial Award") 108 (1988).

<sup>335</sup> **CL-0050**, *Tippetts Award* ¶ 219; **CL-0041**, C. Dugan & D. Wallace, et al., *INVESTOR-STATE ARBITRATION* 451 (Oxford University Press, 2008).

<sup>336</sup> **CL-0040**, *Tecmed Award* ¶ 116.

<sup>337</sup> **Exhibit C-0004**, Supreme Decree 083.

<sup>338</sup> **Exhibit C-0005**, Supreme Decree 032.

mining activity at Santa Ana.<sup>339</sup> Bear Creek has not performed any mining activities whatsoever at Santa Ana since the Government issued Supreme Decree 032. It is not in dispute that Supreme Decree 032 has substantially and permanently deprived Bear Creek of its control over the Santa Ana Project and, therefore, has resulted in the loss of Bear Creek's investment at Santa Ana. Shortly after the Government issued Supreme Decree 032, MINEM commenced a lawsuit against Bear Creek and Ms. Villavicencio seeking to annul Bear Creek's title over the Santa Ana Concessions and obtain their reversion to the Peruvian State.<sup>340</sup> The MINEM Lawsuit is currently pending.<sup>341</sup> If the Government prevails, Bear Creek will formally lose title over the Santa Ana Concessions, even though Supreme Decree 032 has already deprived Bear Creek of the rights and economic value attached to those Concessions.<sup>342</sup>

**2. Peru's expropriatory measures were not taken against prompt, adequate and effective compensation**

127. Article 812.1 of the FTA makes clear that, to be legal, an expropriation must – among other things – be against “prompt, adequate and effective compensation.”<sup>343</sup> Importantly, Articles 812.2 and 812.3 provide conditions for that compensation to be considered prompt, adequate and effective:

Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

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339 **Exhibit C-0005**, Supreme Decree 032.

340 *Supra* at ¶ 89. *See also*, **Exhibit C-0112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011.

341 *Supra* at ¶ 91.

342 *Id.* at ¶ 89. *See also*, **Exhibit C-0112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011.

343 **Exhibit C-0001**, Canada-Peru FTA.

Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until date of payment.<sup>344</sup>

128. Article 812 of the FTA thus requires Peru to pay, without delay, compensation to Bear Creek in the amount of the fair market value of the Santa Ana Project, plus interest from the date of the expropriation until payment, as a result of its expropriation of Bear Creek's rights over the Santa Ana Concessions. These requirements reflect and expressly endorse the general international law principle that compensation must be prompt, adequate and effective, as articulated in 1938 by U.S. Secretary of State Cordell Hull: "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore."<sup>345</sup> The Hull formula has been widely regarded ever since as an expression of the customary international law standard of compensation.<sup>346</sup>

129. The fact that Peru has not paid any form of compensation to Bear Creek is not in dispute in this arbitration. This fact is sufficient in itself to make Peru's expropriation of Bear Creek's investment in Santa Ana an unlawful act under the FTA and international law.

### **3. The expropriation was not for a public purpose**

130. Article 812.1 of the FTA requires that expropriation or nationalization of a protected investment be only for a public purpose. Article 812 makes clear that Peru cannot determine unilaterally what public purpose means by reference to its own domestic legal order:

The term "public purpose" shall be interpreted in accordance with international law. It is not meant to create any inconsistency with the same or similar concepts in the domestic law of either Party.<sup>347</sup>

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<sup>344</sup> **Exhibit C-0001**, Canada-Peru FTA (emphasis added).

<sup>345</sup> **CL-0054**, Tali Levy, NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" 31 *Stan. J. Int'l L.* 426 (1995).

<sup>346</sup> *Id.*

<sup>347</sup> **Exhibit C-0001**, Canada-Peru FTA.

131. The need for a public purpose or public interest to legitimize an expropriation has long been considered part of customary international law.<sup>348</sup> International law also prohibits expropriatory measures that are not taken for a public purpose.<sup>349</sup> In Professor Garcia Amador's words:

[T]he least that can be required of the State is that it should exercise [the] power [to expropriate] only when the measure is clearly justified by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give legal sanction to manifestly arbitrary acts of expropriation [...] [A]ll states should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is 'arbitrary' and therefore involves the international responsibility of the State.<sup>350</sup>

132. As Professor Reinisch explains, "today the requirement of a 'public purpose' or 'public interest' for an expropriation to be considered lawful can be found in almost all IIAs."<sup>351</sup> Accordingly, numerous tribunals held that an expropriation was unlawful when it was not for a public purpose or public interest.

133. In *British Petroleum v. Libya*, the tribunal expressly concluded that Libya's expropriation of British Petroleum's hydrocarbons concessions was unlawful because it had been adopted "for purely extraneous political reasons" and hence not for a public purpose.<sup>352</sup> Similarly, in *LETCO v. Liberia*, an ICSID tribunal found that the revocation of a concession "was not for a *bona fide* public purpose" because "there was no evidence of any stated policy on

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<sup>348</sup> CL-0055, A. Reinisch, STANDARDS OF INVESTMENT PROTECTION 178 (Oxford University Press, 2008).

<sup>349</sup> CL-0056, R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 91, (Oxford University Press, 2008).

<sup>350</sup> CL-0057, F.V. Garcia-Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, UN Doc. A/CN.4/119, (1959) II Y.B. Int'l. L. Comm'n. 1 ¶ 59 (1960).

<sup>351</sup> CL-0055, A. Reinisch, STANDARDS OF INVESTMENT PROTECTION 178 (Oxford University Press, 2008).

<sup>352</sup> CL-0058, *BP Exploration Company (Libya) Ltd., v. Government of The Libyan Arab Republic*, Award, Aug. 1, 1974, 53 ILR 297, 329.

the part of the Liberian Government to take concessions of this kind into public ownership for the public good.”<sup>353</sup>

134. The *ADC v. Hungary* tribunal required the expropriating State to demonstrate a genuine public interest: “a treaty requirement for ‘*public interest*’ requires some genuine interest of the public. If mere reference to ‘*public interest*’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”<sup>354</sup> Likewise, the *Siemens v. Argentina* tribunal found that the fulfillment of the public interest requirement was questionable because Argentina’s abrogation of Siemens’ contractual rights “was an exercise of public authority to reduce the costs to Argentina of the Contract recently awarded through public competitive bidding.”<sup>355</sup>

135. Supreme Decree 032 does not mention how it serves any public interest. Instead, it merely refers to “circumstances ... that would imply the disappearance of the legally required conditions for the issuance” of Supreme Decree 83.<sup>356</sup> The circumstances in which Supreme Decree 032 was enacted leave no doubt as to the Government’s actual motives for expropriating Bear Creek’s rights. The Government adopted Supreme Decree 032 on June 24, 2011 in the immediate aftermath of violent demonstration by Mr. Aduviri’s supporters on the same day at the Juliaca airport, 185 kilometers away from Santa Ana.<sup>357</sup> The Government knew that the death of *Frente de Defensa* activists in Juliaca would likely result in further troubles in the Puno area unless it could appease Mr. Aduviri and his supporters by yielding to one of their main

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<sup>353</sup> **CL-00059**, *LETCO v. Government of The Republic of Liberia*, Award, Mar. 31, 1986, 2 ICSID Reports 343, 366-367 (Cambridge University Press).

<sup>354</sup> **CL-0060**, *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006 (“*ADC Award*”) ¶ 432.

<sup>355</sup> **CL-0031**, *Siemens Award* ¶ 273.

<sup>356</sup> **Exhibit C-0005**, Supreme Decree 032.

<sup>357</sup> *See supra* at ¶ 80.

demands: canceling a foreign-owned mining project in the Puno region.<sup>358</sup> Supreme Decree 032 does not contain any explanation as to how and why the “environmental and social conditions of the Huacullani and Kelluyo districts” would be safeguarded by revoking Bear Creek’s rights and “prohibiting mining activities.”<sup>359</sup> This makes clear that the justification stated is not supported by any tangible evidence or analysis. When, a few months later, MINEM officially notified Bear Creek that no public documents or records – other than a short and equally vague *exposición de motivos* – existed in connection with the issuance of Supreme Decree 032, this further confirmed that the Government had acted out of political expediency without any analysis of the purported “social and environmental conditions” and the means available to “safeguard” them.<sup>360</sup>

136. The Amparo Decision makes clear that the Government did not enact Supreme Decree 032 for a public purpose, and confirms instead that Bear Creek’s Santa Ana Project remained a public necessity at all relevant times.<sup>361</sup> Concerning the “social and environmental conditions” invoked in Supreme Decree 032, the Constitutional Court analyzed whether “from the moment in which Supreme Decree No. 083-2007-EM was issued, up to the date in which Supreme Decree no, 032-2011-EM was issued, the environmental and social conditions changed to the point where they disappeared.”<sup>362</sup> The Constitutional Court emphatically concluded that it was not the case.<sup>363</sup>

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<sup>358</sup> Swarthout Witness Statement ¶ 51; Antunez Witness Statement ¶ 19.

<sup>359</sup> **Exhibit C-0005**, Supreme Decree 032.

<sup>360</sup> **Exhibit C-0110**, Letter from E. Antunez, Bear Creek Mining Company, to the Secretary General of MEM, Aug. 10 2011; **Exhibit C-0111**, Letter from R. Wong, Secretary General of MEM, to E. Antunez, Bear Creek Mining Company, Aug. 19, 2011.

<sup>361</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

<sup>362</sup> *Id.* In Professor Bullard’s opinion, the Court should have refrained from giving any consideration to social and environmental conditions, which are not relevant pursuant to Art. 71 of the Constitution, unless they affect Peru’s national security. According to Professor Bullard, the Court should have refrained from giving any consideration to these issues. See, Bullard Expert Report, ¶¶ 18.r, 136, 182, 183, 185-90.

<sup>363</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

137. With respect to the environmental conditions, the Amparo Decision confirms that the Santa Ana project did not cause any environmental issue in the area, as evidenced by the fact that the DGAAM had approved Bear Creek’s ESIA and PPC on January 7, 2011, only a few months before the enactment of Supreme Decree 032.<sup>364</sup> With respect to the social conditions, the Amparo Decision relies on official statements by the authorities of Huacullani to conclude that the communities lived in a state of peace and tranquility at all relevant times.<sup>365</sup> To the extent that these social conditions evolved, the Amparo Decision observes that this evolution had nothing to do with Bear Creek’s actions or omissions but rather was caused by “the violent demonstrations by anti-mining movements and their illicit attacks on public and private property in the Puno department.”<sup>366</sup> On that basis, the Amparo Decision provides that:

Supreme Decree No. 032-2011-EM contains as a sole factual motive: “*Circumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of Supreme Decree No. 083-2007-EM*” and as previously analyzed, these circumstances are not attributable to the claimant; consequently, they do not imply the disappearance of the legally required conditions for the issuance of Supreme Decree No. 083-2007-EM, nor the assumption of “public necessity.”<sup>367</sup>

138. Based on the foregoing, it is clear that no public purpose justifying the expropriation of Bear Creek’s rights over the Santa Ana Project existed at the time when the Government issued Supreme Decree 032. In fact, any argument that the expropriation of the Santa Ana Project could have served a public purpose and the interest of the local populations would be ludicrous. While the Santa Ana Project would have brought tens of millions of dollars

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<sup>364</sup> *Id.* See also **Exhibit C-0073**, MINEM Resolution No. 021-2011/MEM-AAM, Jan. 7, 2011.

<sup>365</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court dated May 12, 2014. See also **Exhibit C-0118**, Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarrollo y La Inclusión*, May 15, 2013; **Exhibit C-0119**, Memorandum from Members of the Huacuallni District to MINEM, *Reactivación del Proyecto Santa Ana*, Oct. 27, 2013; **Exhibit C-0120**, Memorandum from Members of the Huacuallni District to Prime Minister of Perú, MINEM and Bear Creek Mining, *Reiterativo Por El Desarrollo y La Inclusión*, Jan. 24, 2014.

<sup>366</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

<sup>367</sup> *Id.*

in investments to one of the most destitute areas of Peru, the issuance of Supreme Decree 032 put any development and investments to an abrupt end.<sup>368</sup> While the Santa Ana Project would have resulted in approximately 2,500 direct and indirect jobs for community members and brought socioeconomic development to the area, Supreme Decree 032 has not resulted in any improvement in the living conditions of the local inhabitants.<sup>369</sup> While the Santa Ana Project would have generated revenues for the neighboring communities and hundreds of millions of dollars in taxes for various levels of the Government, neither the local populations nor the Peruvian Government have derived any benefit from the Santa Ana mineral deposits ever since Peru issued Supreme Decree 032. It follows that Supreme Decree 032 did not serve any public purpose and therefore constitutes an internationally wrongful act under the FTA and international law.

**4. The expropriation was not conducted in accordance with due process of law and was arbitrary**

139. Article 812.1 of the FTA requires that expropriation or nationalization of a protected investment must take place in accordance with due process of law. In *ADC v. Hungary*, in which the claimants argued that Hungary had not respected due process of law when it expropriated their investments, the tribunal sought to define the term as follows:

Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that “the actions are taken under due process of law” rings hollow.<sup>370</sup>

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<sup>368</sup> Antunez Witness Statement ¶ 34.

<sup>369</sup> *Id.*

<sup>370</sup> CL-0060, *ADC Award* ¶ 435.

The *ADC* tribunal found that Hungary had not made any of these procedures and mechanisms available to the claimants and that expropriation in violation of the due process requirement of the applicable treaty had indeed taken place.<sup>371</sup>

140. The Peruvian Government did not act in accordance with the due process of law when enacting Supreme Decree 032 because: (i) Supreme Decree 032 was not the proper way to repeal Supreme Decree 083 and rescind Bear Creek’s rights over the Santa Ana Concessions;<sup>372</sup> (ii) Supreme Decree 032 was not issued in the context of any defined legal procedure within MINEM;<sup>373</sup> (iii) Bear Creek never received advance notice of Supreme Decree 032 or an opportunity to be heard;<sup>374</sup> (iv) the Government did not provide any credible justification for Supreme Decree 032;<sup>375</sup> and (v) Supreme Decree 032 violated the legal principles of legal security and prohibition of arbitrariness, as recognized by a Peruvian Constitutional Court.<sup>376</sup>

141. Under Peruvian law, once rights or interests have been conferred upon private parties, they cannot be modified or substituted for “reasons of opportunity, merit or convenience” such as a change in the opinion on criteria by the Administration.<sup>377</sup> As Professor Bullard explains, previously granted prerogatives may only be affected exceptionally and only by following a procedure that guarantees the affected party the right of defense.<sup>378</sup> In this case, contrary to what Peruvian law requires, Bear Creek was not granted an opportunity to present its case before Supreme Decree 032 was issued.<sup>379</sup> Thus, Professor Bullard concludes that “the

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<sup>371</sup> **CL-0060**, *ADC* Award ¶¶ 435-40.

<sup>372</sup> Bullard Expert Report ¶ 18.p-s.

<sup>373</sup> **Exhibit C-0110**, Letter from E. Antunez, Bear Creek Mining Company, to the Secretary General of MEM, Aug. 10 2011; **Exhibit C-0111**, Letter from R. Wong, Secretary General of MEM, to E. Antunez, Bear Creek Mining Company, Aug. 19, 2011.

<sup>374</sup> *See supra* at ¶ 80. *See also* Antunez Witness Statement ¶ 20.

<sup>375</sup> *See supra* at ¶ 83.

<sup>376</sup> *Id.* at ¶ 86.

<sup>377</sup> Bullard Expert Report ¶¶ 181, 120, 124.b, 161, 178.

<sup>378</sup> *Id.* at ¶ 120.

<sup>379</sup> *Id.* at ¶ 196.

issuance of S.D. 032-20011-EM constitutes a deviation of power, which contravenes the principles of legality and reasonability.”<sup>380</sup>

142. The Amparo Decision also describes how Supreme Decree 032 lacks proper reasoning and motivation and thus violates the principles of reasonability, proportionality and legal security – which are all part of the broader principle of due process.<sup>381</sup> The Constitutional Court observes that Supreme Decree 032 “does not impute any responsibility whatsoever” on Bear Creek;<sup>382</sup> “lacks proper reasoning”;<sup>383</sup> “does not set out the circumstances” justifying the Government’s decision;<sup>384</sup> and “is drafted using an uncertain conditional [tense].”<sup>385</sup> Based on the foregoing, the Amparo Decision provides that: “therefore the issuance of Supreme Decree No. 032-2011-EM is an action by the State that is not found within the margins of reasonability and proportionality, required to not violate the principle of legal security.”<sup>386</sup> The Amparo Decision concludes that Supreme Decree 032 lacked proper justification:

Given that, as mentioned, these circumstances [referred to in Supreme Decree 032] are not attributable to the claimant, in which case, the issuance of a decree such as the one issued would be justifiable if it had been the claimant who committed or omitted actions that implied the disappearance of the required conditions and from the reading thereof one cannot observe in the cited decree any of these reasons. Namely, there is no justified purpose for originating an action on the part of the State to reverse the rights granted to BEAR CREEK MINING COMPANY SUCURSAL DEL PERU, which were granted in fulfillment of the corresponding procedures and complying with the necessary requirements.<sup>387</sup>

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380 *Id.* at ¶ 199.

381 **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

382 *Id.*

383 *Id.*

384 *Id.*

385 *Id.*

386 *Id.* (emphasis added).

387 *Id.* (emphasis added).

143. The Amparo Decision also observes that Supreme Decree 032 violated the legal principle of juridical certainty and proportionality and, hence, the prohibition of arbitrariness.<sup>388</sup> The first instance Constitutional Court thus concludes that Supreme Decree 032 was unreasonable and “clearly arbitrary” because Bear Creek was not afforded an opportunity to be heard:

In this case, as there is no reasonable motive in Supreme Decree No. 032-2011-EM, this principle has been violated by this clearly arbitrary act; all the more so, because upon its issuance, the claimant was not provided with the opportunity to accredit that the circumstances relating to its assumed obligations had not been neglected. As such, it can be verified that the cited supreme decree violates the principle of the prohibition of arbitrariness, given that, as observed therein, there is no imputation whatsoever attributable to the claimant that allows the derogation of the supreme decree under which the mining rights of Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6 and Karina 7 were granted.<sup>389</sup>

144. Based on the above, it is clear that Peru acted arbitrarily and in violation of due process of law when it issued Supreme Decree 032, which expropriated Bear Creek’s rights over the Santa Ana Project. Supreme Decree 032 constitutes therefore an internationally wrongful act under the FTA and international law.

#### **B. Peru failed to Treat Bear Creek and its Investments Fairly and Equitably**

145. Pursuant to Article 805 of the Canada-Peru FTA, Peru is obligated to grant to Bear Creek and its investments treatment in accordance with the customary international law minimum standard of treatment, including fair and equitable treatment. Peru is also obligated to grant to Bear Creek and its investments, pursuant to Article 804 of the Canada-Peru FTA, fair and equitable treatment, *i.e.*, the standalone standard of treatment that is not linked to the

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<sup>388</sup> *Id.* “[...] the principles of legal security and the prohibition of arbitrariness are bound by other sub-principles, in this specific case we refer to the principle of juridical reasonability and proportionality, in light of which the decisions that are adopted must be reasonable and bearing a proportional sense to the intended prohibition; consequently, the State is obligated to make its decisions predictable, namely, the principle of the prohibition of arbitrariness plays an important role in legal security.”

<sup>389</sup> *Id.*

customary international law minimum standard of treatment. As is made clear below, Peru's acts and omissions constitute serious violations of the fair and equitable treatment standard, as well as the customary international law minimum standard of treatment of fair and equitable treatment.

### 1. The content of the fair and equitable treatment standard under customary international law

146. Article 805 of the Canada-Peru FTA, entitled Minimum Standard of Treatment, establishes a link between the international minimum standard in customary international law and the fair and equitable treatment standard: "Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment..." Although the FTA does not define either "international minimum standard" or "fair and equitable treatment," Article 805 is similar to Article 1105(1) of the North American Free Trade Agreement ("NAFTA"),<sup>390</sup> and Article 10.5(1) of the Dominican Republic – Central America Free Trade Agreement ("DR-CAFTA").<sup>391</sup> Moreover, it is understood that the content of the international minimum standard evolves over time,<sup>392</sup> and that investment treaty case law provides a good indication of the current standards of investment protection under customary international law.<sup>393</sup>

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<sup>390</sup> **CL-0061**, North American Free Trade Agreement, art. 1105(1), entitled "Minimum Standard of Treatment": "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment..."

<sup>391</sup> **CL-0062**, Dominican Republic – Central America Free Trade Agreement, art. 10.5(1), entitled "Minimum Standard of Treatment": "Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment..."

<sup>392</sup> See, e.g., **CL-0063**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, Sept. 22, 2014, ("Gold Reserve Award") ¶ 567; **CL-0064**, *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Award, Jun. 29, 2012, ("Railroad Award") ¶ 218; **CL-0065**, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, Jun. 12, 2012, ("Ulysseas Award") ¶ 245; and **CL-0066**, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, Aug. 2, 2010, ("Chemtura Award") ¶ 122. See also **CL-0067**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, Jan. 9, 2003, ("ADF Award") ¶ 179: "... what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development;" and **CL-0068**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ("Mondev Award") ¶ 123: "In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitration decisions in the 1920s."

<sup>393</sup> See, e.g., **CL-0067**, *ADF Award*, ¶ 184; and **CL-0068**, *Mondev Award*, ¶ 119.

147. The NAFTA tribunal in *Waste Management II* held that a host State violates this standard if its treatment of an investor or investment is “arbitrary,” “grossly unfair, unjust or idiosyncratic” or “discriminatory,” or if it involves a lack of due process leading to an outcome which offends judicial propriety:

The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.<sup>394</sup>

148. The *Waste Management II* tribunal also held that “[a] basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”<sup>395</sup>

149. More recently, the DR-CAFTA tribunal in *Teco v. Guatemala* endorsed the *Waste Management II* tribunal’s reasoning with respect to the customary international law minimum standard of treatment of fair and equitable treatment:

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<sup>394</sup> CL-0069, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, (“*Waste Management Award*”) ¶¶ 98-99.

<sup>395</sup> *Id.* at ¶ 138.

The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.<sup>396</sup>

150. The *Teco* tribunal also underscored that fair and equitable treatment under customary international law encompasses the principle of good faith:

The Arbitral Tribunal also considers that the minimum standard is part and parcel of the international principle of good faith. There is no doubt in the eyes of the Arbitral Tribunal that the principle of good faith is part of customary international law as established by Article 38.1(b) of the Statute of the International Court of Justice, and that a lack of good faith on the part of the State or of one of its organs should be taken into account in order to assess whether the minimum standard was breached.<sup>397</sup>

151. In interpreting the customary international law minimum standard of treatment of fair and equitable treatment, investment tribunals also have emphasized the protection of investors' legitimate expectations, especially when specific representations have been made by the State – and relied upon by the investor – to induce the foreign investment. Thus, for example, the *Waste Management II* tribunal explained that when analyzing the customary international law minimum standard of treatment of fair and equitable treatment, “it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”<sup>398</sup>

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<sup>396</sup> **CL-0070**, *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013, (“*Teco Award*”) ¶¶ 454-455. See also **CL-0071**, *William Ralph Clayton et al. v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, Mar. 17, 2015, ¶¶ 442-444; **CL-0072**, *Abengoa S.A. y Cofides S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, Apr. 18, 2013, (“*Abengoa Award*”) ¶ 642: “*El Tribunal Arbitral considera, bajo este estándar, que una actuación groseramente incoherente, contradictoria, desprovista de razones, que llegue a revertir de manera arbitraria decisiones o aprobaciones anteriores o preexistentes emanadas del Estado en las que confió el inversor y basó la asunción de sus compromisos, es contraria al nivel mínimo de trato acorde con el derecho internacional consuetudinario;*” **CL-0064**, *Railroad Award*, ¶ 219; and **CL-0034**, *GAMI Award*, ¶ 95.

<sup>397</sup> **CL-0070**, *Teco Award*, ¶ 456. See also **CL-0072**, *Abengoa Award*, ¶ 643.

<sup>398</sup> **CL-0069**, *Waste Management Award*, ¶ 98.

152. The tribunal in *International Thunderbird Gaming Corp. v. Mexico* affirmed the holding of the *Waste Management II* tribunal on this point:

Having considered recent investment case law and the good faith principle of international customary law, the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.<sup>399</sup>

153. Therefore, in summary, the customary international law minimum standard of treatment of fair and equitable treatment would: (i) prohibit Peru from acting in a manner that is “arbitrary, grossly unfair, unjust or idiosyncratic,” “discriminatory,” or “that involves a lack of due process leading to an outcome which offends judicial propriety;” (ii) require Peru “to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means;” and (iii) obligate Peru to honor those “reasonable and justifiable expectations” that Bear Creek relied upon in making its investments.

## **2. The Content of the Fair and Equitable Treatment Standard**

154. Article 804 of the Canada-Peru FTA, entitled Most-Favoured-Nation Treatment, provides, in paragraphs 1 and 2, that each party shall accord to investors of the other party and to covered investments “treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party [and their investments] with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its

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<sup>399</sup> CL-0073, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Final Award, Jan. 26, 2006, (“*International Gaming Award*”) ¶ 147.

territory.”<sup>400</sup> Article 804 is thus a so-called most-favored-nation (“MFN”) clause that has the effect of broadening the protections available to Bear Creek and its investments.<sup>401</sup>

155. Through the application of Article 804, Bear Creek and its investments are entitled to benefit, at a minimum, from the substantive protections that Peru has granted to third parties and that are not provided in the Canada-Peru FTA.<sup>402</sup> Such substantive protections include the fair and equitable treatment standard, *i.e.*, the standalone standard of treatment that is not linked to the customary international law minimum standard of treatment, which tribunals have held a claimant can import through an MFN clause.<sup>403</sup>

156. The fair and equitable treatment standard is set forth in many bilateral investment treaties that Peru has entered into with other states, including Argentina, Australia, Bolivia, China, Cuba, the Czech Republic, Denmark, Ecuador, El Salvador, Finland, Germany, Italy, Malaysia, The Netherlands, Norway, Paraguay, Portugal, Romania, Spain, Sweden, Switzerland, Thailand, and the United Kingdom.<sup>404</sup> Thus, Bear Creek is entitled to benefit, through Article 804 of the Canada-Peru FTA, from the fair and equitable treatment standard that is provided at

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<sup>400</sup> Article 804 of the Canada-Peru FTA is to be interpreted in accordance with Annex 804.1, which provides that the “treatment” referred to in paragraphs 1 and 2 of Article 804 “does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements.”

<sup>401</sup> **CL-0074**, *Sr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, Jun. 19, 2009, ¶ 196.

<sup>402</sup> See, e.g., **CL-0056**, R. Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL LAW* 211 (Oxford University Press, 2<sup>nd</sup> ed. 2012), “The weight of authority clearly supports the view that an MFN rule grants a claimant the right to benefit from substantive guarantees contained in third treaties.”

<sup>403</sup> See, e.g., **CL-0075**, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014, ¶ 555; **CL-0076**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, May 18, 2010, ¶ 125, n. 16; **CL-0077**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009, (“*Bayindir* Award”) ¶ 167; and **CL-0078**, *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, Jul. 29, 2008, (“*Rumeli* Award”) ¶ 575.

<sup>404</sup> **CL-0079**, Bilateral investment treaties to which Peru is a party and that grant fair and equitable treatment: Peru-Argentina, Art. 2(3); Peru-Australia, Art. 3(2); Peru-Bolivia, Art. 3(1); Peru-China, Art. 3(1); Peru-Cuba, Art. 3(1); Peru-Czech Republic, Art. 2(2); Peru-Denmark, Art. 3(1); Peru-Ecuador, Art. 3(1); Peru-El Salvador, Art. 4(1); Peru-Finland, Art. 2(2); Peru-Germany, Art. 2(1); Peru-Italy, Art. 2(3); Peru-Malaysia, Art. 2(2); Peru-Netherlands, Art. 3(1); Peru-Norway, Art. 4(1); Peru-Paraguay, Art. 4(2); Peru-Portugal, Art. 2(1); Peru-Romania, Art. 3(1); Peru-Spain, Art. 4(1); Peru-Sweden, Art. 2(2); Peru-Switzerland, Art. 3(2); Peru-Thailand, Art. 4(1)(a); and Peru-United Kingdom, Art. 2(2).

Article 2(2) of the Peru-United Kingdom bilateral investment treaty: “Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment.”

157. Tribunals have frequently interpreted and applied the fair and equitable treatment standard under international law, thereby imparting it with specific meaning and content.<sup>405</sup> They agree that the ordinary meaning of “fair and equitable” is “just, even-handed, unbiased, legitimate, reasonable,”<sup>406</sup> and that the standard “ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and ... is a means to guarantee justice to foreign investors.”<sup>407</sup>

158. Moreover, though it is true that the concept of fair and equitable treatment is inherently flexible and potentially applicable to any type of host state misconduct (including both acts and omissions), recurring fact patterns and similarities between cases have enabled tribunals and scholars to articulate categories of behavior that indisputably violate the fair and equitable treatment standard.<sup>408</sup> These categories include:

- (a) Conduct that violates an investor’s legitimate expectations in relation to the investment, particularly by creating an unstable or unpredictable legal framework or business environment for the investment;
- (b) Conduct that treats an investor or an investment with a lack of transparency;
- (c) Conduct that is not in good faith; and
- (d) Denial of justice.

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<sup>405</sup> See, e.g., **CL-0080**, *Anatolie Stati et al. v. Kazakhstan*, SCC Arbitration No. 116/2010, Award, Dec. 19, 2013, ¶ 943.

<sup>406</sup> See, e.g., **CL-0081**, *National Grid v. Argentina*, UNCITRAL, Award, November 3, 2008, (“*National Grid Award*”) ¶ 168; **CL-0031**, *Siemens Award*, ¶ 290; **CL-0082**, *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, Jul. 14, 2006, (“*Azurix Award*”) ¶ 360; **CL-0083**, *MTD Equity v. Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, (“*MTD Award*”) ¶ 113.

<sup>407</sup> **CL-0084**, *Swisslion v. FYR Macedonia*, ICSID Case No. ARB/09/16, Award, Jul. 6, 2012, ¶ 273.

<sup>408</sup> See, e.g., **CL-0085**, *Waguih Elie George Siag et al. v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, Jun. 1, 2009, (“*Siag Award*”) ¶ 450.

a) **The fair and equitable treatment standard protects an investor's legitimate expectations**

159. The fair and equitable treatment standard encompasses the legitimate expectations of investors regarding the key terms of their investment and the stability of the host State's legal and business framework. This view is reflected in *Tecmed v. Mexico*, which is considered to be the seminal decision on fair and equitable treatment:

The Arbitral Tribunal considers that this provision of the Agreement [fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions ... that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.<sup>409</sup>

160. Many tribunals have adopted *Tecmed's* interpretation of the fair and equitable treatment standard.<sup>410</sup> Others, such as the *Saluka v. Czech Republic* tribunal, have gone further

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<sup>409</sup> **CL-0040**, *Tecmed* Award, ¶ 154 (emphasis added).

<sup>410</sup> See, e.g., **CL-0063**, *Gold Reserve* Award, ¶ 572; **CL-0086**, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, Dec. 1, 2011, (“*Spyridon* Award”) ¶ 316; **CL-0087**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, Nov. 8, 2010, (“*Alpha Projektholding* Award”) ¶ 420; **CL-0032**, *Kardassopoulos* Award, ¶ 440; **CL-0078**, *Rumeli* Award, ¶ 609; **CL-0088**, *PSEG Global v. Turkey*, ICSID Case No. ARB/02/5, Award, Jan. 19, 2007, (“*PSEG* Award”) ¶ 240; **CL-0089**, *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on

and found that the notion of legitimate expectations is the dominant element of fair and equitable treatment:

An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.

The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations.<sup>411</sup>

161. The case law has identified various situations where host state conduct gives rise to legitimate expectations on the part of the investor. The *Parkerings v. Lithuania* tribunal, for example, emphasized three: (i) the investor receives an explicit promise or guarantee from a government body as to particular legal or regulatory provisions; (ii) the investor receives implicit promises or guarantees to that effect that it then takes into account in making its investment; and (iii) absent such assurances or representations, the circumstances surrounding the investment give rise to legitimate expectations.<sup>412</sup> Once legitimate expectations are found to exist, any host state conduct contrary to such expectations constitutes a breach of the fair and equitable

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Liability, Oct. 3, 2006, ("LG&E Decision on Liability") ¶ 127; **CL-0090**, *Eureko v. Poland*, *Ad hoc*, Partial Award, Aug. 19, 2005, ¶ 235; **RLA-005**, *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, Jul. 1, 2004, ¶ 185.

<sup>411</sup> **CL-0091**, *Saluka v. Czech Republic*, UNCITRAL, Partial Award, Mar. 17, 2006, ("Saluka Partial Award") ¶¶ 301-302. See also **CL-0092**, *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, Nov. 30, 2012, ("Electrabel Decision on Jurisdiction") ¶ 7.75 ("It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations"); **CL-0063**, *Gold Reserve Award*, ¶ 570.

<sup>412</sup> **CL-0093**, *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/08, Award, Sept. 11, 2007, ¶ 331.

treatment standard.<sup>413</sup> It is well settled that the host state need not act in bad faith to violate the legitimate expectations to which its conduct has given rise.<sup>414</sup>

162. With respect to the first situation identified by the *Parkerings* tribunal, the *Total v. Argentina* tribunal held that “[t]he expectation of the investor is undoubtedly ‘legitimate’, and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future ... on which the investor is therefore entitled to rely as a matter of law.”<sup>415</sup> The *El Paso v. Argentina* tribunal agreed, noting that a State’s specific commitment towards the investor grants it “a certain protection against changes in the legislation.”<sup>416</sup>

163. The third situation identified by the *Parkerings* tribunal is closely linked to the view, adopted by the *Saluka* tribunal and affirmed by others,<sup>417</sup> that an investor’s legitimate expectations may be based on an expectation that the host State will act in a particular way in a given situation.<sup>418</sup> The stability of the host State’s legal and business environment is an example of this kind of expectation.<sup>419</sup> As such, the tribunal in *Duke Energy v. Ecuador* noted that “[t]he

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413 See, e.g., **CL-0094**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Jan. 14, 2010, (“*Lemire* Decision on Jurisdiction & Liability”) ¶ 264; **CL-0056**, R. Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 145 (Oxford University Press, 2<sup>nd</sup> ed. 2012).

414 See, e.g., **CL-0095**, *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, October 31, 2011, (“*El Paso* Award”) ¶ 357; **CL-0077**, *Bayindir* Award, ¶ 181.

415 **CL-0096**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, December 27, 2010, ¶ 117.

416 **CL-0095**, *El Paso* Award, ¶ 375.

417 See, e.g., **CL-0092**, *Electrabel* Decision on Jurisdiction, ¶ 7.78. See also **CL-0097**, Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 SANTA CLARA J. INT’L L. 7 (2014) at 24-25 (“There will be no plausible ground, in terms of the inherent purpose and meaning of either FET in general, or legitimate expectations in particular, to restrict the sphere of legitimate considerations to representations alone. In particular, a narrow view restricting legitimate expectations to representations would be inconsistent with the broadly accepted reference to the state of the law at the time of the investment as the primary guideline. Such an approach would also be not compatible with the assumption that all circumstances must be taken into account for the determination of legitimate expectations”).

418 **CL-0091**, *Saluka* Partial Award, ¶ 329 (“The Tribunal finds that the Claimant’s reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government. It is sufficient that Nomura (and subsequently Saluka), when making its investment, could reasonably expect that, should serious financial problems arise in the future for all of the Big Four banks equally and in case the Czech Government should consider and provide financial support to overcome these problems, it would do so in a consistent and even-handed way”).

419 See, e.g., **CL-0098**, *Toto Costruzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, Jun. 7, 2012, (“*Toto* Award”) ¶ 159; **RLA-005**, *Occidental Exploration and Production Company v. Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, Jul. 1, 2004, ¶¶ 180-192. See also **CL-0097**, Rudolf Dolzer, *Fair and Equitable*

stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment."<sup>420</sup> Likewise, the *Alpha v. Ukraine* tribunal held that "governments must avoid arbitrarily changing the rules of the game in a manner that undermines the legitimate expectations of, or the representations made to, an investor."<sup>421</sup> The tribunal in *Frontier Petroleum v. Czech Republic* also highlighted the nexus between legitimate expectations and stability:

Stability means that the investor's legitimate expectations based on this legal framework and on any undertakings and representations made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as on representations and undertakings made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment. While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making.<sup>422</sup>

164. In its review of the fair and equitable treatment standard, the *Suez v. Argentina* tribunal emphasized for its part the investor's reliance on the host state's laws and regulations, and its expectations that this framework, pursuant to which it had invested, would remain stable:

In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the

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*Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7 (2014) at 17 ("The rationale and justification for the recognition of legitimate expectations seems obvious. The investor makes its calculations and decisions in the light of the law of the host state as it is made available to it by the host state, and the investor's assumptions about the return for its investment will depend upon the stability and predictability of those laws. Had the legal order been different, this decision to invest might have been different").

<sup>420</sup> **CL-0099**, *Duke Energy v. Ecuador*, ICSID Case No. ARB/04/19, Award, Aug. 18, 2008, ("Duke Award") ¶ 340. See also **CL-0089**, *LG&E Decision on Liability*, ¶ 125: "the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law;" **CL-0100**, *Micula v. Romania*, ICSID Case No. ARB/05/20, Award, Dec. 11, 2013, ("Micula Award") ¶ 528.

<sup>421</sup> **CL-0087**, *Alpha Projektholding Award*, ¶ 420.

<sup>422</sup> **CL-0101**, *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, ("Frontier Award") ¶ 285.

host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, *acted in reliance upon those laws and regulations and changed their economic position as a result*. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not accorded protected investments fair and equitable treatment.

In the instant case, it should be emphasized that the expectations of the Claimants with respect to their investment in the water and sewage system of Santa Fe did not suddenly and surprisingly come into their minds the way Athena sprang from the head of Zeus. Argentina through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which the Province designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Province's water and sewage system.<sup>423</sup>

165. More recently, the *Gold Reserve v. Venezuela* tribunal held that changes in a government's policy regarding the mining sector did not excuse conducts in breach of the fair and equitable treatment standard.<sup>424</sup> Instead, the tribunal concluded that politically-driven policy changes violated the fair and equitable treatment standard:

The practice that had been so consistently followed regarding the handling of relations with Claimant as holder of mining rights in Venezuela changed when the State's policy concerning mining activities changed. This fact does not excuse Respondent's conduct, rather it confirms that such conduct was in breach of the FET standard as it was driven by political reasons. This also explains Respondent's failure to accept that the Brisas Concession term had been extended by operation of law, just as it had for the El Pauji Concession at about the same time.

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<sup>423</sup> CL-0102, *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, Jul. 30, 2010, ¶¶ 207-208.

<sup>424</sup> CL-0063, *Gold Reserve Award* ¶ 607.

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The reasons given by the tribunal in the *Metalclad v. Mexico* case for concluding that a breach of the FET provision had occurred can also be applied to the present case: “failing to ensure a transparent and predictable framework for Metaclad’s business planning and investment” or to provide an “orderly process and timely disposition in relation to an investor acting in the expectation that it would be treated fairly and justly...” The conclusion here is the same as in the *Metalclad* case: Respondent failed to accord Claimant FET regarding the whole process leading to the termination of the Brisas Concession by failing inter alia to respect Claimant’s due process rights.<sup>425</sup>

166. Thus, it cannot be disputed that a State violates the fair and equitable treatment standard if it “eviscerates” “the arrangements in reliance upon which the foreign investor was induced to invest.”<sup>426</sup>

**b) The fair and equitable treatment standard requires Peru to treat investments transparently**

167. The fair and equitable treatment standard requires a host State to treat investments transparently. Transparency is generally understood to refer to the absence of any administrative ambiguity or opacity.<sup>427</sup> It also means that the legal framework for the investor’s operations must be readily apparent.<sup>428</sup> Moreover, transparency is often linked to an investor’s legitimate expectations.<sup>429</sup>

168. The *Metalclad v. Mexico* tribunal described the transparency obligation in detail:

The Tribunal understands [the obligation of transparency] to include that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments

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<sup>425</sup> *Id.* at ¶¶ 607, 609.

<sup>426</sup> **CL-0103**, *CME v. Czech Republic*, UNCITRAL, Partial Award, Sept. 13, 2001, (“*CME* Partial Award”) ¶ 611.

<sup>427</sup> **CL-0041**, C. Dugan & D. Wallace, et al., *INVESTOR-STATE ARBITRATION* 519 (Oxford University Press, 2008).

<sup>428</sup> *See, e.g.*, **CL-0101**, *Frontier Award*, ¶ 285. *See also* **CL-0056**, R. Dolzer and C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 149 (Oxford University Press, 2<sup>nd</sup> ed. 2012).

<sup>429</sup> *See, e.g.*, **CL-0104**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008, ¶ 178 (“Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework”).

made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party ... become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.<sup>430</sup>

169. Many tribunals later reaffirmed that transparency is a part of the fair and equitable treatment standard.<sup>431</sup> For example, the *Micula v. Romania* tribunal found that the manner in which Romania terminated the EGO 24 incentives regime was not sufficiently transparent to meet the fair and equitable treatment standard.<sup>432</sup> The tribunal concluded that Romania should have provided advance notice to investors that the EGO 24 incentives program would be terminated earlier than expected:

Thus, the Tribunal finds that Romania should have alerted PIC holders reasonably soon after it became clear that the EGO 24 incentives would be abolished. ... Given the importance of the EGO 24 program and how intensely it was discussed in the context of Romania's EU accession, it was reasonable to expect that the Government would have given to the participants a formal advance notice of the program's anticipated termination. ...

As a result, the Tribunal finds that the Respondent breached the fair and equitable treatment obligation by failing to inform PIC holders in a timely manner that the EGO 24 regime would be ended prior to its stated date of expiry (1 April 2009).<sup>433</sup>

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<sup>430</sup> **CL-0105**, *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000, (“*Metaclad Award*”) ¶ 76.

<sup>431</sup> See, e.g., **CL-0063**, *Gold Reserve Award*, ¶ 570; **CL-0106**, *Bosh International et al. v. Ukraine*, ICSID Case No. ARB/08/11, Award, Oct. 25, 2012, ¶ 212; **CL-0086**, *Spyridon Award*, ¶ 314; **CL-0094**, *Lemire Decision on Jurisdiction & Liability*, ¶ 284; **CL-0077**, *Bayindir Award*, ¶ 178; **CL-0078**, *Rumeli Award*, ¶ 609; **CL-0107**, *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, Jul. 24, 2008, (“*Biwater Award*”) ¶ 602; **CL-0089**, *LG&E Decision on Liability* ¶ 128; **CL-0040**, *Tecmed Award*, ¶ 154.

<sup>432</sup> **CL-0100**, *Micula Award*, ¶ 864.

<sup>433</sup> **CL-0100**, *Micula Award*, ¶¶ 869-870.

**c) The fair and equitable treatment standard requires Peru to act in good faith**

170. The principle of good faith is recognized as a general principle of law, and is thus a source of international law under Article 38 of the Statute of the International Court of Justice.<sup>434</sup> In the context of international investment law, the principle of good faith has been recognized as “permeat[ing] the whole approach to the protection granted under treaties and contracts” and as being “at the heart of the concept of fair and equitable treatment.”<sup>435</sup>

171. Numerous arbitral tribunals have confirmed that the requirement to act in good faith is a fundamental aspect of the fair and equitable treatment standard.<sup>436</sup>

172. Although conduct in bad faith is clearly sufficient to violate a host State’s fair and equitable treatment obligation, a violation of the standard “does not require bad faith or malicious intention of the recipient State as a necessary element.”<sup>437</sup> That view has also been affirmed by many tribunals.<sup>438</sup>

**d) The fair and equitable treatment standard includes an obligation not to deny justice**

173. The obligation not to deny justice is recognized as being an element of the fair and equitable treatment standard.<sup>439</sup> It extends to all acts associated with the administration of

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<sup>434</sup> **CL-0108**, Statute of the International Court of Justice, Art. 38(1).

<sup>435</sup> **CL-0109**, *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007, ¶¶ 298-299. See also **CL-0097**, Rudolf Dolzer, *Fair and Equitable Treatment: Today’s Contours*, 12 SANTA CLARA J. INT’L L. 7 (2014) at 16-17.

<sup>436</sup> See, e.g., **CL-0110**, *Jan Oostergetel et al. v. Slovak Republic*, UNCITRAL, Final Award, Apr. 23, 2012, (“*Oostergetel Award*”) ¶ 227; **CL-0086**, *Spyridon Award*, ¶ 314; **CL-0101**, *Frontier Award*, ¶ 301; **CL-0085**, *Siag Award*, ¶ 450.

<sup>437</sup> **CL-0082**, *Azurix Award*, ¶ 372.

<sup>438</sup> See, e.g., **CL-0110**, *Oostergetel Award*, ¶ 227; **CL-0095**, *El Paso Award*, ¶ 357; **CL-0107**, *Biwater Award*, ¶ 602.

<sup>439</sup> See, e.g., **CL-0111**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, Mar. 10, 2015, (“*OI European Group Award*”) ¶ 523; **CL-0112**, *Flughafen Zürich A.G. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014, ¶ 376; **CL-0113**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, Apr. 8, 2013, (“*Franck Charles Award*”) ¶ 438; **CL-0114**, *Jan de Nul N.V. et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, Nov. 6, 2008, (“*Jan de Nul N.V. Award*”) ¶ 188.

justice, regardless of the State organ that is involved,<sup>440</sup> and regardless of the stage that the process is in.<sup>441</sup>

174. For a denial of justice claim under the fair and equitable treatment standard to be successful, a claimant must prove that the act or acts performed by a State organ in relation to the administration of justice are so improper and discreditable as to constitute unfair and inequitable treatment.<sup>442</sup> A claimant must also show that it has exhausted local remedies,<sup>443</sup> unless there is no effective remedy or no reasonable prospect of success.<sup>444</sup>

175. Thus, for example, the tribunal in *Siag v. Egypt* found that Egypt had failed to comply, over a seven-and-a-half year period, with no fewer than eight rulings in the claimants' favor rejecting the seizure by the State of the claimants' investments.<sup>445</sup> The tribunal concluded that Egypt's conduct constituted an egregious denial of justice to the claimants, and a breach of the fair and equitable treatment standard.<sup>446</sup>

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440 **CL-0115**, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT'L & COMP. L. QLY 867 (2014) at 3-4.

441 *See, e.g.*, **CL-0116**, *Robert Azinian et al. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, ¶¶ 102-103: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. [...] There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law." *See also* **CL-0117**, *Iberdrola Energia S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, Aug. 17, 2012, ¶ 444.

442 *See, e.g.*, **CL-0068**, *Mondev Award*, ¶ 127: "The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome... In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment." *See also* **CL-0113**, *Franck Charles Award*, ¶ 445: "The Tribunal holds that the State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions;" and **CL-0118**, *The Loewen Group et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, Jun. 26, 2003, ¶ 132: "Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough..."

443 **CL-0119**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 111 (Cambridge University Press, 2005).

444 *See, e.g.*, **CL-0111**, *OI European Group Award*, ¶¶ 526-527; **CL-0120**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, Jun. 30, 2009, ¶ 182; **CL-0114**, *Jan de Nul N.V.*, Award, ¶ 258; **CL-0099**, *Duke Award*, ¶¶ 399-400.

445 **CL-0085**, *Siag Award*, ¶ 454.

446 *Id.* at ¶ 455.

**3. Peru breached the fair and equitable treatment standard, as well as the customary international law minimum standard of fair and equitable treatment**

176. On November 29, 2007, Peru enacted Supreme Decree 083 which declared that Bear Creek's investment was a public necessity that posed no risk to national security vis-à-vis neighboring countries and approved Bear Creek's acquisition of the Santa Ana Concessions. On December 6, 2007, Bear Creek acquired the Santa Ana Concessions from Ms. Villavicencio in accordance with the provisions stipulated in the duly-registered Option Agreements.

177. On the basis of Supreme Decree 083 as well as earlier confirmations that Bear Creek was proceeding in accordance with Peruvian law, such as SUNARP Registral Tribunal's recognition in the Official Gazette of November 2005 that Bear Creek had properly recorded the Option Agreements for the future transfer of the Santa Ana Concessions, Bear Creek invested tens of millions of U.S. dollars in Peru. Bear Creek conducted an exploration program for the Santa Ana Project, and developed and executed a Feasibility Study (which it later revised) and an Environmental and Social Impact Assessment. In other words, Bear Creek relied on Peru's explicit guarantees in relation to the Santa Ana Concessions when it invested in the Santa Ana Project, and in so doing formed reasonable and legitimate expectations regarding the legality of its investment and the stability of Peru's business and legal framework.

178. Once legitimate expectations are found to exist, any host state conduct contrary to such expectations constitutes a breach of the fair and equitable treatment standard.<sup>447</sup> Peru's May 30, 2011 arbitrary and unwarranted suspension of Bear Creek's ESIA process at Santa Ana was taken in clear violation of the applicable legal framework and Bear Creek's legitimate expectations. Likewise, Peru's abrupt enactment of Supreme Decree 032 three-and-a-half years later on June 25, 2011, reversing Supreme Decree 083 and canceling Bear Creek's authorization

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<sup>447</sup> See *supra* ¶ 161.

to acquire and operate the Santa Ana Concessions, violated Bear Creek's reasonable and legitimate expectations. Peru's attempt to annul Bear Creek's concessions by having MINEM file a civil action against it on August 25, 2011, is a further frustration of those reasonable and legitimate expectations. Peru's conduct was thus contrary to Bear Creek's reasonable and legitimate expectations and is, as a result, in serious breach of the fair and equitable treatment standard.

179. Peru also failed to treat Bear Creek's investment in the Santa Ana Project transparently, in clear violation of the fair and equitable treatment standard. Peru's enactment of Supreme Decree 032 was done without any explanation or advance warning to Bear Creek. Nor did Peru ever provide any serious justification for this abrupt cancellation. Supreme Decree 032 refers to "circumstances ... implying that the legally required conditions for the enactment of Supreme Decree 083 no longer exist." However, to this day, Bear Creek has not been provided with an explanation as to what these new circumstances were.

180. Moreover, Peru failed to act in good faith in respect of Bear Creek's investment in the Santa Ana Project, in further egregious violation of the fair and equitable treatment standard. In December 2006, Bear Creek initiated the procedure to obtain the necessary authorizations to acquire the Santa Ana Concessions, and to that effect submitted to Peru the six Option Agreements into which it had entered with Ms. Villavicencio. Thus, when Peru issued Supreme Decree 083 a year later in 2007 approving Bear Creek's acquisition of the Santa Ana Concessions, it was fully aware of the manner in which Bear Creek intended to acquire the concessions and of the fact that Ms. Villavicencio possessed co-signing powers over the bank account of Bear Creek Peru.<sup>448</sup> Peru's actions over the next three-and-a-half years demonstrate

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<sup>448</sup> This information was also a matter of public knowledge since Ms. Villavicencio's signing powers had been inscribed in the public registry. *See Exhibit C-0017*, Supreme Decree Application, Annex VI.

that the Government clearly understood that Bear Creek's Santa Ana Concessions were acquired validly. As a result, Peru's abrupt enactment of Supreme Decree 032 in June 2011, reversing Supreme Decree 083, followed by its attempt in August 2011 to formally annul Bear Creek's concessions, can only be characterized as bad faith conduct for which Peru is liable under the Canada-Peru FTA. Peru's understanding that its conduct violated both international and domestic laws was confirmed through numerous public statements by government officials and meetings with Bear Creek executives. In light of the above, it is clear that Peru has violated nearly every component of the fair and equitable treatment standard that has been recognized to date.<sup>449</sup>

181. Peru's conduct, in any event, is also a serious breach of the customary international law minimum standard of treatment of fair and equitable treatment under Article 805 of the Canada-Peru FTA. Pursuant to that standard, Peru is required to act in good faith and form, and to honor those reasonable and justifiable expectations upon which Bear Creek relied in making its investments. For the same reasons that are set out above, Peru's abrupt enactment of Supreme Decree 032, reversing Supreme Decree 083, and its attempt to annul Bear Creek's Santa Ana Concessions exemplify its bad faith,<sup>450</sup> as well as its failure to honor the reasonable and justifiable expectations that Bear Creek relied upon in making its investments in Peru.<sup>451</sup>

### **C. Peru's Other Violations of the Canada-Peru FTA**

182. As noted above, Article 804 of the Canada-Peru FTA is an MFN clause that entitles Bear Creek to benefit, at a minimum, from the substantive protections that Peru has

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<sup>449</sup> Bear Creek reserves its rights to assert a claim for denial of justice in connection with the Peruvian Government's improper pursuit of the MINEM Lawsuit.

<sup>450</sup> *See supra* ¶ 180.

<sup>451</sup> *See supra* ¶¶ 176-178.

granted to third parties and that are not provided in the Canada-Peru FTA.<sup>452</sup> Such substantive protections include full protection and security, *i.e.*, the standalone standard of treatment that is not linked to the customary international law minimum standard of treatment as in Article 805 of the Canada-Peru FTA,<sup>453</sup> and protection against unreasonable or discriminatory measures.

183. Full protection and security is set forth in many bilateral investment treaties into which Peru has entered with other States, including the Czech Republic, Denmark, France, Germany, Malaysia, The Netherlands, and the United Kingdom.<sup>454</sup> Thus, Bear Creek is entitled to benefit, through Article 804 of the Canada-Peru FTA, from the full protection and security standard that is provided at Article 2(2) of the Peru-United Kingdom bilateral investment treaty: “Investments of nationals or companies of each Contracting Party ... shall enjoy full protection and security in the territory of the other Contracting Party.”

184. Likewise, the protection against unreasonable or discriminatory measures is set forth in many bilateral investment treaties into which Peru has entered with other States, including Argentina, Bolivia, Cuba, Denmark, Ecuador, Finland, Germany, Italy, The Netherlands, Paraguay, Spain, Sweden, Switzerland, the United Kingdom.<sup>455</sup> Thus, Bear Creek is entitled to benefit, through Article 804 of the Canada-Peru FTA, from the protection against unreasonable or discriminatory measures that is provided at Article 2(2) of the Peru-United Kingdom bilateral investment treaty: “Neither Contracting Party shall in any way impair by

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<sup>452</sup> See *supra* ¶¶ 154-155.

<sup>453</sup> Article 5 of the United States-Uruguay bilateral investment is similar to Article 805 of the Canada-Peru FTA, and specifies that full protection and security “requires each Party to provide the level of police protection required under customary international law” (*see* **CL-0121**, Treaty Between The United States of America And The Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment).

<sup>454</sup> **CL-0079**, Bilateral investment treaties to which Peru is a party and that grant full protection and security: Peru-Czech Republic, Art. 2(2); Peru-Denmark, Art. 3(1); Peru-France, Art. 5(1); Peru-Germany, Art. 4(1); Peru-Malaysia, Art. 2(2); Peru-Netherlands, Art. 3(2); and Peru-United Kingdom, Art. 2(2).

<sup>455</sup> **CL-0079**, Bilateral investment treaties to which Peru is a party and that grant protection against unreasonable or discriminatory measures: Peru-Argentina, Art. 2(3); Peru-Bolivia, Art. 3(1); Peru-Cuba, Art. 3(1); Peru-Denmark, Art. 3(1); Peru-Ecuador, Art. 3(1); Peru-Finland, Art. 2(2); Peru-Germany, Art. 2(2); Peru-Italy, Art. 2(3); Peru-Netherlands, Art. 3(1); Peru-Paraguay, Art. 4(1); Peru-Spain, Art. 3(1); Peru-Sweden, Art. 2(2); Peru-Switzerland, Art. 3(1); Peru-United Kingdom, Art. 2(2); and Peru-Venezuela, Art. 3(1).

unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.”

185. By its acts and omissions, Peru has breached Bear Creek’s right to full protection and security and to protection against unreasonable or discriminatory measures.

**1. Peru failed to afford full protection and security to Bear Creek’s investments**

186. The full protection and security standard requires a host State to take every measure necessary to protect and ensure the legal and physical security of the investments made by a protected investor in its territory.<sup>456</sup> The *Siemens v. Argentina* tribunal defined legal security as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.”<sup>457</sup> Moreover, the *AAPL v. Sri Lanka* tribunal noted that full protection and security entails a very low standard as it does not require negligence on the part of the host State.<sup>458</sup>

187. Peru’s abrupt and unexplained enactment of Supreme Decree 032 in 2011, reversing Supreme Decree 083 and canceling Bear Creek’s authorization to acquire and operate the Santa Ana Concessions, negated the legal security and protection that Peru had afforded to Bear Creek’s investment three-and-a-half years earlier by way of Supreme Decree 083 and other confirmations that Bear Creek was proceeding with its investment in Peru in accordance with Peruvian law.<sup>459</sup> In fact, the Peruvian Constitutional Court itself concluded that: “the issuance of Supreme Decree No. 032 is an action by the State that is not found within the margins of

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<sup>456</sup> See, e.g., **CL-0086**, *Spyridon* Award, ¶ 321; **CL-0101**, *Frontier* Award, ¶ 263; **CL-0107**, *Biwater* Award, ¶¶ 729-730; **CL-0031**, *Siemens* Award, ¶ 303; **CL-0082**, *Azurix* Award ¶ 408; **CL-0103**, *CME* Partial Award, ¶ 613; **CL-0122**, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15 at ¶¶ 109-111.

<sup>457</sup> **CL-0031**, *Siemens* Award, ¶ 303.

<sup>458</sup> **CL-0036**, *AAPL* Award, ¶ 77.

<sup>459</sup> See *supra* ¶ 177.

reasonability and proportionality required not to violate the principle of legal security.”<sup>460</sup> Peru’s attempt to annul Bear Creek’s concessions through MINEM’s 2011 civil action is another illustration of its violation of the full protection and security standard.

## 2. Peru impaired Bear Creek’s investment through unreasonable and discriminatory measures

188. Bear Creek’s investment enjoys protection against unreasonable (or arbitrary or unjustified)<sup>461</sup> or discriminatory measures. The use of the disjunctive term “or” between “unreasonable” and “discriminatory” denotes that a measure need only be either unreasonable or discriminatory to violate the standard.<sup>462</sup> The *EDF v. Romania* tribunal held, in accordance with Professor. Schreuer, that an unreasonable or discriminatory measure is “a measure that inflicts damage on the investor without serving any apparent legitimate purpose; a measure that is not based on legal standards but on discretion, prejudice or personal preference; a measure taken for reasons that are different from those put forward by the decision maker; *or* a measure taken in willful disregard of due process and proper procedure.”<sup>463</sup> Many investor-State arbitration tribunals have affirmed this understanding of unreasonable or discriminatory measures.<sup>464</sup>

189. The *AES v. Hungary* tribunal added, in the case of an unreasonable measure, that even if such a measure served a legitimate purpose (or was taken in connection with a rational policy), it must still be reasonable. In other words, “there needs to be an appropriate correlation

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<sup>460</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

<sup>461</sup> The terms “unreasonable,” “arbitrary” and “unjustified” are interchangeable. See **CL-0081**, *National Grid* Award, ¶ 197: “It is the view of the Tribunal that the plain meaning of the terms “unreasonable” and “arbitrary” is substantially the same in the sense of something done capriciously, without reason.”

<sup>462</sup> See, e.g., **CL-0123**, *AES Summit Generation Limited et al. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010, (“*AES* Award”) ¶ 10.3.2; **CL-0094**, *Lemire* Decision on Jurisdiction & Liability, ¶ 260; **CL-0085**, *Siag* Award, ¶ 457; **CL-0082**, *Azurix* Award, ¶ 391.

<sup>463</sup> **CL-0124**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, Oct. 8, 2009, ¶ 303.

<sup>464</sup> See, e.g., **CL-0098**, *Toto* Award, ¶ 157; **CL-0094**, *Lemire* Decision on Jurisdiction & Liability, ¶ 262.

between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented."<sup>465</sup>

190. In respect of discriminatory measures, the *Ulysseas v. Ecuador* tribunal noted that "for a measure to be discriminatory, it is sufficient that, objectively, two similar situations are treated differently."<sup>466</sup> Discriminatory intent is not required.<sup>467</sup>

191. Peru's conduct towards Bear Creek's investment was both unreasonable and discriminatory. The enactment of Supreme Decree 032 in particular was unreasonable because it (i) did not serve any legitimate public purpose but had the effect of depriving local communities and Peru as a whole of much-needed revenue and opportunities; (ii) was not based on any legal standard, but referred solely to "circumstances implying that the legally required conditions for the enactment of Supreme Decree 083 no longer exist," circumstances that to this day have not been explained to Bear Creek; and (iii) was decided for the purpose of appropriating at no cost a world-class mining project.

192. The enactment of Supreme Decree 032 and MINEM's initiation of its civil action were also discriminatory. Bear Creek acquired the Santa Ana Concessions by entering into Option Agreements with Ms. Villavicencio. This is a common arrangement used in connection with mining and natural resource projects in Peru and was used by Bear Creek here to avoid interference by others with its efforts to obtain the authorization to acquire title as mandated by Article 71 of the Peruvian Constitution. Yet, Peru has not targeted any other foreign investor that acquired mining rights in frontier areas in a comparable way to Bear Creek. In fact, Bear Creek has been the sole focus of Peru's breaches of international law.

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<sup>465</sup> CL-0123, *AES Award*, ¶ 10.3.9.

<sup>466</sup> CL-0065, *Ulysseas Award*, ¶ 293. See also CL-0125, *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, Feb. 10, 1999, ¶ 121.

<sup>467</sup> See, e.g., CL-0126, *Eastern Sugar B.V. v. The Czech Republic*, UNCITRAL, SCC Case No. 088/2004, Partial Award, Mar. 27, 2007, ¶ 338; CL-0031, *Siemens Award*, ¶ 321.

193. Finally, Peru's measures, in particular the enactment of Supreme Decree 032 and MINEM's 2011 civil action, impaired the management, maintenance, use, enjoyment or disposal of Bear Creek's investment in Peru. Indeed, Peru's acts and omissions effectively put an end to the Santa Ana Project. Thus, there can be no doubt that Peru has impaired Bear Creek's investment through unreasonable and discriminatory measures, in violation of the Canada-Peru FTA and its obligations under international law.

## **VII. BEAR CREEK IS ENTITLED TO COMPENSATION AND DAMAGES**

194. As explained above, that Peru unlawfully expropriated Bear Creek's Santa Ana Project cannot be seriously disputed, nor can the fact that Peru's actions seriously damaged Bear Creek's Corani Project. Nor can it be disputed that Peru's acts or omissions constituted serious additional breaches of the FTA, including, but not limited to, breaches of fair and equitable treatment. Because both Peru's expropriation of the Santa Ana Project and other FTA violations resulted in the total deprivation of Bear Creek's Santa Ana mining rights, determining compensation owed to Claimant is, in essence, the Tribunal's only task in this arbitration. This section describes the applicable compensation standards (A.), analyzes the *quantum* of compensation owed by Peru for both the Santa Ana and Corani Projects (B.), and identifies two additional issues related to compensation that the Tribunal should analyze: costs and expenses (C.) and compound post-award interest (D.).

### **A. Standards of Compensation**

#### **1. Bear Creek is Entitled to the Monetary Equivalent of the Investments Unlawfully Taken by Peru**

195. Articles 31 and 36 of the ILC Articles confirm that a State is required to make full reparation for injury caused by breaches of international law. Article 31 of the ILC Articles ("Reparation") provides:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.<sup>468</sup>

196. Article 36 of the ILC Articles (“Compensation”) states:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.<sup>469</sup>

197. Peru must be ordered to pay the full reparation, that is, in the words of the *Chorzów Factory* case, a sum which would “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” Article 31 of the ILC Articles explains that this covers “any damage, whether material or moral” caused by the unlawful expropriation. This would include not only damage caused to Bear Creek concerning the Santa Ana Project itself, but also damages for losses sustained with respect to the Corani Project, which resulted from Peru’s expropriation of the Santa Ana Project and other FTA violations. Article 36 of the ILC Articles, in turn, provides that these damages must “cover any financially assessable damage including loss of profits insofar as it is established.”

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<sup>468</sup> **CL-0030**, Responsibility of States for Internationally Wrongful Acts, U.N. GAOR 6th Comm., 56th Sess., U.N. Doc. A/Res/56/83, Jan. 28, 2002, Art. 31 (emphasis added).

<sup>469</sup> **CL-0030**, *Id.* at Art. 36 (emphasis added).

198. To determine the compensation that Peru owes Bear Creek, the Tribunal should in the first instance look to any *lex specialis* in the FTA and, in the absence of any *lex specialis*, to the rules of customary international law.<sup>470</sup> The only *lex specialis* standard of compensation found in the FTA is in Article 812, which sets out the conditions that Peru must comply with in order to lawfully expropriate investments held by protected investors in Peru. It provides that, in the event the other requirements of Article 812 are satisfied (*i.e.*, the taking is for a public purpose, providing due process of law, acting in a non-discriminatory manner), the expropriation also requires the payment of “prompt, adequate and effective compensation” to foreign investors. If any of those requirements is not met, the expropriation is not in compliance with Article 812 and is, therefore, unlawful.

199. Claimant has already established beyond cavil that Peru’s expropriation of Bear Creek’s investment was unlawful, if for no other reason than Peru’s failure to pay or even offer to pay contemporaneous compensation.<sup>471</sup> The FTA is silent as to the standard of compensation for an unlawful expropriation. In these circumstances, customary international law fills the *lacuna* and provides the governing rules of compensation. This was precisely the holding of the Tribunal in *ADC v. Hungary*:

[I]n the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation [...] Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the

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<sup>470</sup> CL-0053, *Amoco* Partial Award ¶¶ 112, 189, 193-99.

<sup>471</sup> See *supra* at ¶¶ 127-29.

default standard contained in customary international law in the present case.<sup>472</sup>

200. The decision of the Iran-US Claims Tribunal in the case of *Amoco v. Iran* is in accord with this analysis:

Both parties consider that this issue must be decided by reference to customary international law. The Tribunal agrees. Article IV, paragraph 2 of the Treaty determines the conditions that an expropriation should meet in order to be in conformity with its terms and therefore defines the standard of compensation only in case of a lawful expropriation. A nationalization in breach of the Treaty, on the other hand, would render applicable the rules relating to State responsibility, which are to be found not in the Treaty but in customary law.<sup>473</sup>

201. With respect to compensation, the Court in *Chorzów Factory* posed three questions to the expert witnesses in the case. First, the Court asked the experts to determine the value of the factory at the date of the expropriation.<sup>474</sup> Second, the Court asked the experts to value the lost profits during the period between the date of expropriation and the date of the judgment.<sup>475</sup> Finally, the Court asked the experts to compute the current value of the factory as of the date of the judgment.<sup>476</sup> Commentators and case law have consistently interpreted *Chorzów Factory* to require tribunals to award the higher of the value on the date of

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<sup>472</sup> CL-0060, *ADC Award* ¶¶ 481, 483.

<sup>473</sup> CL-0053, *Amoco Partial Award* ¶ 189.

<sup>474</sup> CL-0127, *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Judgment, Sept. 13, 1928 (“*Chorzów Factory Case*”), 1928 P.C.I.J. (ser. A), No. 17, at 43 (“What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?”).

<sup>475</sup> *Id.* (“What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?”).

<sup>476</sup> *Id.* at 44 (“What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?”).

expropriation plus interest, or the value on the date of the award (in either case, accompanied by further compensation for any additional loss not covered by the restitutionary monetary equivalent).<sup>477</sup>

202. The *Chorzów* Factory standard continues to be cited and followed in contemporary cases. In *Amoco v. Iran*, the Tribunal said:

[*Chorzów Factory*] is widely regarded as the most authoritative exposition of the principles applicable in this field and is still valid today.

\* \* \* \*

Undoubtedly, the first principle established by the Court is that a clear distinction must be made between lawful and unlawful expropriations, since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking [...] Such a principle has been recently and expressly confirmed by the celebrated *AMINOIL* case.

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According to the Court in *Chorzów Factory*, an obligation of reparation of all the damages sustained by the owner of expropriated property arises from an unlawful expropriation. The rules of international law relating to international responsibility of States apply in such a case. They provide for *restitutio in integrum*: restitution in kind or, if impossible, its monetary equivalent. If need be, ‘damages for loss sustained which would not be covered by restitution’ should also be awarded.<sup>478</sup>

203. And as the *Rumeli* Tribunal decided:

In assessing compensation for internationally wrongful acts other than expropriation, the Tribunal considers that it should apply the principle of the *Factory at Chorzow* case, according to which any award should ‘as far as possible wipe out all the consequences of

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<sup>477</sup> See, e.g., **CL-0128**, William C. Lieblich, *Determinations by International Tribunals for the Economic Value of Expropriated Enterprises*, 7(1) J. Int'l. Arb. 37, n.36 (1990); **CL-0060**, *ADC Award* ¶¶ 495-99; **CL-0031**, *Siemens Award* ¶¶ 351-52.

<sup>478</sup> **CL-0053**, *Amoco Partial Award* ¶¶ 191-93.

the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed.’<sup>479</sup>

204. Similarly, according to the Tribunal in *ADC v. Hungary*, “there can be no doubt about the present vitality of the *Chorzów Factory* principle, its full current vigor having been repeatedly attested to by the International Court of Justice.”<sup>480</sup> That case arose out of a 12-year concession agreement with the Hungarian Air Traffic and Airport Authority (“ATAA”), which included the construction of a new airport terminal, and modernization and management of the Budapest Airport. ADC owned 34% of the concession, while ATAA held the rest. At the same time, ADC entered into a Terminal Management Agreement to provide technical and managerial assistance to operate the airport. In 2001, the Hungarian Government took possession of the terminal facilities and transferred operations to a newly-created company.

205. The tribunal concluded that ADC had suffered an unlawful taking of its stake in the airport concession. In assessing damages, the Tribunal applied the customary international law standard from *Chorzów Factory*. The Tribunal noted that in a typical expropriation, the expropriated investment often declines in value following the taking. In *ADC*, however, the expropriated asset actually gained in value after the date of expropriation. The Tribunal thus held that the *Chorzów Factory* standard necessitated the use of the date of the award as the valuation date:

[I]n the present, *sui generis*, type of case the application of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation,

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<sup>479</sup> **CL-0078**, *Rumeli Award* ¶ 792.

<sup>480</sup> **CL-0060**, *ADC Award* ¶ 493. The Tribunal in the recent *Vivendi Award* issued a similar statement: “There can be no doubt about the vitality of [the *Chorzów Factory*] statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ’s successor, the International Court of Justice.” **CL-0038**, *Vivendi II Award* ¶ 8.2.5.

since this is what is necessary to put the Claimant in the same position as if the expropriation had not been committed.<sup>481</sup>

206. As a result, the Tribunal awarded the higher of the values between the date of expropriation and the date of the award; its award was thus based on a US\$ 76 million value at the time of the award rather than a US\$ 68 million value at the time of the expropriation. The Tribunal also awarded consequential damages not covered by the monetary equivalent of restitution in kind, from the date of expropriation until the date of the award (in that case, all unpaid dividends and management fees).<sup>482</sup>

207. Other recent arbitral awards also have applied *Chorzów Factory's* “higher of” damages principle. For example, according to the *Vivendi* Tribunal: “It is also clear that such a standard permits, if the facts so require, a higher rate of recovery than that prescribed in Article 5(2) for lawful expropriations.”<sup>483</sup>

208. Likewise, in *Siemens v. Argentina*, the Tribunal relied on *Chorzów Factory* to conclude that:

[U]nder customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages [...]. It is only logical that, if all the consequences of the illegal act need to be wiped out, the value of the investment at the time of this Award be compensated in full. Otherwise compensation would not cover all the consequences of the illegal act.<sup>484</sup>

209. Moreover, payment of compensation to Claimant on the basis of the higher of the market value at the time of expropriation plus interest or the value on the date of the award

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481 **CL-0060**, *ADC Award* ¶ 497.

482 *Id.* at ¶ 518.

483 **CL-0038**, *Vivendi II Award* ¶ 8.2.5 (italics in original).

484 **CL-0031**, *Siemens Award* ¶¶ 352-53.

accords with the universal principle of law that a wrongdoer should not benefit from his wrong – *commodum ex inuria sua nemu habere debet*. As stated by Judge Brower in *Amoco*: “[N]o system of law sensibly can be understood as intended to reward unlawful conduct.”<sup>485</sup> Further, this result is consistent with the opinion of Profs. Reisman and Sloane that “BITs and comparable multilateral investment treaties should, as a matter of both the intent of their drafters and the policies that animate them, be construed to deter, not reward, unlawful expropriation of all kinds.”<sup>486</sup>

210. It is also consistent with the principle stated in *Chorzów Factory* that the compensation due to a claimant in respect of the unlawful taking of property should not be limited to “the value of the undertaking at the moment of dispossession plus interest,” since such a limitation could place the claimant in a position more unfavorable than if the State had complied with its legal obligations.

211. As Professor Marboe concludes in her recent treatise on damages:

[T]he function of compensation [for lawful expropriation] is primarily the replacement of the value of the expropriated property, while the function of damages [for unlawful expropriation] is the full reparation of the damage incurred.<sup>487</sup>

212. For lawful expropriations, the focus is on finding the neutral or objective “value of the property concerned.”<sup>488</sup> For unlawful expropriations, as in the present dispute, the focus is on the subjective “financial situation the injured person would be in if the unlawful act had not been committed.”<sup>489</sup> For unlawful expropriations, Marboe concludes:

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<sup>485</sup> **CL-0053**, *Amoco* Partial Award ¶ 18 n.22 (Concurring Opinion of J. Brower).

<sup>486</sup> **CL-0129**, W. M. Reisman & R. D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 Brit. Y.B. Int'l. L. 115, 148 (2004).

<sup>487</sup> **CL-0130**, I. Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 34 (Oxford University Press 2009) (emphasis added).

<sup>488</sup> *Id.*

<sup>489</sup> *Id.* at 35.

[A] method should be applied that allows evaluating the loss actually incurred by the individual affected. [...] As the concrete financial situation of the individual must be considered, a number of disadvantages may be relevant that affect his or her financial situation as a whole. This includes, in particular, consequential damages. One must take into account additional costs incurred, such as costs for transportation and storage or for a necessary loan but also costs remedying the breach, negotiating, mitigation of damages, and pursuing the claims. Furthermore, depreciation of other assets of the injured party and lost opportunities can have negative effects on the overall financial situation of the victim.”<sup>490</sup>

213. In sum, that there must be a difference between lawful and unlawful expropriations is intuitive and generally accepted.<sup>491</sup> It would be illogical and counterintuitive “that it makes no difference whether the taking is lawful or unlawful and that the financial consequences will be the same in both cases.”<sup>492</sup>

## 2. At a Minimum, Bear Creek is Entitled to “Prompt, Adequate and Effective Compensation”

214. It is clear that Peru’s expropriation of Claimant’s investments was in breach of the FTA, and thus, unlawful. Accordingly, the measure of compensation due to Claimant for this expropriation is not controlled by the terms of Article 812 of the FTA but instead is to be derived from customary principles of international law.

215. Nonetheless, even if the expropriation of Claimant’s investments were lawful, Bear Creek would nonetheless remain entitled to prompt, adequate and effective compensation in

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<sup>490</sup> *Id.* at 36.

<sup>491</sup> **CL-0127**, *Chorzów Factory Case* at 40 (“Such a consequence [of equating lawful with unlawful expropriation] would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned”); **CL-0052**, *SEDCO Interlocutory Award* at 180, 189, 205, n.40 (“the injured party would receive nothing additional for the enhance wrong done it and the offending State would experience no disincentive to repetition of unlawful conduct”).

<sup>492</sup> **CL-0131**, D. W. Bowett, *State Contracts with Aliens*, 59 *Brit. Y.B. Int’l. L.* 47, 61 (1988). *See also* **CL-0132**, Ignaz Seidl-Hohenveldern, *L’évaluation des dommages dans les arbitrages transnationaux*, 33 *Annuaire Français de Droit International* 7, 12 (1987); **CL-0130**, I. Marboe, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* 68 (Oxford University Press 2009) (“As a matter of principle, a differentiation appears to be necessary because the financial consequences of lawful and unlawful behavior would otherwise be the same. This would clearly be against the interest of legal justice and the general preventive function of law”).

accordance with Article 812 of the FTA.<sup>493</sup> Likewise, even if the measure of compensation due to Claimant for the unlawful expropriation of Bear Creek’s investments were the same as that provided in the FTA with respect to a lawful expropriation, Claimant would remain entitled to prompt, adequate and effective compensation.

216. Article 812 of the FTA elaborates on the standards for “just and effective” and “prompt, adequate and effective” compensation as follows:

Such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.<sup>494</sup>

Compensation shall be paid without delay and shall be fully realizable and freely transferable. Compensation shall be payable in a freely convertible currency and shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of payment.<sup>495</sup>

217. While the FTA does not define the term “fair market value,” FTI defined FMV as follows:

[T]he price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms-length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.<sup>496</sup>

218. The Tribunal in the *CME* case made the following observation about “fair market value”:

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<sup>493</sup> **Exhibit C-0001**, Canada-Peru FTA, Art. 812(1).

<sup>494</sup> *Id.* at Art. 812(2).

<sup>495</sup> *Id.* at Art. 812(3).

<sup>496</sup> FTI Expert Report ¶ 7-3.

Today [the 2200 BITs and a few multilateral treaties] are truly universal in their reach and essential provisions. They concordantly provide for payment of ‘just compensation,’ representing the ‘genuine’ or ‘fair market’ value of the property taken. Some treaties provide for prompt, adequate and effective compensation amounting to the market value of the investment expropriated immediately before the expropriation [...]. Others provide that compensation shall represent the equivalent of the investment affected. These concordant provisions are variations on an agreed, essential theme, namely, that when a State takes foreign property, full compensation must be paid.<sup>497</sup>

219. While the FTA does not define “adequate and effective” compensation, international law and international tribunals have consistently equated adequate and effective compensation to “full” compensation and have applied the “full” compensation standard to expropriation claims in investment disputes,<sup>498</sup> and determined “full” compensation on the basis of the fair market value of the expropriated investment.<sup>499</sup> The Tribunal in *Biloune v. Ghana* noted:

Under the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full—*i.e.*, to prompt, adequate and effective—compensation.<sup>500</sup>

220. Awards of the Iran-US Claims Tribunal have displayed near unanimity that the standard of compensation for expropriation is “full” compensation.<sup>501</sup> In *SEDCO v. Iran*, the Tribunal confirmed that “full” compensation is the standard under customary international law:

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<sup>497</sup> **CL-0133**, *CME Czech Republic B.V. v. Czech Republic*, Final Award, Mar. 14, 2003 (“*CME* Final Award”) ¶ 497.

<sup>498</sup> See, e.g., **CL-0134**, *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Second Partial Award, Oct. 21, 2002 (“*S.D. Myers* Second Partial Award”), Chapter VI, at 59; **CL-0105**, *Metalclad* Award ¶ 122.

<sup>499</sup> **CL-0135**, World Bank, “Guidelines on the Treatment of Foreign Direct Investment” reprinted in 7 ICSID Review – Foreign Investment Law Journal (1992) 303. Compensation for expropriation “will be deemed adequate if it is based on the fair market value of an asset.”

<sup>500</sup> **CL-0136**, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs, Jun. 20, 1990, 95 I.L.R. 210-211 (1994). “Full and effective compensation” was also awarded by both *Amco* Tribunals (see **CL-0137**, *Amco Asia Corp. v. Indonesia* (First Tribunal), ICSID Case No. ARB/81/1, Award on the Merits, Nov. 21, 1984 (“*Amco Asia* Award (First Tribunal)”), 24 I.L.M. 1022, 1038 ¶ 280 (1985); and **CL-0138**, *Amco Asia Corp. v. Indonesia* (Resubmission), ICSID Case No. ARB/81/1, Award, May 31, 1990 (“*Amco Asia* Resubmission Award”) ¶ 267.

<sup>501</sup> **CL-0139**, John A. Westberg, *Compensation in Cases of Expropriation and Nationalization: Awards of the Iran-United States Claims Tribunal*, 5(2) ICSID Rev.– Foreign Inv. L.J. 256, 280-82 (1990). See also **CL-0140**, John A. Westberg,

Opinions both of international tribunals and of legal writers overwhelmingly support the conclusion that under customary international law [...] full compensation should be awarded for the property taken.<sup>502</sup>

221. Professor Crawford explains: “Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the ‘fair market value’ of the property lost.”<sup>503</sup> The Iran-US Claims Tribunal further explained that fair market value could be determined by reference to an hypothetical transaction between a willing buyer and a willing seller.<sup>504</sup>

222. Accordingly, in the event the Tribunal determines either that Peru’s expropriation of Claimant’s investment was lawful or, alternatively, that the expropriation was unlawful but that the standard of compensation should be the same as that under Article 812 for a lawful expropriation, then Claimant should receive “full” compensation equivalent to the fair market value of its investment.

### 3. Standard of Compensation for Other FTA Violations

223. In the unlikely event the Tribunal should determine that Peru did not expropriate Bear Creek’s investment, either lawfully or unlawfully, the Tribunal must still award compensation to Claimant because it is clear that Peru violated one or more of the other substantive standards of protection in the BIT. Bear Creek has amply demonstrated that Peru: (i)

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*Applicable Law, Expropriatory Takings and Compensation in Cases of Expropriation*; ICSID and Iran-United States Claims Tribunal Case Law Compared, 8(1) ICSID Rev.– Foreign Inv. L.J. 1, 16-18 (1993).

502 **CL-0052**, *SEDCO* Interlocutory Award at 634; **CL-0141**, *American Int’l. Group, Inc. v. Iran*, Iran-U.S. Claims Tribunal Case No. 2, Award No. 93-2-3, Dec. 19, 1983, 4 Iran-U.S. Cl. Trib. Rep. 96 (1983); **CL-0050**, *Tippetts* Award at 4; **CL-0142**, Peter Schaufelberger, LA PROTECTION JURIDIQUE DES INVESTISSEMENTS INTERNATIONAUX DANS LES PAYS EN DEVELOPPEMENT 85 (1993) (“In practice, the traditional rule of full indemnity is endorsed...”); **CL-0143**, Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, in 4 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 31, 71-79 (Richard B. Lillich ed., University of Virginia 1987); **CL-0137**, *Amco Asia* Award (First Tribunal”), at 1038; **CL-0036**, *AAPL* Award at 577.

503 **CL-0144**, James Crawford, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 225 (2002).

504 **CL-0145**, *Starrett Housing Corp. v. Iran*, Iran-U.S. Claims Tribunal Case No. 24, Interlocutory Award No. ITL32-24-1, Dec. 19, 1983, 23 I.L.M. 1090 (“*Starrett Housing* Interlocutory Award”) (1984).

failed to treat Bear Creek’s investments fairly and equitably and to afford full protection and security to Bear Creek’s investments;<sup>505</sup> and (ii) impaired Bear Creek’s investments through unreasonable and discriminatory measures.<sup>506</sup>

224. The FTA does not assign a particular standard of compensation for these other violations. International law is clear, however, that Claimant is entitled to be fully compensated for such violations. Such actions are akin to unlawful expropriation in that they breach the terms of the FTA, and accordingly, ought to be compensated on the basis of the same principles that apply in the case of an unlawful expropriation. In this situation, the *Chorzów Factory* principle provides that the compensation should take the form of a sum which would wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.<sup>507</sup>

225. The *Vivendi* Tribunal observed that it is generally accepted that, “regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.”<sup>508</sup>

226. The quantification of “full” compensation for non-expropriatory violations will necessarily vary from case to case. According to the Tribunal in *S.D. Myers v. Canada* (a NAFTA case):

By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the

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505 See *supra* at ¶¶ 176-81, 186-87.

506 *Id.* at. ¶¶ 188-93.

507 **CL-0127**, *Chorzów Factory* Case.

508 **CL-0038**, *Vivendi II Award* ¶ 8.2.7.

principles of both international law and the provisions of the NAFTA.<sup>509</sup>

227. There is, however, a clear emerging trend toward basing such damages on the fair market value standard, plus historical or discrete losses when applicable. Thus, according to the Tribunal in *CMS*:

While this [fair market value] standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.<sup>510</sup>

228. Similarly, in *Azurix v. Argentina*, the Tribunal determined that the fair market value standard was appropriate for Argentina's breaches of the fair and equitable treatment, full protection and security, and arbitrary measures provisions in taking over a 30-year water concession in the Province of Buenos Aires in only its third year.<sup>511</sup> The Tribunal awarded US\$ 60 million as the fair market value of the Canon that Azurix paid for the concession and an additional US\$ 105 million for the amounts that Azurix invested during the concession's short life.<sup>512</sup>

229. When faced with a BIT that provided guidance on the measure of compensation for expropriation breaches (*i.e.*, fair market value, as the applicable treaty in this case) but was silent on non-expropriation breaches, the Tribunal in *National Grid v. Argentina* cited "the principles of compensation under customary international law" set out in *Chorzów Factory* to award "full compensation" in excess of US\$ 60 million.<sup>513</sup>

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<sup>509</sup> **CL-0134**, *S.D. Myers* Second Partial Award ¶ 309.

<sup>510</sup> **RLA-010**, *CMS* Award ¶ 410.

<sup>511</sup> **CL-0082**, *Azurix* Award ¶ 424.

<sup>512</sup> *Id.* at ¶¶ 429-30.

<sup>513</sup> **CL-0081**, *National Grid* Award ¶¶ 269-70, 296.

230. Most recently, the *The Gold Reserve v. Venezuela* tribunal held that: “The number, variety and seriousness of the breaches make the FET violation by Respondent particularly egregious. The compensation due to Claimant for such breaches should reflect the seriousness of the violation.”<sup>514</sup> With respect to the appropriate method to determine compensation, the Tribunal observed that:

Nevertheless, the serious nature of the breach in the present circumstances and the fact that the breach has resulted in the total deprivation of mining rights suggests that, under the principles of full reparation and wiping-out the consequences of the breach, a fair market value methodology is also appropriate in the present circumstances. As noted above, both Parties have taken this position in the submissions.<sup>515</sup>

231. In sum, Claimant is entitled to full compensation for Peru’s violations of the FTA provisions relating to fair and equitable treatment, arbitrary and discriminatory measures, and full protection and security. Although it is Claimant’s contention that Peru violated each of these provisions in multiple respects (as well as the expropriation provision of Article 812), a violation of any one of them would entitle Claimant to full compensation.

#### **B. Quantum of Damages**

232. As explained above, under customary international law Bear Creek is entitled to full reparation of the losses caused by Peru’s unlawful acts including, in this case, compensation in the amount of the higher of the value of Bear Creek’s investment on the date of the FTA breaches, plus interest, or the value of Bear Creek’s investment on the date of the award, as well as any damages for additional losses not covered by such compensation. Accordingly, Claimant presents damages methodologies that (i) measure the FMV of Claimant’s investment in the Santa Ana Project as of the day immediately preceding the Valuation Date and (ii) determine the

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<sup>514</sup> CL-0063, *Gold Reserve Award* ¶ 615.

<sup>515</sup> *Id.* at ¶ 680.

amount of damages resulting from the reduction in value of the Corani Project resulting from the Government's taking of Santa Ana. As mentioned above, Bear Creek has retained FTI and RPA to calculate these values.<sup>516</sup>

233. FTI is a world-recognized leader in the field of forensic accounting and damages valuation. Howard Rosen, who authored the present report along with Chris Milburn, has extensive experience in the valuation and quantification of damages relating to mineral properties at all stages of development and served as an expert witness in over 200 quantification and valuation matters before courts and arbitral tribunals.<sup>517</sup> FTI's experts relied, in part, on the expert report prepared by Graham G. Clow, Ian C. Weir, Kathleen Ann Altman and Katharine Masun from RPA.<sup>518</sup> RPA is widely recognized as the specialty firm of choice for resource and reserve work and has carried valuations of more than a thousand mineral exploration properties across the world over its nearly 30 years of existence.<sup>519</sup> RPA completed a technical review of the Santa Ana Project and Corani Project, including, among other things, evaluation of the detailed Santa Ana Feasibility Study, Santa Ana Revised Feasibility Study and Corani Feasibility Study previously prepared by independent third-party mining consultants for Bear Creek.<sup>520</sup>

234. RPA reviewed and assessed the reasonableness of the cost assumptions used in connection with both the Santa Ana and Corani Projects, including: (i) estimation of Mineral Resources;<sup>521</sup> (ii) mining and Mineral Reserves, including design of the open pits and production schedules;<sup>522</sup> (iii) metallurgical test work and mineral processing and the metal recoveries

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<sup>516</sup> See, gen., FTI Expert Report, RPA Expert Report.

<sup>517</sup> FTI Expert Report ¶ 1.7.

<sup>518</sup> *Id.* at ¶ 1.5.

<sup>519</sup> RPA Expert Report at 4-1.

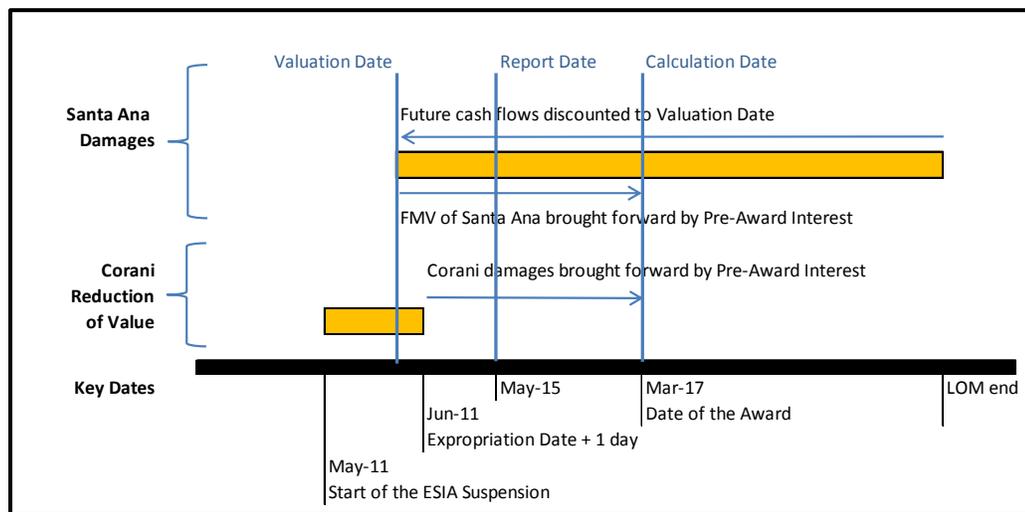
<sup>520</sup> *Id.* at § 18.

<sup>521</sup> *Id.* at § 6.

<sup>522</sup> *Id.* at § 7.

assumed for leaching of the different ore zones;<sup>523</sup> (iv) Bear Creek’s ability to connect with existing infrastructure;<sup>524</sup> (v) compliance and intended compliance with environmental permitting and demonstration of corporate social responsibility;<sup>525</sup> and (v) estimates of capital costs and operating costs.<sup>526</sup>

235. The table below summarizes the approaches employed by FTI to calculate (i) the FMV of the Santa Ana Project on the Valuation Date and (ii) damages resulting from the reduction of value of the Corani Project caused by Peru’s taking of Santa Ana.



**Fig. 10: Summary of Damages Approaches.**<sup>527</sup>

### 1. Santa Ana Compensation damages

236. To calculate the compensation due to Bear Creek for Peru’s breaches of the FTA – including, but not limited to, expropriation and violations of the fair and equitable treatment standard – FTI, along with RPA, used the DCF methodology, which is widely used as a measure

<sup>523</sup> *Id.* at § 8.

<sup>524</sup> *Id.* at § 9.

<sup>525</sup> *Id.* at § 10.

<sup>526</sup> *Id.* at §§ 11-12.

<sup>527</sup> FTI Expert Report Fig. 1.

of damages in investment treaty arbitration.<sup>528</sup> The DCF methodology utilizes forecasted future cash flows and discounts them to a present date by applying a risk adjusted discount rate.<sup>529</sup> It is FTI's view that the quantification of damages sustained by a claimant following a wrongful act should, where possible, be based on objective information.<sup>530</sup> Even though the Santa Ana Project had not yet reached production, a DCF approach to determining its FMV is appropriate because the practices employed to assess mineral resources and reserves are well-established, the time and costs required to develop and process the minerals can be estimated with a reasonable degree of precision, detailed capital estimates had been conducted, and well-developed international markets exist for the processed or semi-processed metal products that will absorb a project's entire production immediately.<sup>531</sup> In that sense, mining and other extractive projects are different than non-extractive businesses and can therefore be valued by using a DCF methodology even though they have not yet entered production.<sup>532</sup>

237. FTI's DCF valuation analysis is based on the financial model prepared by RPA.<sup>533</sup> With respect to the Santa Ana Project, RPA concluded that the Santa Ana Revised Feasibility Study accurately reflects the nature and economic prospects of the Santa Ana Project as planned.<sup>534</sup> As such, an appropriate economic analysis of Santa Ana can be conducted using the detailed information in the Revised Feasibility Study and available data.

238. For calculating the FMV of the Santa Ana Project, FTI used the extended life of mine case set forth in the RPA Expert Report, which included Mineral Reserves and Mineral Resources, both of which have a demonstrable value and would be included in any transaction

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528 *Id.* at ¶ 7.18.

529 *Id.*

530 *Id.* at ¶ 6.3.

531 *Id.*

532 *Id.*

533 *Id.* at ¶ 7.19.

534 RPA Expert Report at 3-1.

between a willing buyer and seller on the Valuation Date.<sup>535</sup> RPA’s extended life of mine case increases the life of the mine from 11 to 24 years and includes additional “mineable Resources”, bringing the total volume of ore to be processed to 81.3 million tonnes containing 107.3 million ounces of silver.<sup>536</sup>

239. One of the important variables in the DCF model is the price that will be received over the life of the Project from the sale of silver produced at Santa Ana.<sup>537</sup> FTI applied silver futures contract prices from 2013 to 2015 in the DCF analysis because futures prices represent actual market-based prices for the sale of silver during those years through December 31, 2015.<sup>538</sup> From 2016 and onward, FTI applied a long term price estimate of US\$ 22.21 per ounce (in 2011 dollars) based on a PWC survey of how metal prices would be determined by industry participants in evaluating mining projects.<sup>539</sup> FTI also determined that the appropriate discount rate to convert future after-tax cash flows of the Project to a present value at the Valuation Date is 10.0%, calculated on the basis on Santa Ana’s weighted average cost of capital (“WACC”).<sup>540</sup>

240. Based on the DCF methodology set forth above, FTI calculated the FMV of the Santa Ana Project at the Valuation Date at US\$ 224.2 million, before the addition of interest.<sup>541</sup> With pre-award interest of US\$ 72.4 million calculated 5.0% per annum, compounded annually, up to the estimated date of the award (March 15, 2017), the FMV of Santa Ana is US\$ 296.6 million.<sup>542</sup> In this respect, FTI notes that if it had used an alternative long-term price forecast based on the last futures price as a proxy for the long-term prices – as was recently employed by

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535 FTI Expert Report ¶ 4-32.

536 RPA Expert Report at 14-3.

537 FTI Expert Report ¶ 7.27.

538 *Id.* at ¶ 7.45.

539 *Id.* at ¶¶ 7.46-7.47.

540 *Id.* at ¶ 7.53.

541 *Id.* at ¶ 7.54.

542 *Id.* at Fig. 28.

the tribunal in the *Gold Reserve* case – the FMV of the Santa Ana Project at the Valuation Date would increase to US\$ 333.7 million, before the addition of interest.<sup>543</sup>

241. FTI also used alternative valuation methodologies to check the reasonableness of its damages calculation using the DCF methodology.<sup>544</sup> In particular, FTI analyzed (i) Bear Creek’s shares price data over the period up to the Valuation Date and (ii) reports of analysts covering Bear Creek. Relying on share price data, FTI observed that Bear Creek’s enterprise value (“EV”) declined by approximately 48% more than market indicators over the period immediately prior to and after the issuance of Supreme Decree 032, or approximately US\$ 260.9 million in dollar terms.<sup>545</sup> FTI considers this decline of Bear Creek’s enterprise value over that period compared to market indicators to be indicative of the damages sustained by Bear Creek as a result of Peru’s unlawful actions.<sup>546</sup> FTI also reviewed reports prepared by seven analyst firms covering Bear Creek over the period leading up to the Valuation date and concluded that these reports result in an average estimate of the net asset value (“NAV”) of the Santa Ana Project of US\$ 257.8 million (US\$ 237.5 million when removing the highest and lowest of these analyst estimates).<sup>547</sup> Additionally, FTI reviewed a comprehensive database of mining project transactions but was unable to identify any transaction sufficiently comparable to the Santa Ana Project for the purpose of determining FMV.<sup>548</sup>

## 2. Corani Damages

242. FTI calculated the reduction in value of the Corani Project as a result of Peru’s taking of Santa Ana by referring to the precipitous drop in Bear Creek’s EV over the period from

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<sup>543</sup> *Id.* at ¶ 7.57.

<sup>544</sup> *Id.* at ¶¶ 7.84-7.86.

<sup>545</sup> *Id.* at ¶ 7.78.

<sup>546</sup> *Id.*

<sup>547</sup> *Id.* at ¶ 7.82.

<sup>548</sup> *Id.* at ¶ 7.67.

May 27, 2011, the last trading day before Peru suspended Bear Creek's ESIA process at Santa Ana, to June 27, 2011, the first trading day after Peru issued Supreme Decree 032.<sup>549</sup> FTI estimated the reduction in the value of Corani as a result of the alleged breaches as follows:

We estimated the value of Corani as of June 27, 2011 absent the alleged breaches as: Bear Creek's EV of as of May 27, 2011 (i.e. the date prior to the first alleged breach) of \$543.5 million, less the estimated value attributable to Santa Ana, adjusted for the 7.3% decline in the S&P/TSX Global Mining Index over the period from May 27, 2011 to June 27, 2011.

Less:

The estimated value of Corani given the alleged breaches as: Bear Creek's EV on June 27, 2011 of \$236.2 million less the estimated value of Santa Ana on that date. We have assumed that the June 27, 2011 Bear Creek's EV reflected no value for Santa Ana Project as a result of the Expropriation, thus the full EV of \$236.2 million is attributable to Corani on this date.<sup>550</sup>

243. FTI relied on analysts covering Bear Creek's stock to determine the portion of Bear Creek EV which the market attributed to the Santa Ana Project in the period prior to the alleged breaches.<sup>551</sup> According to the seven analysts reviewed by FTI, the NAV of the Santa Ana Project ranged from 9.1% to 32.2% of the combined NAV of the two Santa Ana and Corani Projects, with a 19.2% average.<sup>552</sup> FTI also noted that shortly after Bear Creek's ESIA at Santa Ana was suspended on May 30, 2011, some of these analysts commented that Bear Creek's share price did not appear to include Santa Ana's implied NAV, thus indicating that any subsequent reduction in Bear Creek's EV would only reflect the NAV of Corani.<sup>553</sup> FTI's calculations with respect to the reduction in value of the Corani Project as described above are presented in the following table:

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<sup>549</sup> *Id.* at ¶ 8.4.

<sup>550</sup> *Id.* at ¶ 8.5.

<sup>551</sup> *Id.* at ¶ 8.7.

<sup>552</sup> *Id.* at ¶ 8.8.

<sup>553</sup> *Id.* at ¶ 8.9.

Description	Calculation	Santa Ana Allocation		
		FMV	19.2% of EV	0.0% of EV
May 27, 2011 BCM EV	[A]	\$ 543.5	\$ 543.5	\$ 543.5
Less: Santa Ana value	[B]	\$ (224.2)	\$ (104.3)	\$ -
May 27, 2011 Corani value	[C] = [A] - [B]	\$ 319.3	\$ 439.1	\$ 543.5
Less: Index decline @ 7.3%	[D] = [C] * [1 - 7.3%]	\$ (23.4)	\$ (32.2)	\$ (39.9)
June 27, 2011 Corani value	[E] = [C] - [D]	\$ 295.9	\$ 406.9	\$ 503.6
Less: June 27, 2011 BCM EV	[F]	\$ (236.2)	\$ (236.2)	\$ (236.2)
<b>Reduction in Corani value</b>	<b>[E] - [F]</b>	<b>\$ 59.6</b>	<b>\$ 170.6</b>	<b>\$ 267.3</b>

**Fig. 11: Summary of Reduction in Value of the Corani Project.**<sup>554</sup>

244. FTI calculated the reduction in value of Corani immediately after the Expropriation Date in a range from US\$ 59.6 million (deducting the full FMV of the Santa Ana Project) to US\$ 267.3 million (without ascribing any value to the Santa Ana Project in Bear Creek's EV).<sup>555</sup> Within this range, FTI calculated the reduction in Corani's value to be US\$ 170.6 million based on the 19.2% average of EV.<sup>556</sup> This is because in FTI's view, the market would have placed a value on Santa Ana, but would not have attributed the full FMV calculated herein as that time.<sup>557</sup>

### 3. Summary of Damages

245. Based on the foregoing, Bear Creek is entitled to an amount of US\$ 296.6 million equal to the FMV of the Santa Ana Project and an additional amount of US\$ 225.6 million representing the reduction in value of the Corani project as of the expected date of the award.<sup>558</sup> Bear Creek is thus entitled to a total amount of damages of US\$ 522.2 million as of the date of the award, as reflected by the table below.

<sup>554</sup> *Id.* at Fig. 27.

<sup>555</sup> *Id.* at ¶ 8.11.

<sup>556</sup> *Id.*

<sup>557</sup> *Id.* at ¶ 8.12.

<sup>558</sup> Bear Creek reserves the right to calculate the FMV of the Santa Ana Project as of the date of the Award, if appropriate.

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

**Fig. 12: Summary of Damages Calculations.**<sup>559</sup>

**C. Costs and Expenses**

246. Claimant also requests that the Tribunal award Bear Creek all of its costs and expenses associated with this arbitration proceeding, including attorneys' fees. Peru has breached its obligations to Bear Creek under the FTA and expropriated (or otherwise impaired by unlawful means) Claimant's investments. Bear Creek would not have incurred these arbitration costs if Peru had complied with its FTA obligations and paid compensation when it was owed. Therefore, in order to place Bear Creek in the same position where it would have been had Peru not breached its international obligations, Bear Creek should be awarded all costs, expenses and attorneys' fees incurred herein. Bear Creek will set forth its full costs submission at the conclusion of this proceeding or as otherwise directed by the Tribunal.

**D. Compound Post-Award Interest**

247. In addition to compensation for all damages it has suffered, Bear Creek requests an award of post-award interest (until the date Peru pays in full) at the highest possible lawful

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<sup>559</sup> FTI Expert Report Fig. 2.

rate, such as Peru's borrowing rate used for pre-award interest. In essence, Peru's failure to pay compensation to Claimant is effectively a loan to Peru. Hence, Bear Creek should be compensated like any other lender to Peru during this period and thus, should receive interest at a rate equivalent to Peru's external cost of debt financing from private lenders.

248. Because international law recognizes that compound interest is the generally-accepted standard in international investment arbitrations, Bear Creek further requests that any award of interest granted by this Tribunal be compounded. The recent practice of international investment tribunals confirms that awarding compound interest is the most accepted and appropriate method of making a claimant whole. Since 2000, at least 15 investment arbitration tribunals have awarded compound interest in cases involving diverse countries, different facts and various industries.<sup>560</sup> As such, it can only be concluded that international law now recognizes the awarding of compound interest as the generally accepted standard for compensation in international investment arbitrations.

249. In *Santa Elena v. Costa Rica*, the Tribunal, awarding compound interest to the claimant, noted that compound interest serves two distinct goals: (i) to ensure that the claimant receives "the full present value of the compensation that it should have received at the time of

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<sup>560</sup> See, e.g., **CL-0146**, *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, Feb. 17, 2000, 15 ICSID Rev.–Foreign Inv. L.J. 169 (2000) ("*Santa Elena Award*") ¶ 104 ("[W]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect [...] the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest [...] [Compound interest] is a mechanism to ensure that the compensation awarded the Claimant is appropriate in the circumstances."); **CL-0147**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002) ("*Wena Award*") ¶ 129; **CL-0038**, *Vivendi II Award* ¶ 9.2.6; **CL-0037**, *Middle East Cement Award* ¶ 174; **CL-0148**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, Jul. 25, 2007, ¶ 103; **CL-0060**, *ADC Award* ¶ 522; **CL-0082**, *Azurix Award* ¶ 440; **CL-0083**, *MTD Award* ¶ 251; **CL-0040**, *Tecmed Award* ¶ 196; **CL-0031**, *Siemens Award* ¶ 399; **CL-0088**, *PSEG Award* ¶ 348; **CL-0149**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000, ¶ 96; **CL-0150**, *Enron Corporation, Ponderosa Assets, L.P., v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶¶ 451-52; **RLA-010**, *CMS Award* ¶ 471. See also **CL-0134**, *S.D. Myers Second Partial Award* ¶ 307; **CL-0151**, *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Damages, May 31, 2002, ¶¶ 89-90; **CL-0105**, *Metalclad Award* ¶ 128.

the taking,” and (ii) to prevent “the State [from being] unjustly [...] enrich[ed] [...] by reason of the fact that the payment of compensation has long been delayed.”<sup>561</sup>

250. Similarly, in *Wena v. Egypt*, the Tribunal explained its reasons for awarding compound interest as follows:

[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations [...] [A]most all financing and investment vehicles involve compound interest. [...] If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.<sup>562</sup>

251. Decisions by investment arbitration tribunals have confirmed that the awarding of compound interest is now the recognized standard of compensation in international law. For example, in *Middle East Cement v. Egypt*, the Tribunal confirmed that international jurisprudence and literature have recently, after detailed consideration, concluded that compound interest was now the international law standard in investment arbitration, noting that “interest is an integral part of the compensation due [...] and that compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law in such expropriation cases.”<sup>563</sup>

252. In *Vivendi*, the Tribunal neatly summarized the prevailing jurisprudence of modern investor-State arbitration by stating that “a number of international tribunals have recently expressed the view that compound interest should be available as a matter of course if

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<sup>561</sup> CL-0146, *Santa Elena Award* ¶ 101.

<sup>562</sup> CL-0147, *Wena Award* ¶ 129.

<sup>563</sup> CL-0037, *Middle East Cement Award* ¶ 174.

economic reality requires such an award to place the claimant in the position it would have been in had it never been injured.”<sup>564</sup>

253. A leading scholar on interest in investment arbitration has suggested several reasons for requiring an award of compound interest.<sup>565</sup> First, the payment of interest furthers the principle of full compensation because it aids in restoring the claimant to the position where it would have been had the respondent not committed the breach.<sup>566</sup> Second, an interest award prevents unjust enrichment of the respondent by requiring it to pay compensation for the benefits received from using the money it wrongfully withheld. Third, interest awards promote efficiency. In the absence of interest, a respondent has an incentive to delay the arbitral proceedings (or payment of the award) because it is able to profit from the use of the claimant’s money during the pendency of the arbitration (or enforcement proceedings).<sup>567</sup> The same principles apply as justifications for awarding compound interest rather than simple interest. As Colón & Knoll state: “Awarding simple interest generally fails to compensate claimants fully

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<sup>564</sup> **CL-0038**, *Vivendi II Award* ¶ 9.2.6.

<sup>565</sup> **CL-0152**, John Y. Gotanda, *A Study of Interest* 4 (Villanova University School of Law Working Paper Series, Working Paper No. 83, 2007) (“Gotanda, *A Study of Interest*”). See also **CL-0153**, John Y. Gotanda, *Compound Interest in International Disputes*, 34 *Law & Pol’y Int’l. Bus.* 393, 397-98 (2003) (“Gotanda, *Compound Interest*”); **CL-0154**, F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 *U.C. Davis L. Rev.* 577, 585 (1987-88) (“F.A. Mann, *Compound Interest*”) (“[I]t is necessary first to take account of modern economic conditions. It is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. This applies, in particular, to bank deposits or savings accounts. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular to business people whose own funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks [...]. If, in accordance with the usual formula, damages are intended to afford *restitutio in integrum* (complete compensation for the wrong suffered) such items of damage should not be excluded.”).

<sup>566</sup> **CL-0152**, Gotanda, *A Study of Interest* at 4; **CL-0153**, Gotanda, *Compound Interest* at 397. See also **CL-0155**, Jeffrey Colón & Michael Knoll, *Prejudgment Interest In International Arbitration*, 4(6) *Transnat’l. Disp. Mgmt.* 10 (2007) (“Colón & Knoll”) (“Because the goal of prejudgment interest is to place parties in the same position that they would have been had the award been made immediately after the cause of action arose, awarding simple interest fails to fully compensate claims. All awards of prejudgment interest should therefore be computed using compound interest.”).

<sup>567</sup> **CL-0152**, Gotanda, *A Study of Interest* at 4. See also **CL-0155**, Colón & Knoll at 8 (“Awarding simple interest generally fails to compensate claimants fully and can create strong incentives for respondents to delay arbitration proceedings and cause harms, thereby wasting resource.”).

and can create strong incentives for respondents to delay arbitration proceedings and cause harms, thereby wasting resource.”<sup>568</sup>

254. The role of interest is to compensate a claimant fully for the delay between the date of harm suffered and the award of damages. Interest is, therefore, “an integral part of compensating the claimant for its injury” and a “properly calculated award should return the claimant to its position had the injury not occurred.”<sup>569</sup> A tribunal’s failure to properly calculate the interest award would “thwart justice for claimants.”<sup>570</sup> In this regard, interest awarded on a compound basis more accurately reflects what the claimant would have been able to earn on the sums owed if it had been paid in a timely manner.<sup>571</sup> Moreover, because the goal of interest (as with compensation generally) is to place the parties in the same position where they would have been had the award been made immediately after the cause of action arose, “awarding simple interest fails to fully compensate claimants,” and “all awards of prejudgement interest should therefore be computed using compound interest.”<sup>572</sup>

255. In sum, modern economic reality, as well as equity, demands that injured parties be compensated on a compound basis in order to be made whole. As such, no doubt remains that international law now recognizes that awarding compound interest is the generally-accepted standard in international investment arbitrations.

## VIII. REQUEST FOR RELIEF

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

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<sup>568</sup> CL-0155, Colón & Knoll at 8.

<sup>569</sup> *Id.* See also CL-0156, Natasha Affolder, *Awarding Compound Interest In International Arbitration*, 12 Am. Rev. Int’l. Arb. 45, 80 (2001).

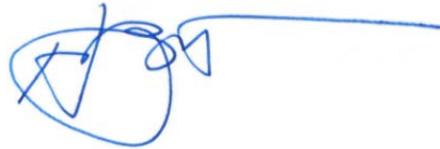
<sup>570</sup> CL-0152, Gotanda, *A Study of Interest* at 31.

<sup>571</sup> CL-0155, Colón & Knoll at 10.

<sup>572</sup> CL-0154, F.A. Mann, *Compound Interest* at 581-82; CL-0145, *Starrett Housing Interlocutory Award*.

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

Respectfully submitted,

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

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