

**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 REJOINDER ON JURISDICTION**

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## I. INTRODUCTION

1. Fraud forms the essence of Peru’s case on jurisdiction. Throughout its Rejoinder on the Merits and Reply on Jurisdiction (“Respondent’s Rejoinder”), Peru maintains that Bear Creek illegally acquired the Santa Ana Concessions through “fraud and deceit,”<sup>1</sup> a “scheme,”<sup>2</sup> and a “ruse”<sup>3</sup> because it used its Peruvian employee, Ms. Villavicencio, “as a front.”<sup>4</sup> In addition to (mis)characterizing Bear Creek’s acquisition structure in these terms, Peru abdicates all responsibility for vetting Bear Creek’s application for a declaration of public necessity, claims that “no one official at MINEM knew the full extent of the relationship between Ms. Villavicencio and Bear Creek,”<sup>5</sup> and blames Bear Creek for failing to “connect-the-dots.”<sup>6</sup>

2. But Peru cannot abscond from liability by feigning ignorance when all of the evidence shows that Peru knew of and approved Bear Creek’s acquisition structure. By the time Peru issued the declaration of public necessity (Supreme Decree 083) and Bear Creek made its investment in Peru by exercising its option under the Option Agreements, Bear Creek had disclosed to Peru, *inter alia*, that: (i) Ms. Villavicencio was a registered employee of Bear Creek; (ii) Ms. Villavicencio was a legal representative of Bear Creek; (iii) Ms. Villavicencio had applied for (and obtained some of) the Santa Ana Concessions; (iv) Ms. Villavicencio and Bear Creek had entered into Option Agreements regarding the future transfer of the Santa Ana Concessions; and (v) preeminent Peruvian mining counsel advised Bear Creek in connection with the Santa Ana Project.

3. At the time, Peru raised no red flags regarding the legality of Bear Creek’s acquisition structure, including its relationship with Ms. Villavicencio. Peru was not troubled in the least by Bear Creek’s acquisition structure because that structure was legal and consistent with Peruvian practice. Peru “does not claim that option contracts *per se* violate Article 71 [of the Peruvian Constitution], or that these particular option contracts (alone and on their faces)

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<sup>1</sup> Respondent’s Rejoinder on the Merits and Reply on Jurisdiction, Apr. 13, 2016, ¶ 364 (“Respondent’s Rejoinder”).

<sup>2</sup> *Id.* at ¶ 36.

<sup>3</sup> *Id.* at ¶ 6.

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

<sup>5</sup> *Id.* at ¶ 66.

<sup>6</sup> *Id.* at ¶ 285.

would violate Article 71.”<sup>7</sup> Peru also knew of and never objected to foreign companies acquiring mining concessions in border areas from Peruvian nationals with whom a relationship of trust existed (*e.g.*, counsel, general manager, etc.) even when acquired *before* obtaining a declaration of public necessity (in contrast to Bear Creek, which acquired the Santa Ana Concessions only *after* Peru issued Supreme Decree 083).

4. Not only did Bear Creek disclose the required information to Peru, but Peru repeatedly confirmed the legality and propriety of Bear Creek’s investment and acquisition structure. Two Peruvian organs (SUNARP, Peru’s public registry where Bear Creek registered the Option Agreements, and INACC, the arm of the Ministry of Energy and Mines responsible for analyzing mining concession applications) independently reviewed the Option Agreements and confirmed their legality. The Ministry of Energy and Mines (MINEM), the Ministry of Defense, and the Council of Ministers reviewed and approved the contents of Bear Creek’s application for a declaration of public necessity—including Ms. Villavicencio’s concession applications, the Option Agreements, the Santa Ana Concessions in Ms. Villavicencio’s name, and Ms. Villavicencio’s power of attorney, the last of which MINEM specifically reviewed. Even after Bear Creek exercised its option, high-ranking Peruvian public officials repeatedly confirmed the legality of Bear Creek’s investment, including the Minister of Energy and Mines, his advisor, the Vice Minister of Energy and Mines, and the Managing Director of the Ministry’s Legal Department. Although Peru attempts to minimize the importance of these decisions and statements, and to circumscribe the very authority of these officials, the Tribunal should give these decisions and statements due weight and consideration.

5. Faced with this factual record, Peru has no choice but to rest its case on two faulty premises. First, Peru argues that the Option Agreements—which, it concedes, do not violate Article 71 “alone and on their faces”—nonetheless must be with an “arm’s length third party.”<sup>8</sup> But (i) Peru cannot point to any provision of Peruvian law that imposes such a requirement; (ii) Peru is incapable of defining what constitutes an “arm’s length” transaction; and (iii) Peru cannot reconcile its position with common Peruvian practice permitting the acquisition of mining concessions from Peruvian nationals having a trust relationship with the foreign investor, as

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<sup>7</sup> *Id.* at ¶ 60.

<sup>8</sup> *Id.*

detailed in Claimant’s Reply Memorial and further in this submission. Second, because Peru knows it cannot demonstrate that Bear Creek was acting in knowing misrepresentation and bad faith, Peru now seeks to move the goalposts by softening its “fraud and deceit” argument into one of alleged “illegality,” in an attempt to lower its burden and standard of proof and to lull the Tribunal into dismissing Bear Creek’s claims. But Peru’s jurisdictional case is dependent entirely on its allegations that Bear Creek knowingly implemented a “scheme” to “circumvent” Article 71 such that Bear Creek’s investment is not worthy of investment treaty protection. For it to succeed, Peru must demonstrate Bear Creek’s deliberate, intentional, and fraudulent violation of Article 71, something that Peru simply cannot prove. As detailed in **Section II** of this Rejoinder, Bear Creek acquired the Santa Ana Concessions in good faith and in accordance with Peruvian law, specifically: (i) Bear Creek *first* obtained Supreme Decree 083, *then* acquired ownership rights in the Santa Ana Concessions; (ii) Bear Creek acquired the Santa Ana Concessions through option agreements, a common and widely-used mechanism in Peruvian mining law; (iii) Bear Creek obtained and followed the advice of preeminent Peruvian mining counsel when making its investment; and (iv) Bear Creek acted openly and transparently and disclosed the Option Agreements and its relationship to Ms. Villavicencio to Peru before Peru granted the concessions to Ms. Villavicencio and before Peru issued Supreme Decree 083.

6. Peru—which bears the burden of proving its affirmative defenses of fraud and bad faith with clear and convincing evidence—has simply not sustained that burden (**Section III**). There was no fraud or bad faith in the making of Bear Creek’s investment, and Peru knew or should have known the full extent of Ms. Villavicencio’s relation to Bear Creek at the time of the making of Bear Creek’s investment and certainly long before June 2011, when Peru issued Supreme Decree 032 revoking Supreme Decree 083. Bear Creek acted in accordance with Peruvian law *before* it made its investment in Peru and *when* it made its investment in Peru.

7. In all events, Peru is estopped from asserting fraud or illegality (**Section IV**). Bear Creek disclosed the manner in which it intended to acquire its investment prior to Peru’s approval of Ms. Villavicencio’s petitions for the Santa Ana Concessions and prior to Peru’s issuance of Supreme Decree 083. Armed with that knowledge, Peru supported Bear Creek’s acquisition of mineral rights over the Santa Ana area. Peru represented to Bear Creek on many occasions and over the course of years that it did not have any concerns regarding the legality of

Bear Creek's investment, and Bear Creek was entitled to rely on these representations in making significant investments to develop the Santa Ana Project. It was only when Peru realized that Supreme Decree 032 was a rank violation of Peruvian and international law that it trumped up its claim that Bear Creek's acquisition of the Santa Ana Concessions over four years earlier was improper. Peru is estopped from doing a *volte-face* and claiming fraud or bad faith on the part of Bear Creek in this arbitration.

8. Finally, contrary to Peru's assertions, Bear Creek owned an investment upon which the Tribunal can base its jurisdiction (**Section V**), and Claimant held the rights upon which it bases its claim (**Section VI**).

9. Accordingly, the Tribunal should affirm its jurisdiction over Bear Creek's claims and should grant the relief requested by Bear Creek in its submissions to date (**Section VII**).

## **II. BEAR CREEK ACQUIRED THE CONCESSIONS IN GOOD FAITH AND IN ACCORDANCE WITH PERUVIAN LAW**

10. In its Counter-Memorial, Peru did not contest that (i) option agreements "that anticipate a future transfer of border zone mining rights to a foreign company"<sup>9</sup> are legal under Peruvian law; (ii) Bear Creek's Option Agreements with Ms. Villavicencio conditioned Bear Creek's exercise of the option on compliance with Peruvian law;<sup>10</sup> (iii) Bear Creek exercised its option under the Option Agreements only after it received Supreme Decree 083;<sup>11</sup> and (iv) there was no illegality surrounding the payment of the purchase price.<sup>12</sup> Peru's sole line of attack was to point to Ms. Villavicencio's status as an employee and legal representative of Bear Creek so

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<sup>9</sup> Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, Oct. 6, 2015, ¶ 47 ("Respondent's Counter-Memorial").

<sup>10</sup> **Exhibit C-0016**, Contracts for the Option to Transfer Mineral Rights between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, Nov. 17, 2004, and Dec. 5, 2004, Arts. 1.1, 2.1, 2.4.1 ("Option Agreements").

<sup>11</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 ("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. *See also* **Exhibit C-0020**, SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 9A, 1, 2 and 3, Feb. 1, 2008; **Exhibit C-0021**, SUNARP Registration Notice of the Transfer Agreement for Santa Ana Concessions 5, 6 and 7, Feb. 28, 2008.

<sup>12</sup> Respondent's Rejoinder ¶ 60.

as to accuse Claimant of engaging in a “scheme” to acquire the Santa Ana Concessions illegally.<sup>13</sup>

11. In its Rejoinder, Peru now shifts its position. In the latest iteration of its claim of illegality, Respondent now argues that it does not object to the employer-employee relationship *per se*, but rather to the alleged absence of an “arm’s length transaction.” As Respondent’s expert, Dr. Eguiguren, and Respondent itself admit, “had Bear Creek had an arm’s length relation with Ms. Villavicencio, the arrangement presumably would not have been a constitutional violation.”<sup>14</sup> But the alleged requirement of an arm’s length transaction does not appear anywhere in Peruvian law and is a murky and undefined standard in all events. Regardless, Respondent’s argument still fails: Bear Creek did not acquire ownership rights, whether directly or indirectly, in the Santa Ana Concessions until **after** it had obtained Supreme Decree 083 (**Section II.A**); Peruvian law does not prohibit option agreements between an employer and an employee (**Section II.B**); as evidence that it acted in good faith, Bear Creek consulted preeminent Peruvian mining counsel when it made its investment (**Section II.C**); Bear Creek’s acquisition structure is consistent with Peruvian practice (**Section II.D**); Bear Creek acted transparently at all times and disclosed the Option Agreements (by public registration and inclusion in the application for a declaration of public necessity) and its relationship to Ms. Villavicencio to Peru prior to obtaining Supreme Decree 083 (**Section II.E**); and Peru’s conduct after it issued Supreme Decree 083 confirmed the legality of Bear Creek’s investment (**Section II.F**).

**A. BEAR CREEK DID NOT ACQUIRE ANY OWNERSHIP RIGHTS IN THE CONCESSIONS UNTIL IT OBTAINED SUPREME DECREE 083**

12. The 2004 Option Agreements did not transfer to Bear Creek any (direct or indirect) ownership rights in the Concessions. By their terms—and Peru does not contend otherwise<sup>15</sup>—the Option Agreements recognize Ms. Villavicencio as the sole owner of the Concessions,<sup>16</sup> who, contrary to Peru’s baseless allegations, was under no obligation,

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<sup>13</sup> Respondent’s Counter-Memorial ¶¶ 207-214.

<sup>14</sup> Respondent’s Rejoinder ¶ 73; **REX-007**, Second Report of Francisco Eguiguren Praeli, Mar. 31, 2016, ¶ 44 (“Eguiguren Second Report”).

<sup>15</sup> Respondent’s Counter-Memorial ¶ 47.

<sup>16</sup> **Exhibit C-0016**, Option Agreements, Art. 1.1.

contractually or otherwise, to follow instructions from Bear Creek.<sup>17</sup> The Option Agreements contemplated only Bear Creek’s *future* acquisition of mining rights,<sup>18</sup> and conditioned Bear Creek’s exercise of its option to purchase the Concessions on first obtaining a supreme decree in accordance with Article 71 of the Constitution.<sup>19</sup> Thus, until Bear Creek obtained Supreme Decree 083, it was not able to acquire ownership of the Concessions. In this regard, Peru cannot dispute that Bear Creek exercised its option on December 3, 2007, *i.e.*, *after* it obtained Supreme Decree 083.<sup>20</sup>

13. In connection with Bear Creek’s registration of the Option Agreements, Peru’s SUNARP Registry Tribunal examined the Option Agreements in 2005 and concluded that these agreements did not confer any ownership rights on Bear Creek because they could not be exercised until **after** issuance of a declaration of public necessity.<sup>21</sup> In fact, Respondent expressly recognizes in its Rejoinder that SUNARP “decided that the option contracts between Bear Creek and Ms. Villavicencio could be recorded on the Registry... because **the option contracts did not by themselves execute a transfer of ownership of the concessions to Bear Creek.**”<sup>22</sup> Although Peru accepts that SUNARP published its decision in the Peruvian official gazette, *El Peruano*,<sup>23</sup> and that SUNARP’s registration of the Option Contracts “puts others on notice,”<sup>24</sup> it nonetheless attempts to minimize the importance of the SUNARP decision and its registration by arguing that SUNARP “does not create and cannot create rights” and that its decision does not constitute precedent.<sup>25</sup> However, this argument misses the point. The SUNARP decision confirmed Bear Creek’s understanding—based on the advice of experienced Peruvian mining counsel—that the structure of its future investment was legal. And even in this

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<sup>17</sup> *Id.* at Art. 2.1.

<sup>18</sup> *Id.* at Arts. 2.1, 2.3.1.

<sup>19</sup> *Id.* at Art. 2.4.1.

<sup>20</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; Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, Jan. 8, 2016, ¶ 19 (“Claimant’s Reply”).

<sup>21</sup> **Exhibit C-0038**, Resolution No. 193-2005-SUNARP-TR-A issued by the SUNARP Registry Tribunal, Nov. 7, 2005 (“SUNARP Decision”).

<sup>22</sup> Respondent’s Rejoinder ¶ 48 (emphasis added).

<sup>23</sup> *Id.* at ¶ 107; **Exhibit C-0038**, SUNARP Decision.

<sup>24</sup> *Id.* at ¶ 107.

<sup>25</sup> *Id.*

arbitration, Peru again confirms that it “**does not claim that ... these particular option contracts (alone and on their faces) would violate Article 71[.]**”<sup>26</sup>

14. Additionally, in the context of the administrative proceeding that examined Ms. Villavicencio’s application for the Santa Ana Concessions, the National Institute of Concessions and Mining Cadaster (*Instituto Nacional de Concesiones y Catastro Minero* or INACC, later, INGEMMET) independently reached the same conclusion as the SUNARP tribunal. On March 8, 2006, INACC issued four different reports confirming that the Karina 9A, 1, 2, and 3 concessions were not located within the protected Aymara Lupaca region and that the application process should continue.<sup>27</sup> INACC consulted the SUNARP registry, verified that the Option Agreement covering the Karina 9A, 1, 2, and 3 mining concessions was registered, reviewed the Option Agreement, and concluded that the transfer of the mining title had not occurred upon signature of the Option Agreement, but **could** occur only at a later time **if** the optionee, Bear Creek, exercised the option in accordance with the conditions set forth in the Agreement.<sup>28</sup> Accordingly, it is common ground between the Parties—as SUNARP confirmed in 2005, INACC confirmed in 2006, and Peru recognized again in 2016—that the Option Agreements did not transfer ownership of the Concessions to Bear Creek and thus cannot constitute a violation of Article 71 of the Peruvian Constitution. These reports also evidence that, contrary to Peru’s contentions,<sup>29</sup> the entity directly in charge of considering and evaluating Ms. Villavicencio’s applications for the concessions, INACC, had full knowledge of the Option Agreements before approving these applications.

15. Peru nonetheless insists that Bear Creek somehow held indirect ownership rights over the Concessions prior to obtaining Supreme Decree 083. To construct this argument, Peru points to Ms. Villavicencio’s agreement to apply for the mining concessions at the request of

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<sup>26</sup> *Id.* at ¶ 60 (emphasis added).

<sup>27</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

<sup>28</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

<sup>29</sup> Respondent’s Rejoinder ¶ 58.

Bear Creek and concludes, without more, that she must have been under Bear Creek's control.<sup>30</sup> But Peru cites no support for this proposition other than its own speculations, and in doing so, Peru wholly ignores that the Option Agreements *on their face* provide that Ms. Villavicencio is under no obligation whatsoever to follow **any** instructions from Bear Creek.<sup>31</sup>

**B. PERU ACCEPTS THAT PERUVIAN LAW DOES NOT PROHIBIT OPTION AGREEMENTS BETWEEN AN EMPLOYER AND AN EMPLOYEE**

16. Although Respondent uses strong language to object to the structure by which Bear Creek acquired the Santa Ana Project (calling it “illegal,” “fraudulent,” “a scheme,” and “deceitful”<sup>32</sup>), it has been unable to articulate why this type of structure or similar structures, commonly used in Peruvian mining practice for the acquisition of concessions in border areas, was not proper in this case.<sup>33</sup> As Professor Bullard explains, as a matter of Peruvian law, there was no fraud or simulation in Bear Creek's acquisition of the Santa Ana mining rights.<sup>34</sup>

17. Respondent accepts that option contracts in the context of Article 71 do not violate the Constitution.<sup>35</sup> In its recent submission, Peru further accepts that entering into an option agreement with an employee is not *per se* a violation of Article 71.<sup>36</sup> But Peru's objection now seems to focus on whether this was an “arm's length” transaction (irrespective of whether Ms. Villavicencio was Bear Creek's employee).<sup>37</sup>

18. There are two fundamental flaws with Peru's newfound assertion. First, Peru fails to define the parameters of an “arm's length” transaction or to explain what would qualify as such a transaction. Would an option agreement between a lawyer and its client qualify as “arm's

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<sup>30</sup> Respondent's Rejoinder ¶¶ 49, 72.

<sup>31</sup> **Exhibit C-0016**, Option Agreements, Art. 2.1.

<sup>32</sup> Respondent's Rejoinder ¶¶ 36, 117, 364; **REX-007**, Eguiguren Second Report ¶ 13, 45.

<sup>33</sup> Third Expert Report of Alfredo Bullard González, May 25, 2016 at ¶ 44 (“Third Bullard Expert Report”).

<sup>34</sup> Third Bullard Expert Report ¶¶ 42-73.

<sup>35</sup> Respondent's Rejoinder ¶ 60 (“To be clear, Respondent does not claim that option contracts *per se* violate Article 71, or that these particular option contracts (alone and on their faces) would violate Article 71 (...).”).

<sup>36</sup> Respondent's Rejoinder ¶ 60.

<sup>37</sup> Respondent's Rejoinder ¶ 73 (“[H]ad Bear Creek had an arm's length relation with Ms. Villavicencio, the arrangement presumably would not have been a constitutional violation”); **REX-007**, Eguiguren Second Report ¶ 44 (“This could be done, as the case may be, by directly bringing a request before the mining authorities, if the concessions have not been claimed, or by entering into a transfer option contract with the holder of such concessions, as long as the person is not subject to a relationship of dependence or subordination with the company.”).

length”? What if the contract were between a mining company and one of its executives? Is the amount paid for the option relevant to this inquiry? How much should be paid for an option contract to be considered “arm’s length”? Respondent provides no answers to any of these questions. Indeed, the standard of “arm’s length” that Respondent advances is vague, ill-defined, and as a result opportunistic: when it suits Respondent, it can fall back on this “arm’s length” argument to purport to undermine otherwise legal transactions. Second, and more importantly, Respondent has failed to show that Peruvian law requires an option contract transferring property in a border area to be an “arm’s length” transaction. There is no such express requirement in Article 71 or elsewhere in Peruvian law. There is also no such requirement in the application process for a declaration of public necessity: if such requirement existed, one would expect Peru to require the applicant to disclose specifically whatever circumstances Peru would not consider “arm’s length” (as discussed above, an amorphous and undefined concept). There is no such requirement under Peruvian law.

19. Notwithstanding the above, Peru insists that the Option Agreements evidence Bear Creek’s “control” over Ms. Villavicencio, such that these agreements do not constitute an “arm’s length” transaction.<sup>38</sup> Peru relies on the opinion of Dr. Rodríguez-Mariátegui, who “explains that the language in the option contracts also shows that Bear Creek had control over the activities related to the mining concessions.”<sup>39</sup>

20. For example, Peru argues that Ms. Villavicencio did not have “any ability to sell the concessions to an unrelated third party while Bear Creek was in the process of applying for the Supreme Decree.”<sup>40</sup> But this is the very essence of an option agreement: the optionor agrees to hold open an option for the exclusive benefit of the optionee for a specified period of time. Peru cannot argue that this aspect of an option agreement evidences “control,” while simultaneously recognizing the constitutionality of option agreements.<sup>41</sup>

21. Peru also points to the purchase price of \$14,000 for the Concessions, which is detailed in the Option Agreements, as evidence that this was not an arm’s length transaction. But

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<sup>38</sup> Respondent’s Rejoinder ¶¶ 57, 60.

<sup>39</sup> Respondent’s Rejoinder ¶ 63; **REX-009**, Second Report of Luis Rodríguez-Mariátegui Canny, Mar. 31, 2016, ¶¶ 71-73 (“Rodríguez-Mariátegui Second Report”).

<sup>40</sup> Respondent’s Rejoinder ¶ 60.

<sup>41</sup> *Id.*

this was neither an unreasonable nor an insufficient purchase price, especially given that other benefits inured to Ms. Villavicencio under the Option Agreements. As Peru itself highlights, Ms. Villavicencio was not required to reimburse Bear Creek for any expenses incurred in maintaining her mineral rights over Santa Ana. This constitutes additional consideration for the option that Bear Creek acquired, not—as Peru asserts—additional evidence of the so-called “restrictive relations” between Ms. Villavicencio and Bear Creek.<sup>42</sup> Moreover, if Bear Creek failed to secure a supreme decree, Ms. Villavicencio retained full (and unencumbered) ownership of the Santa Ana Concessions, which she could then sell. As Peru admits, “it is true that if the exploration was successful, but Bear Creek failed to get the Supreme Decree, then Ms. Villavicencio could sell the concessions.”<sup>43</sup>

22. In all events, Peru’s position that the Option Agreements evidence “control” or the absence of an “arm’s length” transaction is fatal to Peru’s illegality argument (as further detailed in Section II.E below). On Peru’s own case, this supposed illegality was obvious from a plain reading of the text of the Option Agreements. As Respondent explains, its own experts “confirm that the option contracts are evidence of the broader, illegal scheme to violate Article 71.”<sup>44</sup> Dr. Eguiguren analyzes the language of several clauses of the Option Agreements<sup>45</sup> and concludes that “Bear Creek, in fact but covertly, exercised indirect ownership and beneficial ownership of the 7 mining concessions.”<sup>46</sup> Similarly, Dr. Danos states that “the option agreements show that Bear Creek had control over the concessions and the activities that were carried out in the concession area (...).”<sup>47</sup> But if this was the case, then there can be no question that Peru *knew* about this supposed “control” when it issued Supreme Decree 083. Bear Creek submitted the Option Agreements in its application for a declaration of public necessity. While Peru considered Bear Creek’s application for nearly a year, Peru never raised any questions about or objections to the terms of the Option Agreements that Peru attacks today in this arbitration. Moreover, in the context of the proceedings aimed at issuing the concessions in

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<sup>42</sup> *Id.* at ¶ 57.

<sup>43</sup> *Id.* at ¶ 60.

<sup>44</sup> *Id.* at ¶ 391, *citing* **REX-007**, Eguiguren Second Report ¶¶ 50-56 and **REX-006**, Expert Report of Jorge Danos Ordóñez, Apr. 13, 2016, ¶¶ 86-97 (“Danos Expert Report”).

<sup>45</sup> **REX-007**, Eguiguren Second Report ¶¶ 50-56.

<sup>46</sup> **REX-007**, Eguiguren Second Report ¶ 55.

<sup>47</sup> **REX-006**, Danos Expert Report ¶ 97.

favor of Ms. Villavicencio, Peru again, this time through INACC, independently reviewed the Option Agreements in March 2006 and concluded that the transfer of the mining title had not occurred upon the signature of the Option Agreements, but would occur at a later time if the optionee exercised the option in accordance with the conditions set forth in the Option Agreements.<sup>48</sup>

23. Respondent also points to the timing of the Option Agreements to further argue that this was not an arm's length transaction. According to Peru, because Ms. Villavicencio was bound by the terms of the Option Agreements before she acquired title over the concessions,<sup>49</sup> she “never possessed an unencumbered right to the concessions.”<sup>50</sup> But Peru's attack on the timing of the Option Agreements in relation to Ms. Villavicencio's acquisition of the Concessions is also fatal to Peru's illegality argument in this arbitration (*see also* Section II.E below). In 2005, Bear Creek applied to SUNARP for registration of the Option Agreement and SUNARP issued and published its decision that the Option Agreement did not confer ownership of the concessions on Bear Creek later that same year, *i.e.*, *before* Peru granted the Concessions to Ms. Villavicencio in 2006. As Peru's own expert states, the SUNARP Registry's “**main duty** is to **provide the public with knowledge** of the **existence and contents** of the transactions registered there... their primary purpose is that of providing public knowledge.”<sup>51</sup> The existence of the Option Agreement between Ms. Villavicencio and Bear Creek thus became public knowledge once SUNARP published its decision.

24. In fact, while it was considering Ms. Villavicencio's application for the concessions, INACC specifically consulted the SUNARP registry and independently came to the same conclusion as the SUNARP tribunal regarding the Option Agreements, namely that the transfer of a mining title does not occur upon signature of the option agreement, but at a later

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<sup>48</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

<sup>49</sup> Respondent's Rejoinder ¶ 59

<sup>50</sup> *Id.* at ¶ 60

<sup>51</sup> **REX-003**, Expert Report of Luis Rodríguez-Mariátegui Canny, Oct. 6, 2015, ¶ 19 (“Rodríguez-Mariátegui First Report”) (emphasis added).

time when and if the optionee exercises the option.<sup>52</sup> Peru was thus on notice of the timing of the Option Agreements before Peru granted these Concessions to Ms. Villavicencio and this fact was not an issue back then. On the contrary, after reviewing the Option Agreements, the legal department of INACC expressly recommended that the titling proceeding go forward.<sup>53</sup> Furthermore, Bear Creek's application for the declaration of public necessity under Article 71 included copies of Ms. Villavicencio's applications for all of the Santa Ana Concessions (dated April 26, 2004 for the first set of applications and November 29, 2004 for the second set of applications) and copies of the Option Agreements (dated November 17, 2004 and December 5, 2004). Therefore, before Peru issued Supreme Decree 083, Peru was also on notice that Ms. Villavicencio was bound by the terms of the Option Agreements before she acquired title over the concessions and that "she never possessed an unencumbered right to the concessions," and this fact was also not an issue back then.

**C. BEAR CREEK CONSULTED PREEMINENT PERUVIAN MINING COUNSEL IN CONNECTION WITH ITS INVESTMENT**

25. Acting in good faith and seeking to ensure the legality of its acquisition of the mining concessions, Claimant consulted preeminent Peruvian mining counsel in the mining sector in Peru, Estudio Grau, who prepared, among other documents, the Option Agreements, Bear Creek's application for the declaration of public necessity, and the Transfer Agreements. Peru has no counter-argument to the stature of Estudio Grau other than to point out that Dr. Miguel Grau sits on the board of Bear Creek.<sup>54</sup> To the extent that Peru is intimating that Dr. Grau's position on the Board somehow blinded his judgment or caused him or his firm to recommend and implement an illegal transaction, Claimant rejects that insinuation in its entirety.

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<sup>52</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

<sup>53</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006 at 4; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006 at 4; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006 at 4; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006 at 4.

<sup>54</sup> Respondent's Rejoinder ¶ 114.

26. Estudio Grau has represented—and represents—dozens of junior, mid-sized, and major mining companies for many years.<sup>55</sup> The firm’s best mining lawyers, including Cecilia Gonzalez, who is recognized by Chambers Latin America as being one of the top Peruvian lawyers with extensive experience in dealing with the contractual aspects of mining, carefully drafted all of the relevant documents underlying Bear Creek’s acquisition of the Santa Ana Concessions and advised that the acquisition structure was in accordance with Peruvian law and not dissimilar to other common structures used by foreign companies in applying for declarations of public necessity under Article 71.<sup>56</sup>

27. Respondent argues that “receiving advice from a law firm does not mean that the advice is accurate.”<sup>57</sup> However that may be, the Tribunal should give due weight and consideration to the fact that Bear Creek consulted preeminent mining counsel in Peru—counsel who has worked on many of Peru’s largest mining projects<sup>58</sup>—and followed that counsel’s advice. As set forth more fully below (*see infra* Section III.B), this stands in stark contrast to the claimant in *Fraport*, who sought counsel’s advice but then knowingly and secretly acted against that advice,<sup>59</sup> or the claimant in *Mamidoil*, who “chose not to employ a lawyer and not to seek advice on the application requirements [to make a legal foreign investment in the host state].”<sup>60</sup> In the latter case, the *Mamidoil* tribunal “consider[ed] such an approach as unhelpful in fulfilling the obligation to comply with the legal requirements of a host State for foreign investment.”<sup>61</sup> That is not the case here. Bear Creek sought legal advice from “[o]ne of the most established

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<sup>55</sup> **Exhibit C-0199**, Latin Lawyer 250: Latin America’s leading business law firms (2007) at 121; **Exhibit C-0200**, Chambers Latin America: Latin America’s Leading Lawyers for Business (2010) at 556-57.

<sup>56</sup> Witness Statement of Andrew T. Swarthout, May 28, 2015, ¶¶ 16, 24 (“Swarthout First Witness Statement”); Rebuttal Witness Statement of Andrew T. Swarthout, Jan. 6, 2016, ¶¶ 12-13, 25, 34 (“Swarthout Rebuttal Witness Statement”); **Exhibit C-0016**, Option Agreements signed by Cecilia González Guerra, Estudio Grau partner.

<sup>57</sup> Respondent’s Rejoinder ¶ 115.

<sup>58</sup> **Exhibit C-0199**, Latin Lawyer 250: Latin America’s leading business law firms (2007) at 121; **Exhibit C-0200**, Chambers Latin America: Latin America’s Leading Lawyers for Business (2010) at 556-57.

<sup>59</sup> **RLA-091**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award, Aug. 16, 2007, ¶¶ 313, 315, 327 (“*Fraport I* Award”).

<sup>60</sup> **RLA-017**, *Mamidoil Jetoil Greek Petroleum Products Société S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, Mar. 30, 2015, ¶ 388 (“*Mamidoil* Award”).

<sup>61</sup> *Id.* at ¶ 389.

names on the Lima legal scene” that “is also one of the most traditional names in mining, active in the sector since the 1970s.”<sup>62</sup>

28. Respondent attempts to undermine the legal advice that Claimant sought, received, and followed by arguing that Claimant has not provided any contemporaneous written memorandum from Estudio Grau or disclosed what facts were provided to Estudio Grau or what advice was sought.<sup>63</sup> However, the proof is in the proverbial pudding. Estudio Grau drafted the Option Agreements, Bear Creek’s application for a declaration of public necessity, and the Transfer Agreements. Estudio Grau would not risk its reputation and standing in the Peruvian mining sector, earned over decades, by implementing an illegal structure. Moreover, Estudio Grau attorneys signed the Option Agreements and the Transfer Agreements before their registration with SUNARP.<sup>64</sup> Under Peruvian law,<sup>65</sup> when a contract is to be recorded as a public deed before a notary public, it is mandatory that the contract bear an attorney’s signature, demonstrating the attorney’s approval thereof.<sup>66</sup> This is precisely what happened in this case. Estudio Grau’s preparation of the relevant transactional documents, its prominence in the Peruvian mining sector, and its approval of these documents should be decisive evidence of the legality of Bear Creek’s acquisition of the mining concessions and of Bear Creek’s good faith.

29. Finally, Respondent claims that this Tribunal “cannot give any weight” to the memorandum of law prepared by Rodrigo, Elias & Medrano Abogados, another prominent Peruvian law firm Claimant consulted to analyze its rights and the legality of its investment.<sup>67</sup> Respondent contends that because Bear Creek requested the analysis after Peru unlawfully enacted Supreme Decree No. 032, it was “far more likely... prepared for public consumption—for lobbying for the repeal of Supreme Decree No. 032 and/or for litigation.”<sup>68</sup> Respondent’s subjective speculation on the purpose of the memorandum (and its accompanying insinuation

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<sup>62</sup> **Exhibit C-0199**, Latin Lawyer 250: Latin America’s leading business law firms (2007) at 121.

<sup>63</sup> Respondent’s Rejoinder ¶¶ 115, 395.

<sup>64</sup> **Exhibit C-0015**, Transfer Agreements (signed by Edgardo Portaro Van Oordt, Estudio Grau associate); **Exhibit C-0016**, Option Agreements (signed by Cecilia González Guerra, Estudio Grau partner).

<sup>65</sup> **Exhibit C-0253**, Law Decree No 26002, Dec. 26, 1992, Article 57.1.

<sup>66</sup> *Id.*

<sup>67</sup> Respondent’s Rejoinder ¶ 116; **Exhibit C-0142**, Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, Sept. 26, 2011.

<sup>68</sup> Respondent’s Rejoinder ¶ 116.

that Rodrigo, Elias & Medrano Abogados, another law firm with a preeminent mining practice, gave tainted or skewed legal advice) is belied by the tone and nature of the memorandum and its analysis. It is clear from the face of the memorandum that it was not prepared (and Bear Creek had not requested that it be prepared) as an argumentative piece akin to a legal brief or lobbying memorandum, but rather as a neutral analysis from outside counsel on the legality of Bear Creek's actions. The Tribunal therefore should reject Respondent's speculations and accusations, and give the memorandum, which is consistent with the advice previously provided by Estudio Grau, due weight and consideration.

**D. BEAR CREEK'S STRUCTURE IS CONSISTENT WITH PERUVIAN PRACTICE, WHICH PERU REPEATEDLY AFFIRMED BY GRANTING SUPREME DECREES TO FOREIGN INVESTORS USING STRUCTURES SIMILAR TO BEAR CREEK'S**

30. Contrary to what Respondent maintains, Bear Creek has never argued that "Article 71 is a mere technicality that can be ignored or circumvented."<sup>69</sup> What Bear Creek has argued is that it has not ignored nor circumvented this—nor any other—constitutional provision. Bear Creek made its investment in compliance with Peruvian law upon the advice of counsel and according to common practice at the time. In its Reply, Bear Creek demonstrated that other foreign mining companies that acquired concessions in border areas have used structures that resembled Bear Creek's. Bear Creek focused on four such examples, which Peru never denounced as illegal and which never resulted in the repeal of a supreme decree. To the contrary, in one case, Peru issued a supreme decree to authorize retroactively the foreign company's prior acquisition of concessions in border areas.

31. In its Rejoinder, Peru has not been able to deny the facts underlying these four examples, notwithstanding its unfettered access to the complete file presented by the foreign investor to the Peruvian government in each case. Respondent attempts to distinguish these cases from Bear Creek's but as will be explained below, these attempted distinctions are distinctions without a difference.

32. The examples discussed in Claimant's Reply demonstrate how Article 71 actually works in practice. What clearly emerges is that Peru has granted declarations of public necessity embodied in supreme decrees to foreign investors, even after such investors had already acquired

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<sup>69</sup> *Id.* at ¶ 43.

concessions in the border areas (**Section D.1**), and the identity of the seller of the concessions or its relation to the foreign investor has never been relevant for purposes of the public necessity declaration (**Section D.2**). Respondent's current interpretation of Article 71 is inconsistent with previous practice. This is nothing more than Peru's *ex post* attempt to avoid paying compensation for the expropriation of the Santa Ana Project. Peru cannot profit from such capricious (and highly selective) enforcement of a constitutional provision.

33. Peru then alleges that Bear Creek did not need to ask Ms. Villavicencio to apply for the concessions before it obtained the declaration of public necessity because Bear Creek could have requested the concessions directly from INGEMMET while applying for such a declaration. Peru points to seven examples of foreign entities that applied for concessions, had their applications temporarily suspended, then applied for and obtained the required declaration of public necessity, and were then granted the concessions. Respondent maintains that, because Bear Creek did not follow this same path, its acquisition was not proper. But this argument borders on illogical. That this path to acquire mining rights in border areas exists does not mean that Bear Creek's path is improper, particularly when that path has been widely used and repeatedly approved by the competent authorities. Bear Creek has never denied the availability of other mechanisms that foreigners can legally use to acquire rights in border areas. Mr. Flury in his first report even described the same mechanism Peru now presents by way of examples.<sup>70</sup> In all events, as detailed in **Section D.3** below, the seven examples proffered by Peru are irrelevant to the outcome of this case.

**1. While Bear Creek Only Acquired Ownership of the Santa Ana Concessions After the Issuance of Supreme Decree 083, Peru Has Granted Declarations of Public Necessity to Foreign Companies that Acquired Concessions in the Border Areas Prior to Issuance of a Declaration of Necessity**

34. Bear Creek has detailed two specific cases in which foreign investors acquired mining concessions in border areas *before* obtaining a declaration of public necessity. The competent authorities issued such declarations later, without ever questioning or challenging the foreign investor's investment, much less revoking or expropriating such investment. And yet, in Bear Creek's case, Peru strains to portray Bear Creek as having acquired title to the Concessions

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<sup>70</sup> Expert Report of Hans A. Flury, Jan. 5, 2016, ¶¶ 40-47 ("Flury First Expert Report").

prior to issuance of Supreme Decree 083, which it did not, and downplays that Peru has, in fact, issued declarations of public necessity when foreign investors have done exactly that—with Peru’s endorsement. Peru’s desperate attempt to paint Bear Creek as having acted inappropriately, and its utterly implausible story of its purported “discovery” of undisclosed, unidentified “information” or “documents” only one day before issuing Supreme Decree 032, is nothing more than an attempt to shirk its obligation to compensate Bear Creek for its ham-fisted treaty violations.

*a. Supreme Decree 024-2008-DE*

35. Peru issued Supreme Decree 024-2008-DE after the foreign investor (Zijin) already had acquired mining rights in border areas.<sup>71</sup> This acquisition was widely publicized, and was known to Peru<sup>72</sup> when it granted the declaration of public necessity through an authoritative supreme decree with retroactive effect.<sup>73</sup> This situation did not raise any concerns, however.

36. Respondent and its experts contend that this case is not analogous to Bear Creek’s<sup>74</sup> and raise a number of arguments in this regard. But they offer no adequate explanation for the one distinguishing feature that defeats Peru’s interpretation of Article 71: in stark contrast to Zijin, Bear Creek acquired the Santa Ana Concessions *after* the issuance of the authoritative supreme decree embodying the declaration of public necessity, not *before*, and yet Peru attacks Bear Creek’s transaction—not Zijin’s—as illegal.<sup>75</sup>

37. Instead of addressing this key point which is fatal to Peru’s current reading of Article 71, Respondent focuses on other distinctions that are as inconsequential as they are

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<sup>71</sup> Xiamen Xijin Tongguan Investment and Development Co., Ltd. (“Zijin”), a Chinese investor, was granted the authoritative supreme decree after it was already the indirect owner the Río Blanco Copper Mining Project. *See* Claimant’s Reply ¶¶ 47-53.

<sup>72</sup> **Exhibit C-0205**, Monterrico Metals Plc’s Annual Report 2007 at 6, 54; **Exhibit C-0206**, Archived Title of Entry N° C00011 of File N° 11352728 of the Corporate Registry of the Public Registry Office of Lima at 7-8; **Exhibit C-0207**, *The new CEO of Monterrico had an audience with Peru’s minister of Energy & Mines*, The Zijin Consortium Press Release, Jun. 11, 2007; **Exhibit C-0208**, *China’s ambassador in Peru Gao Zhengyue investigated Majaz company*, The Zijin Consortium Press Release, Jun. 11, 2007.

<sup>73</sup> **Exhibit C-0204**, Supreme Decree 024-2008-DE, Dec. 27, 2008.

<sup>74</sup> Respondent’s Rejoinder ¶¶ 84-87; **REX-009**, Rodriguez-Mariátegui Second Report ¶ 44.

<sup>75</sup> Also, social conflict in the area opposing the development of the mining project acquired by Zijin was not an impediment for the issuance of the authoritative decree in this case. **Exhibit C-0254**, Peruvian Congress, *Legality and Problems of the company Minera Maijaz in the Territories of the Segunda y Cajas, and Yanta Rural Communities in the Provinces of Huancabamba and Ayabaca in the Piura Region*, May 9, 2008.

irrelevant to the issue at hand. First, Peru contends that, in Zijin’s case, the State had already authorized another foreign investor to acquire mining rights in the same border area. In contrast, in Bear Creek’s case, Peru argues that it had not yet decided whether to have any foreign investor in the border area. However, this argument has no merit. The declaration of public necessity is specific to a foreign investor (and requires a specific favorable opinion by the Chairman of the Joint Chiefs of Staff of the Peruvian Armed Forces). Thus, when a foreign investor transfers its rights to another foreign investor, the new investor must apply to the State to obtain its own declaration of public necessity. As Mr. Flury describes, this is explicitly stated in the authoritative decrees.<sup>76</sup> Thus, irrespective of whether a foreign investor selling its concessions in a border area was already awarded a declaration of public necessity, the purchasing foreign investor must apply for its own declaration. This is precisely what Zijin did. This requirement allows Peru to maintain control over the identity of the specific foreign investor in a border area.

38. Second, Peru attempts to distinguish Zijin’s case from Bear Creek’s by focusing on the fact that Zijin’s acquisition was a takeover (forced sale).<sup>77</sup> This distinction has no basis in Article 71, however. Article 71 requires a declaration of public necessity without regard to the modality of the acquisition structure.<sup>78</sup> Thus, the fact that the acquisition was the result of a forced sale is wholly irrelevant.

*b. Supreme Decree 021-2003-EM*

39. Supreme Decree 021-2003-EM is another example of an authoritative supreme decree granted *after* a foreign investor already had acquired mining rights in border areas.<sup>79</sup> In that case, Minera IMP Perú S.A.C. (“IMP”), a Peruvian company with foreign shareholders

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<sup>76</sup> Second Expert Report of Hans A. Flury, May 25, 2016 (“Flury Second Expert Report”), ¶ 29 (“the declaration of public necessity is specific for each foreign investor. In fact, the authoritative supreme decrees expressly so provide, in a consistent manner. Thus, the authoritative decree obtained by the previous owner in this first example expressly established as is usual in this type of decree, that in order to transfer the mining rights referred to in this decree to another foreigner, a new authoritative decree was needed.”).

<sup>77</sup> Respondent Rejoinder ¶¶ 85, 87.

<sup>78</sup> Flury Second Expert Report ¶¶ 27-28 (“The fact that the transfer of the mining concessions is a result of a forced sale or that a declaration of public necessity has been previously issued in favor of another foreign investor for the same project, as is mentioned, is not relevant because an authoritative supreme decree is always required... the Ministry of Energy and Mines must issue a declaration of public necessity regardless of what is the mechanism by means of which the foreign investor performs the acquisition. There is no specific provision relating to certain acquisition methods providing different rules for one approach or another.”).

<sup>79</sup> Claimant’s Reply ¶¶ 54-59.

(IMPSA Resources BVI Inc.), already owned mining concessions (Río Tabaconas Project) in a border area when it obtained a declaration of public necessity.<sup>80</sup>

40. Again, Peru does not contest that the authoritative decree was granted *after* the acquisition had taken place.<sup>81</sup> Rather, Peru only argues that, *at this time*, IMP’s mining concessions cannot revert back to the State (as prescribed for cases of breach of Article 71) because they have long since expired.<sup>82</sup> This argument is weak, at best, and without merit. Although it may be true that, at this time, there is nothing that Peru can do to sanction a breach, it still remains that Peru awarded—yet again—a declaration of public necessity to a foreign investor that already owned mining concessions in the border zones. Also, these mining rights were in force for approximately 11 years after such decree was issued, and were never challenged by Peru in all that time.<sup>83</sup>

41. As these examples make clear, rather than challenging the acquisition made by foreign investors like Zijin or IMP that owned mining concessions in border areas without a declaration of public necessity in hand, Peru approved their acquisitions by granting them such declarations.<sup>84</sup> This stands in stark contrast to Peru’s treatment of Bear Creek, a foreign investor

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<sup>80</sup> **Exhibit C-0211**, Supreme Decree 021-2003-EM, Jun. 26, 2003; **Exhibit C-0212**, INGEMMET Unique File for mining concession “Don José” N° 01-01751-00 at 2-5, 31-33.

<sup>81</sup> Respondent acknowledges that the mining rights were “transferred to IMP, a foreign-controlled company, prior to IMP obtaining the June 2003 declaration of public necessity.” Respondent’s Rejoinder ¶ 88.

<sup>82</sup> Respondent’s Rejoinder ¶ 89; **REX-009**, Rodríguez-Mariátegui Second Report ¶ 51.

<sup>83</sup> The Supreme Decree was issued on June 26, 2003. **Exhibit C-0211**, Supreme Decree 021-2003-EM, Jun. 26, 2003. The mining concession “Don Jose” expired on April 9, 2015. **Exhibit C-0212**, INGEMMET Unique File for mining concession “Don José” N° 01-01751-00 at 101.

<sup>84</sup> These are only a few illustrative examples. Certainly, many more similar cases can be found. Such is the case, for example, of the Supreme Decree 010-2007-EM. **Exhibit C-0255**, Supreme Decree 010-2007-EM, Feb. 28, 2007. In that case, the foreign investor, Molinetes (BVI) Ltd., was authorized to acquire mining rights located in the border areas indirectly through the acquisition of shares in a Peruvian corporation called Compañía Minera Molinetes S.A.C. This Peruvian mining corporation had acquired mining rights on December 2006, more than two months before the authoritative decree was issued. **Exhibit C-0256**, INGEMMET Unique File for mining concessions “Molinetes 2004” N° 03-00201-04 at 41-42. It is clear that this Peruvian corporation was controlled by the foreign investor since its incorporation in 2004. This is obvious not only by the name of the Peruvian corporation, but also because its main shareholder and general manager was precisely the person authorized to represent the foreign investor before MINEM for purposes of obtaining the public necessity declaration. **Exhibit C-0257**, Entry A00001 of File N° 11707970 of the Corporate Registry of the Public Registry Office in Lima; **Exhibit C-0258**, Archived File of Entry A00001 of File N° 11858626 of the Corporate Registry of the Public Registry Office in Lima at 5-6. As in all previous cases Bear Creek has noted, this case also had the participation of reputable Peruvian counsel, in this case from Estudio Rodrigo, Elías & Medrano. *See* **Exhibit C-0259**, Archive File of Entry A00001 of File N° 11858626 of the Corporate Registry of the Public Registry Office in Lima at 2-3, mentioning Francisco Tong Gonzalez and Luis Carlos Rodrigo Prado.

that did not own mining concessions in a border area until *after* it obtained a declaration of public necessity: Peru revoked its supreme decree embodying the declaration of public necessity overnight, after allegedly discovering a “possible” violation of Peruvian law the day before, without affording Bear Creek notice or an opportunity to be heard.

**2. The Identity of the Peruvian Seller of Concessions or Its Relation to the Foreign Investor Has Never Been Relevant For Purposes of the Public Necessity Declaration under Article 71**

42. Respondent alleges that “it is neither lawful nor common practice for a foreign company to acquire mining concessions in the border zone through a proxy (a Peruvian national) under its control before obtaining the constitutionally-required authorization.”<sup>85</sup> Despite the fact that Bear Creek did not acquire title to the Santa Ana Concessions until after obtaining a declaration of public necessity, three of the examples presented in Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction disprove Respondent’s contention. In each case, the foreign investor acquired the mining rights from a Peruvian national. In each case, there are strong indicators that the Peruvian national was acting on instruction of the foreign investor when acquiring such mining rights. In each case, the declaration of public necessity embodied in an authoritative supreme decree was granted. If the Peruvian government’s present concern about the relationship between a Peruvian national selling the concessions and a foreign investor purchasing them were genuine, these three transactions should have raised some concerns on Peru’s part. However, until now, Peru never expressed any concern about this issue. In fact, it is common practice in the Peruvian mining industry to see a foreign investor ask a Peruvian national to obtain mining rights that it can later transfer to the foreign investor once the public necessity declaration has been obtained. This type of structure has never been problematic in Peruvian mining practice.<sup>86</sup>

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<sup>85</sup> Respondent’s Rejoinder ¶ 36.

<sup>86</sup> Flury Second Expert Report ¶¶ 31-32, 38, 42.

a. *Supreme Decree 021-2003-EM*

43. In the case of the IMP supreme decree discussed above, well-known Peruvian mining lawyer, Catalina Tomatis, requested the mining concessions at issue, which she later transferred to IMP.<sup>87</sup>

44. Respondent and its mining expert contend that Bear Creek has failed to prove that Peru was aware that Ms. Tomatis was acting on behalf of IMP when she requested the mining concessions or when Peru approved the declaration of public necessity.<sup>88</sup> As Mr. Flury explains, however, it is common practice for Peruvian lawyers to directly request mining concessions for purposes of assisting their clients in ultimately acquiring these concessions.<sup>89</sup> Here, the Peruvian government knew that Ms. Tomatis had acquired the concessions, and it knew that IMP intended to acquire these concessions from Ms. Tomatis since IMP applied for a public necessity declaration with respect to these concessions.<sup>90</sup> Yet, despite the participation of a well-known mining lawyer in this transaction who was obviously acting at her client's direction, and the common practice in the Peruvian mining industry evoked above, Peru did not dig deeper into the relationship between the Peruvian national and the foreign investor precisely because this was common—and well-accepted—practice.

b. *Supreme Decree 041-94-EM*

45. Hugo Forno Flórez, a well-known corporate lawyer with a close relationship with Compañía Minas Ubinas S.A. (“CMU”) (he was CMU's general manager and legal representative),<sup>91</sup> obtained mining concessions in the border zones in his own name.<sup>92</sup> Mr. Forno

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<sup>87</sup> **Exhibit C-0212**, INGEMMET Unique File for mining concession “Don José” N° 01-01751-00 at 39 to 40.

<sup>88</sup> Respondent's Rejoinder ¶ 89; **REX-009**, Rodríguez-Mariátegui Second Report ¶ 50.

<sup>89</sup> Flury Second Expert Report ¶¶ 31-32, 38.

<sup>90</sup> **Exhibit C-0212**, INGEMMET Unique File for mining concession “Don José” N° 01-01751-00 at 39-40.

<sup>91</sup> According to the Public Record, Mr. Forno was the general manager and a legal representative of this company. He had formerly also been a shareholder of CMU. Under Peruvian law, everyone is presumed to know the contents of the Public Registry. Also, it is hard to believe that the government did not perform at least a basic review of the registry file of the company before granting the public necessity declaration. **Exhibit C-0218**, Archived File of Entry N° 10 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa at 6; **Exhibit C-0219**, File 02002531 of the Corporate Registry of the Public Registry Office in Lima at 1-2; **Exhibit C-0220**, Entry N° 4 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa at 3.

<sup>92</sup> **Exhibit C-0221**, INGEMMET Unique Files for mining concessions “La Solución” N° 14003327x01 at 66-72; **Exhibit C-0217**, Supreme Decree 041-94-EM, Oct. 6, 1994.

then transferred these mining concessions to CMU once CMU obtained the declaration of public necessity through Supreme Decree 041-94-EM.<sup>93</sup>

46. Respondent attempts to distinguish this case from Bear Creek's on two counts: (1) Mr. Forno acquired the concessions from a third party, not by applying directly for them before INGEMMET;<sup>94</sup> and (2) the CMU concessions have expired.<sup>95</sup> Neither argument advances Peru's case, however.<sup>96</sup>

47. First, as stated earlier in this submission, Article 71 of the Peruvian Constitution does not distinguish between acquiring mining rights in "free areas" (areas not occupied by existing concessions) or acquiring mining rights from third parties. Indeed, Mr. Flury states that "this distinction is not relevant given that Article 71 of the Constitution does not distinguish between mining rights that are acquired (i) from third parties who were the original petitioners, (ii) from third parties who, in turn, acquired them from another third party, or (iii) by requesting them directly from the State through a petition. In any of these cases, the important issue is that an authoritative supreme decree is required, and in practice, given the previously mentioned reasons, the same types of structures are often used to acquire mining rights in any of these situations."<sup>97</sup> In all of these cases, a foreign investor must seek a public necessity declaration. In all of these cases, the application process is the same, and the State's considerations in deciding whether to grant such declaration are the same.<sup>98</sup> Second, even though the CMU concessions expired due to lack of payment of the mining fees, it remains that these mining concessions were in force for more than 8 years after the issuance of the declaration of public necessity.<sup>99</sup> Thus, the Peruvian government had ample opportunity to challenge this acquisition if it had been problematic, yet it never did so.

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<sup>93</sup> **Exhibit C-0217**, Supreme Decree 041-94-EM, Oct. 6, 1994.

<sup>94</sup> Respondent's Rejoinder ¶ 92; **REX-009**, Rodríguez-Mariátegui Second Report ¶¶ 53.

<sup>95</sup> Respondent's Rejoinder ¶ 95; **REX-009**, Rodríguez-Mariátegui Second Report ¶ 54.

<sup>96</sup> Flury Second Expert Report ¶¶ 37-39.

<sup>97</sup> Flury Second Expert Report ¶ 37.

<sup>98</sup> See Procedure No. 53 in the Texto Único de Procedimientos Administrativos del Ministerio de Energía y Minas (TUPA) (Bullard 034).

<sup>99</sup> The Supreme Decree was issued on October 6, 1994. **Exhibit C-0217**, Supreme Decree 041-94-EM. The mining concessions expired on November 19, 2002. **Exhibit C-0221**, INGEMMET Unique Files for mining concessions "La Solución" N° 14003327x01 at 139.

48. Like with the prior example (IMP), Respondent argues that Bear Creek has failed to prove that an arrangement between CMU and Mr. Forno existed<sup>100</sup> or that Peru was aware of the acquisition structure when it granted the declaration of public necessity through an authoritative supreme decree.<sup>101</sup> But Peru’s argument does not withstand scrutiny. Mr. Forno is not only a well-known Peruvian lawyer, but he was also the general manager and legal representative of CMU.<sup>102</sup> Peru’s assertion that, at the time, it did not verify or investigate Mr. Forno’s relationship to CMU only further confirms that the nature of such relationship—between *a Peruvian national* and a foreign investor—was never relevant to Peru for purposes of determining whether to issue a declaration of public necessity under Article 71 even where, as was the case with CMU, the former acted as the latter’s general manager and legal representative.<sup>103</sup> In the present case, however, Bear Creek and the Peruvian citizen ensured no title could pass to Bear Creek prior to and without a declaration of public necessity.

*c. Supreme Decree 013-97-EM*

49. The final example is the acquisition by Empresa Minera Coripacha S.A. (“EMC”) of mining concessions related to the Rio Blanco project located in a border area.<sup>104</sup> EMC, incorporated by three partners of a well-known Peruvian law firm (Rubio, Leguia & Normand),<sup>105</sup> obtained 18 mining concessions in border areas.<sup>106</sup> Rio Blanco Exploration LLC (“Rio Blanco US”), a U.S. company, requested a declaration of public necessity with respect to

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<sup>100</sup> Respondent’s Rejoinder ¶ 92.

<sup>101</sup> *Id.* at ¶ 93.

<sup>102</sup> **Exhibit C-0220**, Entry N° 4 of File N° 01186245 of the Corporate Registry of the Public Registry Office of Arequipa at 3.

<sup>103</sup> Flury Second Expert Report ¶ 38.

<sup>104</sup> Claimant’s Reply ¶¶ 62-64.

<sup>105</sup> **Exhibit C-0222**, Archived File of Entry N° 001 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima at 6 and 7. EMC was incorporated on August 24, 1993.

<sup>106</sup> **Exhibit C-0224**, INGEMMET Unique Files for mining concessions “Mojica 1” N° 01-02296-93 at 2 to 11 and 35 to 36; “Mojica 2” N° 01-02297-93 at 2 to 11 and 36 to 37; “Mojica 3” N° 01-02298-93 at 2 to 11 and 34 to 35 ; “Mojica 4” N° 01-02299-93 at 2 to 11 and 35 to 36; “Mojica 9” N°01-02304-93 at 2 to 10 and 34 to 35; “Mojica 10” N° 01-00793-95 at 2 to 11 and 32 to 34; “Mojica 11” N° 01-00792-95 at 2 to 12 and 53 to 55; “Mojica 12” N° 01-07757-95 at 2 to 10 and 26 to 28; “Mojica 13” N° 01-08578-95 at 2 to 13 and 31 to 33; “Mojihua 1” N° 01-02424-93 at 2 to 12 and 35 to 36; “Mojihua 2” N° 01-02425-93 at 2 to 8 and 35 to 36; “Mojihua 3” N° 01-02426-93 at 2 to 8 and 34 to 35; “Mojihua 4” N° 01-02427-93 at 2 to 8 and 35 to 36; “Mojihua 5” N° 01-02428-93 at 2 to 8 and 35 to 36; and, “Mojihua 6” N° 01-02429-93 at 2 to 8 and 35 to 36.

these concessions. Once Rio Blanco US obtained the authoritative Supreme Decree 013-97-EM,<sup>107</sup> it acquired EMC's shares from the three Peruvian lawyers.<sup>108</sup>

50. As with the prior examples, Respondent does not deny these facts. It only argues that there is no definitive proof that the partners Rubio, Leguia & Normand, Peruvian citizens, were acting on behalf of the foreign company (their client).<sup>109</sup> This argument rings hollow. The competent Peruvian authorities easily could have obtained proof at the time if this fact—the nature of the relationship between the Peruvian concession-holder and the foreign investor—had been relevant to the public necessity analysis. Also, as Mr. Flury explains, it was common practice for lawyers and their clients to enter into such arrangements, and Peru must have been aware of it.<sup>110</sup>

51. In sum, these three examples—IMP, CMU, and EMC—prove that Peru has never objected to or been concerned with the existence of a close relationship between the Peruvian individual or entity holding mining rights in a border area and the foreign investor to whom such rights were transferred. Historically, Peru has not taken issue with foreign investors purchasing concessions from their attorneys or even from their own general manager. In such circumstances, Respondent's eleventh-hour condemnation of Ms. Villavicencio's employee relationship to Bear Creek<sup>111</sup> is disingenuous, at best.

52. Finally, Respondent asserts that “the errors allegedly committed by the State in these cases do not constitute a source of law.”<sup>112</sup> But Claimant has not alleged that the State committed any error in any of these cases. To the contrary, it is Claimant's position that these cases exemplify the State's correct and regular application of Article 71 in practice, and confirm that Bear Creek's acquisition structure was on par with such practice, not a nefarious scheme.

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<sup>107</sup> **Exhibit R-0283**, Supreme Decree 013-97-EM, July 16, 1997.

<sup>108</sup> **Exhibit C-0228**, Archived File of Entry N° 0010 of File N° 02021527 of the Corporate Registry of the Public Registry Office of Lima at 4, July 5, 1998.

<sup>109</sup> Respondent Rejoinder ¶ 97.

<sup>110</sup> Flury Second Expert Report ¶ 42 (“[T]his example, along with the previous case of CMU, confirm my opinion that this type of practice is common in the Peruvian mining industry, which is not illegal or prohibited. The information regarding the relationship between foreign companies and attorneys was obvious and in any case was easily accessible to the competent authority. However, the officials of the Ministry of Energy and Mines were not worried about having many details because there is no illegality in this type of operation.”).

<sup>111</sup> Respondent's Rejoinder ¶¶ 36-39.

<sup>112</sup> *Id.* at ¶ 83.

### 3. Peru's Seven Examples Have No Bearing on the Legality of Bear Creek's Acquisition

53. Respondent argues that Bear Creek should have applied directly for the concessions before INGEMMET while seeking a public necessity declaration. Peru points to seven examples proposed by its expert, Dr. Rodríguez-Mariátegui, in which foreign investors applied for concessions directly with INGEMMET, and had their applications suspended until they sought and obtained the requisite declarations.<sup>113</sup> However, these examples only show that filing directly with INGEMMET was *one* legal option available to foreign investors—which Mr. Flury already described in his first report<sup>114</sup>—not that it was the *only* legal option available. It does not necessarily follow from these seven examples that no other legal option exists. It should be noted that Peru fails to explain how a foreign investor would proceed to acquire existing concessions.

54. Claimant does not dispute that Bear Creek *could* have applied directly for the Santa Ana Concessions; however, as explained in Mr. Flury's first report, this entailed certain business risks.<sup>115</sup> Thus, as many other foreign companies did, Bear Creek opted for a different mechanism to acquire the concessions. Rodrigo, Elias & Medrano Abogados, a top tier Peruvian

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<sup>113</sup> *Id.* at 78-82.

<sup>114</sup> Flury First Expert Report ¶ 38 (“*to access mining concessions in border areas, foreigners usually opt for one of the following alternatives: (i) the mining petitorio is filed directly by a foreigner by following the corresponding procedure of INGEMMET, or (ii) the foreigner is ensured that it can acquire the mining concession in the future through some contractual arrangement while the required authorization is being processed before the MINEM.*”) (emphasis added).

<sup>115</sup> Flury First Expert Report ¶¶ 46-47 (“one of the risks is that third parties that are aware of the foreign investor’s intention to take a certain area (something that they will learn from the foreign investor’s own petitorio), shall themselves be attempting to be the beneficiaries of the mining concession title and could take advantage of the delays in the processing of the authoritative supreme decree. This creates a situation of uncertainty and eventual conflict of interest (between local investors and foreign investors) that may risk the foreign investor’s ability to obtain the mining right title. It is important to understand that the information – and the confidential handling thereof when so appropriate – is very valuable in the mining industry. Thus, disclosing an interest in a certain area to third parties could harm an investor in many ways, if said investor is at the same time subject to a condition to actively materialize such interest. During the period in which the petitorio is suspended due to the lack of an authoritative decree, for more than 7 months, and given a third-party request, the risk is that INGEMMET shall be obligated to fulfill the principles imposed by the LPAG, which aim for proceedings to be completed in a diligent and timely manner.”); Flury Second Expert Report ¶¶ 14-18.

law firm highly recommended in the mining industry, confirmed that Bear Creek’s mechanism acquisition was “absolutely reasonable and legitimate.”<sup>116</sup>

55. The fact that the risks described by Mr. Flury did not materialize in the seven cases proffered by Peru does not mean that such risks do not exist. Mr. Flury, an attorney with more than 30 years of experience in the Peruvian mining sector, has explained the reality of such risks and how they are perceived by investors operating in the industry.<sup>117</sup> The examples described in Sections II.D.1 and II.D.2 above confirm this.

56. Respondent points only to seven examples when 35 authoritative decrees have been issued since 1994 regarding mining concessions.<sup>118</sup> Respondent incorrectly focuses its argument on the cases that refer to areas not occupied by existing concessions (“free areas”). Respondent fails, however, to mention any case in which individuals or entities with a relationship of trust with the foreign investor filed the applications for the concessions (*petitorios*) on free areas, thereby implying that no such cases exist. But this is incorrect. Aside from the cases described above ¶¶ 35-52, there are at least three additional cases.

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<sup>116</sup> **Exhibit C-0142**, Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, Sept. 26, 2011 at 4.

<sup>117</sup> Flury Second Expert Report ¶ 18.

<sup>118</sup> **Exhibit C-0217**, Supreme Decree 041-94-EM, Oct. 6, 1994; **Exhibit C-0259**, Supreme Decree 041-95-EM, Dec. 20, 1995; **Exhibit R-0283**, Supreme Decree 013-97-EM, July 16, 1997; **Exhibit C-0260**, Supreme Decree 017-97-EM, Aug. 28, 1997; **Exhibit C-0261**, Supreme Decree 024-97-EM, Nov. 13, 1997; **Exhibit C-0262**, Supreme Decree 025-97-EM, Nov. 13, 1997; **Exhibit C-0263**, Supreme Decree 037-98-EM, Nov. 5, 1998; **Exhibit C-0264**, Supreme Decree 025-99-EM, Jun. 22, 1999; **Exhibit C-0265**, Supreme Decree 026-99-EM, Jun. 22, 1999; **Exhibit C-0266**, Supreme Decree 001-2001-EM, Jan. 3, 2001; **Exhibit R-0247**, Supreme Decree 017-2002-EM, May. 2, 2002; **Exhibit C-0211**, Supreme Decree 021-2003-EM, Jun. 26, 2003; **Exhibit R-0281**, Supreme Decree 022-2003-EM, Jun. 26, 2003; **Exhibit R-0280**, Supreme Decree 023-2003-EM, Jun. 26, 2003; **Exhibit R-0251**, Supreme Decree 014-2005-EM, Apr. 21, 2005; **Exhibit C-0267**, Supreme Decree 026-2005-EM, July 12, 2005; **Exhibit FLURY 022**, Supreme Decree 030-2006-EM, May 22, 2006; **Exhibit FLURY 021**, Supreme Decree 060-2006-EM, Oct. 26, 2006; **Exhibit FLURY 020**, Supreme Decree 062-2006-EM, Oct. 28, 2006; **Exhibit FLURY 019**, Supreme Decree 010-2007-EM, Feb. 28, 2007; **Exhibit FLURY 018**, Supreme Decree 040-2007-EM, July 18, 2007; **Exhibit FLURY 017**, Supreme Decree 042-2007-EM, Aug. 6, 2007; **Exhibit C-0004**, Supreme Decree 083-2007-EM, Nov. 28, 2007; **Exhibit FLURY 016**, Supreme Decree 017-2008-EM, Mar. 25, 2008; **Exhibit FLURY 014**, Supreme Decree 032-2008-EM, Jun. 13, 2008; **Exhibit FLURY 015**, Supreme Decree 033-2008-EM, Jun. 13, 2008; **Exhibit FLURY 012**, Supreme Decree 024-2008-DE, Dec. 1, 2008; **Exhibit C-0268**, Supreme Decree 061-2008-EM, Dec. 13, 2008; **Exhibit FLURY 013**, Supreme Decree 063-2008-EM, Dec. 24, 2008; **Exhibit FLURY 010**, Supreme Decree 012-2009-EM, Feb. 12, 2009; **Exhibit FLURY 011**, Supreme Decree 013-2009-EM, Feb. 12, 2009; **Exhibit FLURY 009**, Supreme Decree 072-2009-EM, Oct. 21, 2009; **Exhibit FLURY 008**, Supreme Decree 080-2009-EM, Nov. 29, 2009; **Exhibit FLURY 007**, Supreme Decree 085-2009-EM, Dec. 13, 2009; **Exhibit C-0269**, Supreme Decree 025-2011-EM, May 18, 2011.

57. Two cases are related to Peñoles, a well-known Mexican mining group. In 2003, Luz Anggelina Correa de la Mata, the legal representative of Minas Peñoles de Perú S.A.,<sup>119</sup> a Peruvian subsidiary of the Mexican group,<sup>120</sup> filed several petitorios.<sup>121</sup> After the concessions had been issued to Luz Anggelina Correa de la Mata,<sup>122</sup> MINEM issued two public necessity declarations in 2006<sup>123</sup> and 2007,<sup>124</sup> thereby authorizing Minera Peñoles del Perú S.A. to acquire those mining rights. Later, on November 2007, Ms. Correa de la Mata transferred three of these mining rights in favor of Minera Peñoles del Perú S.A.<sup>125</sup>

58. The case of Resources Cristobal Inc. is similar. In a single authoritative supreme decree, this Canadian company was authorized to acquire several mining rights.<sup>126</sup> Some of these mining rights had been petitioned directly by its subsidiary; however, one of these rights had been petitioned by a Peruvian individual.<sup>127</sup> This Peruvian individual was also a shareholder and a member of the Board of Compañía Minera Cristobal Resources Peru S.A., and the other

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<sup>119</sup> **Exhibit C-0270**, Peruvian National Tax Authority (SUNAT) Public Information of Legal Representatives of Minera Peñoles de Peru S.A.; **Exhibit C-0271**, Entry C002 of File N° 40215 of the Mining Registry of the Public Registry Office in Lima at 13-14; **Exhibit C-0272**, Entry C0001 of File N° 11580265 of the Corporate Registry of the Public Registry Office in Lima.

<sup>120</sup> As the Peruvian government knew well (and specifically mentioned in the authoritative supreme decrees), Minera Peñoles del Perú S.A. was owned by three entities incorporated in Mexico: Minas Peñoles S.A. de C.V., Metales Peñoles S.A. de C.V. and Industrias Peñoles S.A. de C.V. See **Exhibit FLURY 021**, Supreme Decree 060-2006-EM, Oct. 26, 2006; **Exhibit FLURY 017**, Supreme Decree 042-2007-EM, Aug. 6, 2007.

<sup>121</sup> Luz Anggelina Correa de la Mata filed the following petitorios: Minaspampa 2, Minaspampa 3, Minaspampa 5, Challaviento and Challaviento 2. **Exhibit C-0273**, INGEMMET Unique File for mining concession “Minaspampa 2” N° 01-01764-03 at 3-8; **Exhibit C-0274**, INGEMMET Unique File for mining concession “Minaspampa 3” N° 01-01765-03 at 3-8; **Exhibit C-0275**, INGEMMET Unique File for mining concession “Minaspampa 5” N° 01-01767-03 at 3-8; **Exhibit C-0276**, INGEMMET Unique File for mining concession “Challaviento” N° 01-01745-03 at 3-8; **Exhibit C-0277**, INGEMMET Unique File for mining concession “Challaviento 2” N° 01-003398-03 at 3-8.

<sup>122</sup> **Exhibit C-0273**, INGEMMET Unique File for mining concession “Minaspampa 2” N° 01-01764-03 at 30-34; **Exhibit C-0274**, INGEMMET Unique File for mining concession “Minaspampa 3” N° 01-01765-03 at 30-34; **Exhibit C-0275**, INGEMMET Unique File for mining concession “Minaspampa 5” N° 01-01767-03 at 30-34; **Exhibit C-0276**, INGEMMET Unique File for mining concession “Challaviento” N° 01-01745-03 at 31-35; **Exhibit C-0277**, INGEMMET Unique File for mining concession “Challaviento 2” N° 01-003398-03 at 33-37.

<sup>123</sup> **Exhibit FLURY 021**, Supreme Decree 060-2006-EM, Oct. 26, 2006.

<sup>124</sup> **Exhibit FLURY 017**, Supreme Decree 042-2007-EM, Aug. 6, 2007.

<sup>125</sup> **Exhibit C-0278**, Entry N° 002 of File No 11079985 of the Mining Registry of Arequipa; **Exhibit C-0279**, Entry N° 002 of File N° 11079986 of the Mining Registry of Arequipa and **Exhibit C-0280**, Entry N° 002 of File N° 11079982 of the Mining Registry of Arequipa.

<sup>126</sup> **Exhibit C-0261**, Supreme Decree No. 024-97-EM, Nov. 13, 1997.

<sup>127</sup> **Exhibit C-0281**, INGEMMET Unique File for mining concession “Chapana” N° 01-00751-97 at 2-7.

shareholders were well-known lawyers Jose Ludowig Echeopar (one of Peru’s primary outside counsel) and Alfonso de Orbegoso.<sup>128</sup>

59. The chart below illustrates clearly that the structure used by Bear Creek was not uncommon or improper:

Foreign Investor	Supreme Decree	Supreme Decree issued after the foreign investor acquired mining rights	Trusted Peruvian individuals (or companies owned by trusted Peruvian individuals) secure and hold mining rights pending the application for the supreme decree	<i>Petitorio</i> filed by trusted Peruvian individuals (or by companies owned by trusted Peruvian individuals)	Authorization challenged, revoked or expropriated
Compañía Minera Ubinas S.A.	041-94-EM	--	✓	--	--
Rio Blanco Exploration LLC	013-97-EM	--	✓	✓	--
Resources Cristobal Inc	024-97-EM	--	✓	✓	--
Minera IMP-Perú S.A.C.	021-2003-EM	✓	✓	✓	--
Minera Peñoles del Perú S.A	060-2006-EM 042-2007-EM	--	✓	✓	--
Molinetes (BVI) Ltd	010-2007-EM	✓	✓	✓	--

<sup>128</sup> **Exhibit C-0282**, Entry 0001 of File N° 4037 of the Corporate Registry of the Public Registry Office in Lima. Mr. Ríos identified himself as the representative of Compañía Minera Cristobal Resources Peru S.A. not only before the Mining Public Registry but also directly before MEM in the context of the request for the public necessity declaration. See **Exhibit C-0281**, INGEMMET Unique File for mining concession “Chapana” N° 01-00751-97 at 33-34.

Foreign Investor	Supreme Decree	Supreme Decree issued after the foreign investor acquired mining rights	Trusted Peruvian individuals (or companies owned by trusted Peruvian individuals) secure and hold mining rights pending the application for the supreme decree	<i>Petitorio</i> filed by trusted Peruvian individuals (or by companies owned by trusted Peruvian individuals)	Authorization challenged, revoked or expropriated
Xiamen Zijin Tongguan Investment and Development Co., Ltd	024-2008-DE	✓	--	--	--
Bear Creek	083-2007-EM	--	✓	✓	✓

**E. BEAR CREEK ACTED TRANSPARENTLY AT ALL TIMES AND DISCLOSED THE OPTION AGREEMENTS AND ITS RELATIONSHIP TO MS. VILLAVICENCIO TO PERU**

60. In light of the facts detailed above, Peru’s knowledge of the type of relationship between Bear Creek and Ms. Villavicencio is irrelevant: (1) option agreements are legal under Peruvian law (Peru concedes this); (2) Peruvian law does not prohibit employers from entering into option agreements with an employee (Peru cannot point to any legal provision prohibiting this); and (3) Bear Creek did not exercise its option to acquire ownership over the mining concessions until after it had obtained the declaration of public necessity required by Article 71 of the Constitution. At all times, Bear Creek acted transparently and in good faith, consulted renowned Peruvian mining counsel, registered its actions with the relevant Peruvian authorities, and was forthcoming with any and all additional information that those authorities requested. It is difficult to see how Bear Creek’s actions could be seen in any other light and, more importantly, how Peru can now claim ignorance of any relevant facts surrounding the acquisition of the investment at the time, including the fact that Ms. Villavicencio was an employee of Bear Creek (disclosure of which, again, is not a legal requirement at all). A summary timeline demonstrates that Peru had all relevant information contemporaneously:

<b>2003</b>	Jenny Karina Villavicencio is registered as an employee of Bear Creek with the Peruvian Ministry of Labor. <sup>129</sup>
<b>August 21, 2003</b>	SUNARP registered the Power of Attorney for Ms. Villavicencio as legal representative of Bear Creek in certain matters. <sup>130</sup>
<b>May 26, 2004</b>	Ms. Villavicencio submitted an application to INACC to acquire four mining concessions (Karina 9A, 1, 2, and 3). <sup>131</sup>
<b>November 17, 2004</b>	Ms. Villavicencio and Bear Creek entered into an Option Agreement for the future transfer of the Karina 9A, 1, 2, and 3 mining concessions, should Bear Creek satisfy Peruvian legal requirements. <sup>132</sup>
<b>November 29, 2004</b>	Ms. Villavicencio submitted an application to INACC to acquire the Karina 5, 6, and 7 mining concessions. <sup>133</sup>
<b>December 5, 2004</b>	Ms. Villavicencio and Bear Creek entered into an Option Agreement for the future transfer of the Karina 5, 6, and 7 mining concessions, should Bear Creek satisfy Peruvian legal requirements. <sup>134</sup>
<b>June 28, 2005</b>	Ms. Villavicencio and Bear Creek requested that SUNARP register the November 17, 2004 Option Agreement covering the Karina 9A, 1, 2, and 3 mining concessions in order to put the public on notice of the agreements and their content. <sup>135</sup> Their request included

<sup>129</sup> Ms. Villavicencio was registered as an employee of Bear Creek with the Peruvian Ministry of Labor as far back as 2002 as well as when she applied for the mining concessions. See **Exhibit C-0283**, Letter from A. Swarouth, Bear Creek, to Ministry of Labor and Social Welfare dated June 16, 2002 requesting approval of the attached Fixed Term Labor Contract dated June 2, 2002; **Exhibit C-0284**, Fixed Term Labor Contract dated January 2, 2003; **Exhibit C-0285**, Letter from A. Swarouth, Bear Creek, to Ministry of Labor and Social Welfare dated July 2, 2003 requesting approval of the attached Fixed Term Labor Contract dated July 2, 2003; **Exhibit C-0286**, Fixed Term Labor Contract dated March 5, 2004.

<sup>130</sup> **Exhibit C-0017**, Supreme Decree Application at 84.

<sup>131</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.

<sup>132</sup> **Exhibit C-0016**, Option Agreements.

<sup>133</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.

<sup>134</sup> **Exhibit C-0016**, Option Agreements.

<sup>135</sup> **Exhibit C-0039**, SUNARP Notice of Observation No. 2005-00041200, July 5, 2005. As Respondent's expert Rodríguez-Mariátegui explains, the SUNARP Registry's "main duty is to provide the public with knowledge of the existence and contents of the transactions registered there... their primary purpose is that of providing public knowledge." **REX-003**, Rodríguez-Mariátegui First Report ¶ 19.

	copies of Ms. Villavicencio’s petitions for the mining concessions. <sup>136</sup>
<b>November 7, 2005</b>	SUNARP issued a decision confirming that the Option Agreement did not transfer the ownership of the mining concessions from Ms. Villavicencio to Bear Creek and thus did not violate Article 71 of the Peruvian Constitution. <sup>137</sup>
<b>December 22, 2005</b>	SUNARP published its decision in the Official Gazette, which “puts others on notice.” <sup>138</sup>
<b>March 8, 2006</b>	While Ms. Villavicencio’s application for the concessions was pending before INACC, INACC—referencing the Option Agreement and its registration with SUNARP—issued four different reports confirming that the Karina 9A, 1, 2, and 3 mining concessions are not located within the protected Aymara Lupaca region, no title transferred upon mere signing of the Option Agreement, and Ms. Villavicencio’s application process should continue. <sup>139</sup>
<b>June 9, 2006</b>	Ms. Villavicencio filed before MINEM an application Request for the Approval of Mining Exploration Category B Affidavit in which she declared her email to be <a href="mailto:bearcreek@speedy.com.pe">bearcreek@speedy.com.pe</a> . <sup>140</sup> Ms. Villavicencio also explicitly mentioned that Bear Creek would be responsible for providing certain resources for the exploratory works. <sup>141</sup>
<b>June 22, 2006</b>	MINEM’s General Directorate for Environmental Mining Affairs (DGAAM) reviewed Ms. Villavicencio’s land use agreement with the Association of Agricultural Producers of El Condór de Aconcahua and noted that the authorization for the use of the land

<sup>136</sup> **Exhibit C-0038**, SUNARP Decision at 1-2 (listing documents Bear Creek and Ms. Villavicencio submitted to SUNARP, including *inter alia* the November 17, 2004 Option Agreement, the applicants’ national identification certification, and certified copies of Ms. Villavicencio’s petitions for the Karina 9A, 1, 2, and 3 mining concessions).

<sup>137</sup> **Exhibit C-0038**, SUNARP Decision.

<sup>138</sup> Respondent’s Rejoinder ¶ 107; **Exhibit C-0038**, SUNARP Decision.

<sup>139</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

<sup>140</sup> **Exhibit C-0287**, J. Karina Villavicencio’s Request for the Approval of Mining Exploration Category B Affidavit, June 9, 2006.

<sup>141</sup> *Id.*

	was signed by Bear Creek, a third party distinct from the owner of the mining rights, Ms. Villavicencio. <sup>142</sup> The DGAAM raised no concerns regarding Bear Creek's involvement and simply asked Ms. Villavicencio to obtain or update the authorization for use of the surface land. <sup>143</sup>
<b>June 27, 2006</b>	Bear Creek paid sub-surface mining fees to INGEMMET, on behalf of Ms. Villavicencio, and INGEMMET accepted these payments without raising any concerns. <sup>144</sup>
<b>July 10, 2006</b>	MINEM's General Directorate for Environmental Mining Affairs (DGAAM), when reviewing Ms. Villavicencio's comments regarding Informe No. 157-2006/MEM-AAM/EA, acknowledged and accepted Ms. Villavicencio's explanation that the land use agreement with the Fundo Ancocahua was signed by Bear Creek <i>on behalf of Ms. Villavicencio</i> who, in any event, informed DGAAM that she was going to sign the agreement herself before entering into operations. <sup>145</sup> Again, DGAAM raised no concerns regarding Bear Creek's involvement.
<b>July 5, 2006</b>	INGEMMET granted the Karina 2 and 3 mining concessions to Ms. Villavicencio. <sup>146</sup>
<b>August 8, 2006</b>	INGEMMET registered the Karina 1 mining concession to Ms. Villavicencio. <sup>147</sup>
<b>August 9, 2006</b>	SUNARP registered the Option Agreement dated November 17, 2004. <sup>148</sup>
<b>September 19, 2006</b>	Ms. Villavicencio and Bear Creek requested that SUNARP register the December 5, 2004 Option Agreement covering the Karina 5, 6, and 7 mining concessions in order to put the public on notice. <sup>149</sup>
<b>September 26, 2006</b>	INGEMMET registered the Karina 9A mining concessions to Ms. Villavicencio. <sup>150</sup>

<sup>142</sup> **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 at 5.

<sup>143</sup> *Id.* at 6.

<sup>144</sup> **Exhibit C-0201**, Letter from A. Swarthout and K. Villavicencio to Banco de Credito, June 27, 2006; Claimant's Reply ¶ 32.

<sup>145</sup> **Exhibit C-0140**, Informe No. 170-2006/MEM-AAM/EA, July 10, 2006 at 1.

<sup>146</sup> **Exhibit C-0034**, Notice of Registration of the Karina 2 and Karina 3 Concessions, July 5, 2006.

<sup>147</sup> **Exhibit C-0035**, Notice of Registration of the Karina 1 Concession, Aug. 8, 2006.

<sup>148</sup> **Exhibit C-0041**, SUNARP Notice of Registration of Mineral Rights, Aug. 9, 2006.

<sup>149</sup> **Exhibit C-0017**, Supreme Decree Application at 187.

<b>November 3, 2006</b>	SUNARP registered the Option Agreement dated December 5, 2004. <sup>151</sup>
<b>December 5, 2006</b>	Bear Creek applied for a declaration of public necessity, including in its application, <i>inter alia</i> , (i) the Option Agreements, (ii) proof of registration of the Option Agreements, (iii) copies of Ms. Villavicencio’s applications for all of the Santa Ana Concessions, (iv) copies of Ms. Villavicencio’s claims for mineral rights and proof of registration for the concessions that Ms. Villavicencio had obtained as of that date (Karina 9A, 1, 2, and 3), and (v) a 2003 notarized delegation of banking powers from Bear Creek to Ms. Villavicencio registered with SUNARP. <sup>152</sup>
<b>December 5, 2006 – November 29, 2007</b>	MINEM, the Ministry of Defense, and the Vice-Minister Secretary General of External Relations all reviewed and gave “careful consideration” <sup>153</sup> to Bear Creek’s application over the course of almost a year. <sup>154</sup>
<b>February 8, 2007</b>	MINEM requested additional information regarding Bear Creek’s application for a declaration of public necessity in respect of the location and access roads to the Santa Ana Project, as well as Bear Creek’s incorporation and nationality. <sup>155</sup> In paragraph 4 of that letter, MINEM acknowledged the power of attorney that Bear Creek granted to Dr. Miguel Grau and that is included at the bottom of page 80 of Bear Creek’s Supreme Decree Application. <sup>156</sup> At the top of this same page 80 appeared the power of attorney that Bear Creek granted to Ms. Villavicencio. <sup>157</sup>
<b>February 16, 2007</b>	Bear Creek addressed MINEM’s request for additional information in connection with its request for a declaration of public necessity. <sup>158</sup>

<sup>150</sup> **Exhibit C-0288**, Notice of Registration of the Karina 9A Mining Concession to J. Karina Villavicencio, Sept. 26, 2006.

<sup>151</sup> **Exhibit C-0017**, Supreme Decree Application at 187.

<sup>152</sup> **Exhibit C-0017**, Supreme Decree Application.

<sup>153</sup> Respondent’s Counter-Memorial ¶ 29; **RWS-003**, Witness Statement of César Zegarra, Oct. 6, 2015 at ¶¶ 6-7 (“Zegarra Witness Statement”).

<sup>154</sup> Claimant’s Reply ¶ 208.

<sup>155</sup> **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007; Claimant’s Reply ¶ 36.

<sup>156</sup> **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007.

<sup>157</sup> **Exhibit C-0017**, Supreme Decree Application at 80.

<sup>158</sup> **Exhibit C-0043**, Letter from M. Grau Malachowski, Bear Creek, to MINEM, Feb. 26, 2007; Claimant’s Reply ¶ 36.

<b>June 20, 2007</b>	Bear Creek paid sub-surface mining fees to INGEMMET, on behalf of Ms. Villavicencio. <sup>159</sup>
<b>November 29, 2007</b>	After a year-long review and consideration of Bear Creek’s application by MINEM, the Ministry of Defense, and the Vice-Minister Secretary General of External Relations, over the course of almost a year, the Government enacted Supreme Decree 083, declaring that the development of the Santa Ana Concessions is a public necessity and approving Bear Creek’s acquisition of the concessions. <sup>160</sup>
<b>December 3, 2007</b>	Bear Creek and Ms. Villavicencio executed the Transfer Agreements for the Santa Ana Concessions, which they confirmed before a notary. <sup>161</sup>
<b>February 1, 2008</b>	SUNARP registered the Transfer Agreement for the Karina 9A, 1, 2, and 3 concessions. <sup>162</sup>
<b>February 28, 2008</b>	INGEMMET registered the Karina 5, 6, and 7 mining concessions to Ms. Villavicencio. <sup>163</sup> SUNARP registered the Transfer Agreement for the Karina 5, 6, and 7 mining concessions. <sup>164</sup>

61. As the timeline above demonstrates, Peru was aware of all relevant facts at all relevant time. In response to this laundry list of evidence showing Peru’s contemporaneous knowledge (prior to Supreme Decree 083) of when and how Bear Creek acquired the Santa Ana Concessions, Peru now admits that “MINEM may have received these disparate pieces of information[,]”<sup>165</sup> but complains that “the information was given in separate bits and pieces to separate entities or divisions within MINEM. No one official knew the full extent of Bear

<sup>159</sup> **Exhibit C-0202**, Letter from D. Volkert and K. Villavicencio to Banco de Credito, June 20, 2007; Claimant’s Reply ¶ 32.

<sup>160</sup> **Exhibit C-0004**, Supreme Decree 083-2007-EM adopted on Nov. 29, 2007.

<sup>161</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, Sucrusal del Perú, Dec. 6, 2007; Claimant’s Reply ¶ 19.

<sup>162</sup> **Exhibit C-0020**, SUNARP Registration Notice of Transfer Agreements for Santa Ana Concessions 9A, 1, 2, and 3, Feb. 1, 2008.

<sup>163</sup> **Exhibit C-0036**, Notice of Registration of the Karina 5, Karina 6, and Karina 7 Concessions, Feb. 28, 2008.

<sup>164</sup> **Exhibit C-0021**, SUNARP Registration Notice of Transfer Agreements for Santa Ana Concessions 5, 6, and 7, Feb. 28, 2008.

<sup>165</sup> Respondent’s Rejoinder ¶ 66.

Creek’s relations and agreements with Ms. Villavicencio.”<sup>166</sup> Even if this were true (which it is not, given the thorough disclosure provided in December 2006 when applying for the declaration of public necessity), Peru fails to acknowledge that this is a function of the fragmented system that its own government set up for submitting each of these tranches of information: employees must be registered with the Ministry of Labor; SUNARP is responsible for registering contracts like the Option Agreements; INACC (now INGEMMET) handles applications for mining concessions; MINEM and other relevant branches of the Government are responsible for reviewing applications for declarations of public necessity under Article 71; and so forth. Peru cannot complain that Bear Creek’s compliance with the very structure for registering information that Peru itself devised and mandates by law is insufficient. To rule otherwise would mean that despite forthright disclosures in compliance with the registration requirements of national law, foreign investors such as Bear Creek would have a perpetual sword of Damocles—the prospect of a future claim of illegality—hanging over their investments.

62. Peru also attempts to abdicate its responsibility for reviewing Bear Creek’s application and in “connecting the dots.”<sup>167</sup> However, on Peru’s own case, Article 71 “carefully regulates property rights”,<sup>168</sup> and as part of this strict regulatory oversight, Peru “carefully controls whether to allow a foreigner to obtain any title to properties or natural resources within them[.]”<sup>169</sup> Accordingly, “the highest Executive body of Perú analyzes if it is in the State’s public interest [to grant a supreme decree]”;<sup>170</sup> and “[a] declaration of public necessity is only issued after careful consideration by the government authorities involved in the oversight of the

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

<sup>167</sup> *See, e.g., Id.* at ¶¶ 68, 70 (“[W]hen MINEM reviews an application, its staff proceeds on the assumption that the applicant is acting in good faith; it does not scour the application or consult external sources (such as the Ministry of Labor) in a search for possible Article 71 violations.”); *Id.* at ¶ 286 (“MINEM’s officials do not review an application for a declaration of public necessity in search of possible legal violations; they assume the good faith of the applicant and focus their review on whether the proposed project would contribute to or pose any risks to Peru’s welfare, in order to determine if they should recommend a declaration of public necessity to the Council of Ministers.”); **RWS-007**, Second Witness Statement of César Zegarra, Apr. 8, 2016 (“Zegarra Second Witness Statement”), ¶ 27 (“[E]ven if Bear Creek provided all the necessary information to the MINEM, and I approved that documentation, this does not mean that the State knew of and was aware of the true relationship between Bear Creek and Ms. Villavicencio.”).

<sup>168</sup> Respondent’s Rejoinder ¶¶ 38, 46, 48.

<sup>169</sup> *Id.* at ¶ 41.

<sup>170</sup> *Id.* at ¶ 46.

economic activity that the foreigner intends to develop in the border area.”<sup>171</sup> **Peru cannot argue on the one hand that it carefully reviews applications for supreme decrees and that it is of the highest importance to the State to do so, and on the other hand abdicate or limit its responsibility in reviewing Bear Creek’s application,** which it did over the course of almost an entire year.

63. Peru blames Claimant because “[t]hese documents [the Option Agreements and ‘a one-page registry document that stated that Ms. Villavicencio was a legal representative of the company for financial purposes’] were scattered in a 200 page application and Bear Creek made no effort to direct MINEM’s officials to them, in particular to the registry document.”<sup>172</sup> Peru again accepts that Bear Creek submitted these documents, but appears to object on the basis that they were not highlighted, in bold, and underlined to facilitate Peru’s review. The documentary evidence puts the lie to Peru’s position, however, since MINEM *did in fact review* the “one-page registry document” by which Bear Creek granted Ms. Villavicencio a power of attorney. In a letter dated February 8, 2007, MINEM requested additional information from Bear Creek specifically in connection with Bear Creek’s application for a declaration of necessity.<sup>173</sup> In paragraph 4 of that letter, MINEM’s lawyer, Mr. Benjamín Rivas Cifuentes, acknowledged the power of attorney that Bear Creek granted to Dr. Miguel Grau.<sup>174</sup> That power of attorney granted to Dr. Grau is contained **at the bottom of page 80 of Bear Creek’s application for a declaration of public necessity,**<sup>175</sup> precisely the page that Peru now complains was “scattered in a 200 page application.” **The top of page 80 of Bear Creek’s application** sets forth the power of attorney granted from Bear Creek **to Ms. Villavicencio.**<sup>176</sup> Contrary to Peru’s blame-shifting excuses in this arbitration, there is no doubt whatsoever that MINEM specifically reviewed page 80 of Bear Creek’s application for a declaration of public necessity and thus **knew** of Ms.

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<sup>171</sup> Respondent’s Counter-Memorial ¶ 29; **RWS-003**, Zegarra Witness Statement ¶¶ 6-7.

<sup>172</sup> Respondent’s Rejoinder ¶ 70. *See also id.* at ¶ 286 (“Bear Creek omits the fact that this information was not provided in any direct or organized manner. This information is scattered in hundred [sic] of pages of the application.”).

<sup>173</sup> **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007.

<sup>174</sup> **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007 (“*La Escritura de Delegación de Poderes otorgado por ‘Bear Creek Mining Company, Sucursal del Perú’ en favor de don Miguel Grau Malachowski, se extendió con fecha 19 de mayo de 2003, por el mismo notario público Dr. Gustavo Correa Miller.*”).

<sup>175</sup> **Exhibit C-0017**, Supreme Decree Application at 80.

<sup>176</sup> **Exhibit C-0017**, Supreme Decree Application at 80.

Villavicencio’s power of attorney. Yet MINEM—in the context of evaluating Bear Creek’s application—raised no concerns whatsoever about this power of attorney or Ms. Villavicencio’s relationship to Bear Creek.

64. Faced with evidence that Peru knew of the relationship between Bear Creek and Ms. Villavicencio by the time it enacted Supreme Decree 083, Peru tries to go back even further in time and argues that Bear Creek should have informed MINEM that Ms. Villavicencio was its employee “when she applied for the concessions,” *i.e.*, back in 2004.<sup>177</sup> But Peru does not point to any disclosure requirement that Ms. Villavicencio disregarded. In any event, at the time that Ms. Villavicencio applied for the concessions, she was a registered Bear Creek employee with the Ministry of Labor.<sup>178</sup> Moreover, Peru ignores the fact that it knew of the Option Agreements from the moment they were submitted for registration to SUNARP on June 28, 2005, *i.e.*, *before* Peru granted the Santa Ana Concessions to Ms. Villavicencio and *before* Peru issued Supreme Decree 083.

**F. PERU’S CONDUCT AFTER THE ISSUANCE OF SUPREME DECREE 083 CONFIRMED THE LEGALITY OF BEAR CREEK’S ACQUISITION**

65. As shown above, and as Respondent concedes, Peru carefully reviewed Bear Creek’s application for a declaration of public necessity, including the Option Agreements and the power of attorney in favor of Ms. Villavicencio that were contained therein. After completing this meticulous review, and even requesting additional information on specific points, Peru issued Supreme Decree 083, which recognized that Bear Creek’s ownership of the Santa Ana mining concessions was a public necessity.<sup>179</sup> On the basis of this decree, Bear Creek

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<sup>177</sup> Respondent’s Rejoinder ¶ 286.

<sup>178</sup> **Exhibit C-0283**, Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated June 16, 2002 requesting approval of the attached Fixed Term Labor Contract dated June 2, 2002; **Exhibit C-0284**, Fixed Term Labor Contract dated January 2, 2003; **Exhibit C-0285**, Letter from A. Swarthout, Bear Creek, to Ministry of Labor and Social Welfare dated July 2, 2003 requesting approval of the attached Fixed Term Labor Contract dated July 2, 2003; **Exhibit C-0286**, Fixed Term Labor Contract dated March 5, 2004.

<sup>179</sup> Even assuming Peru’s position that there were irregularities in the acquisition was correct, such issues would have been rendered moot by Supreme Decree 083 as an administrative act that contains the required declaration of public necessity. As Professor Bullard explains, “in the denied scenario in which there were any irregularities, they would have been validated with the issuance of Supreme Decree No. 083-2007-EM which, as an administrative act, was the result of a regular administrative procedure in which the Peruvian Government verified that BEAR CREEK request was a case of public necessity that did not affect national security. Therefore it is not possible to allege the existence of an illegality.” Bullard Third Expert Report ¶ 76. Further,

acquired the concessions from Ms. Villavicencio and subsequently spent millions of U.S. dollars developing them.

66. Bear Creek kept the Peruvian government continuously informed of its activities in connection with the development of the Santa Ana Project, in accordance with the relevant legal requirements. Moreover, Peru approved each and every step that Bear Creek took in its quest to build and operate the Santa Ana Project, including approving the summary of its Environmental and Social Impact Assessment (ESIA) and its Citizen Participation Plan (*Plan de Participación* or PPC), and endorsing Bear Creek's successful public hearing.

67. The events leading up to the issuance of Supreme Decree 032, revoking Bear Creek's rights under Supreme Decree 083, including, for instance, the public statements by multiple high-ranking Peruvian public officials and Mr. Gala's inconsistent and incomplete testimony in connection with supposed "new documents," further confirm that Bear Creek did not violate Article 71 of the Peruvian Constitution when it acquired the Santa Ana mining concessions. Rather, these events show that Peru fabricated—and seized upon—an alleged and unsubstantiated "irregularity" to conceal the fact that it issued Supreme Decree 032 to appease the political protests of southern Puno led by Walter Aduviri and the *Frente de Defensa de Recursos Naturales de la Región de Puno* ("FDRN"). And in this arbitration, it is clear that Peru now relies on this fabricated excuse to claim that the Tribunal does not have jurisdiction and thus to avoid compensating Bear Creek for the expropriation of its Santa Ana Project.

68. Peru's acts after the issuance of Supreme Decree 032 are even more revealing of its awareness that Bear Creek had not violated the Constitution when it acquired the Santa Ana mining concessions. The numerous meetings between Bear Creek representatives and high-level government officials, as well as the content of the discussions that took place at these meetings, show that Respondent knew that the enactment of Supreme Decree 032 was unlawful and that Bear Creek was nothing but collateral damage in the context of a political situation that had gotten out of hand.

69. But the most striking of Peru's acts after its issuance of Supreme Decree 032 was the Minister of Energy & Mines Jorge Merino's actual handing over to Bear Creek of a draft

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a Peruvian Court has confirmed that Supreme Decree 083 is an administrative act. **Exhibit C-0289**, Superior Court of Lima, 14<sup>th</sup> Contentious Administrative Chamber, Resolution No. 1, Mar. 16, 2016 at 5-6.

document at a meeting on December 13, 2013, which outlined in detail the specific procedure that Bear Creek should follow to resolve the dispute. That document provided that Bear Creek should request formal consultations with the Government to discuss: (i) the issuance of a new Supreme Decree derogating from Article 1 of Supreme Decree 032 revoking Bear Creek’s rights; (ii) the mutual termination of the MINEM Lawsuit and Bear Creek’s *amparo*; and (iii) the execution of a settlement agreement putting an end to the dispute. If Peru truly believed that Bear Creek had violated the Constitution when it acquired the Santa Ana mining concessions and that, as a result, the issuance of Supreme Decree 032 was well-founded, it would never have accepted to meet as often with Bear Creek as it did, let alone indicate to Bear Creek the steps that it needed to take to resolve the dispute.

70. Thus, the events that took place after Peru issued Supreme Decree 083, which are described in further detail in the timeline below, confirm that Bear Creek did not violate the Constitution when it acquired the Santa Ana mining concessions, and that it acted in good faith and conducted itself in a transparent manner vis-à-vis Peru in this regard.

<b>November 29, 2007</b>	Peru issued Supreme Decree 083, declaring that Bear Creek’s ownership of the Santa Ana mining concessions is of public necessity. <sup>180</sup>
<b>December 3, 2007</b>	Bear Creek and Ms. Villavicencio executed the Transfer Agreements for the Santa Ana Concessions, which they confirmed before a notary. <sup>181</sup> Bear Creek later registered these Transfer Agreements with SUNARP.
<b>Early 2009</b>	Bear Creek hired Ausenco Vector, one of the leading mining consultancies in Peru and the world, to assist with the preparation of the ESIA.
<b>April 20, 2009</b>	Bear Creek announced the results of a positive Preliminary Economic Assessment, published on May 26, 2009, which provided for measured and indicated resources of 97.7 million ounces of silver, inferred resources of 41.4 million ounces of silver,

<sup>180</sup> **Exhibit C-0004**, Supreme Decree No. 083-2007-EM, Nov. 29, 2007.

<sup>181</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.

	and a net present value of US\$ 115 million at current silver prices. <sup>182</sup>
<b>July 6, 2009</b>	Bear Creek wrote to Felipe Ramírez Delpino, a witness in this arbitration, requesting that the DGAAM participate in the workshops that Bear Creek will organize to introduce the communities to the Santa Ana Project. <sup>183</sup>
<b>August 2009</b>	Bear Creek conducted five workshops with the communities to introduce them to the Santa Ana Project. <sup>184</sup>
<b>October 19, 2010</b>	Bear Creek wrote to Felipe Ramírez Delpino, requesting that the DGAAM participate in a workshop in connection with the Santa Ana Project. <sup>185</sup>
<b>October 21, 2010</b>	Ausenco Vector published a Feasibility Study and Technical Report for Santa Ana, which ascribed a pre-tax internal rate of return of 70.2% and a pre-tax net present value of US\$ 341 million to Santa Ana (at a 5% discount rate and current silver prices of US\$ 22.92 per ounce). <sup>186</sup> Drilling, metallurgical testing, and engineering studies were carried out in 2009 and 2010 in preparation for this Feasibility Study. <sup>187</sup>
<b>November 5, 2010</b>	Bear Creek raised US\$ 130 million in equity financing, less than one month after announcing the results of the Feasibility Study. <sup>188</sup>
<b>November 10, 2010</b>	Ms. Villavicencio wrote to the General Director of Mining at MINEM, Mr. Victor Vargas Vargas, on Bear Creek letterhead, as “ <i>apoderada</i> ” of Bear Creek, regarding Bear Creek’s “ <i>complementación de declaración de pasivos ambientales.</i> ” The Santa Ana Project, as well as the Karina 9A and Karina 1 mining concessions, were specifically mentioned. <sup>189</sup>

<sup>182</sup> Swarthout First Witness Statement ¶ 32; **Exhibit C-0136**, Technical Report – Santa Ana Resource Update and Preliminary Economic Assessment, May 26, 2009.

<sup>183</sup> **Exhibit C-0157**, Letter from C. Rios Vargas, Bear Creek, to F. Ramírez, MINEM, July 6, 2009.

<sup>184</sup> **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

<sup>185</sup> **Exhibit C-0158**, Letter from E. Antunez de Mayolo, Bear Creek to F. Ramírez, MINEM, Oct. 19, 2010.

<sup>186</sup> **Exhibit C-0003**, Ausenco Vector, Feasibility Study-Santa Anna Project-Puno, Perú-NI 43-101 Technical Report.

<sup>187</sup> Swarthout First Witness Statement ¶ 33.

<sup>188</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>189</sup> **Exhibit C-0290**, Letter from J. Karina Villavicencio to Ing. Victor Vargas Vargas, Nov. 11, 2010.

<b>November 17, 2010</b>	Ms. Villavicencio wrote to the Director of Energy and Mines in Puno, on Bear Creek letterhead, as “ <i>apoderada</i> ” of Bear Creek advising of the Participatory Workshops with the communities, seeking to change the date of a workshop after coordinating with the DGAAM the new date at the request of the Ancomarca community. <sup>190</sup>
<b>November 18, 2010</b>	Bear Creek wrote to Felipe Ramírez Delpino, informing him of Bear Creek’s progress in connection with the various workshops that it has implemented. <sup>191</sup>
<b>December 2010</b>	Peru’s Ministry of Environment’s Environmental Assessment and Monitoring Agency (“OEFA”) visited the project and issued a report describing the relationship between Bear Creek and the communities as harmonious. <sup>192</sup>
<b>December 23, 2010</b>	Bear Creek submitted its ESIA to MINEM, and requested that the DGAAM approve the ESIA’s Executive Summary and the PPC. <sup>193</sup>
<b>January 7, 2011</b>	MINEM approved Bear Creek’s ESIA summary and PPC. <sup>194</sup> Ms. Clara García Hidalgo approved the PPC and ESIA summary even though Peru claims she was merely a “personal advisor” of the Minister and lacked “the power to confirm the legality of an individual’s or company’s activities on behalf of the Ministry.” <sup>195</sup> Obviously, this is an incorrect description of Ms. García’s responsibilities.
<b>January 21, 2011</b>	In accordance with the DGAAM’s instructions, which it provided to Bear Creek when it approved the PPC and ESIA summary, Bear Creek completed all of the steps required in advance of the public hearing, and informs the DGAAM accordingly. <sup>196</sup>

<sup>190</sup> **Exhibit C-0291**, Letter from J. Karina Villavicencio to Ing. Victor Paredes Argandoña (DREM-Puno), Nov. 17, 2010.

<sup>191</sup> **Exhibit C-0160**, Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, Nov. 18, 2010.

<sup>192</sup> **Exhibit C-0143**, OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, Jan. 2011 at 4, 31. The OEFA Report describes Bear Creek’s community relations as “good.” The other categories are “bad” and “regular.”

<sup>193</sup> **Exhibit C-0072**, Request from Bear Creek Mining Corporation to DGAAM for Approval of the ESIA, Dec. 23, 2010.

<sup>194</sup> **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

<sup>195</sup> Respondent’s Rejoinder ¶ 110.

<sup>196</sup> **Exhibit C-0162**, Letter from Bear Creek to DGAAM, Jan. 21, 2011. *See also Exhibit C-0156*, MINEM, *Dirección General de Asuntos Ambientales Mineros, Certificación Ambiental para Actividades de Explotación Mediana y Gran Minería*; Rebuttal Witness Statement of Elsiario Antunez de Mayolo, Jan. 7, 2016, ¶ 22 (“Antunez de Mayolo Rebuttal Witness Statement”); Witness Statement of Elsiario Antunez de Mayolo, May

<b>February 1, 2011</b>	Bear Creek wrote to Felipe Ramírez Delpino, informing him of the company's community relations activities during the month of January 2011. <sup>197</sup>
<b>February 23, 2011</b>	Bear Creek, with the DGAAM's support and authorization, held a public hearing, which lasted five hours and was attended by over 700 community members. The public hearing was also attended by two DGAAM representatives, Kristian Véliz Soto, an attorney, and Walter Alfaro Lopez, an engineer, as well as by another attorney representing the DREM, Jesus Obet Alvarez Quispe. <sup>198</sup> After the public hearing ended, Mr. Antunez de Mayolo and the DGAAM and DREM attorneys toasted at dinner to the success of the Santa Ana Project. <sup>199</sup>
<b>March 1, 2011</b>	Bear Creek wrote to Felipe Ramírez Delpino, informing him of the company's community relations activities during the month of February 2011. <sup>200</sup>
<b>March – June 2011</b>	Bear Creek held various meetings with Vice-Minister of Energy & Mines Fernando Gala, a witness in this arbitration, who assured Bear Creek that its rights would be protected and that Peru would uphold the principle of legal security. <sup>201</sup>
<b>April 1, 2011</b>	Bear Creek wrote to Ms. García, informing her of the company's community relations activities during the month of March 2011. <sup>202</sup>
<b>April 1, 2011</b>	Ausenco Vector published a revised Feasibility Study and Technical Report for Santa Ana, which ascribed a pre-tax internal rate of return of 103.4% and a pre-tax net present value of US\$ 554 million to Santa Ana (at a 5% discount rate and current silver prices of US\$ 28.19 per ounce). <sup>203</sup>
<b>April 19, 2011</b>	Mr. Antunez de Mayolo met with Prime Minister Rosario

28, 2015, ¶ 12 (“Antunez de Mayolo First Witness Statement”); **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>197</sup>

**Exhibit C-0187**, Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, Feb. 1, 2011.

<sup>198</sup>

Antunez de Mayolo First Witness Statement ¶ 13; Antunez de Mayolo Rebuttal Witness Statement ¶ 24.

<sup>199</sup>

Antunez de Mayolo Rebuttal Witness Statement ¶ 26.

<sup>200</sup>

**Exhibit C-0188**, Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, Mar. 1, 2011.

<sup>201</sup>

Antunez de Mayolo Rebuttal Witness Statement ¶ 48.

<sup>202</sup>

**Exhibit C-0190**, Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, May 3, 2011.

<sup>203</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.

	Fernandez, a witness in this arbitration, and expressed concern over the protests in the south of Puno and the political motivations behind them. Bear Creek also offered assistance while Prime Minister Fernandez assured Bear Creek that its rights will be respected and the rule of law will be maintained. <sup>204</sup>
<b>May 2, 2011</b>	Bear Creek wrote to Felipe Ramírez Delpino, informing him of the company’s community relations activities during the month of April 2011. <sup>205</sup>
<b>May 18, 2011</b>	Prime Minister Rosario Fernandez explained that the Puno protests were political in nature and that extremist organizations were behind them. <sup>206</sup>
<b>May 19, 2011</b>	Mr. Swarthout and Mr. Antunez de Mayolo, among others, met with Ms. García, Legal Advisor to the Minister of Energy & Mines, who indicated that the option agreement structure with Ms. Villavicencio was proper and legal. <sup>207</sup>
<b>May 19, 2011</b>	Ms. García publicly stated that the Santa Ana Project complies with the law. <sup>208</sup>
<b>May 21, 2011</b>	Vice Minister Gala publicly declared that it is not feasible to annul the concessions. <sup>209</sup>
<b>May 26, 2011</b>	Vice-Minister Gala explained that the cancellation of concessions and the revocation of Supreme Decree 083 are “completely illegal demands.” <sup>210</sup>
<b>May 26, 2011</b>	President Alan García confirmed that political or electoral interests were behind the protests in Puno and that the demand that all

<sup>204</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 48.

<sup>205</sup> **Exhibit C-0189**, Letter from E. Antunez, Bear Creek, to C. García, DGAAM, Apr. 1, 2011.

<sup>206</sup> **Exhibit C-0092**, Press Release, Presidencia del Gobierno de Ministros, *Premier califica de inadmisibile bloqueo de carreteras en Puno y pide deponer acciones violentas*, May 18, 2011. See also **Exhibit C-0292**, *Diálogo Dos Años Después Peru; Estado y Conflicto Social*, at 8, 71, Sept. 2014.

<sup>207</sup> **Exhibit C-0173**, Email from T. Balestrini to E. Antunez de Mayolo, A. Swarthout and M. Leduc, May 18, 2011. Peru has not in any way rebutted this testimony by submitting a witness statement by Ms. García.

<sup>208</sup> **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, *La República*, May 19, 2011 (“Clara García Hidalgo, the principal advisor at the Ministry of Energy and Mines, argued there is no legislation to cancel concessions that were granted legally. She explained the State guarantees the rights of the mining companies, as long as they comply with what the law provides in order for them to be considered legal”).

<sup>209</sup> **Exhibit C-0094**, *Huelga antiminera en Puno sigue sin solución*, *LA REPÚBLICA*, May 21, 2011.

<sup>210</sup> **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, *MINISTRO DE ENERGÍA Y MINAS*, May 26, 2011.

	mining concessions be cancelled was “irrational” and “constitutional nonsense.” <sup>211</sup>
<b>May 27, 2011</b>	Minister of Energy & Mines Pedro Sánchez publicly declared that the protesters’ demands to annul the mining concessions are unconstitutional, excessive and impossible to implement. <sup>212</sup>
<b>May 27, 2011</b>	Vice-Minister Gala publicly declared that it would not be feasible to cancel the oil and mining concessions because this would affect legal security in the country. <sup>213</sup>
<b>May 30, 2011</b>	The DGAAM summarily and improperly suspended the evaluation process of Bear Creek’s ESIA for a 12-month period, without providing advance notice to Bear Creek or providing it with an opportunity to be heard. <sup>214</sup>
<b>May 30, 2011</b>	MINEM directed Bear Creek to provide it with a copy of its December 2006 application for a declaration of public necessity, claiming that it had been misplaced. <sup>215</sup>
<b>May 31, 2011</b>	Prime Minister Rosario Fernandez publicly rejected protesters’ demands to cancel oil and mining concessions, noting that “legal security comes first, and without that, there is nothing.” <sup>216</sup>
<b>June 3, 2011</b>	Bear Creek complied with MINEM’s odd request, and sent a copy of its December 2006 application for a declaration of public necessity. <sup>217</sup>
<b>June 17, 2011</b>	Mr. Antunez de Mayolo wrote to the DGAAM requesting that the resolution suspending the ESIA process be reexamined by the Mining Council ( <i>Consejo de Minería</i> ), MINEM’s highest administrative body. <sup>218</sup> However, the Council could not rule on

<sup>211</sup> **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011.

<sup>212</sup> **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011.

<sup>213</sup> **Exhibit C-0237**, *El aimarazo, a cuatro años de la huelga antiminera*, DIARIO CORREO, May 26, 2014.

<sup>214</sup> **Exhibit C-0098**, DGAAM Resolution No. 162-2011-MEM-AAM, May 30, 2011.

<sup>215</sup> **Exhibit C-0174**, MINEM Report No. 442-2011-MEM-DGM-DNM and Resolution No. 165-2011-MEM-DGM/V, May 30, 2011.

<sup>216</sup> **Exhibit C-0097**, Interview of Prime Minister Rosario Fernández, Mira Quien Habla, Willax TV, May 31, 2011.

<sup>217</sup> **Exhibit C-0175**, Letter from E. Antunez de Mayolo, Bear Creek to the General Directorate of Mining, Jun. 3, 2011.

<sup>218</sup> **Exhibit C-0166**, Letter from Bear Creek to the DGAAM, Jun. 17, 2011.

	Bear Creek’s appeal because Peru failed to fill a vacancy on the Council, which vacancy persisted for three (3) years. <sup>219</sup>
<b>June 17-23, 2011</b>	Vice-Minister Gala stated in his first Witness Statement that he was present at meetings with Aymaran leaders, during which “the participants also presented documents indicating that Bear Creek, a foreign company, obtained a mining concession in the border area through a Peruvian citizen (Jenny Karina Villavicencio) before having obtained the declaration of public necessity....That was the first time I learned of these facts and of the relationship that existed between Ms. Villavicencio and Bear Creek.” <sup>220</sup>
<b>June 22, 2011</b>	<p>Mr. Swarthout and Mr. Antunez de Mayolo met with Vice-Minister Gala, who did not refer to the unidentified documents he allegedly received from unidentified Aymaran leaders. Rather, Mr. Gala advised Bear Creek that Peru will protect the company’s legally acquired rights over the Santa Ana Project.<sup>221</sup></p> <p>Mr. Gala does not deny this meeting took place. Had Vice-Minister Gala actually received the information that he claims to have received before June 22, one would think that he would have asked Messrs. Swarthout and Antunez de Mayolo about it. Alternatively, had he received such information after the meeting, one would have expected Mr. Gala to contact Bear Creek and ask for an explanation. He did neither.</p>
<b>June 23, 2011</b>	<p>In his second Witness Statement, Vice-Minister Gala now claims that he only received the unidentified documents on June 23, 2011, and not from Aymaran leaders, as he claims in his first statement, but from “protester representatives,” including Congressman Yohnny Lescano.<sup>222</sup> He also claims that:</p> <p>(i) he was shown documents indicating that there was a relationship between Ms. Jenny Karina Villavicencio and Bear Creek;</p> <p>(ii) he was shown the Option Agreements (which SUNARP registered in August 2006, and which Bear Creek subsequently included in its application to MINEM for a declaration of public necessity in December 2006);</p> <p>(iii) he was told that “they believed” that Ms. Jenny Karina Villavicencio was an employee and legal representative of Bear</p>

<sup>219</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 43.

<sup>220</sup> **RWS-001**, Witness Statement of Fernando Gala, Oct. 6, 2015, ¶¶ 34-35 (“Gala First Witness Statement”).

<sup>221</sup> Swarthout Rebuttal Witness Statement ¶¶ 29-31; Antunez de Mayolo Rebuttal Witness Statement ¶¶ 52, 54.

<sup>222</sup> **RWS-005**, Second Witness Statement of Fernando Gala, Apr. 4, 2016, ¶ 17 (“Gala Second Witness Statement”)

	Creek; and  (iv) the community leaders “lead us to understand the company had been present in the area long before the declaration of public necessity was approved.” <sup>223</sup>
<b>June 24, 2011</b>	Peru signed Supreme Decree 032, repealing Supreme Decree 083 and the declaration of public necessity. <sup>224</sup> Vice Minister Gala stated: “Taking into account the situation we were in, we considered that the most reasonable alternative was to repeal the declaration of public necessity, because we had significant evidence that a constitutional violation had occurred. This information, as well as the prolonged and violent protests against mining, including the Project, made the declaration of public necessity unsustainable.” <sup>225</sup>
<b>June 25, 2011</b>	Peru published Supreme Decree 032. <sup>226</sup>
<b>July 5, 2011</b>	Two weeks after enacting Supreme Decree 032, MINEM commenced a civil lawsuit against Bear Creek and Ms. Villavicencio before the Civil Court in Lima. <sup>227</sup>
<b>July 12, 2011</b>	Bear Creek filed a constitutional <i>amparo</i> action against Supreme Decree 032, due to its violation of Bear Creek’s fundamental right to legal security, freedom of industry and prohibition against arbitrariness. <sup>228</sup>
<b>August 10, 2011</b>	Mr. Antunez de Mayolo filed a request with MINEM to obtain all copies of documents related to the issuance of Supreme Decree 032, which stated that “new circumstances” existed prompting its enactment. <sup>229</sup>

<sup>223</sup>

*Id.*

<sup>224</sup>

**Exhibit C-0005**, Supreme Decree 032-2011-EM adopted, Jun. 25, 2011. According to the PCM webpage, there was no Council of Ministers’ session on June 23 or 24, 2011. **Exhibit C-0293**, Notarial Certifications of the PCM webpage, May 12 and 20, 2016.

<sup>225</sup>

**RWS-005**, Gala Second Witness Statement ¶ 17.

<sup>226</sup>

**Exhibit C-0005**, Supreme Decree 032-2011-EM, Jun. 25, 2011.

<sup>227</sup>

**Exhibit C-0112**, Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court of Lima, July 5, 2011.

<sup>228</sup>

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

<sup>229</sup>

**Exhibit C-0110**, Letter from E. Antunez, Bear Creek, to R. Wong, Secretary General of the Ministry of Energy and Mines, Aug. 10, 2011. *See also*, Antunez de Mayolo Witness Statement ¶ 23; Claimant’s Memorial on the Merits, May 29, 2015, ¶ 83 (“Claimant’s Memorial”).

<b>August 19, 2011</b>	MINEM responded to Mr. Antunez de Mayolo’s August 10, 2011 request, indicating that no such documents exist. <sup>230</sup> Dr. Cesar Juan Zegarra Robles, a witness in this arbitration, specifically noted that “there is no report that served as a basis for the issuance of Supreme Decree 032-2011-EM.” <sup>231</sup>
<b>September 26, 2011</b>	Rodrigo, Elias & Medrano Abogados, one of Peru’s premier mining law firms, issued an opinion confirming that the structure used by Bear Creek, and therefore Estudio Grau’s advice, was legal and did not violate Article 71 of the Constitution. <sup>232</sup>
<b>September 27, 2011</b>	Mr. Swarthout and Mr. Antunez de Mayolo met with President Ollanta Humala and Minister of Energy & Mines Carlos Herrera Descalzi. <sup>233</sup> President Humala suggested that Bear Creek focus on the Corani project first, but Mr. Swarthout informed him that this would not be possible without the Santa Ana Project being in production first. <sup>234</sup> President Humala answered that he understood the company’s position and indicated that the parties should work towards finding a constructive solution. <sup>235</sup>
<b>November 2011</b>	OEFA visited the Santa Ana Project and found that the communities close to Santa Ana continue to support Bear Creek and the project, despite the fact that Supreme Decree 032 had been issued. <sup>236</sup>
<b>March 27, 2012</b>	Ms. McLeod-Seltzer, Messrs. Swarthout, Grau, Morano, Watson and Tweddle (all members of Bear Creek’s Board of Directors), and Mr. Antunez de Mayolo met with President Humala and Minister of Energy & Mines Jorge Merino. <sup>237</sup> Mr. Antunez de Mayolo described the relationships with the communities at Corani

<sup>230</sup> **Exhibit C-0111**, Letter from R. Wong, Secretary General of the Ministry of Energy and Mines to E. Antunez, Bear Creek, Aug. 19, 2011. The only document related to Supreme Decree 032 provided by MINEM was a one-page long *exposición de motivos* (or explanatory statement) paraphrasing the language of the decree without adding any meaningful precision or justification.

<sup>231</sup> **Exhibit C-0111**, Letter from R. Wong, Secretary General of the Ministry of Energy and Mines to E. Antunez, Bear Creek, Aug. 19, 2011 at 7.

<sup>232</sup> **Exhibit C-0142**, Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, Sept. 26, 2011 at 3, ¶ 2.

<sup>233</sup> Antunez de Mayolo First Witness Statement ¶ 26.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> **Exhibit C-0179**, *Acta de Supervisión Ambiental*, Nov. 25, 2011; **Exhibit C-0180**, OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, Dec. 31, 2011 at 15.

<sup>237</sup> Antunez de Mayolo First Witness Statement ¶ 27.

	and told them that he believed that the same would be true for Santa Ana if the project were returned. <sup>238</sup> President Humala did not offer any concrete solution but said that Minister Merino had full authority to resolve the Santa Ana situation.
<b>October 23, 2012</b>	Mr. Antunez de Mayolo, Mr. Alvaro Diaz (Bear Creek General Counsel) and Mr. Andres Franco (Vice President of Corporate Development) met with President Humala and Minister of Mines Merino. <sup>239</sup> They discussed the strong community support for the Corani communities and Bear Creek again explained the importance of putting the Santa Ana Project into production first in order to finance the Corani project. President Humala instructed Minister Merino to find a solution. <sup>240</sup>
<b>May 23, 2013</b>	Messrs. Antunez de Mayolo, Swarthout, Diaz and Franco from Bear Creek met with Prime Minister Juan Jimenez. <sup>241</sup> They discussed, among other topics, the resolution of the Santa Ana issue, Bear Creek's plans for the Santa Ana project, and the communities' support for the project. Prime Minister Jimenez indicated that he would work with the ministers in his government to find a solution to the problem. <sup>242</sup>
<b>November 18, 2013</b>	Vice-Minister Gala admitted that Peru used Bear Creek's alleged "improper" acquisition of the Santa Ana mining concessions in 2007 as a pretext to conceal the real basis for the enactment of Supreme Decree 032, namely the appeasement of the political protests in the south of Puno led by Walter Aduviri and the FDRN. <sup>243</sup>
<b>December 13, 2013</b>	Messrs. Antunez de Mayolo and Diaz met with Minister of Energy and Mines Merino, who told them that he had received an order to resolve the Santa Ana issue "from the highest authorities in the Government." <sup>244</sup> He advised that MINEM and the Ministry of Justice had devised a framework to resolve the issue and return Santa Ana to Bear Creek. <sup>245</sup> To that end, he handed to Bear Creek a draft document outlining the procedure and advised Bear Creek to

<sup>238</sup>

*Id.*

<sup>239</sup>

*Id.* at ¶ 29.

<sup>240</sup>

*Id.*

<sup>241</sup>

*Id.* at ¶¶ 30-31.

<sup>242</sup>

*Id.*

<sup>243</sup>

**Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontificia Universidad Católica del Perú, Nov. 18, 2013.

<sup>244</sup>

Antunez de Mayolo First Witness Statement ¶ 32.

<sup>245</sup>

*Id.*

	submit a formal request containing those points to the Government. <sup>246</sup>
<b>December 17, 2013</b>	Bear Creek sent a letter to the Government containing the points suggested by Minister Merino in order to resolve the situation, specifically, requesting formal consultations to discuss: (i) the issuance of a new Supreme Decree derogating from Article 1 of Supreme Decree 032 revoking Bear Creek’s rights; (ii) the mutual termination of the MINEM Lawsuit and Bear Creek’s <i>amparo</i> ; and (iii) the execution of a settlement agreement putting an end to the dispute. <sup>247</sup> The Peruvian Government never responded to Bear Creek’s letter.
<b>February 26, 2014</b>	The Mining Council convened a hearing on Bear Creek’s appeal of the DGAAM’s 12-month suspension of the evaluation process of Bear Creek’s ESIA. <sup>248</sup> Bear Creek argued that the DGAAM’s suspension was unlawful; the DGAAM did not defend its position. <sup>249</sup>
<b>May 12, 2014</b>	The Lima First Constitutional Court held that Peru violated Bear Creek’s constitutional rights by issuing Supreme Decree 032. <sup>250</sup>
<b>May 13, 2014</b>	The Mining Council ruled on Bear Creek’s appeal of the DGAAM’s 12-month suspension of the evaluation process of Bear Creek’s ESIA, holding that a ruling is no longer required since the initial 12-month suspension has expired. <sup>251</sup> The Mining Council returned the file to the DGAAM, and no further action has since been taken.

71. The events described above confirm that Bear Creek did not unlawfully acquire the Santa Ana mining concessions. To the contrary, the timeline establishes that Peru approved Bear Creek’s development of the Santa Ana Project every step of the way, and did not raise any concerns when, for example, in 2010, Ms. Villavicencio wrote to MINEM and the DREM in Puno on Bear Creek letterhead, signing as a Bear Creek “*apoderada*,” in connection with the

<sup>246</sup> *Id.* See also **Exhibit C-0121**, Draft Letter by J. Merino, Minister of Energy and Mines, to E. Antunez de Mayolo, Bear Creek, outlining the Government’s proposed steps to resolve Bear Creek’s situation at Santa Ana

<sup>247</sup> Antunez de Mayolo First Witness Statement ¶ 33; **Exhibit C-0122**, Letter from E. Antunez de Mayolo to J. Merino and D. Figallo, Minister of Justice, Dec. 17, 2013

<sup>248</sup> **Exhibit C-0167**, Letter from the Mining Council to Bear Creek, Jan. 21, 2014.

<sup>249</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 43.

<sup>250</sup> **Exhibit C-0006**, Amparo Decision No. 28, rendered by the Lima First Constitutional Court, May 12, 2014.

<sup>251</sup> **Exhibit C-0168**, Mining Council Resolution No. 13-2014-MEM-CM, May 13, 2014.

Santa Ana Project. The record also shows that Peru clumsily concocted an alleged “violation” of Article 71 of the Constitution for the sole purpose of covering up the fact that it issued Supreme Decree 032 to placate a radical political group. As a result, on the facts alone, the Tribunal should reject Peru’s unfounded allegation that it has no jurisdiction over Bear Creek’s claims in this arbitration.

### **III. THE TRIBUNAL HAS JURISDICTION OVER BEAR CREEK’S CLAIMS, AS CLAIMANT MADE ITS INVESTMENT LAWFULLY AND IN GOOD FAITH**

72. In light of the above, there can be no question that Bear Creek’s investment was made in accordance with Peruvian law, and that Bear Creek acted in good faith. Whether a legality or good faith requirement exists in international law or should be implied in the FTA is accordingly a moot question in this case. Nevertheless, Peru raises a number of arguments in its Rejoinder that cannot go unanswered. As detailed below, and contrary to Peru’s submissions, Bear Creek does not bear the burden of proving the legality of its investment; rather, *Peru* bears the burden of proving its affirmative defenses of “fraud and deceit” in respect of Article 71 of Peru’s Constitution,<sup>252</sup> and must satisfy a high standard of proof that Bear Creek’s investment was made fraudulently (**Section III.A**). Peru has failed to sustain this burden with respect to its allegations of fraud (**Section III.B**) and bad faith (**Section III.C**). This Tribunal has jurisdiction over Bear Creek’s claim and should consider Respondent’s allegations in the context of the merits of Bear Creek’s claim (**Section III.D**).

#### **A. PERU BEARS THE BURDEN OF PROVING ITS AFFIRMATIVE DEFENSE OF A FRAUDULENT VIOLATION OF ARTICLE 71, AND MUST DO SO WITH CLEAR AND CONVINCING EVIDENCE**

73. *Burden of Proof.* In its Counter-Memorial, Respondent asserted that “[a] claimant bears the burden of proving the factual prerequisites for jurisdiction.”<sup>253</sup> In its Rejoinder, Respondent now claims that because “Claimant did not address this issue in its Reply, [it] accept[ed] that it must demonstrate to this Tribunal that it lawfully made and held an investment in Perú.”<sup>254</sup> Respondent is incorrect on the facts and the law.

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<sup>252</sup> Respondent’s Rejoinder ¶ 364.

<sup>253</sup> Respondent’s Counter-Memorial ¶ 197.

<sup>254</sup> Respondent’s Rejoinder ¶ 362.

74. Putting aside the fact that Claimant did in fact address the burden of proof in its Reply,<sup>255</sup> there can be no question that Respondent’s allegations of fraud and deceit are affirmative defenses. As such, Peru bears the burden of proving these affirmative defenses, as the tribunal in *Fraport* held unequivocally:

Regarding burden of proof, **in accordance with well-established rule of *onus probandi incumbit actori*, the burden of proof rests upon the party that is asserting affirmatively a claim or defense. Thus, with respect to its objections to jurisdiction, Respondent bears the burden of proving the validity of such objections.** The Tribunal accepts that if Respondent adduces evidence sufficient to present a *prima facie* case, Claimant must produce rebuttal evidence, although **Respondent retains the ultimate burden to prove its jurisdictional objections.**<sup>256</sup>

Other investment tribunals also have placed the burden of proof on the respondent State to prove its jurisdictional objections, including allegations of illegality in the making of the investment.<sup>257</sup>

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<sup>255</sup> Claimant’s Reply ¶ 226 (“Respondent, as the party advocating that illegality is a jurisdictional impediment implied by international law and the ICSID system, bears the burden of persuasion[.]” (citing **CL-0170**, Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review (2014) at 17)). See also *id.* at ¶ 455 (citing **RLA-064**, *Talsud S.A. v. The United Mexican States*, Case No. ARB(AF0/04/04, Award, June 16, 2010, ¶ 13-99).

<sup>256</sup> **RLA-083**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [III]*, ICSID Case No. ARB/11/12, Award, Dec. 10, 2014, ¶ 299 (emphasis added).

<sup>257</sup> See, e.g., **CL-0147**, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, Dec. 8, 2000, 41 ILM 896 (2002), ¶ 117 (“*Wena Award*”) (explaining that Respondent bore “the burden of proving such an affirmative defense” of corruption); **CL-0176**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press, 2006) ¶¶ 323-24; **RLA-092**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. AEB/05/18, Decision on Jurisdiction, July 6, 2007, ¶ 229 (“*Kardassopoulos Decision on Jurisdiction*”) (recognizing that “the burden of proof on this issue [Respondent’s affirmative defense] lies with Respondent”); **CL-0169**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, Jun. 22, 2010, ¶ 194 (“*Liman Caspian Oil Award*”) (“the burden of proving fraud and bribery regarding the making of the original investment lies with Respondent”); **CL-0171**, Aloysius Llamzon & Anthony C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in Albert Jan van den Berg (ed), *LEGITIMACY: MYTHS, REALITIES, CHALLENGES*, ICCA Congress Series, Vol. 18 (© Kluwer Law International 2015) at 484-85 (“When investor wrongdoing is plead as a defense, the burden [of proving the facts on which it relies] would fall on the host State”); **RLA-047bis**, Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (Cambridge: Grotius Publications, 1987) at 329 (“Bin Cheng”) (“It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof”); **RLA-094**, *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, May 28, 2012, ¶ 138 (“*InterTrade Award*”) (“the Respondent must marshal sufficient evidence of its so-called ‘badges of fraud’ to persuade the Tribunal that an existing investment should nevertheless be denied protection under the BIT”); **RLA-087**, *Convial Callao S.A. and CCI – Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013, ¶ 420 (“*Convial Award*”) (“the tribunal agrees with the Plaintiffs in the sense that the

For example, the tribunal in *Liman Caspian Oil* held that “the burden of proving fraud and bribery regarding the making of the original investment lies with Respondent,”<sup>258</sup> and the *Wena Hotels* tribunal noted that Egypt “bears the burden of proving such an affirmative defense [of illegality.]”<sup>259</sup> Case law is clear, emphatic, and unanimous on this point.<sup>260</sup>

75. Respondent ignores the findings of these investment tribunals, and relies instead on Professor Bin Cheng to support its untenable position that the entire burden of proof rests solely with Claimant.<sup>261</sup> But Respondent fails to quote Professor Cheng’s important qualifier to this position: “Indeed, it may be said that the term *actor* in the principle of *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved ... It may in fact happen that the claimant is procedurally the defendant[.]”<sup>262</sup> Here, on the claims of the alleged illegality and bad faith of Claimant’s investment amounting to fraud and deceit, Respondent is the moving party and thus the proper *actor* in *onus probandi actori incumbit*. Professor Cheng also clarifies that bearing the burden of proof “means that a party having the burden of proof not only must bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for

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burden of proof of said allegation [of fraudulent acts] falls on Perú. The party that alleges fraud must prove it with facts and not base [the accusation] on mere inference.”).

<sup>258</sup> **CL-0169**, *Liman Caspian Oil* Award ¶ 194.

<sup>259</sup> **CL-0147**, *Wena* Award ¶ 117.

<sup>260</sup> **RLA-093**, *Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award, Dec. 1, 2008, ¶ 138 (“*Chevron* Interim Award”) (“As a general rule, the holder of a right raising a claim on the basis of that right in legal proceedings bears the burden of proof for all elements required for the claim. However, an exception to this rule occurs when a respondent raises a defense to the effect that the claim is precluded despite the normal conditions being met. In that case, the respondent must assume the burden of proof for the elements necessary for the exception to be allowed.”); **CL-0112**, *Flughafen Zurich A.G. et al., v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, Nov. 18, 2014, ¶¶ 135-36 (“*Flughafen* Award”) (holding that the respondent, Venezuela, carried the burden of proof since it was the party alleging that the contract underlying the investment was obtained via public corruption”); **RLA-022**, *Gustav F. W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 ¶ 132 (“*Hamester* Award”) (finding that the burden of proof is on the respondent State, and holding that the State did not sustain its burden of proof); **RLA-023**, *SAUR International S.A., v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, ¶ 311 (“*SAUR* Decision on Jurisdiction and Liability”) (holding that Argentina bore the burden of proof and failed to sustain its burden of proving illegality); **RLA-088**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, Oct. 4, 2013, ¶ 237 (“*Metal-Tech* Award”) (stating that the principle that “each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals.”); **RLA-019**, *Khan Resources Inc., et al., v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, July 25, 2012, ¶ 326 (“*Khan Resources* Decision on Jurisdiction”) (“each party shall have the burden of proving the facts relied on to support its claim or defence.”).

<sup>261</sup> Respondent’s Rejoinder n.732.

<sup>262</sup> **RLA-047**, Bin Cheng at 332.

want, or insufficiency, of proof.”<sup>263</sup> Accordingly, Respondent not only must present evidence to this Tribunal to prove its affirmative defenses, but also must convince the Tribunal of their truth.

76. *Standard of Proof.* Peru raises very serious accusations of illegality and bad faith against Claimant—indeed, Peru alleges not just any type of illegality, but rather “fraud and deceit[.]”<sup>264</sup> To succeed on such grave charges, Respondent must meet the high standard of proof set for fraud allegations. As the *Chevron* tribunal put it, quoting Judge Higgins’ separate Opinion in the *Oil Platforms* case, “there is ‘a general agreement that the graver the charge the more confidence must there be in the evidence relied on.’”<sup>265</sup> Where disputes persist, “the Tribunal must find that the Respondent has not borne its burden to an extent that would justify dismissing the Claimant’s claims at this [jurisdictional] stage.”<sup>266</sup>

77. Accordingly, tribunals have adopted the standard of “clear and convincing” evidence where allegations of fraud, deceit, or corruption are at issue. For example, in *Siag v. Egypt*, the tribunal accepted the claimant’s submission that the standard of “clear and convincing” evidence should be adopted to assess allegations of fraud,<sup>267</sup> and in *Fraport*, the tribunal adopted the standard of “clear and convincing” evidence for the assessment of allegations of corruption.<sup>268</sup> *Siag* and *Fraport* reflect the prevailing view on this issue.<sup>269</sup>

78. In the case of allegations of fraud, any difficulties in obtaining evidence do not shift the burden or lessen the standard of proof.<sup>270</sup> Mere allegations of wrongdoing supported by inferences cannot suffice to compel dismissal of an investor’s claims. In considering the respondent’s allegations of fraud, the *Hamester* tribunal put the matter succinctly: “The Tribunal

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<sup>263</sup> *Id.* at 329.

<sup>264</sup> Respondent’s Rejoinder ¶ 364.

<sup>265</sup> **RLA-093**, *Chevron* Interim Award ¶ 143.

<sup>266</sup> *Id.* at ¶ 145.

<sup>267</sup> **CL-0085**, *Waguih Elie George Siag et al., v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶¶ 325-36 (“*Siag* Award”).

<sup>268</sup> **RLA-091**, *Fraport I* ¶¶ 477, 479.

<sup>269</sup> See also, e.g., **RLA-021**, *Inceysa Vallisoletana S.L., v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, Aug. 2, 2006, ¶ 244 (“*Inceysa* Award”) (requiring “clear and convincing” evidence); **RLA-024**, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014, ¶ 133 (“*Minnotte* Award”) (requiring “manifest fraud or other defects”).

<sup>270</sup> See, e.g., **RLA-094**, *InterTrade* Award ¶ 138.

can only decide on substantiated facts, and cannot base itself on inferences.”<sup>271</sup> Both the *InterTrade* and *Hamester* tribunals held that the respective respondents had not shown sufficient evidence to prove their claims of illegality.<sup>272</sup> Similarly, in the present case, Peru has failed to meet its burden of proving fraud or deceit in the making of Bear Creek’s investment for the reasons set forth in the following sections.

## **B. PERU HAS FAILED TO SUSTAIN ITS BURDEN OF PROVING FRAUD**

79. Peru alleges that the Tribunal cannot hear Bear Creek’s claims because it allegedly acquired its investment in Peru through “fraud and deceit” and acted in bad faith in so doing.<sup>273</sup> To prove fraud, Peru bears the burden of proving to this Tribunal that Bear Creek knowingly misrepresented or concealed the truth of its relationship with Ms. Villavicencio.<sup>274</sup> Given the diligence and transparency with which Bear Creek made its investment, fraud simply cannot be found: as expressed by the *Jan de Nul* tribunal, “there is no fraud when the alleged victim could have known about the relevant facts by other means[,]” such as, in this case, by consulting the very documents Bear Creek submitted to Peru or by simply asking).<sup>275</sup> Peru fails to meet this burden because there was no fraud in the making of Bear Creek’s investment (**Section 1**) or prior thereto (**Section 2**).

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<sup>271</sup> **RLA-022**, *Hamester* Award ¶ 134. See also **RLA-087**, *Convial* Award ¶ 420 (quoting *Hamester* tribunal with approval).

<sup>272</sup> **RLA-022**, *Hamester* Award ¶ 134; **RLA-094**, *InterTrade* Award ¶ 277. In addition to *Hamester* and *InterTrade*, several investment treaty arbitral tribunals have examined allegations of illegality and concluded that the respondent State did not sustain its burden of proof. See, e.g., **CL-0112**, *Flughafen* Award; **CL-0147**, *Wena* Award; **CL-0169**, *Liman Caspian Oil* Award; **RLA-023**, *SAUR* Decision on Jurisdiction and Liability; **RLA-087**, *Convial* Award.

<sup>273</sup> Respondent’s Rejoinder ¶¶ 364, 383.

<sup>274</sup> See **CL-0216**, Black’s Law Dictionary 731 (9<sup>th</sup> ed., 2009) (Fraud is a “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”); **CL-0217**, Carolyn Lamm et. al., *Fraud and Corruption in International Arbitration*, in Liber Amicorum Bernardo Cremades 699 (Fernandez-Ballesteros and Arias, eds., 2010) (defining fraud as “a knowing misrepresentation of the truth of a material fact to induce another to act in a manner that is detrimental to their interests.”); **CL-0171**, Aloysius Llamzon & Anthony C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, in Albert Jan van den Berg (ed), LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA Congress Series, Vol. 18 (© Kluwer Law International 2015) at 467-70 (“Fraud has been defined as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”) (internal citations omitted). Also, as Professor Bullard explains, there is no fraud under Peruvian law in this case. Third Bullard Expert Report ¶¶ 66-73.

<sup>275</sup> **CL-0114**, *Jan de Nul N.V. & Dredging International N.V. v. Egypt*, ICSID Case No.ARB/04/13, Award, Nov. 6, 2008, ¶ 208.

**1. There Was No Fraud in the Making of Bear Creek’s Investment and, Contrary to Peru’s Assertions, Peru Knew, or Should Have Known, the Full Extent of Ms. Villavicencio’s Relation to Bear Creek Prior to June 2011**

80. Peru claims that Bear Creek’s investment was fraudulent and deceitful because Bear Creek did not disclose its employer-employee relationship with Ms. Villavicencio to Peru, and because Bear Creek allegedly exercised control over Ms. Villavicencio and therefore indirectly owned the Concessions prior to obtaining Supreme Decree 083.<sup>276</sup> Peru further claims that it only discovered this “**possible** constitutional violation”<sup>277</sup> on June 23, 2011. These bare allegations are demonstrably false; insinuations are not evidence.

*a. Bear Creek made its investment in accordance with the law*

81. It is common ground between the Parties that the relevant time for assessing the legality of an investment is at the making of that investment.<sup>278</sup>

82. Bear Creek made its investment when it exercised its option under the Option Agreements on December 3, 2007; this is the relevant point in time for the Tribunal’s analysis.<sup>279</sup> To be clear, Peru does not allege that any of the following was illegal:

- *Entering into the Option Agreements:* Peru concedes that option agreements between an employer and employee “that anticipate a future transfer of border zone mining rights to a foreign company” are legal.<sup>280</sup> Peru even goes further and concedes that it “**does not claim . . . that these particular option contracts (alone and on their faces) would violate Article 71,**”<sup>281</sup> and thus be illegal.

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<sup>276</sup> Respondent’s Rejoinder ¶¶ 49, 72; **REX-006**, Danos Expert Report ¶ 97.

<sup>277</sup> **RWS-005**, Gala Second Witness Statement ¶¶ 14, 15, 19, 22 (emphasis added); **RWS-007**, Zegarra Second Witness Statement ¶¶ 18, 20.

<sup>278</sup> Respondent’s Rejoinder at Section III.A.1 (“Investments that are **made** in violation of the law of the host State are not protected[.]”). See also **RLA-019**, *Khan Resources* Decision on Jurisdiction ¶ 382 (“... the protections of an investment treaty such as the ECT cannot be extended to an investment *made* illegally.”) (emphasis in original); **RLA-018**, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014, ¶ 1354 (“*Yukos* Award”).

<sup>279</sup> Claimant’s Reply ¶ 190; **Exhibit C-0015**, Transfer Agreements.

<sup>280</sup> Respondent’s Counter-Memorial ¶ 47; Respondent’s Rejoinder ¶ 391; **REX-003**, Rodríguez-Mariátegui First Report ¶ 16 (“It is standard in the market for mining concession transfer agreements to be preceded by an option agreement by means of which the grantor provides the beneficiary with a temporary, exclusive, unconditional, and irrevocable right to enter into a final agreement if the beneficiary requests this within the agreed period.”).

<sup>281</sup> Respondent’s Rejoinder ¶ 60 (emphasis added).

- *Exercising the option:* Respondent cannot dispute that Bear Creek exercised its option only **after** it had obtained the requisite declaration of public necessity embodied in Supreme Decree 083, thereby satisfying the contractual and constitutional condition precedent.<sup>282</sup>
- *Bear Creek’s payment of consideration for the option:* Although Peru insinuates that USD 14,000 was insufficient consideration, it does not take the position that the consideration paid was in any manner unlawful, and cannot point to any provision of Peruvian law that Bear Creek’s payment violated.<sup>283</sup> Crucially, that USD 14,000 amount was never hidden, having been stipulated explicitly in the Option Agreements submitted to Peru.

In such circumstances, the Tribunal must find that Peru has not sustained its burden of proving that illegality amounting to fraud tainted Bear Creek’s making of its investment, *i.e.*, the exercise of its option under the Option Agreements.<sup>284</sup>

83. Because Peru cannot attack the investment at the time of its making—*i.e.*, when Bear Creek exercised its option—its strategy involves moving back the clock and forcing Claimant to defend itself at the time when Supreme Decree 083 was issued. Peru claims that when it issued the Supreme Decree, it was not aware of all relevant facts. But Peru does not and cannot deny that Bear Creek submitted, among other material, the following documents with its application for a declaration of public necessity:

- A certificate of validity of the power of attorney for Ms. Villavicencio as legal representative of Bear Creek, which the SUNARP Registry Tribunal had registered;<sup>285</sup>
- Copies of Ms. Villavicencio’s applications for the Karina 9A, 1, 2, 3, 5, 6, and 7 mining concessions;<sup>286</sup>
- Copies of INACC’s approval of Ms. Villavicencio’s petition for the Karina 9A, 1, 2, and 3 mining concessions;<sup>287</sup>

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<sup>282</sup> **Exhibit C-0015**, Transfer Agreements.

<sup>283</sup> Respondent’s Rejoinder ¶ 60.

<sup>284</sup> As Professor Bullard explains, “the mining rights were acquired in a valid way because BEAR CREEK complied with the established legal requirements, without having engaged in the alleged “simulation” or “legal fraud.” Third Bullard Expert Report ¶ 42.

<sup>285</sup> **Exhibit C-0017**, Supreme Decree Application, Annex VI at 80-81.

<sup>286</sup> *Id.* at Annex VIII at 86 *et seq.*

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

- Copies of the official registration of Ms. Villavicencio’s concession rights for Karina 9A, 1, 2, and 3;<sup>288</sup> and
- Copies of the registered Option Agreements for the Karina 9A, 1, 2, 3, 5, 6, and 7 mining concessions.<sup>289</sup>

These documents were submitted for a reason: to give Peru the information it needed to assess whether Bear Creek’s proposed investment merited the issuance of a declaration of public necessity. In this regard, Bear Creek gave Peru all the information it needed, including information that demonstrated a direct relationship of trust existing between Bear Creek and Ms. Villavicencio (through registration of Ms. Villavicencio’s employment with Bear Creek, and submission of the power of attorney as well as the Option Agreements). Neither at the time of Bear Creek’s application for the declaration of public necessity nor in its submissions before this Tribunal was Peru able to point to a single document that Bear Creek was required to submit with its application but failed to submit.

84. Indeed, Peru itself states that it carefully reviews and vets applications for declarations of public necessity:

**MINEM** analyzes what type of benefits the project can bring to the region. The **Ministry of Defense** ascertains the national security risks that the development of a mining project in a sensitive zone, like the border are, may present. The **Foreign Affairs Ministry** also reviews whether the project presents a risk to the country’s international relations, including with neighboring countries. After these entities review the proposal submitted by the interested party and they issue their opinion on it, the file goes to the **Council of Ministers** to be evaluated. The public necessity declaration must be approved by the **President of the Republic** with a vote of approval by the Council of Ministers.<sup>290</sup>

In the present case, Respondent took almost a full year to complete these many levels of review and requested additional information when deemed necessary.<sup>291</sup> Bear Creek provided this additional information to the satisfaction of the Government as evidenced in the Government’s

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<sup>288</sup> *Id.* at Annex X at 185-186.

<sup>289</sup> *Id.* at Annex IX at 165-183.

<sup>290</sup> **RWS-003**, Zegarra First Witness Statement ¶ 6 (emphasis added).

<sup>291</sup> **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007; Claimant’s Reply ¶ 36.

eventual enactment of Supreme Decree 083. **Peru clearly carefully vetted Bear Creek’s application and to this day cannot point to any missing or falsified documents, any misrepresentations, any intentionally concealed or newly discovered documents, or any failure of Bear Creek to provide supplementary information the Government requested.**

85. These facts stand in stark contrast to the cases on which Respondent relies to support its allegations of fraud and deceit. In *Fraport*, for example, the investor sought and received legal advice from local counsel in the Philippines regarding national law restrictions on foreign ownership of certain types of investments. However, the investor purposefully and knowingly disregarded counsel’s advice and entered into secret shareholder agreements to hide its true ownership structure. The tribunal held that the investor acted in knowing violation of the host State’s law.<sup>292</sup> In the tribunal’s words, “Fraport had been fully advised and was fully aware of the ADL [Anti-Dummy Law] and the incompatibility with the ADL of the structure of its investment which it planned and ultimately put into place with the secret shareholder agreements.”<sup>293</sup> By contrast, Bear Creek publicly registered the Option Agreements detailing its transaction with Ms. Villavicencio, even when it was not required to do so under Peruvian law, and freely included these agreements as part of its application for a declaration of public necessity that it submitted to the Government. Bear Creek also **sought and followed** advice from preminent Peruvian mining counsel, who raised no red flags about possible Peruvian law violations, prepared the Option Agreements, the Transfer Agreements, and the application for a declaration of public necessity, and signed their approval of those documents as required under Peruvian law when a party wishes to publicly notarize a document.

86. In *Plama*, the investor misrepresented that it had substantial assets when it did not, and that it was a consortium when it was not, and deliberately failed to inform the host State of the true state of affairs.<sup>294</sup> The tribunal found, under these circumstances, a “deliberate concealment amounting to fraud, calculated to induce [Bulgaria to authorize the claimant’s investment].”<sup>295</sup> And in *Inceysa*, the investor falsified financial documents, and purposefully

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<sup>292</sup> **RLA-091**, *Fraport I* Award ¶¶ 313, 315, 327.

<sup>293</sup> *Id.* at ¶ 327.

<sup>294</sup> **CL-0104**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, Aug. 27, 2008, ¶¶ 133-34 (“*Plama* Award”).

<sup>295</sup> *Id.* at ¶ 135.

misrepresented its experience and capacity to make the investment at issue.<sup>296</sup> The tribunals in each of these cases held that, had the respective host State known the truth about the investor’s financials and actual credentials, the host State would not have permitted the investment.<sup>297</sup> Peru does not allege that Bear Creek failed to disclose its true financial status, or that Bear Creek attempted to conceal the true identity of the investor who would develop the proposed investment in its application for a declaration of public necessity. Peru knew of Bear Creek’s stature, its experience, its finances, and its plans for developing the concession area, and approved Bear Creek as the investor to address the public need for the development of the Santa Ana Concessions. Peru does not and cannot claim that, had it known Bear Creek’s true financials and credentials, it would not have granted the declaration of public necessity, because Peru did, in fact, know these details. Moreover, Article 71’s key purpose relates to Peru’s security concerns against external threats to its sovereignty, and the forthright disclosure of the putative foreign concessionaire’s nature and capabilities is essential to that analysis. Bear Creek provided all the information necessary in a timely and transparent fashion for Peru to undertake that national security analysis. At no point—not even now—does Peru suggest that its “discovery” of the employer-employee relationship between Bear Creek and Ms. Villavicencio threatens its security.

87. Since Peru cannot point to any wrongdoing in Bear Creek’s application for a declaration of public necessity, it complains that Bear Creek failed to “connect the dots” for Peru and that “no one official at MINEM knew the full extent of the relationship between Ms. Villavicencio and Bear Creek.”<sup>298</sup>

88. Peru’s argument is untenable for at least four distinct reasons. First, Peru cannot set up a Government structure for publicizing and registering information with different arms of the Government and then be permitted to complain that no one individual within the Government knew all of the information. In accordance with Peruvian law, Claimant registered Ms.

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<sup>296</sup> **RLA-021**, *Inceysa* Award ¶¶ 236-37.

<sup>297</sup> *Id.* at ¶ 237 (“It is clear to this Tribunal that, had it known the aforementioned violations of Inceysa, the host State, in this case El Salvador, would not have allowed it to make its investment.”); **CL-0104**, *Plama* Award ¶ 133 (“The Arbitral Tribunal is persuaded that Bulgaria would not have given its consent to the transfer of Nova Plama’s shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources.”).

<sup>298</sup> Respondent’s Rejoinder ¶ 66.

Villavicencio as an employee with the Ministry of Labor, publicized the Option Agreements through SUNARP, and applied for the declaration of public necessity with MINEM, while Ms. Villavicencio applied for the Santa Ana Concessions with INACC. Much of the same information was filed with each of these government agencies; but even if not, Peru cannot fault Claimant for complying with the structure for providing information to the Government that Peru itself imposed.

89. Second, Peru’s complaint that “no one official” knew all relevant information is inapposite as a matter of law because the State is considered unitary under international law, *i.e.*, all the constituent agencies and instruments of the Government are considered as one. Article 4(1) of the ILC Articles on State Responsibility provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”<sup>299</sup> Article 4(2) clarifies that “[a]n organ includes any person or entity which has that status in accordance with the internal law of the State.”<sup>300</sup> This extends even to *ultra vires* acts, as discussed further below.<sup>301</sup> Peru—the State as a whole—is imputed with knowledge that Ms. Villavicencio was Bear Creek’s employee *because Bear Creek made Peru aware thereof* by registering her as such with the Ministry of Labor.

90. Third, Peru takes the position that even if Bear Creek had included in its application additional information on the employer-employee relationship (which Peru already knew through the Ministry of Labor), there are no circumstances under which Bear Creek could have lawfully obtained the declaration of public necessity. Peru’s witness Mr. Zegarra claims that **“even if Bear Creek provided all the necessary information to the MINEM, and I approved that documentation, this does not mean that the State knew of and was aware of the true relationship between Bear Creek and Ms. Villavicencio.”**<sup>302</sup> Thus, per Mr. Zegarra’s

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<sup>299</sup> **CL-0030**, The International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR 6<sup>th</sup> Comm., 53<sup>rd</sup> Sess., U.N. Doc. A/56/10, 2001, Art. 4(1) (“ILC Draft Articles”).

<sup>300</sup> *Id.* at Art. 4(2).

<sup>301</sup> *Id.* at Art. 7. *See infra* ¶¶ 146-49.

<sup>302</sup> **RWS-007**, Zegarra Second Witness Statement ¶ 21 (emphasis added).

testimony, there appears to be nothing that Bear Creek could have disclosed that would lead Peru to accept that it “knew of and was aware of” that relationship.

91. Fourth, and finally, on Peru’s own case the Option Agreements *on their face* evidence Bear Creek’s alleged control over Ms. Villavicencio such that there were no “dots” to “connect.” If—as Peru contends—“the language and terms of the option contracts shed light on the restrictive relations between Ms. Villavicencio and Bear Creek”<sup>303</sup> and by extension indirect ownership over the Concessions (which Claimant denies,<sup>304</sup> *see* Section II.A above), a simple review of the Option Agreements that Bear Creek submitted with its application for a declaration of public necessity would have raised red flags with the Government, but it did not.

*b. Peru knew of Ms. Villavicencio’s relation to Bear Creek prior to June 23, 2011*

92. Despite the facts outlined above, in its Counter-Memorial and in Vice-Minister Gala’s first witness statement, Peru took the position that, during meetings held between June 17 and 23, 2011, Aymaran leaders representing the “Southern front” protesters provided new documents to the Government that allegedly demonstrated the illegality of Claimant’s acquisition of the Santa Ana Concessions.<sup>305</sup> Upon Claimant pointing out in its Reply that Messrs. Swarthout and Antúnez de Mayolo met with Vice-Minister Gala on June 22, 2011, and during this meeting Vice-Minister Gala did not mention these documents or raise any concerns regarding the legality of Bear Creek’s investment, Peru now claims in its Rejoinder that “protester representatives”—not “Aymaran leaders”—provided these documents the very next day, on June 23, 2011, the last day of the meetings. Notwithstanding the improbability that key pieces of information and documents would be presented and discussed only on the last day of a week-long series of meetings regarding the very subject-matter of these documents, compounded by Peru’s subsequent failure to contact Bear Creek regarding this allegedly new information, Peru to date has not presented a single one of these “documents” that supposedly prove Bear Creek’s “fraud and deceit.”

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<sup>303</sup> Respondent’s Rejoinder ¶ 57.

<sup>304</sup> **Exhibit C-0016**, Option Agreements, Art. 2.1 (expressly providing that Ms. Villavicencio is under no obligation to follow instructions from Bear Creek).

<sup>305</sup> Respondent’s Counter-Memorial ¶¶ 125-26; **RWS-001**, Gala First Witness Statement ¶¶ 33-36.

93. Peru’s witnesses claim that the State only learned of a “**possible** constitutional violation”<sup>306</sup> on June 23, 2011 and that this possible violation of the law combined with social upheaval compelled it to issue Supreme Decree 032.<sup>307</sup> It is clear from Peru’s witnesses’ statements, however, that the very documents they claim constituted new information were the same documents that Bear Creek had submitted years ago with its application for a declaration of public necessity and had resubmitted to MINEM a few weeks earlier per MINEM’s May 30, 2011 request.<sup>308</sup> In his Second Witness Statement, Vice-Minister Gala testifies:

They [the protesters’ representatives, among them Yohnny Lescano] showed us **the documents that indicated that there was a relationship** between Ms. Jenny Karina Villavicencio and the Bear Creek company [on June 23, 2011]. **They showed us the option contracts** between the parties for the acquisition of the mining concessions; **they told us that they believed that Ms. Jenny Karina Villavicencio was an employee and a legal representative** of the company and, generally speaking the community representatives **led us to understand that the company had been present in the area long before the declaration of public necessity** was approved. Once we obtained this information, there were serious **doubts** about the constitutional legality of the acquisition process of the Santa Ana Project.<sup>309</sup>

Vice-minister Gala’s statement is the most extensive explanation of what the allegedly new documents and information were on which Respondent repeatedly relies without submitting them into evidence. Yet even here, Vice-Minister Gala does not list a single new fact that was allegedly disclosed on June 23, 2011 of which the Government was not aware years earlier, prior to granting Supreme Decree 083 and prior to granting Ms. Villavicencio’s concession applications.

94. Conveniently, Vice-Minister Gala refers to “documents” but does not provide any details on what these documents were. Neither do any of Peru’s other witnesses, who also refer to “documents” without providing any substantive details whatsoever:

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<sup>306</sup> **RWS-005**, Gala Second Witness Statement ¶¶ 14, 15, 19, 22 (emphasis added); **RWS-007**, Zegarra Second Witness Statement ¶¶ 18, 20.

<sup>307</sup> **RWS-005**, Gala Second Witness Statement ¶ 17.

<sup>308</sup> **Exhibit C-0174**, MINEM Report No. 442-2011-MEM-DGM-DNM and Resolution No. 165-2011-MEM-DGM/V, May 30, 2011.

<sup>309</sup> **RWS-005**, Gala Second Witness Statement ¶ 17 (emphasis added).

- Rosario de Pilar Fernández Figueroa: “Congressman Yohnny Lescano also made a statement and produced, in the middle of the discussions, **documents** which he used to argue that the authorization granted to Bear Creek was unlawful”<sup>310</sup>; “we became aware of **the existence of documents** that objectively evidenced the fact that Bear Creek had acquired the mining concessions in violation of Article 71 of the Constitution”<sup>311</sup>;
- Cesar Zegarra: “the congressman for the Department of Puno, Yohnny Lescano, with other representatives of the protesters, **delivered information** that indicated that Bear Creek had acquired the Santa Ana Concessions through Ms. Villavicencio before obtaining the declaration of public necessity, which violated Article 71 of the Constitution of Peru.”<sup>312</sup>

Peru never entered into evidence what, according to the Government, are damning “documents” that “objectively evidence” Bear Creek’s “possible” constitutional violation. On the basis of these undisclosed documents, Peru revoked Bear Creek’s rights under Supreme Decree 083 overnight, without ever consulting Bear Creek, and without giving Bear Creek notice or an opportunity to be heard. Peru’s complete disregard for any due process rights to which Bear Creek was and is entitled is particularly troubling in light of Peru’s witnesses’ repeated references to only a “possible” violation of Peruvian law.<sup>313</sup> Worse, when Bear Creek asked the Government to provide it any documents or other information on which Supreme Decree 032 (which revoked Supreme Decree 083) was based, Peru responded that no such documents exist.<sup>314</sup> And yet now, Peru attempts to rely on these to-date undisclosed, allegedly new documents that Peru denied existed when Bear Creek asked it for any information underlying the issuance of Supreme Decree 032. This is simply not credible.

95. After referring to these allegedly new documents, Vice-Minister Gala specifically mentions only the Option Agreements. But these agreements were registered with SUNARP and were submitted to MINEM with Bear Creek’s application for a declaration of public necessity

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<sup>310</sup> **RWS-004**, Witness Statement of Rosario de Pilar Fernández Figueroa, Apr. 8, 2016, ¶ 24 (Fernández Witness Statement”) (emphasis added).

<sup>311</sup> *Id.* at ¶ 28 (emphasis added).

<sup>312</sup> **RWS-007**, Zegarra Second Witness Statement ¶ 20 (emphasis added).

<sup>313</sup> **RWS-005**, Gala Second Witness Statement ¶¶ 14, 15, 17, 19, 22; **RWS-007**, Zegarra Second Witness Statement ¶¶ 18, 20; **RWS-004**, Fernández Witness Statement ¶ 13.

<sup>314</sup> **Exhibit C-0111**, Letter from R. Wong, Secretary General of the Ministry of Energy and Mines to E. Antunez, Bear Creek, Aug. 19, 2011.

and cannot possibly constitute new information. In hindsight, it is no coincidence that, on May 30, 2011, the same day MINEM suspended Bear Creek's ESIA, the Director General of Mining from MINEM issued a resolution directing Bear Creek to "reconstruct" its December 5, 2006 application for a declaration of public necessity and send it to MINEM **within three days**.<sup>315</sup> Bear Creek complied and sent another copy of its full 2006 application, including additional information requested by MINEM during the application process, within three days as requested by MINEM.<sup>316</sup> It is clear that MINEM was searching for a basis to justify revoking Supreme Decree 083.

96. Vice-Minister Gala next states that the protesters' representatives informed the Government of their belief that Ms. Villavicencio was an employee and a legal representative of the company. Peru knew this too at the time it issued Supreme Decree 083 and granted the concession applications to Ms. Villavicencio: Ms. Villavicencio was a registered Bear Creek employee, and Bear Creek submitted the power of attorney for Ms. Villavicencio (which was registered with SUNARP years earlier) with its application for a declaration of public necessity, which, evidence shows, Peru specifically reviewed. Again, none of this information was new to the Government.

97. Finally, Vice-Minister Gala points to the protesters' statements that Bear Creek had been "present in the area" long before the issuance of Supreme Decree 083. This is hardly secret information of which the Government was unaware when it issued Supreme Decree 083, especially when it was clear to all parties that Bear Creek was a third party to the land use agreements, which the DGAAM reviewed.<sup>317</sup> As contemporaneous evidence shows, the Government was fully aware of Bear Creek's presence in the area and knew that it was conducting exploration for and on behalf of Ms. Villavicencio.<sup>318</sup> Among this evidence is the Government's acceptance of Bear Creek's payment of sub-surface mining fees, on behalf of Ms.

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<sup>315</sup> **Exhibit C-0174**, MINEM Report No. 442-2011-MEM-DGM-DNM and Resolution No. 165-2011-MEM-DGM/V, May 30, 2011.

<sup>316</sup> **Exhibit C-0175**, Letter from E. Antunez de Mayolo, Bear Creek, to the General Director of Mining, Jun. 3, 2011.

<sup>317</sup> **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006.

<sup>318</sup> **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006; **Exhibit C-0201**, Letter from A. Swarouth and K. Villavicencio to Banco de Credito, Jun. 27, 2006; **Exhibit C-0202**, Letter from D. Volkert and K. Villavicencio to Banco de Credito, Jun. 20, 2007.

Villavicencio, to INGEMMET.<sup>319</sup> Faced with such documented evidence, it is unclear how the Government could deny contemporaneous knowledge of Bear Creek’s “presence” and activities in the area.

98. Vice-Minister Gala does not and cannot point to a single piece of information that Bear Creek did not already disclose to the Government before Peru issued Supreme Decree 083, and none of Peru’s other witnesses elaborates on these allegedly new documents either.<sup>320</sup> That is because no such new documents exist. When Bear Creek asked the Government to provide any documents it had to support its issuance of Supreme Decree 032, the Government responded that no such documents exist.<sup>321</sup> Peru conveniently ignores this contemporaneous fact, which wholly undermines the unidentified “documents” referenced by Peru and its witnesses: if these mysterious “new” documents existed, surely they ought to have been provided to Bear Creek at that time, not to mention in these proceedings. Peru simply has not done so because these documents do not exist.

99. Peru is asking this Tribunal to assume that these still undisclosed and unidentified “documents” somehow evidence fraud and deceit in the making of Bear Creek’s investment, thereby justifying Peru’s revocation of Supreme Decree 083. Peru also asks this Tribunal to make unsupported inferences of “control” based on the mere existence of an employer-employee relationship between Bear Creek and Ms. Villavicencio,<sup>322</sup> a fact that Bear Creek has never attempted to hide. This cannot even begin to satisfy the heightened standard of proof that Peru must meet to prove its allegations that Bear Creek acted fraudulently. As the *Hamester* tribunal stated, “[t]he Tribunal can only decide on substantiated facts, and cannot base itself on inferences.”<sup>323</sup>

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<sup>319</sup> **Exhibit C-0201**, Letter from A. Swarthout and K. Villavicencio to Banco de Credito, Jun. 27, 2006; Claimant’s Reply ¶ 32.

<sup>320</sup> **RWS-004**, Fernández Witness Statement ¶ 24; **RWS-007**, Zegarra Second Witness Statement ¶ 20.

<sup>321</sup> **Exhibit C-0111**, Letter from R. Wong, Secretary General of the Ministry of Energy and Mines to E. Antunez, Bear Creek, Aug. 19, 2011.

<sup>322</sup> **REX-006**, Danos Expert Report ¶ 96 (“Ms. Villavicencio was employed by Bear Creek and, **therefore**, was under the control of the company.”) (emphasis added).

<sup>323</sup> **RLA-022**, *Hamester* Award ¶ 134.

## 2. Bear Creek Acted in Accordance with Peruvian law in the Pre-Investment Phase

100. Faced with the facts outlined above, Peru now claims that the alleged fraud in Bear Creek’s investment dates back to 2004, when Ms. Villavicencio applied for the concessions—before she obtained them and before Bear Creek exercised its option to purchase them.<sup>324</sup> Peru alleges that, because Ms. Villavicencio did not disclose at that time that she was an employee of Bear Creek, “Bear Creek deprived the Peruvian State of its constitutional right and obligation to determine at that moment whether the company’s presence in the border zone was a public necessity.”<sup>325</sup> Respondent’s position has no merit for the following reasons.

101. First, as noted in Section III.B.1 above, the relevant point in time for assessing the legality of an investment is when the investor makes the investment. Investment tribunals are unanimous in this regard.<sup>326</sup> Focusing on when Ms. Villavicencio applied for the concessions in 2004 is not only inconsistent with these arbitral awards, but it is also nonsensical. When Ms. Villavicencio applied for the concessions, she did not yet own the concession rights and thus Bear Creek could not have acquired those rights from her at that point in time. Ownership of the concessions by Bear Creek in any way, shape, or form, let alone under direct or indirect “title” as provided in Article 71 of the Constitution, was simply impossible.

102. Second, Peruvian law and the application form for concession petitions do not require disclosure of the applicant’s employer. Peru never indicated that this information was relevant, let alone material, and cannot point to any authority for the proposition that disclosure thereof was required. Yet in this arbitration, Peru alleges that Bear Creek and Ms. Villavicencio committed fraud and deceit because they allegedly did not disclose information that Peru did not require to be disclosed at the relevant point in time. Peru is fabricating additional requirements *ex post facto* and applying them retroactively to smear Bear Creek’s and Ms. Villavicencio’s conduct. This exercise should not be rewarded.

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<sup>324</sup> Respondent’s Rejoinder ¶¶ 41, 58.

<sup>325</sup> *Id.* at ¶ 41.

<sup>326</sup> **RLA-091**, *Fraport I* Award ¶ 395; **RLA-019**, *Khan Resources* Award ¶ 382; **RLA-018**, *Yukos* Award ¶ 1354.

103. Third, even though Peruvian law does not require an applicant for a concession to disclose his or her employer,<sup>327</sup> Peru in fact knew that Ms. Villavicencio was an employee of Bear Creek before it granted the concessions to Ms. Villavicencio or the declaration of public necessity to Bear Creek. Before Peru granted any of Ms. Villavicencio’s applications for mining concessions or Bear Creek’s application for a declaration of public necessity, Peru was aware of (i) Ms. Villavicencio’s employment with Bear Creek through the Ministry of Labor’s registration data going back to at least 2002, (ii) Ms. Villavicencio’s power of attorney from Bear Creek, registered with SUNARP in 2003, (iii) the terms of the Option Agreements, as of their filing with SUNARP, and (iv) SUNARP’s published ruling in the Official Gazette that the Option Agreements did not transfer ownership to Bear Creek.<sup>328</sup>

104. Specifically with respect to the latter, Peru’s own expert states that the SUNARP Registry’s “**main duty** is to **provide the public with knowledge** of the **existence and contents** of the transactions registered there... their primary purpose is that of providing public knowledge.”<sup>329</sup> Once SUNARP published its decision on the Option Agreements on **December 22, 2005**, the existence of the Option Agreements became **public knowledge**. Peru cannot claim ignorance or that it was deprived of the opportunity to make an informed decision when it registered the first two mining concessions it approved (Karina 2 and Karina 3) to Ms. Villavicencio on **July 5, 2006** on the basis that Bear Creek allegedly did not make it aware of information that was already public knowledge. In fact, as outlined above (*see* ¶ 24), INACC (the entity which granted Ms. Villavicencio’s petitions for the concessions) consulted the SUNARP registry, including the Option Agreements, prior to granting Ms. Villavicencio’s applications for concessions.<sup>330</sup> Thus, Peru knew of the Option Agreements and Ms. Villavicencio’s status as employee of Bear Creek **before** Peru granted any of the concession applications. Even assuming *arguendo* that Peru could not be charged with knowledge of the employer-employee relationship between Bear Creek and Ms. Villavicencio, the relationship of

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<sup>327</sup> *See supra* Section II.E.

<sup>328</sup> *Id.*

<sup>329</sup> **REX-003**, Rodríguez-Mariátegui First Report ¶ 19 (emphasis added).

<sup>330</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

trust is evident based on the Power of Attorney and the Option Agreements. Peru's claim that Bear Creek or Ms. Villavicencio sought to hide the true nature of their relationship, or that Peru had no basis to know of this relationship is frankly absurd.<sup>331</sup>

### C. PERU HAS FAILED TO MEET ITS BURDEN OF PROVING BAD FAITH

105. As the facts show, Bear Creek acted in good faith prior to and in making its investment, seeking and following the legal advice of preeminent Peruvian mining counsel, and disclosing to Peru all documents relating to the transaction with Ms. Villavicencio.

106. In its Memorial and its Reply, Claimant demonstrated how it acted transparently by disclosing the Option Agreements and related information to Peru, and by providing additional information to the Government when requested to do so.<sup>332</sup> Peru itself acknowledges how forthright and honest Bear Creek has been regarding its acquisition of the Santa Ana Concessions.<sup>333</sup> While Respondent feigns surprise at Bear Creek's frank discussion of the facts surrounding the making of its investment, this open attitude has been consistent throughout all of Bear Creek's correspondence and interactions with Peru. Bear Creek never sought to hide any information from Peru. On the contrary, Bear Creek took steps to register publicly documents relating to its transaction with Ms. Villavicencio, even when this was not required by Peruvian law. As previously explained,<sup>334</sup> Bear Creek took these steps, and others, to ensure that the modality through which it acquired the Santa Ana Concessions was in fact in accordance with Peruvian law.

107. Transparency is one of the hallmarks of good faith. As the *Plama* tribunal explained, the "principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the

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<sup>331</sup> Further evidence that Ms. Villavicencio and Bear Creek did not seek to hide their relationship by any means (contrary to what Peru contends) is Ms. Villavicencio's application entitled "*Aprobación de la Declaración Jurada de Exploración Minera Categoría B*," filed before MINEM on June 9, 2006, in connection with the environmental permits required to undertake exploratory works, which included her email address: [bearcreek@speedy.com.pe](mailto:bearcreek@speedy.com.pe). **Exhibit C-0287**, J. Karina Villavicencio's Request for the Approval of Mining Exploration Category B Affidavit, June 9, 2006 at Annex 1.

<sup>332</sup> Claimant's Memorial ¶¶ 15-16, 40; Claimant's Reply ¶¶ 34-36, 195-196.

<sup>333</sup> Respondent's Counter-Memorial ¶ 5; Respondent's Rejoinder ¶ 6.

<sup>334</sup> Claimant's Reply ¶¶ 194-196.

investment.”<sup>335</sup> Peru alleges that Bear Creek displayed bad faith by using its employee Ms. Villavicencio as a “front” to circumvent Article 71 of the Peruvian Constitution and acquire the Santa Ana Concessions,<sup>336</sup> which Peru characterizes as a “scheme.” But Peru sets forth no evidence of this alleged “scheme”—let alone any evidence that would demonstrate Bear Creek’s bad faith. Peru cannot identify a single disclosure requirement under Peruvian law that either Bear Creek or Ms. Villavicencio violated, and indeed the information that Peru complains was omitted was information in the public domain or otherwise in Peru’s possession.

108. Another indicator of good faith lies in following the advice of counsel. In *Fraport*, the tribunal held that when the compliance of an investor with the national law of the host State is at issue, a violation of law made in good faith would not deprive the tribunal of jurisdiction. One key indicator of good faith is the investor’s reliance upon competent local counsel that “failed to flag the issue”:

When the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *rationae materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent local counsel’s legal due diligence report to flag that issue.<sup>337</sup>

109. Here, Bear Creek sought advice from its legal counsel Estudio Grau—one of, if not the, most established and experienced Peruvian mining law firms—which advised on and did not flag any issues concerning the legality of the investment structure, and prepared all documents relating to the transaction.<sup>338</sup> Bear Creek was entitled to rely on the advice of counsel,

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<sup>335</sup> **CL-0104**, *Plama* Award ¶ 144.

<sup>336</sup> Respondent’s Rejoinder ¶¶ 6, 390.

<sup>337</sup> **RLA-091**, *Fraport I* Award ¶ 396. The tribunal also elaborated on another manifestation of the investor’s good faith that should prevent a violation of local law from resulting in a lack of jurisdiction: “[a]nother indicator that should work in favour of an investor that had run afoul of a prohibition in local law would be that the offending arrangement was not central to the profitability of the investment, such that the investor might have made the investment in ways that accorded with local law without any loss of projected profitability. This would indicate the good faith of the investor.” In this case, any violation by Bear Creek of Article 71 was indisputably “not central to the profitability of the investment,” and would thus “indicate the good faith of the investor.”

<sup>338</sup> Peru contends that “acting on supposed advice of counsel is not a legitimate excuse for violating the Constitution; counsel can be wrong.” Respondent’s Rejoinder ¶ 395. Yet if that were the case (which Claimant

and its diligent actions pursuant to that advice render impossible a finding of fraud or bad faith, which requires knowing misrepresentation. Peru also confirmed on many occasions that it accepted Bear Creek's investment structure as lawful,<sup>339</sup> and Peru approved similar acquisition structures in several other cases.<sup>340</sup>

110. All told, Bear Creek relied in good faith on the legal advice it received from highly qualified local mining counsel, which was consistent with Peru's practice in several other cases in which comparable acquisitions were permitted, and on Peru's statements and actions vis-à-vis Bear Creek. Contrary to Respondent's claim, there is not a shred of evidence of Bear Creek's alleged bad faith, much less fraudulent misrepresentation. The fact that Bear Creek sought and followed Estudio Grau's legal advice, and that Peru can put forth no stronger claim of illegality than, in essence, inventing new alleged legal requirements that have no support in Peruvian law,<sup>341</sup> clearly demonstrates Bear Creek's good faith reliance on the legally sound advice of competent local counsel.

111. Given these circumstances and facts, Peru cannot possibly satisfy its burden of proving by clear and convincing evidence that Bear Creek acquired the Santa Ana Concessions in bad faith.

**D. PERU MISCONSTRUES BEAR CREEK'S POSITION ON THE LAW OF INVESTOR ILLEGALITY IN INVESTMENT TREATY ARBITRATION**

112. Notwithstanding the plethora of evidence showing that Bear Creek made its investment lawfully and in good faith, fully disclosing all information to the Government, and acting upon competent Peruvian counsel's advice, Peru maintains that its allegations of fraud and bad faith deprive this Tribunal of its jurisdiction over Bear Creek's claims. Although unsubstantiated, Peru's allegations are grave and Peru knows that (as Professor Wälde warned in

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denies), "the failure of a competent local counsel's legal due diligence report to flag that issue" would be—as the *Fraport* tribunal noted—an "indicator of a good faith error." **RLA-091**, *Fraport I* Award ¶ 396.

<sup>339</sup> See *supra* Section II.F; see also disc. *infra* Section IV.

<sup>340</sup> See *supra* Section II.D.2.

<sup>341</sup> See disc. *supra* Section II.E.

*Thunderbird v. Mexico*) even uncorroborated accusations can taint the arbitrators' appreciation of a claimant's case.<sup>342</sup> Once such allegations are raised, the damage is often irreparable.

113. In its discussion of the law on legality and good faith, Peru sets up a proverbial straw man to knock down by misconstruing Claimant's position. Peru asserts that Claimant makes "the rather remarkable argument that neither the FTA nor international law principles require it to have obtained its investment lawfully and in good faith."<sup>343</sup> But Claimant's position is not (and never has been) the extreme position Peru suggests, namely that legality and good faith are wholly irrelevant. Rather, Claimant's position has always been that illegality and bad faith are not automatic bars to the Tribunal's jurisdiction, and should be assessed at the merits stage of the case.

114. As Claimant stated in its Reply, "contrary to Peru's assertions, legality and good faith are not independent bars to the Tribunal's *jurisdiction*. Although legality of the investment and good faith are principles of international law that the Tribunal may take into account in adjudicating the merits of Claimant's case, they are not independent jurisdictional hurdles."<sup>344</sup> Respondent's only counter is to quote various cases out of context—ignoring altogether that the facts of those cases are entirely distinguishable—and to assert that, from a practical perspective, it makes no difference whether this Tribunal dismisses Bear Creek's claims on the basis of jurisdiction or admissibility since these arbitral proceedings are not bifurcated.<sup>345</sup> On the basis of a controversial theory of an implied legality requirement, Peru assumes that any form of alleged unlawful conduct by an investor must be treated as a jurisdictional issue in investment treaty arbitration, such that any finding of wrongdoing in whatever form would automatically deprive this Tribunal of its jurisdiction.<sup>346</sup> Respondent then posits that, if the Tribunal nonetheless were to assert jurisdiction, it must treat any allegation of investor wrongdoing as a question of

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<sup>342</sup> **CL-0218**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, Dec. 2005, ¶ 111 (Professor Wälde observed that insinuations of corruption cast a "heavy dark cloud" over the case, affected the majority's analysis, and "may have coloured the tribunal's award.").

<sup>343</sup> Respondent's Rejoinder ¶ 363.

<sup>344</sup> Claimant's Reply ¶ 215 (emphasis in original).

<sup>345</sup> Respondent's Rejoinder ¶ 373.

<sup>346</sup> *Id.* at ¶¶ 371, 384.

admissibility on the merits.<sup>347</sup> As discussed in this section, however, Respondent is incorrect. First, the majority of the case law supports Claimant’s position that alleged illegality or bad faith is *not an automatic bar to jurisdiction*. Second, the Tribunal may and should consider Peru’s allegations of illegality on the merits without limiting its analysis to the question of the admissibility of Bear Creek’s claims.

### **1. Alleged Illegality or Bad Faith Does Not Necessarily Implicate the Tribunal’s Jurisdiction**

115. Respondent quotes selectively from cases allegedly supportive of its position that illegality or bad faith in the making of Bear Creek’s investment automatically results in the dismissal of the arbitration on jurisdictional grounds. In its Reply, Claimant demonstrated that a true reflection of the case law shows that the vast majority of tribunals does not consider illegality or bad faith an *eo ipso* bar to jurisdiction when no express legality requirement is set forth in the applicable BIT.<sup>348</sup> Claimant maintains and incorporates by reference its prior arguments on this issue,<sup>349</sup> and addresses Respondent’s latest assertions here.

116. As a preliminary matter and for the avoidance of doubt, it is undisputed that the FTA does not contain a legality or good faith requirement. Peru implicitly concedes this point.<sup>350</sup> Under international law, the Tribunal may not import a requirement that limits its jurisdiction when none is specified by the parties themselves.<sup>351</sup> Accordingly, Peru’s position rests entirely on requirements of legality and good faith implied under general principles of international law.<sup>352</sup> Yet Respondent cannot cite a single case in which an arbitral tribunal dismissed an

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<sup>347</sup> *Id.* at ¶ 384.

<sup>348</sup> Claimant’s Reply ¶¶ 212-230.

<sup>349</sup> *Id.* at ¶¶ 212-230.

<sup>350</sup> Respondent’s Rejoinder ¶ 369.

<sup>351</sup> **CL-0080**, *Anatoli Stati et. al., v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 812; **CL-0169**, *Liman Caspian Oil Award* ¶ 187.

<sup>352</sup> For Peru, “[e]stablishment of a rule of customary international law requires a factual showing of: ‘(1) a concordant practice of a number of States acquiesced in by others; (2) and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)’.” Respondent’s Rejoinder ¶ 522 (citation omitted). Thus, on Peru’s own case, Peru must establish a State practice to imply a legality and good faith requirement under international law **and** *opinio juris*, but Respondent has not proven either.

investor's claims on jurisdictional grounds on the basis of an implied international law legality requirement.<sup>353</sup>

117. In *Plama*, the tribunal reserved consideration of the respondent's allegations of illegality and misrepresentation for the merits phase of the arbitration and expressly held in its Decision on Jurisdiction that these allegations of illegality did not "affect[] its jurisdiction."<sup>354</sup> As the *Plama* tribunal put it, "[c]ontrary to Respondent's argument, the matter of **the alleged misrepresentation by Claimant does not pertain to the Tribunal's jurisdiction**["]."<sup>355</sup> On the facts of that case, the tribunal held that the claimant had "deliberately" misrepresented to the host State's authorities its true financial situation,<sup>356</sup> and that "Bulgaria [the host State] would not have given its consent to the transfer of Nova Plama's shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources."<sup>357</sup> It was integral to the tribunal's decision that the investor's misrepresentations were deliberate and designed to make the investor appear to be more financially sound and capable of managing the investment than he actually was. In other words, the investor was guilty of fraud in that case, and it was on that basis that the tribunal found the investor's claims inadmissible.<sup>358</sup> The *Plama* tribunal did not find that the investor's deliberate deception and active misrepresentations deprived the tribunal of jurisdiction. Neither did the *Plama* tribunal state that a violation of national law, *without fraud*, bears the consequence of inadmissibility.

118. The tribunal in *Malicorp* reached a similar conclusion, finding that allegations of investor wrongdoing (in this case primarily violation of the principle of good faith) do not necessarily deprive the tribunal of jurisdiction but may be considered either at the merits stage or

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<sup>353</sup> In the four cases in which an arbitral tribunal dismissed an investor's claims on jurisdictional grounds, the applicable BITs contained an express legality requirement (*Phoenix Action*, *Inceysa*, *Metal-Tech*, and *Fraport*).

<sup>354</sup> **CL-0104**, *Plama* Award ¶ 78; **CL-0172**, *Plama Consortium v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶¶ 126-30, 228-30.

<sup>355</sup> **CL-0104**, *Plama* Award ¶ 112 (emphasis added). See also **RLA-019**, *Khan Resources* Award ¶ 411 ("the Respondent's argument [on illegality of the claimant's investment] **cannot affect** the Tribunal's **jurisdiction** over Khan Netherlands' claims under the ECT.") (emphasis added); **RLA-017**, *Mamidoil* Award ¶ 494; **RLA-092**, *Kardassopoulos* Decision on Jurisdiction ¶ 184; **RLA-087**, *Convia* Award ¶¶ 490-411.

<sup>356</sup> **CL-0104**, *Plama* Award ¶ 134.

<sup>357</sup> *Id.* at ¶ 133.

<sup>358</sup> *Id.* at ¶ 133.

the jurisdictional stage.<sup>359</sup> The *Malicorp* tribunal held that different circumstances will “justify different solutions” and in that case, the tribunal considered the respondent’s allegations of illegality better suited to an analysis on the merits.<sup>360</sup> The tribunal based its decision to consider the respondent’s allegations of illegality on three factors. First, the tribunal cited to the principle of autonomy of the arbitration agreement according to which “defects undermining the validity of the substantive legal relationship, which is the subject of the dispute on the merits, **do not automatically undermine the validity of the arbitration agreement.**”<sup>361</sup> Second, the tribunal found that the possible grounds for finding the invalidity of an investment are “extremely numerous” and “in particular those that might be inferred from breach of the principle of good faith with regard to the investment, have a particular value but that **does not justify creating a special category calling for priority treatment.**”<sup>362</sup> The tribunal clarified that where issues of this nature are in question, “it seems more appropriate to defer the examination until the merits.”<sup>363</sup> Third, the tribunal considered that the factual analysis of a respondent’s allegations of investor misconduct “most often requires an in-depth examination” rendering it more appropriate for consideration with the merits.<sup>364</sup> In short, facts matter, and it would be wrong to simply draw a legalistic conclusion without careful attention to the circumstances surrounding the alleged illegality. For the reasons set forth in detail below, the reasoning of the *Malicorp* tribunal applies equally in the present case, and the Tribunal therefore should consider Respondent’s allegations of fraud, deceit and bad faith in the context of its analysis of the merits of Bear Creek’s claim.<sup>365</sup>

119. Similarly, the *Minnotte* tribunal deemed the following considerations instrumental to determining whether an allegation of illegality or bad faith should be examined as a matter of jurisdiction or merits: “[t]here may be circumstances where fraud is **so manifest**, and so closely connected to facts (such as the making of an investment) which form the basis of a tribunal’s jurisdiction as to warrant a dismissal of claims *in limine* for want of jurisdiction. This situation

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<sup>359</sup> **CL-0173**, *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, Feb. 7, 2011, ¶ 117 (“*Malicorp Award*”).

<sup>360</sup> *Id.* at ¶ 118.

<sup>361</sup> *Id.* at ¶ 119 (emphasis added).

<sup>362</sup> *Id.* (emphasis added).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *See infra* ¶¶ 123-38.

is, however, likely to be **exceptional**[.]”<sup>366</sup> On the facts of the case, the tribunal held that the allegations of illegality were not of such a nature as to warrant consideration as jurisdictional issues.<sup>367</sup>

120. The *Fraport* tribunal also recognized that illegality does not *eo ipso* deprive the tribunal of jurisdiction *rationae materiae*, although on the facts, the tribunal ultimately found that it did not have jurisdiction.<sup>368</sup> But as discussed above, the facts of *Fraport* are very different from the facts of the present case. In essence, the investor in *Fraport* sought legal advice from domestic counsel and purposefully disregarded said advice, entered into secret shareholder agreements, and actively, knowingly, and deliberately sought to circumvent domestic legal requirements.<sup>369</sup> Moreover, the applicable treaty in *Fraport* contained an express legality requirement, and the tribunal did not rest its holding on an implied international law requirement of legality or good faith.<sup>370</sup> The tribunal emphasized that “[i]t is the language of the BIT which is dispositive and it is unequivocal in this matter.”<sup>371</sup> The lack of an express legality requirement in the Canada-Peru FTA is thus similarly “dispositive,” in the opposite direction.<sup>372</sup>

121. The following conclusions may be distilled from the cases discussed heretofore: (i) allegations of illegality or bad faith do not necessarily implicate a tribunal’s jurisdiction; (ii) tribunals consider the gravity and nature of the alleged illegality in determining whether it should be assessed as a matter of jurisdiction or merits; and (iii) to warrant dismissal at the jurisdictional stage, the alleged illegality must be manifest. As detailed in Sections III.B and III.C above, Respondent has not shown that Claimant acted unlawfully or in bad faith, let alone that Claimant’s alleged wrongdoing is manifest.

122. Respondent attempts to wave away the distinction between a dismissal at the merits and jurisdictional stages as irrelevant, arguing that a finding in favor of Claimant on this

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<sup>366</sup> **RLA-024**, *Minnotte* Award ¶ 132 (emphasis added). See also **RLA-020**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/05, Award, Apr. 15, 2009, ¶ 104 (“*Phoenix Action* Award”).

<sup>367</sup> **RLA-024**, *Minnotte* Award ¶¶ 130, 132.

<sup>368</sup> **RLA-091**, *Fraport I* Award ¶ 333.

<sup>369</sup> *Id.* at ¶¶ 383-95.

<sup>370</sup> *Id.* at ¶ 300.

<sup>371</sup> *Id.* at ¶ 402 (emphasis added).

<sup>372</sup> See *supra* ¶ 116.

issue would be a “pyrrhic victory[.]”<sup>373</sup> But Respondent’s position assumes that in the face of a finding of illegality, the only alternative to a dismissal on jurisdiction for this Tribunal is a dismissal on the grounds of inadmissibility. As discussed in the following section, however, this is not a case of deliberate misrepresentation and fraud of the kind found in *Plama*, *Fraport*, and other cases on which Peru relies. Peru has not cited any case in which a violation of national law without fraudulent intent resulted in the dismissal for a lack of jurisdiction or for the inadmissibility of all claims.

## **2. The Illegality Alleged in this Case Does Not Bar the Tribunal from Examining and Deciding the Merits of Bear Creek’s Claim**

123. Peru claims that “on a practical level, Claimant’s proposed distinction between denying protection to illegally-obtained investments at the jurisdiction phase and denying protection to illegally-obtained investments at the merits phase does Claimant little good here, where the two phases have not been separated.”<sup>374</sup> But Peru’s “practicality” argument rests entirely on the bare assumption that, in every instance where illegality occurs, the Tribunal must dismiss Bear Creek’s claim in its entirety. This is simply not the case. No tribunal has ever denied jurisdiction or declared inadmissible the entirety of a claimant’s claims when the claimant did not act fraudulently or corruptly.<sup>375</sup> Thus, it is eminently “practical” to examine the totality of Bear Creek’s claims together with Peru’s illegality defense, in order for the Tribunal to arrive at a true appreciation of all the issues.

124. There are situations in which a tribunal may find illegality yet nonetheless consider the substance of the claimant’s case and reach a decision on the merits of the claim. As Dr. Ori Herstein put it, “[t]he law generally does not deny access to established legal recourse to a victim of legally recognized wrongdoing even if the victim’s past is marred with moral, legal, or ethical blemishes[.]” and legal claims should be assessed based on their substantive and procedural merits unless they are “among the operative or material facts on which the legal merits of the claim turn.”<sup>376</sup> Justice is not served by turning the defense of illegality into an absolute jurisdiction or admissibility “trump” in all instances, including in cases where the

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<sup>373</sup> Respondent’s Rejoinder ¶ 371.

<sup>374</sup> *Id.* at ¶ 373.

<sup>375</sup> See disc. of *Liman Caspian* *infra* at ¶¶ 127-30.

<sup>376</sup> CL-0219, Ori Herstein, *A Normative Theory of the Clean Hands Defense*, 17 *Legal Theory* 171 (2011).

claimant's violation was not done fraudulently and was attended by a good faith effort at compliance. Such doctrine would mean "on a practical level" that the blatantly unlawful expropriation of an investment worth hundreds of millions, as in this case, would not have any means for redress at all. **If Respondent's argument were to succeed and this Tribunal denies jurisdiction or considers Bear Creek's claims wholly inadmissible despite a lack of fraud, it would be the first tribunal to impose such a draconian consequence upon an investor.**

125. The case law supports Claimant's position, requiring a finding of fraud before illegality is treated as peremptory. Indeed, even fraud does not lead to a lack of jurisdiction or inadmissibility in all cases—the underlying facts matter greatly in the analysis. Three of the situations in which a tribunal may assess the substance of a claimant's case in spite of a breach of national law in the making of the investment are instructive and should guide the Tribunal in the circumstances of the present case.

126. First, where an investor's unlawful actions attend the making of an investment, and the host State's law provides that the illegality renders the investment voidable rather than void *ab initio*, tribunals have held that a protected investment will nonetheless have been made. Indeed, even if the investment was considered void under national law, that fact alone, without any accompanying fraud on the part of the investor, still would not deprive the tribunal of jurisdiction: that illegality would be weighed on the merits along with the host State's own wrongdoing.

127. In *Liman Caspian Oil v. Kazakhstan*, the respondent State raised jurisdictional objections on the basis of the investor's violation of a law requiring the State's prior consent before a license to explore and extract hydrocarbons could be transferred. The *Liman Caspian Oil* tribunal held that a distinction must be drawn "between a transaction which is void or invalid, and a transaction which is merely voidable. Whereas a void or invalid transaction has no legal effect from the very beginning, a voidable transaction continues to have legal effect until the moment when it is declared invalid by a Court."<sup>377</sup> Even if the transaction were to be considered void *ab initio* under Kazakhstani law, the tribunal's jurisdiction still would not be

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<sup>377</sup> CL-0169, *Liman Caspian Oil* Award ¶ 181.

affected—the “question of legality might well be relevant to the merits, but it would not have preclusive effect at the level of jurisdiction”:

Taking into account the above contentions of the Parties, the Tribunal considers that **the scope of Respondent’s consent to jurisdiction must be understood to extend also to those investments in respect of which the underlying transaction was made in breach of Kazakh law and was therefore voidable.** Since the transfer of the Licence was not invalid, but only voidable, Claimants’ investment does not fall outside the scope of Respondent’s consent to jurisdiction. **But even in the case of an investment finally found to be in breach of Kazakh law from the very beginning it could be argued that an investment had still been made** and consequently that a dispute over such an investment regarding an alleged breach of the ECT would fall within the jurisdiction of the Tribunal. **In such a case, the question of legality might well be relevant to the merits, but it would not have preclusive effect at the level of jurisdiction.**<sup>378</sup>

The tribunals’ holdings in *Kardassopoulos* and *Mamidoil* support this understanding of the scope of a State’s consent to arbitration.<sup>379</sup>

128. *Liman Caspian Oil* thus casts serious doubt on the propriety of treating violations of national law as a jurisdictional issue *per se*.<sup>380</sup> In the present case, Article 71 of the Peruvian Constitution contemplates that rights obtained in contravention thereof **revert** to the State, meaning that those rights are not automatically extinguished. Rather, ownership of those rights must be transferred back to the State. In other words, rights acquired in violation of Article 71 are not automatically void *ab initio* and the State must take affirmative action to re-acquire rights a putative investor unlawfully obtained in violation of Article 71. Peru’s own experts and witnesses confirm that this is the correct understanding of Article 71.<sup>381</sup> Claimant therefore must

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<sup>378</sup> *Id.* at ¶ 187 (emphasis added).

<sup>379</sup> **RLA-092**, *Kardassopoulos* Decision on Jurisdiction ¶¶ 184, 192 (as discussed further *infra* at ¶ 147, the tribunal held that the transaction was void *ab initio* but nevertheless entitled to protections under the applicable treaty because the investor reasonably relied on the respondent’s representations and actions that intimated the legality of its investment); **RLA-017**, *Mamidoil* Award ¶ 494 (finding that if the State was willing to negotiate to cure the unlawfulness of the investor’s investment, then “it can be expected to accept the jurisdiction of an arbitral tribunal.”).

<sup>380</sup> It also bears noting that, as with the Canada-Peru FTA, the applicable investment treaty in *Liman Caspian Oil* was the Energy Charter Treaty, which did not contain a “legality clause.”

<sup>381</sup> According to Peru’s expert, Mr. Rodríguez-Mariátegui, Article 71 “restricts the rights of foreigners and prohibits them—under penalty of **losing** their rights to the State—from in any manner acquiring or possessing

be held to have made an investment that is protected under the Treaty, and the Tribunal may proceed to consider the substantive merits of Bear Creek’s claims.

129. Indeed, following *Liman Caspial Oil*, even if a violation of Article 71 rendered a transaction *void* from the beginning, an investment indisputably would still have been made by Bear Creek, and a case based on a violation of the Canada-Peru FTA would still fall within the jurisdiction of the Tribunal.

130. *Liman Caspian Oil* is also instructive as to what form of investor wrongdoing *should* be considered potentially jurisdictional in nature. The tribunal agreed that “it does not have jurisdiction over investments made in violation of international public policy.”<sup>382</sup> This narrow category of wrongdoing includes “fraud and bribery,” which must be proven by the respondent State. Thus, a violation of Kazakhstani law could have resulted in a lack of jurisdiction, but only if the violation was done fraudulently, which the respondent State was unable to prove.<sup>383</sup> Similarly, in this case, even if *arguendo* the Tribunal were to find that a violation of Article 71 occurred, such would not be sufficient: it would still be incumbent upon Peru to demonstrate that Bear Creek knowingly misrepresented its relationship with Ms. Villavicencio in a manner that amounted to fraud—an impossibility, given the transparent disclosure of the Option Agreements and its following of Estudio Grau’s legal advice, together with all the other reasons articulated in the preceding sections.

131. Second, where the allegedly unlawful conduct is minor, procedural, or a good faith mistake, a tribunal may consider the substantive merits of the claimant’s case and evaluate

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[rights without a declaration of public necessity].” **REX-003**, Rodríguez-Mariátegui First Report ¶ 20 (emphasis added). For a foreigner to “lose” its rights to the state necessarily means the foreigner owned or possessed them in the first place. Vice-Minister Gala also confirms that this is the correct interpretation of Article 71. According to Vice-Minister Gala, “[i]t is important to clarify that Supreme Decree No. 032 repealed the declaration of public necessity of Santa Ana; **it did not cancel the mining concessions. A judicial process** was initiated for the cancellation of the mining concessions, as **is required**, which I understand is still in progress.” **RWS-001**, Gala First Witness Statement n.19 (emphasis added).

<sup>382</sup> **CL-0169**, *Liman Caspian Oil* Award ¶ 194.

<sup>383</sup> *Id.* at ¶ 194 (“The Tribunal agrees with the authorities cited by the Parties that it does not have jurisdiction over investments made in violation of international public policy. However, the burden of proving fraud and bribery regarding the making of the original investment lies with Respondent. The Tribunal considers that Respondent has not provided sufficient proof for its allegations that the Licence was acquired by fraudulent misrepresentation to the Ministry of Energy and/or by fraud on the minority shareholders. Therefore, the Tribunal concludes that Respondent was not able to satisfy its burden of proof of facts showing a breach of international public policy.”).

the effect of the investor’s conduct in that context. Only grave violations of national law—violations which the Tribunal is persuaded were decisive to the host State’s decision to allow the investment—may justify a finding of inadmissibility.<sup>384</sup> The consequence imposed should be proportionate to the severity of the alleged unlawful conduct.<sup>385</sup>

132. In *Inceysa*, the tribunal held that it was “clear” that the claimant had committed fraud in the public bidding process by falsifying financial documents, and lying about its experience.<sup>386</sup> Based on its analysis of the *travaux préparatoires* to the applicable treaty, the *Inceysa* tribunal held that “without any doubt,” the contracting states to the BIT intended “to exclude from the scope of the application and protection of the Agreement disputes originating from investments which were not made in accordance with the laws of the host State.”<sup>387</sup> Consequently, the tribunal held that it did not have jurisdiction over *Inceysa*’s claims. Integral to its ruling, however, was the tribunal’s finding that, “had it known the aforementioned violations of *Inceysa*, the host State, in this case El Salvador, would not have allowed it to make its

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<sup>384</sup> **RLA-022**, *Hamster Award* ¶¶ 135, 137 (“[E]ven if the respondent State had been able to adduce sufficient evidence of the claimant’s alleged fraud, respondent would still have been unsuccessful as it had not proven “that the alleged fraud was decisive in securing the [joint venture agreement].”); **RLA-021**, *Inceysa Award* ¶ 237 (finding that the host State would not have permitted the investment “had it known” of the fraud); **CL-0104**, *Plama Award* ¶ 133.

<sup>385</sup> For example, in *Metal-Tech*, the tribunal found the claimant guilty of corruption and dismissed its claim on jurisdiction. The tribunal’s remedy of dismissal was proportionate to the gravity of the claimant’s unlawful conduct. **RLA-088**, *Metal-Tech Award* ¶ 165. The principle of proportionality when imposing sanctions or other consequences is well established in international law. Remedies “must have some degree of equivalence with the alleged breach.” **CL-0220**, DW Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA. J. INTL. L. 295, 342 (1993). See also **CL-0039**, Vienna Convention on the Law of Treaties, art. 60; **CL-0221**, Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECEUIL DES COURS 1 (1957) (“a State whose wrongful act has provoked or contributed to illegal (or what would normally be illegal) action by another, [retains] its right of complaint if such action was out of reasonable proportion or relation to the provocation or contributory acts.”); **CL-0222**, Bruno Simma and Christian Tams, *Reacting Against Treaty Breaches*, in THE OXFORD GUIDE TO TREATIES 576, 598-90 (2012) (discussing the principle of proportionality as a key restraint on a State’s response to a treaty breach: “As the ILC’s work clarifies, the proportionality comparison is primarily between the levels of injury (i.e., quantitative), but also the importance of the interest protected by the rule infringed and the seriousness of the breach.”); **CL-0223**, Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 AJIL 715 (2008) (discussing proportionality in various contexts, including non-military and trade disputes between States and non-State actors decided by international courts and tribunals: “Even if the unlawfulness of the initial provocation can be demonstrated, that would not, by itself, establish the proportionality, and, thus, the legality, of the response. Only if the provocation is unlawful and the countermeasure is proportionate would its unlawfulness be cured. If a response, even to an unlawful action, is disproportionate, it would be as unlawful as (or even more unlawful than) the provocation itself. That is the central role assigned to proportionality in international law.”).

<sup>386</sup> **RLA-021**, *Inceysa Award* ¶¶ 236-37.

<sup>387</sup> *Id.* at ¶¶ 192-95.

investment.”<sup>388</sup> As discussed in the preceding section, the tribunal in *Plama* also rested its decision to dismiss the claimant’s case on admissibility grounds on this basis, namely that, but for the investor’s deliberate misrepresentations, which led the government to believe the investor had significant assets when in fact it did not, the host State would not have permitted the investment.<sup>389</sup>

133. By contrast, where the investor’s unlawful conduct is merely procedural, minor, or a good faith mistake, a claimant may still benefit from treaty protections. As the *Minnotte* tribunal explained, “the critical question at this [merits] stage ... is not whether any fraud or deception occurred, but rather whether, within the framework of these proceedings, it is proved that there was **fraud and/or deception of such a kind as to disentitle the Claimants to the protection of the BIT for the investment.**”<sup>390</sup> The *Khan Resources* tribunal adopted a comparable approach:

[T]here is no compelling reason to altogether deny the right to invoke the ECT to any investor who has breached the law of the host state in the course of its investment. The ECT contains no provision to this effect. If the investor acts illegally, the host state can impose upon it sanctions available under local law, as Mongolia indeed purports to have done by invalidating and refusing to re-register the Exploration License. However, if the investor believes these sanctions to be unjustified, it must have the possibility of challenging their validity. **It would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.**<sup>391</sup>

Claimant submits that the *Minnotte* and *Khan Resources* tribunals should guide the Tribunal on this issue. Here, Peru enacted Supreme Decree 032 to “impose upon [Bear Creek] sanctions available under local law” as Mongolia did in *Khan Resources*. This action and Respondent’s alleged justification for Supreme Decree 032 are at the core of Claimant’s case on both

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<sup>388</sup> *Id.* at ¶ 237.

<sup>389</sup> **CL-0104**, *Plama* Award ¶ 133 (“The Arbitral Tribunal is persuaded that Bulgaria would not have given its consent to the transfer of Nova Plama’s shares to PCL had it known it was simply a corporate cover for a private individual with limited financial resources.”).

<sup>390</sup> **RLA-024**, *Minnotte* Award ¶ 156 (emphasis added).

<sup>391</sup> **RLA-019**, *Khan Resources* Award ¶ 384 (emphasis added).

jurisdiction and the merits, and it would undermine the object and purpose of the FTA to deny Bear Creek the right to make its case before this Tribunal “based on the same alleged violations the existence of which [Bear Creek] seeks to dispute on the merits.”<sup>392</sup>

134. The Tribunal’s task is, as the *Minnotte* tribunal put it, to determine whether the alleged “fraud and/or deception [is] of such a kind as to disentitle the Claimants to the protection of the BIT for the investment[.]”<sup>393</sup> In the present case, it is not. Claimant acted in good faith by seeking and following the advice of preeminent Peruvian mining counsel to ensure that its investment structure would be in compliance with Peruvian law. Claimant had no reason to doubt the soundness of the advice it received, and indeed, Claimant’s investment structure resembles that of other foreign investors that have acquired rights within 50 km of the Peruvian border.<sup>394</sup> Bear Creek also sought to ensure that the entirety of its transaction with Ms. Villavicencio was known to the Peruvian Government by registering with the relevant Peruvian authorities all contracts relating to the acquisition of the Santa Ana Concessions, even when this was not required under Peruvian law. Throughout the application process leading to the Supreme Decree’s issuance, Claimant did not withhold information and openly and transparently disclosed the Option Agreements it entered into with Ms. Villavicencio; and it answered every request for additional information the Government sent it. Under these circumstances, it would be wholly disproportionate and violative of the FTA’s object and purpose to deprive Claimant of its right to seek justice through this Tribunal on the basis of Article 71 objections raised by Peru.

135. Third, where a state’s actions and representations to the investor create a legitimate expectation on the part of the investor that his investment will be protected under an international treaty in case of a breach thereof, the claimant is entitled to have those legitimate expectations respected.

136. In *Kardassopoulos*, the respondent State claimed that the joint venture agreement (JVA) on which the investor’s claims rested was in violation of local law. The government of Georgia argued that the investment was unlawful, because Georgian officials acted *ultra vires* when they signed, endorsed and ratified the JVA. Even though the investment was void *ab initio*

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<sup>392</sup> *Id.*; see also **RLA-018**, *Yukos Award* ¶ 1355.

<sup>393</sup> **RLA-024**, *Minnotte Award* ¶ 156 (emphasis added).

<sup>394</sup> See *supra* Section II.D.

under Georgian law, the tribunal nonetheless found that the investor was entitled to protection under the BIT because “Respondent created a legitimate expectation for Claimant that its investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection.”<sup>395</sup>

137. The same is true in the present case. As discussed in detail in Section IV on estoppel below, prior to Bear Creek’s acquisition of the investment and throughout the course of its performance and development of the project, time and again Peruvian public officials led Claimant to believe that its investment was made in accordance with Peruvian law (which it was) and consistently endorsed Claimant’s continued performance of the project.<sup>396</sup> Peru’s actions and representations vis-à-vis Bear Creek fostered in Bear Creek the legitimate expectation that it had made a lawful investment that would be protected under the Treaty in case of a breach. That legitimate expectation—which stems from Respondent’s own conduct—is entitled to protection under the Treaty.

138. In sum, Respondent has built its entire jurisdictional objection on an erroneous assumption: that its allegations of illegality and fraud in the making of Bear Creek’s investment must necessarily deprive this Tribunal of jurisdiction or render Claimant’s claims inadmissible. The law is not binary, however, and it accords this Tribunal ample discretion to decide whether the nature of the alleged illegality merits outright dismissal or a weighing of any investor wrongdoing against the respondent State’s own violations of international law. Given the good faith and transparency attendant to the making of Claimant’s investment, Respondent’s repeated representations to Claimant, and Respondent’s unlawful expropriation of the Concessions, Bear Creek is entitled to have its claims heard on their substance, and it would undermine the object and purpose of the FTA, as well as be deeply unfair and disproportionate, to deny Bear Creek the right to make its case before this Tribunal. Respondent’s allegations of unlawfulness and bad faith should be considered on the merits, as part of the overall balance of this case.

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<sup>395</sup> **RLA-092**, *Kardassopoulos* Decision on Jurisdiction ¶¶ 184, 192.

<sup>396</sup> *See infra* ¶ 142.

#### IV. PERU IS ESTOPPED FROM ASSERTING ILLEGALITY OR BAD FAITH

139. Despite Peru's many representations and manifestations of approval towards Bear Creek's investment structure, Respondent maintains that it is not estopped from alleging the illegality or bad faith of Claimant's investment. But as Claimant discussed in its Reply Memorial,<sup>397</sup> international law does not allow a party to take a position in litigation or arbitration that is diametrically opposed to its prior position. Claimant maintains and incorporates its previous arguments on this issue, but responds to Peru's latest claims here. Because Peru dismisses Peruvian law as irrelevant on this issue,<sup>398</sup> Claimant's discussion and analysis will focus on international law.

140. The principle of estoppel prohibits a State from taking a position in contentious proceedings that is in contradiction with its previous acts or attitude.<sup>399</sup> This principle may be referred to, *inter alia*, as estoppel, preclusion, acquiescence, waiver, or acceptance, but its core import remains the same: a State may not take a position on which an investor reasonably relied and later take another position when that position better suits its needs.<sup>400</sup> This principle reflects longstanding, recognized international principles derived from Roman law, such as *venire contra factum proprium* ("no one may set himself in contradiction to his own previous conduct") and *allegans contraria non audiendus est* ("one making contradictory statements is not to be heard").

141. Contrary to what Respondent would have this Tribunal believe, the doctrine of estoppel is firmly established in international law and is frequently invoked.<sup>401</sup> As stated by now-

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<sup>397</sup> Claimant's Reply ¶¶ 201-211.

<sup>398</sup> Respondent's Rejoinder ¶ 420. Peruvian law also supports Claimant's position. See Third Bullard Expert Report ¶¶ 85-105.

<sup>399</sup> **CL-0158**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award on the Merits, Jun. 15, 1962, I.C.J. Reports 1962 at 39, Separate Opinion of Vice-President Alfaro, quoted in **CL-0159**, *Argentine-Chile Frontier Case (Arg. V. Chile)*, Award, Dec. 9, 1966, 16 R.I.A.A. at 109, 164 (1969).

<sup>400</sup> **CL-0159**, *Argentine-Chile Frontier Case (Arg. V. Chile)*, Award, Dec. 9, 1966, 16 R.I.A.A. at 109, 164 (1969) (citing **CL-0158**, *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award on the Merits, Jun. 15, 1962, I.C.J. Reports 1962, at 39, Separate Opinion of Vice-President Alfaro. See also **CL-0160**, *Legal Status of Eastern Greenland (Den. V. Nor.)*, Judgment, 1933 P.C.I.J., Ser. A/B, No. 53 at 68-69; **RLA-017**, *Mamidoil Award (citing Kardassopoulos v. Georgia* in which the tribunal rejected the respondent State's illegality claim because the State, acting under the cloak of State authority, had repeatedly confirmed the validity of the agreements the State claimed were illegal in the arbitration).

<sup>401</sup> Respondent's Rejoinder ¶ 402 ("Although the doctrine of estoppel is fairly established in international law, it is not commonly invoked.") Cf. **CL-0060**, *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, Oct. 2, 2006, ¶ 475; **CL-0164**, *Canfor Corp. v. United States*, NAFTA, Order of the Consolidated Tribunal, Sept. 7, 2005, ¶ 168; **CL-0165**, *Pan American Energy LLC, et al.*,

Judge James Crawford, “[a] considerable weight of authority supports the view that estoppel is a general principle of international law.”<sup>402</sup> In fact, “[n]o equitable conception recurs more frequently in international adjudication in important contexts than that of estoppel.”<sup>403</sup> This position is in line with, and indeed mandated by, considerations of international public policy:

[I]nternational public policy would be strongly opposed to the idea that a public entity, when dealing with a foreign party, could openly, knowingly and willingly enter into an arbitration agreement, on which its co-contractor would rely, only to claim subsequently, whether during the arbitral proceedings or on enforcement of the award, that its own undertaking was void.<sup>404</sup>

The applicability of the doctrine of estoppel to investment arbitration was perhaps best summarized by the *Fraport* tribunal: “[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law.”<sup>405</sup>

142. As the facts of this case show, Peru was fully aware of Bear Creek’s relationship to Ms. Villavicencio and the acquisition structure it intended to and did employ in its acquisition of the Santa Ana Concessions *prior to* Peru’s approval of Ms. Villavicencio’s petitions for the

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v. *The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, ¶¶ 159-60; **CL-0166**, *Chevron Corp. and Texaco Petroleum Co., v. The Republic of Ecuador*, PCA Case No. AA277, Partial Award on the Merits, Mar. 30, 2010, ¶¶ 351-52.

<sup>402</sup> **CL-0224**, James Crawford, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 8<sup>TH</sup> ED. at 420 (Oxford University Press, 2012) (citations omitted). See also **CL-0161**, Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. L. REV. 1777, 1779 (1986), stating that “[i]nternational estoppel...is based on good faith and promotes consistency in international relations. It is a broad concept, capable of myriad applications, and as a ‘general principle of law recognized by civilized nations’ it carries persuasive moral weight...”.

<sup>403</sup> **CL-0225**, C. Wilfred Jenks, *The Prospects of International Adjudication*, at 415 (London, 1964) (emphasis added).

<sup>404</sup> **CL-0226**, John Savage and Emmanuel Gaillard, Chapter II – *Formation of the Arbitration Agreement* in *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* 326 (citing ICC Award No. 3327 (1981)) (Savage and Gaillard ed., © Kluwer Law International; Kluwer Law International 1999).

<sup>405</sup> **RLA-091**, *Fraport I* Award ¶ 346.

Concessions and *prior to* Peru's issuance of Supreme Decree 083.<sup>406</sup> Peru represented to Bear Creek on many occasions that it did not have any concerns regarding the legality of Bear Creek's investment, and acted accordingly over the course of years as it witnessed Bear Creek investing significant sums of money to develop the Santa Ana Project. Peru had no hesitation in accepting Government-mandated payments from Bear Creek in relation to the investment.<sup>407</sup> Bear Creek was entitled to and did reasonably rely on these representations, which fostered and confirmed its own belief and understanding that its investment was made and performed in accordance with Peruvian law. Peru cannot deny that it did, in fact, make statements of approbation and conducted itself accordingly. On at least the following occasions before, during, and after Bear Creek acquired its investment and developed the project, representatives of the Government of Peru conveyed to Claimant their approval of Bear Creek's investment structure:

- **November 7, 2005:** SUNARP, having received and reviewed Ms. Villavicencio's concession petitions and the Option Agreements, held that the Option Agreements were in accordance with Peruvian law.<sup>408</sup>
- **December 22, 2005:** SUNARP published its decision in the Official Gazette, which "puts others on notice[.]"<sup>409</sup>
- **March 8, 2006:** INACC consulted the SUNARP registry and verified that the Option Agreements were registered. INACC independently came to the same conclusion as SUNARP, namely that the transfer of a mining title does not occur upon signature of the option agreement, but at a later time when the optionee exercises the option in accordance with the conditions set forth in the option contract.<sup>410</sup>
- **June 22, 2006:** MINEM's General Directorate for Environmental Mining Affairs (DGAAM) reviewed Ms. Villavicencio's land use agreement with the Association of Agricultural Producers of El Condór de Aconcahua and noted that the authorization for the use of the land was signed by Bear Creek, a third party distinct from the owner of the

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<sup>406</sup> See disc. *supra* Section II.E.

<sup>407</sup> **Exhibit C-0201**, Letter from A. Swarthout and K. Villavicencio to Banco de Credito, June 27, 2006; **Exhibit C-0202**, Letter from D. Volkert and K. Villavicencio to Banco de Credito, June 20, 2007; Claimant's Reply ¶ 32. See also *supra* Section II.E.

<sup>408</sup> **Exhibit C-0038**, SUNARP Decision.

<sup>409</sup> Respondent's Rejoinder ¶ 107.

<sup>410</sup> **Exhibit C-0249**, Report No. 3129-2006-INACC-DGCM-UL for Karina 1 issued by INACC, Mar. 8, 2006; **Exhibit C-0250**, Report No. 3128-2006-INACC-DGCM-UL for Karina 2 issued by INACC, Mar. 8, 2006; **Exhibit C-0251**, Report No. 3127-2006-INACC-DGCM-UL for Karina 3 issued by INACC, Mar. 8, 2006; **Exhibit C-0252**, Report No. 3111-2006-INACC-DGCM-UL for Karina 9A issued by INACC, Mar. 8, 2006.

mining rights, Ms. Villavicencio.<sup>411</sup> The DGAAM raised no concerns regarding Bear Creek's involvement and simply asked Ms. Villavicencio to obtain or update the authorization for use of the surface land.<sup>412</sup>

- **June 27, 2006:** INGEMMET accepted Bear Creek's payment on behalf of Ms. Villavicencio of certain sub-surface mining fees without raising any concern that Bear Creek was paying these fees rather than Ms. Villavicencio.<sup>413</sup>
- **July 5, 2006:** INGEMMET registered the Karina 2 and 3 mining concessions to Ms. Villavicencio.<sup>414</sup>
- **August 8, 2006:** INGEMMET registered the mining concessions for the Karina 1 mining concession to Ms. Villavicencio.
- **August 9, 2006:** SUNARP registered the November 17, 2004 Option Agreement.<sup>415</sup>
- **September 26, 2006:** INGEMMET registered the Karina 9A mining concessions to Ms. Villavicencio.<sup>416</sup>
- **November 3, 2006:** SUNARP registered the December 5, 2004 Option Agreement.<sup>417</sup>
- **February 8, 2007:** MINEM requested additional information from Bear Creek in connection with its Supreme Decree Application. In paragraph 4 of its letter, MINEM acknowledged that it had reviewed specifically the power of attorney granted from Bear Creek to Dr. Miguel Grau, which was contained on the bottom of p. 80 of Bear Creek's Supreme Decree Application. The top of p. 80 evidenced the power of attorney granted from Bear Creek to Ms. Villavicencio.<sup>418</sup> MINEM raised no questions or concerns regarding either power of attorney.

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<sup>411</sup> **Exhibit C-0139**, Informe No. 157-2006/MEM-AAM/EA, Jun. 22, 2006 at 5.

<sup>412</sup> *Id.*

<sup>413</sup> **Exhibit C-0202**, Letter from D. Volkert and K. Villavicencio to Banco de Credito, Jun. 20, 2007; Claimant's Reply ¶ 32.

<sup>414</sup> **Exhibit C-0034**, Notice of Registration of the Karina 2 and Karina 3 Concessions, July 5, 2006.

<sup>415</sup> **Exhibit C-0041**, SUNARP Notice of Registration of Mineral Rights, Aug. 9, 2006.

<sup>416</sup> **Exhibit C-0288**, Notice of Registration of the Karina 9A mining concession to J. Karina Villavicencio, Sept. 26, 2006.

<sup>417</sup> **Exhibit C-0017**, Supreme Decree Application at 187.

<sup>418</sup> **Exhibit C-0042**, Letter from J.C. Pinto Najar, MINEM, to Bear Creek Mining Company, Feb. 8, 2007; Claimant's Reply, ¶ 36.

- **June 20, 2007:** INGEMMET again accepted Bear Creek’s payment on behalf of Ms. Villavicencio of certain sub-surface mining fees without raising any concern that Bear Creek was paying these fees rather than Ms. Villavicencio.<sup>419</sup>
- **November 29, 2007:** After careful review by at least three organs of the Peruvian State of Bear Creek’s application for a declaration of public necessity, which included a power of attorney for Ms. Villavicencio, her petitions for the concessions, and the Option Agreements, Peru granted the requisite declaration by enacting Supreme Decree 083.<sup>420</sup>
- **December 3, 2007 – June 25, 2011:** A number of organs of the Peruvian Government worked with Bear Creek to develop the Santa Ana Project, approved its environmental plans, and approved its community outreach program, among other things.<sup>421</sup>
- **May 19, 2011:** Clara García Hidalgo, senior adviser to the Minister of Energy and Mines confirmed that “the Santa Ana project was lawful” and there was “no legislation to cancel concessions that were granted legally.”<sup>422</sup>
- **Between March and June 2011:** Vice-Minister Gala met with Bear Creek officials on several occasions and assured Bear Creek that its investment was lawful and protected.<sup>423</sup>
- **November 18, 2013:** In an interview, Vice-Minister Gala admitted again that, when Peru enacted Supreme Decree 032, it had not been established that Bear Creek had violated Article 71 of the Constitution.<sup>424</sup> Vice-Minister Gala further conceded that, had it not been for the social conflict in Puno, the Government would not have taken away Bear Creek’s right to operate and develop Santa Ana: “If we [the Government] were sure that social issues would not be presented, **the**

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<sup>419</sup> **Exhibit C-0202**, Letter from D. Volkert and K. Villavicencio to Banco de Credito, June 20, 2007; Claimant’s Reply ¶ 32.

<sup>420</sup> **Exhibit C-0004**, Supreme Decree 083-2007-EM adopted on Nov. 29, 2007.

<sup>421</sup> **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

<sup>422</sup> **Exhibit C-0093**, *Comuneros exigen pronunciamiento de PCM*, LA REPÚBLICA, May 19, 2011; Claimant’s Reply ¶ 26.

<sup>423</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 48.

<sup>424</sup> **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013: “In the supreme decree the conditional ‘would imply’ was included because it had to be proved, the State was certain, but it had to conduct further investigations regarding the check and the company’s employee, they were only indicia. The State believed that it implied a wrongful acquisition. But it would be the judges who would at the end determine it.”

**problem between the State and the company could be solved, so that the project could continue.”<sup>425</sup>**

143. Peru attempts to undermine this long chain of representations by arguing that (i) Peru did not know the full extent of Bear Creek’s relationship to Ms. Villavicencio when these representations were made;<sup>426</sup> (ii) any representations confirming or accepting the legality of Bear Creek’s investment would not have been authorized by the Peruvian Government and are thus not entitled to any weight or reasonable reliance by Bear Creek;<sup>427</sup> and (iii) Bear Creek has failed to show that Respondent’s representations meet a stringent three-part test for estoppel espoused by some arbitral tribunals.<sup>428</sup> As elaborated below, Peru’s arguments are without merit.

144. First, despite what Peru claims in this arbitration, it knew of Ms. Villavicencio’s relationship to Bear Creek before it granted Ms. Villavicencio’s petitions for the concessions and before it enacted Supreme Decree 083 (*see supra* ¶ 60). Moreover, as late as November 18, 2013, Vice-Minister Gala admitted that the alleged illegality of Bear Creek’s investment had not been established,<sup>429</sup> and the Lima First Constitutional Court confirmed on May 12, 2014 that Bear Creek was the rightful owner of the Santa Ana Concessions.<sup>430</sup>

145. Peru attempts to counter these facts by claiming that it had no opportunity to appeal the decision of the Lima First Constitutional Court because Bear Creek withdrew the claim.<sup>431</sup> Respondent’s allegations ignore the fact that Bear Creek was **required to withdraw** the claim in order to bring the present arbitration in light of the FTA’s waiver requirement. More importantly, Peru’s inability to appeal the decision does not in any way disprove the findings of the Lima First Constitutional Court, and the Tribunal should give those findings proper weight. First instance decisions, like any rulings of domestic courts, are entitled to due consideration.

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<sup>425</sup> **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013 (emphasis added).

<sup>426</sup> Respondent’s Rejoinder ¶¶ 109-110, 300-304.

<sup>427</sup> *Id.* at ¶¶ 300-304, 415-416; **RWS-005**, Gala Second Witness Statement ¶ 20.

<sup>428</sup> Respondent’s Rejoinder ¶¶ 399-419.

<sup>429</sup> **Exhibit C-0197**, Entrevista al Ing. Fernando Gala, Presidente del Consejo de Minería, Pontifica Universidad Católica del Perú, Nov. 18, 2013: “In the supreme decree the conditional ‘would imply’ was included because it had to be proved, the State was certain, but it had to conduct further investigations regarding the check and the company’s employee, they were only indicia. The State believed that it implied a wrongful acquisition. But it would be the judges who would at the end determine it.”

<sup>430</sup> **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014.

<sup>431</sup> Respondent’s Rejoinder ¶ 299.

146. Second, Peru’s argument that no weight may be given to the many representations of its public officials affirming the legality of Bear Creek’s investment, as “[n]one of these advisors has the power to confirm the legality of an individual’s or company’s activities on behalf of the Ministry”<sup>432</sup> fails in light of the international law of attribution. As provided in Article 7 of the ILC Articles on State Responsibility, “[t]he conduct of an organ of the State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”<sup>433</sup> The Official Commentary to this Article makes unmistakably clear that under this provision, even *ultra vires* acts of government officials “shall be considered an act of the State[.]”<sup>434</sup> This is a bedrock principle of international law, and its application is mandatory.

147. In *Kardassopoulos*, organs of the respondent, the Government of Georgia, had approved a joint venture agreement (JVA) that was void under Georgian law.<sup>435</sup> The JVA was the basis of the claimant’s investment. Georgia argued that the investment was not entitled to protection under the relevant treaty on the ground that its State organs acted *ultra vires* and in direct violation of Georgian law when they approved the JVA and performed under its terms over the course of several years.<sup>436</sup> Under Georgian law, the investment was not simply voidable, but rather void *ab initio*, and the arbitral tribunal agreed.<sup>437</sup> However, the tribunal’s analysis did not end there. Instead, the tribunal correctly considered the meaning and application of ILC Article 7 in the context of the respondent allegations of *ultra vires* representations to the investor. The tribunal reasoned that ILC Article 7 requires a holding that even *ultra vires* acts of Government organs that render an investment illegal under the host State’s laws are attributable to the Government:

**The principle of attribution, in principle, applies to Georgia by virtue of its status as a sovereign State and is not contingent on the timing of its**

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<sup>432</sup> Respondent’s Rejoinder ¶ 110.

<sup>433</sup> **CL-0030**, ILC Draft Articles, Art. 7.

<sup>434</sup> *Id.*

<sup>435</sup> **RLA-092**, *Kardassopoulos* Decision on Jurisdiction ¶¶ 184, 191-93.

<sup>436</sup> *Id.* at ¶¶ 182-84, 190-91.

<sup>437</sup> *Id.* at ¶ 184.

adherence to a treaty. **It is also immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law.** Article 7 of the Articles on State Responsibility provides that **even in cases where an entity empowered to exercise governmental authority acts *ultra vires* of it, the conduct in question is nevertheless attributable to the State.**<sup>438</sup>

On the facts, the tribunal held that the assurances given to the investor by the host State “were endorsed by the Government itself, and some of the most senior Government officials of Georgia[.]”<sup>439</sup> Those assurances, even if *ultra vires* and in violation of domestic law, were attributable to the respondent State by virtue of ILC Article 7 and the respondent’s status as a sovereign State.<sup>440</sup> The *Kardassopoulos* tribunal also concluded that the “Respondent created a legitimate expectation for Claimant that its investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection.”<sup>441</sup> Accordingly, the tribunal ruled, “notwithstanding the fact that the JVA and the Concession may be void *ab initio* under Georgian law, Claimant’s investment nonetheless remains entitled to protection under the BIT and the Tribunal so finds.”<sup>442</sup>

148. In all events, contrary to Peru’s assertions, the Peruvian officials who confirmed the legality of Bear Creek’s investment had the authority to make these statements on behalf of Peru. Ms. Clara García Hidalgo, who advised Bear Creek that its acquisition of the Concessions was perfectly legal,<sup>443</sup> had approved Bear Creek’s PPC and ESIA Summary on January 7, 2011, on behalf of MINEM.<sup>444</sup> When Ms. García represented to Bear Creek that its acquisition of the Concessions was in accordance with Peruvian law, she was acting in her official capacity. Even assuming *arguendo* that Ms. García was only a “personal advisor to the Minister,” which she was not, and “did not speak for and had no responsibilities for legal reviews or other functions in

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<sup>438</sup> *Id.* at ¶ 190 (emphasis added).

<sup>439</sup> *Id.* at ¶ 191.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at ¶ 192.

<sup>442</sup> *Id.* at ¶ 184.

<sup>443</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 56.

<sup>444</sup> **Exhibit C-0161**, Informe No. 013-2011-MEM-AAM/WAL/AD/KVS, Jan. 7, 2011.

the Legal Department of the Ministry”—as Peru now contends<sup>445</sup>—the same cannot be said for the Minister of Energy and Mines, his Vice Minister, or the Managing Director of his Legal Department. Minister of Energy and Mines, Pedro Sánchez, told Bear Creek that he had no reason to believe that Bear Creek improperly acquired the Santa Ana Concessions.<sup>446</sup> Vice Minister of Energy and Mines, Guillermo Shinno, and Managing Director of the MINEM Legal Department, César Zegarra, also confirmed that Bear Creek’s option arrangement was legal.<sup>447</sup> These three individuals clearly had “the power to confirm the legality of . . . [Bear Creek’s] activities on behalf of the Ministry”<sup>448</sup> and to provide “authoritative views on the legality of Bear Creek’s”<sup>449</sup> acquisition.

149. Even in the incredible event that each and every one of the representations of the many Peruvian governmental organs and representatives outlined above were all *ultra vires*, these representations were still made under color of official authority and accordingly are still attributable to Peru under Article 7 of the ILC Articles; Bear Creek was entitled to and did rely on these representations. Thus, international law will not permit Respondent to invoke Bear Creek’s supposed fraudulent violation of Article 71, as it had repeatedly represented to Bear Creek that the investment was lawful, and Bear Creek reasonably relied on these representations. In other words, “[a]s a matter of law, . . . the cumulative actions of the host government may constitute an informal “acceptance” of a foreign investment that otherwise violates the law[,]”<sup>450</sup> and Respondent therefore is estopped from taking a diametrically opposite position in these proceedings.

150. Peru claims that its position in the present case is not in contradiction to its previously-taken position, because it presented the same arguments in front of the Lima First Constitutional Court.<sup>451</sup> But that is not the relevant point of comparison to assess Respondent’s position. The relevant point of comparison is when Bear Creek acquired its investment and over

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<sup>445</sup> Respondent’s Rejoinder ¶ 110.

<sup>446</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 61

<sup>447</sup> Antunez de Mayolo Rebuttal Witness Statement ¶ 62.

<sup>448</sup> Respondent’s Rejoinder ¶ 110.

<sup>449</sup> *Id.* at ¶ 110.

<sup>450</sup> **RLA-091**, *Fraport I* Award ¶ 387.

<sup>451</sup> Respondent’s Rejoinder ¶ 400.

the course of its development of the investment, not when the contentious proceedings between Bear Creek and Respondent had already begun.

151. Third, Peru advocates that this Tribunal must adopt a three-part test for evaluating claims of estoppel by which Claimant must show: (1) a clear statement of fact by one party which (2) is voluntary, unconditional and authorized, and (3) reliance in good faith by another party on that statement to that party's detriment or to the advantage of the first party.<sup>452</sup> Some tribunals have adopted this test; more have applied the broader principle of estoppel as discussed above, without reference to this putative test. But even assuming that estoppel can only apply when this three-part test is met, Respondent's consistent and unequivocal conduct over a significant period, which Claimant relied upon in good faith, easily fulfills those criteria, estopping Peru from impugning the legality of Claimant's investment.

152. SUNARP, DGAAM, INGEMMET, MINEM, Minister of Energy and Mines Sánchez, Vice-Minister Shinno, Vice-Minister Gala, Managing Director of MINEM's Legal Department César Zagarra, and senior advisor to the Minister of Energy and Mines, Clara García Hidalgo, all made clear statements of fact regarding the legality of Claimant's investment to Claimant, and Peru has neither presented nor argued that any of these statements were involuntary or conditional. Regarding the allegation that these statements were unauthorized, at least the SUNARP, DGAAM, INGEMMET and MINEM statements are beyond the scope of any possible allegation of *ultra vires* conduct. In any event, under ILC Article 7, even alleged *ultra vires* statements are attributable to the State. Finally, it is indisputable that Bear Creek was entitled to rely on these representations, as is evidenced by its exercise of its option under the Option Agreements and its work on the development of the Santa Ana Project over the years following the issuance of Supreme Decree 083. Such reliance was detrimental given that Bear Creek spent millions during this time, and Peru ultimately expropriated the investment unlawfully, as previously briefed.<sup>453</sup>

153. In sum, Respondent made a plethora of representations to Claimant that created the legitimate expectation that Claimant's investment was in accordance with Peruvian law, and even if some of these representations were *ultra vires* (which they were not), they would still be

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<sup>452</sup> Respondent's Rejoinder ¶ 403.

<sup>453</sup> Claimant's Reply ¶¶ 208, 252, 360.

attributable to Peru under international law. Peru cannot be allowed to take the diametrically opposite position and claim—at the very moment when it is being held to account for its own violations of international law—illegality on the part of Bear Creek.

## V. AN INVESTMENT CONFERRING JURISDICTION UPON THE TRIBUNAL EXISTS

154. In its Rejoinder, Peru continues to argue that Bear Creek’s “investment is invalid under Peruvian law, which in turn means that this Tribunal lacks jurisdiction because there is no investment on which to base the Treaty claims.”<sup>454</sup> No support whatsoever exists for that position. Peru does not and cannot dispute that the terms of the Canada-Peru FTA and the ICSID Convention are the relevant legal instruments that govern this Tribunal’s jurisdiction, including the definition of investment.<sup>455</sup> Peru’s national law has no impact on the definition of “investment” for purposes of obtaining the protections afforded by the Canada-Peru FTA.<sup>456</sup> Accordingly, Peru’s argument that this Tribunal should make a jurisdictional finding based “on the legality of the Santa Ana investment as a matter of Peruvian law”<sup>457</sup> should be dismissed summarily.

155. Peru is well aware that other arbitral tribunals consistently have rejected its argument that national law governs the definition of “investment” and hence the determination of whether an investment exists falls exclusively within the purview of the applicable treaty.<sup>458</sup> The tribunal in *Convial Callao et al. v. Peru* expressly rejected Peru’s contention that “the alleged investment did not exist or is null for not complying with Peru’s laws and regulations, an

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<sup>454</sup> Respondent’s Rejoinder ¶ 421.

<sup>455</sup> See generally Respondent’s Rejoinder ¶¶ 421-23. See also **Exhibit C-0001**, Chapter Eight of the Free Trade Agreement between Canada and the Republic of Peru signed May 29, 2008 and entered into force on August 1, 2009, §§ 824-825, 847; **CL-0175**, ICSID Convention, Regulations and Rules, April 2006, Art. 25; Claimant’s Reply ¶¶ 231-234; **RLA-087**, *Convial* Award ¶¶ 372-373, 381.

<sup>456</sup> See **CL-0168**, Rudolf Dolzer and Christopher Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 64 (Oxford University Press, 2nd ed. 2012) (stating that “a host state’s domestic law concerns not the definition of the term ‘investment’ but solely the legality of the investment”).

<sup>457</sup> Respondent’s Rejoinder ¶ 423.

<sup>458</sup> **RLA-087**, *Convial* Award ¶¶ 384-394 (citing *Salini Costruttori S.P.A/ et al. v. The Kingdom of Morocco*, ICSID Case No. ARB/00/4, Award on Jurisdiction, July 16, 2001, ¶ 46; *Bayindir v. Pakistan*, ICSID Case No. ARB/03/09, Award on Jurisdiction, Nov. 14, 2005, ¶ 109; **CL-0174**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 112 (“*Saba Fakes* Award”); **RLA-020**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, Apr. 15, 2009, ¶ 104)).

indispensable requisite for the existence of the investment according to the Respondent.”<sup>459</sup> The *Convial* tribunal explained that “[t]he requirement of ‘legality’ or ‘validity’ at issue, although included in the text of article 1(1) of the Treaty that defines the term ‘investment,’ **does not determine the existence of the same.**”<sup>460</sup> Thus, the *Convial* tribunal applied the definition of investment contained in the relevant BIT (Argentina-Peru) and the ICSID Convention, without reference to Peruvian law, to assess whether an investment existed within the meaning of that treaty.<sup>461</sup>

156. Similarly, while analyzing the definition of “investment,” the *Saba Fakes* tribunal found that “[a]s far as the legality of investments is concerned this question does not relate to the definition of ‘investment’ provided in Article 25(1) of the ICSID Convention and in Article 1(b) of the BIT.”<sup>462</sup> Indeed, the *Saba Fakes* tribunal expressly rejected the argument that an “illegal” investment or one not made in “good faith” did not fall within Article 25(1) of the ICSID Convention’s definition of investment:

The principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: **an investment might be ‘legal’ or ‘illegal,’ made in ‘good faith’ or not, it nonetheless remains an investment.** The expressions ‘legal investment’ or ‘investment made in good faith’ are not pleonasm, and the expressions ‘illegal investment’ or ‘investment made in bad faith’ are not oxymorons.<sup>463</sup>

157. In the present case, the Canada-Peru FTA and the ICSID Convention are the relevant instruments to determine whether an investment exists. The Tribunal should not look to Peruvian law, especially given that the Canada-Peru FTA does not require the application of Peruvian law to the definition of “investment” and does not contain an express legality requirement. Importing such a requirement to determine whether an investment exists under the

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<sup>459</sup> **RLA-087**, *Convial* Award ¶¶ 384-386 (“*la alegada inversión o no existe o es nula al no haber cumplido con las leyes y reglamentaciones del Perú, requisito indispensable para la existencia de la inversión según la Demandada*”).

<sup>460</sup> *Id.* at ¶ 386 (“*El requisito de “legalidad” o “validez” en cuestión, aunque incluido en el texto del artículo 1(1) del Tratado que define el término “inversión”, no determina la existencia de la misma*”) (emphasis added).

<sup>461</sup> *Id.* at ¶¶ 381-386.

<sup>462</sup> **CL-0174**, *Saba Fakes* Award ¶ 114.

<sup>463</sup> *Id.* at ¶ 112, n.73 (emphasis added).

Canada-Peru FTA and the ICSID Convention would do violence to the text of both international agreements. In short, Peru’s request that this Tribunal assess the existence of an “investment” on the basis of “the legality of the Santa Ana investment as a matter of Peruvian law” should be dismissed as unfounded in international law.

158. In any event, as detailed throughout this Rejoinder (*see* **Sections II, III, and IV**), Peru has failed to satisfy its burden of proving that there has been a purported violation of Peruvian law.<sup>464</sup>

159. Peru further argues that Bear Creek’s rights would “revert to the State” if “a domestic court in Peru” finds that Claimant’s acquisition of the Santa Ana Concessions were acquired unlawfully,<sup>465</sup> in which case, according to Peru, Bear Creek would be “stripped of its concession rights entirely.”<sup>466</sup> But on its face, this argument concedes (as does Peru in various submissions<sup>467</sup>) that Bear Creek continues to own the Santa Ana Concessions, which are a protected investment within the meaning of the Canada-Peru FTA and the ICSID Convention.<sup>468</sup> More importantly, the determination of illegality by a national court is not binding upon an investment tribunal, which has a duty under international law to fulfill its independent mandate under the Treaty and to make its own assessment of facts and law.

160. In sum, there is simply no justifiable reason for this Tribunal to decline jurisdiction based on Peruvian law (whether before or after the eventual findings of a Peruvian domestic court) or on the facts of this case. Bear Creek’s investment in Peru is exactly the type of investment that is protected by the Canada-Peru FTA and the ICSID Convention.<sup>469</sup>

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<sup>464</sup> For a detailed discussion of Peru’s burden of proof, *see* Section III.A above.

<sup>465</sup> Respondent’s Rejoinder ¶ 421.

<sup>466</sup> *Id.* at ¶ 421.

<sup>467</sup> *See, e.g.*, Respondent’s Rejoinder on Claimant’s Request for Provisional Measures, Mar. 6, 2015, ¶ 6 (asserting that Peru is entitled to investigate the manner “in which **Claimant acquired the mineral concessions** that are essential to the Santa Ana Project.”); Respondent’s Response to Claimant’s Request for Provisional Measures, Feb. 6, 2015, ¶ 30 (emphasis added).

<sup>468</sup> Peru’s assertion that Bear Creek made no attempt to respond to Peru’s argument that the Tribunal should determine for itself that the Santa Ana acquisition violated Peruvian law such that no jurisdiction would exist is misguided. Respondent’s Rejoinder ¶ 423. Claimant responded to all of Peru’s “illegality” arguments in Claimant’s Reply at §§II.B, III, which Claimant incorporates herein.

<sup>469</sup> *See also* Claimant’s Reply ¶¶ 231-234.

## VI. CLAIMANT HELD THE RIGHTS UPON WHICH IT BASES ITS CLAIM

161. Peru continues to argue—again, without any support—that “Claimant cannot establish that it ‘owned or controlled’ the right to mine at Santa Ana, and thus, the Tribunal cannot assert jurisdiction.”<sup>470</sup> According to Peru, Bear Creek only “held an exclusive right to seek a right to mine and to pursue a mining project” and this right purportedly cannot confer jurisdiction upon the Tribunal.<sup>471</sup> Central to Peru’s argument is the empty assertion that ownership of concession rights does not mean that a concessionaire has the “right to both ‘explore and exploit mineral resources’ and ‘use and enjoy ... products that are extracted.’”<sup>472</sup>

162. With respect, this line of argument cannot be taken seriously—concession rights self-evidently are property rights of real value, and fall within the ambit of protected “investments” under the Treaty. Although Peru seeks to identify the nature of concession rights under Peruvian law—as factual context for the Tribunal—it ignores (i) statutory language; (ii) Peru’s own legal experts; and (iii) the facts of this case. These omissions are not accidental. An analysis of each of these sources establishes that Bear Creek held an ascertainable set of rights, including the right to own and exploit the mineral concessions that it lawfully acquired, which forms the basis of its claim in these proceedings.

163. First, the Peruvian General Mining Act expressly provides that concessions grant the holder the right to explore and exploit mineral resources. The statutory language unequivocally states that “[t]he concession grants its holder the right to explore and exploit the mineral resources granted.”<sup>473</sup> This language could not be any clearer. Specifically, the Peruvian State “[v]ia the title to the concession, [ ] grants the concessionaire the exclusive right to engage in the activities inherent to the concession, within a duly circumscribed area, in addition to all other rights granted to the concessionaire by this Law, without prejudice to the obligations that correspond to it.”<sup>474</sup> The Organic Law for Sustainable Development of Natural

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<sup>470</sup> Respondent’s Rejoinder ¶ 425.

<sup>471</sup> *Id.* at ¶¶ 425-427.

<sup>472</sup> *Id.* at ¶¶ 426-427.

<sup>473</sup> **Bullard 031**, General Mining Act, Art. 9 (“*La concesión minera otorga a su titular el derecho a la exploración y explotación de los recursos minerales concedidos*”).

<sup>474</sup> **Exhibit R-008**, Compiled Text of Peru’s General Mining Law, Supreme Decree No. 014-92-EM, Art. 127 (“*Por el título de la concesión, el Estado reconoce al concesionario el derecho de ejercer exclusivamente,*

Resources also states that “[t]he concession grants its holder the right to use and enjoyment of the natural resource granted and, consequently, the property of the fruits and products to be extracted.”<sup>475</sup> The Peruvian Constitution and the General Mining Act both define concession rights as “a right in rem.”<sup>476</sup>

164. Second, Peru’s own legal experts confirm that a mining concession grants the holder a set of ascertainable rights. Specifically, Mr. Rodríguez-Mariátegui agrees that “[a] mining concession grants its holder the exclusive right to explore for and produce the mineral resources in question,”<sup>477</sup> but contends that this does not “automatically” mean that the concession holder can “exercise the various rights that [ ] may be exercised.”<sup>478</sup> In other words, Mr. Rodríguez-Mariátegui does not question the legal existence of these rights, and in that regard, he agrees with Bear Creek’s legal expert, Mr. Hans Flury, that a concession carries with it a set of substantive rights.<sup>479</sup> These substantive rights, per Mr. Rodríguez-Mariátegui, give the “holder **the exclusive right to explore for and produce the mineral resources in question** with the limitations established therein.”<sup>480</sup> In turn, these limitations include going through the permitting process—Bear Creek does not dispute this. But the relevant question here is whether, by virtue of owning the mining concessions, Bear Creek owned the rights of exploration and exploitation within those concession areas. The answer is yes. In fact, as Mr. Rodríguez-Mariátegui states, owning a concession carries with it “a transferable exclusive right to engage in

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*dentro de una superficie debidamente delimitada, las actividades inherentes a la concesión, así como los demás derechos que le reconoce esta Ley, sin perjuicio de las obligaciones que le correspondan”).*

<sup>475</sup> **Exhibit R-0124**, Organic Law for Sustainable Development of Natural Resources, Law No. 26821, Art. 23 (“*La concesión otorga a su titular el derecho de uso y disfrute del recurso natural concedido y, en consecuencia, la propiedad de los frutos y productos a extraerse*”).

<sup>476</sup> **C-0024**, Peru’s Constitution, Art. 66 (“*La concesión otorga a su titular un derecho real, sujeto a dicha norma legal*”); **Bullard 031**, General Mining Act, Art. 10 (“*La concesión minera otorga a su titular un derecho real, consistente en la suma de los atributos que esta Ley reconoce al concesionario. Las concesiones son irrevocables, en tanto el titular cumpla las obligaciones que esta ley exige para mantener su vigencia*”).

<sup>477</sup> **REX-009**, Rodríguez-Mariátegui Second Report ¶¶ 2(a), 9.

<sup>478</sup> *Id.* at ¶ 9.

<sup>479</sup> *Id.* (stating that “Dr. Hans Flury describes mining concessions in Peru as the vehicles for obtaining and exercising substantive rights to mineral resources within the area for which the concession is granted. Although Dr. Flury has correctly quoted the provision of mining law, the truth is that merely being granted a mining concession is not sufficient to entitle the concession holder to immediately and automatically exercise the various rights that he notes may be exercised”); *see also id.* at ¶ 19.

<sup>480</sup> *Id.* at ¶ 11 (emphasis added).

mining activity in the area specified in the concessions.”<sup>481</sup> At a minimum, as Mr. Rodríguez-Mariátegui explains, that transferable exclusive right includes “the right to (i) apply for the remaining authorizations that would allow it to begin exploring for and/or exploiting the resources; (ii) sell its title; and (ii) prevent third parties from acquiring any right to the mineral resources in the concession area.”<sup>482</sup>

165. Moreover, Peru’s other expert, Mr. Jorge Danos Ordóñez, opines that Supreme Decree 083 granted Bear Creek a right to acquire property. Mr. Danos opines, *inter alia*, that “[t]he Supreme Decree provided for in Article 71 of the Constitution ... grants that right” to a foreigner—such as Bear Creek—to acquire property within 50 kilometers of a border zone.<sup>483</sup> Here, Bear Creek properly obtained a declaration of public necessity, which was embodied in Peru’s enactment of Supreme Decree 083, thus granting Bear Creek the right to acquire property within a border zone. Bear Creek obtained that property—a right *in rem*—when it exercised its option under the Option Agreements. In short, there can be no doubt that Bear Creek owned the rights upon which it bases its claim because it exercised its option and acquired the Santa Ana Concessions, which in turn gave Bear Creek a set of ascertainable rights, including the right to exploit the mineral resources granted.

166. Peru’s Rejoinder altogether fails to address several related arguments that Bear Creek raised in its Reply, namely that: (i) Peru improperly seeks to limit and minimize the scope and nature of Bear Creek’s protected investment in Peru; (ii) Peru conflates the existence of mining rights (*i.e.*, the existence of a right to exploit the mineral rights) with the need to obtain the requested permits and licenses to build and operate a mine (*i.e.*, the necessary approvals to exercise the right to exploit the mineral rights); (iii) even if Bear Creek only had “a mining exploration project,” as asserted by Peru, this would still be a protected investment under the Canada-Peru FTA and the ICSID Convention; and (iv) Peru cannot argue that Bear Creek had no right to mine when Peru’s illegal expropriation of Bear Creek’s investment thwarted the full development of the project and prevented Bear Creek from obtaining all requisite permits and

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<sup>481</sup> *Id.* at ¶ 21.

<sup>482</sup> *Id.* at ¶ 21.

<sup>483</sup> **REX-006**, Danos Expert Report ¶ 26.

authorizations. Peru has no answer to any of these arguments, and its blanket assertion that Claimant “cannot be correct” should be dismissed.<sup>484</sup>

167. Third, and finally, an analysis of the basic facts of this case demonstrates that Bear Creek owned the Santa Ana Project when Peru illegally expropriated it. On December 3, 2007, after it lawfully obtained the required public necessity declaration, Bear Creek exercised its option to acquire the Santa Ana Project under the Option Agreements.<sup>485</sup> For three and a half years, Bear Creek engaged in extensive and costly exploration and development efforts exercising its exclusive right to explore for minerals within its concession territory.<sup>486</sup> Then, on June 25, 2011, Peru issued Supreme Decree 032 revoking Bear Creek’s public necessity declaration. These basic facts cannot be disputed, and they confirm that Bear Creek “owned or controlled” its investment at the time of Peru’s breach of the Canada-Peru FTA.

168. On the law, Peru merely cites the *Gallo* award for the general proposition that ownership or control of an investment is necessary to trigger the protections of a bilateral investment treaty.<sup>487</sup> Peru does not explain the significance of this case to the Tribunal’s analysis,<sup>488</sup> which is hardly surprising given that it bears no resemblance to the case at hand. In *Gallo*, the claimant provided “no written evidence, direct or circumstantial” showing the date on which he purportedly acquired a C\$3.25 million investment.<sup>489</sup> The claimant admitted that he “never visited the Adams Mine [the investment] ... he never did any due diligence, nor engaged any engineer or consultant to do a due diligence, that he never saw any documentation referring to the mine.”<sup>490</sup> The claimant never had contact with the manager of the Adams Mine, nor did he disclose ownership of the mine in his U.S. tax declarations.<sup>491</sup> He simply entrusted the purchase

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<sup>484</sup> Respondent’s Rejoinder ¶ 427.

<sup>485</sup> **Exhibit C-0015**, Transfer Agreements; **Exhibit C-0017**, Supreme Decree Application; **Exhibit C-0004**, Supreme Decree 083-2007-EM, Nov. 29, 2007.

<sup>486</sup> See, e.g., Claimant’s Memorial ¶¶ 44 *et seq.*

<sup>487</sup> Respondent’s Rejoinder ¶¶ 424-427.

<sup>488</sup> *Id.*

<sup>489</sup> **RLA-25**, *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, Sept. 15, 2011, ¶¶ 160-163 (“*Vito G. Gallo* Award”).

<sup>490</sup> *Id.* at ¶ 164.

<sup>491</sup> *Id.* at ¶¶ 168, 241, 247, 283.

of a multi-million investment to a third party, with no paper trail to prove such agreement,<sup>492</sup> and the purchase agreement between the seller of the mine and the third party made no reference whatsoever to the claimant.<sup>493</sup> Accordingly, the *Gallo* tribunal concluded that the claimant had failed to prove the date on which he acquired ownership and control of the investment at issue.<sup>494</sup> In contrast, here, Bear Creek has submitted conclusive evidence of its ownership of its investment, including contemporaneous documents and witness testimony regarding its ownership and control of the Santa Ana and Corani projects.<sup>495</sup> The *Gallo v. Canada* decision is simply inapposite to the Tribunal's analysis.

## VII. REQUEST FOR RELIEF

169. For the reasons stated herein and in Claimant's submissions to date, Bear Creek requests that the Tribunal dismiss in full Respondent's jurisdictional objections and award Bear Creek all of its related costs, including attorneys' fees. For the avoidance of doubt, Bear Creek incorporates by reference all relief requested in its prior submissions.

May 26, 2016

Respectfully submitted,



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<sup>492</sup> *Id.* at ¶¶ 164-166.

<sup>493</sup> *Id.* at ¶ 168.

<sup>494</sup> *Id.* at ¶ 290.

<sup>495</sup> *See* Claimant's Memorial at § II; Claimant's Reply at § II.