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**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
ICSID**

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**BEAR CREEK MINING CORPORATION**  
Claimant

v.

**THE REPUBLIC OF PERU**  
Respondent

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**EXPERT REPORT**

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May 25, 2016

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## I. SUMMARY OF CONCLUSIONS

1. The present report is issued at the request of King & Spalding in its capacity as attorneys representing BEAR CREEK Mining Corporation in the tracked arbitration procedure against the Republic of Peru (henceforward, the Peruvian State). In particular, this report responds to the reports issued by Francisco Eguiguren and Jorge Danos with respect to: (i) the administrative act nature of Supreme Decree No. 083-2007-EM; (ii) the imputations to BEAR CREEK and Mrs. Villavicencio of committing an intentional “simulation” or “legal fraud”; and (iii) questioning the application of the Doctrine of *Actos Propios* in favor of BEAR CREEK.
2. The three matters stated in the aforementioned paragraph are related to the objection to the Tribunal’s jurisdiction, since it is based, among other considerations, on BEAR CREEK’s having, allegedly illegally obtained its mining rights.
3. Nevertheless, as we will see, (i) the mining rights were validly acquired by BEAR CREEK as it complied with the legally established requisites to obtain a favorable administrative act, without having engaged in an alleged “simulation” or “legal fraud”; and (ii) even in the scenario in there were any irregularities, they would had been validated with the issuance of Supreme Decree No. 083-2007-EM that as an administrative act, resulted from a regular administrative procedure in which the Peruvian State verified that national security was not affected.
4. The present report reaches the following conclusions:
  - a. Supreme Decree No. 083-2007-EM constitutes an administrative act because it has particular and specifically defined effects and it is the consequence of an administrative procedure regulated in the TUPA [Consolidated Text of Administrative Procedures] of the Ministry of Energy and Mines (henceforward, MEM).
  - b. It has not been shown that the acts and legal transactions carried out by Mrs. Villavicencio and BEAR CREEK suffer any legal defect derived from simulation, neither absolute nor relative, or that they have been carried out in fraud under the Constitution or the Law.

- c. In any case, in the denied scenario in which an irregularity existed, it would have been validated with the issuance of Supreme Decree No. 083-2007-EM which as an administrative act, resulted from a regular administrative procedure in which the Peruvian State verified that national security was not affected.
- d. Both the repeal of Supreme Decree No. 083-2007-EM and the jurisdictional objection lodged by the Peruvian State in this arbitration reflect contradictory behavior that is not supported by the Doctrine of *Actos Propios*, because it ignores the legitimate reliance created in BEAR CREEK with respect to the validity, efficacy, and legality of the legitimately obtained mining rights.

## **II. SUPREME DECREE NO. 083-2007-EM IS AN ADMINISTRATIVE ACT**

- 5. Assessing the nature of Supreme Decree No. 083-2007-EM becomes pertinent to discuss the Tribunal's jurisdiction because by deciding that it constitutes an administrative act, it becomes clear that with its issuance the Peruvian State validated any assumed irregularity that could have been present in the acquisition of the mining rights.

### **A. Supreme Decree No. 083-2007-EM produces effects within a concrete situation**

- 6. Both Danos and Eguiguren have maintained that Supreme Decree No. 083-2007-EM does not constitute an administrative act.
- 7. Danos has pointed out that it would be a phenomenon of a *sui generis* nature since it has been approved through a normative instrument despite its specific or singular character (directed at BEAR CREEK).<sup>1</sup> He adds that the supreme decree would have been adopted in exercise of a governmental function or State policy.
- 8. However, the fact that the instrument used to approve the authoritative decision was a supreme decree does not rule out its nature of an administrative act, nor transform it into a "sui generis phenomenon."

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<sup>1</sup> See DANOS, paragraphs 48 and 49.

9. Law No. 27444, Law of General Administrative Procedure (henceforward, LPAG) defines administrative acts according to their content and effects; not by means of the instrument through which they are approved.
10. Article 1 of LPAG<sup>2</sup> establishes administrative acts as declarations of the entities, within the framework of public law, intended to have legal effects on the interests, obligations, or rights of the administration's subjects within a specific situation.
11. Considering that Supreme Decree No. 083-2007-EM declared the public necessity of private investment in mining activities so that BEAR CREEK could acquire and possess concessions and mining rights and complementary resources for the best development of its productive activities within fifty (50) kilometers of the southern border of the country, it is clear that this pronouncement that legally affects the interests, obligations, and rights of an administration's subject (BEAR CREEK) constitutes an administrative act in terms of Article 1 of LPAG.
12. The instrument of approval of a decision (whether a supreme decree, a ministerial resolution, or directive order) is irrelevant. For example, a decision of the Executive Council of the Supervisory Agency for Investment in Energy and Mining (OSINERGMIN) may constitute an administrative act when it resolves the objection of a matter against a pronouncement that affects its interests<sup>3</sup> or a general rule when it approves a regulation governing certain activity.<sup>4</sup> The administrative act is defined by its content and not by its means of expression.
13. A supreme decree can constitute an administrative act when it grants an authorization to a particular entity (as is the case of Supreme Decree. 083-2007-EM that authorizes

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<sup>2</sup>Law on General Administrative Procedure – Law No. 27444, Article 1. **(BULLARD 005)**

<sup>3</sup> See, for example, the Resolution of the Board of Directors No. 277-2015-OS/CD on November 16, 2015 **(BULLARD 070)**, deciding the appeal brought by *Servicio Público de Electricidad del Oriente - Electro Oriente S.A.* against Osinergmin Resolution No. 111-2015-OS/GAR **(BULLARD 071)** that approved the administrative and operational costs linked to the FISE program of electrical distributors for the month of June 2015. In this decision (Resolution No. 277-2015-OS/CD) the Board of Directors of OSINERGMIN expressly stated that it was an administrative act:

*"That against Resolution 111, October 1, 2015, Servicio Público de Electricidad del Oriente - Electro Oriente S.A. . (henceforward, "Electro Oriente") filed an appeal; the subject of the present administrative act being the analysis and decision of such means of challenge."*

<sup>4</sup> See, for example, Resolution of Board of Directors No. 191-2011-OS/CD of October 18, 2011 that approved Regulations for the registration of hydrocarbons and other procedures. **(BULLARD 072)**

BEAR CREEK to acquire mining rights) or also a generally applicable rule when it approves a regulation (as, for example, is the case of Supreme Decree No. 014-92-EM that approves the Single Uniform Text of the General Mining Law).

14. In his report, Dr. Danos argues that Supreme Decree No. 083-2007-EM would belong to the category of singular laws (special regulations), because “despite not having a general and abstract content, they do not lose their nature as laws.” To support his point, he mentions the thesis “Case Law Analysis of Popular Action Proceedings in the Peruvian State: Proposal to Improve Judicial Review of Regulatory Standards” written by the recognized jurist and expert on the subject Juan Carlos Morón<sup>5</sup> and Dr. Danos’s partner in the same law office.
15. However, the thesis of Juan Carlos Morón does not point out that special regulations are rules without a general and abstract content, rather, he points out that generality and abstraction are no longer the main criterion for distinguishing them from administrative acts. He adds that special attention needs to be paid to the legal order-like character of the regulations, namely, their permanence in being “*intended to be applied/repeated continuously in future juridical situations foreseen in their de facto assumptions until their repeal.*”<sup>6</sup>
16. In the present case, Supreme Decree No. 083-2007-EM lacks this legal order-like character because it states:
  - (i) “*Declare the private investment in mining activities is a public necessity, for BEAR CREEK MINING COMPANY SUCURSAL DEL PERU to acquire and possess concessions and rights over mines and supplementary resources for the better development of its productive activities, within the fifty (50) kilometers from the southern border of the country, in areas in which the mining rights detailed in Article 2 of this supreme decree are located.*”

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<sup>5</sup> See DANOS, paragraphs 52 and 53.

<sup>6</sup> See DANOS, Annex (R-354), page 75.

- (ii) *“Authorize BEAR CREEK MINING COMPANY SUCURSAL DEL PERU to acquire seven (7) mining rights, located in the Puno department, in the border zone with Bolivia, detailed as follows: (...)”*
- (iii) *“The mining authority shall grant the authorizations for the mining activities in the mining rights referred to in Article two, in favor of the enterprise BEAR CREEK MINING COMPANY SUCURSAL DEL PERU, previously complying with the applicable provisions and legal requirements and in strict compliance with Peru’s international obligations.*
- (iv) *“The transfer of the possession or property of the assets referred to in this supreme decree to other foreign investors that do not have the corresponding authorization shall result in the loss of the acquired right, in benefit of the State, pursuant to that established in Article 71 of the Political Constitution of Peru.*

17. It is clear that Supreme Decree No. 083-2007-EM is not intended to be applied to others subjects of the administration, other geographical areas, or other requests. In fact, the last point (Article 4) expressly states that the possession or property authorized to BEAR CREEK by means of the supreme decree cannot automatically be transferred (applied/repeated) to other foreign investors (legal system-like in character).
18. On the contrary, a new subject of the administration different from BEAR CREEK must process a new authorization (declaration of public necessity) if it wants to be the owner or possessor of mining rights located within fifty (50) kilometers of the south border of the country that this decree refers to: Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6, and Karina 7. We understand that this is because Supreme Decree No. 083-2007-EM was issued with the particularities of the BEAR CREEK project in mind.<sup>7</sup>
19. Footnote 86 of the Thesis of Juan Carlos Morón – not mentioned by Danos – expressly points out that the nature of a pronouncement is independent of the type of disposition

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<sup>7</sup> It should be recalled that in accordance with the provisions in Annex III of Supreme Decree No. 162-92-EF, collected in Procedure 53 of the MEM TUPA, to obtain a declaration of public necessity applicants must report, among other items: (i) types of property acquisition; (ii) property rights acquired; (iii) new investment amount; (iv) investment destination; (v) Economic Sector; (vi) description of the project; (vii) firm receiving the investment; and (ix) term for making the investment.

Keeping this information in mind, the Joint Command of the Armed Forces should analyze if there is a risk to national defense and the Presidency of the Council of Ministers should resolve the request on the merits of the opinion provided. **(BULLARD 023)**

by which it is approved, being that a supreme decree can also contain administrative acts:

***“It is important to differentiate among regulations, as juridical phenomenon per se, and denomination of the types of provisions by means of which they can be approved, because they correspond to the idea of content and container, reciprocally. For example, although the Supreme Decree is the common legal form by which regulations are approved, there are also Supreme Decrees that contain administrative acts (for example, Emergency Declaration, approval of a TUPA) and on the other hand, there are regulations that can be approved by Ministerial or Directorial Resolution.”<sup>8</sup>***  
(Emphasis added)

20. In the following paragraphs, also not mentioned by Dr. Danos, Juan Carlos Morón points out that supreme decrees that contain declarations such as those granting guarantees to the investors do not constitute regulations or administrative standards and therefore popular action<sup>9</sup> claims against them are inadmissible<sup>10</sup>. He likewise lists examples of particular administrative acts contained in the form of Supreme Decrees – against which popular actions would also not be admissible – such as: (i) disposition by direct sale of a state property;<sup>11</sup> and, (ii) cancellation of companies’ operations.<sup>12</sup>
21. It is equally pertinent to point out that Juan Carlos Morón’s Thesis mentions a research article written by Danos himself in which he elaborates in greater detail than in his report the criteria for differentiating between a regulation and an administrative act, classifying

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<sup>8</sup> See DANOS, Annex (R-354), page 78.

<sup>9</sup> A popular action is a process that operates in case of infringement of the Constitution and the law, against regulations, administrative rules, and general resolutions and decrees. . Article 200, Peruvian Constitution of 1993. **(BULLARD 003)**

<sup>10</sup> Morón cites as an example, Supreme Decree No. 124-2005-EF that granted guarantees to the contract concessionaire of the roadway concession of the Pucusana Bridge Road Section – Cerro Azul to Ica of the South Panamerican Highway and against the Concession Contract itself. **(BULLARD 073)**.

<sup>11</sup> He cites as an example Supreme Decree No. 080-2006-EF, through which ownership of a Rimac District property was transferred by direct sale to the Federation of Entrepreneurs and Traders in Supplies for the Footwear Industry. **(BULLARD 074)**

<sup>12</sup> He cites as an example Supreme Decree No. 016-2003-ED that cancels operation of the Private Teaching Institute of Applied Linguistic Science – IPELICA. **(BULLARD 075)**

them into 3 types: (i) criterion of abstraction or generality in the subjective or objective sense; (ii) legal system incorporation criterion; and (iii) criterion of consumption.<sup>13</sup>

22. As for the first criterion, Danos indicates that although it is not definitive, **“regulations generally use an impersonal, general, and abstract language about specific existing situations. In contrast, administrative acts are directed to or have as objective a specific addressee, they refer to an existing and individualized situation or a certain matter.”**<sup>14</sup>
23. Referring to the legal system incorporation criterion, he points out that **“a regulation is any administrative activity incorporated into the legal system whose precepts transcend, in this sense, a specific case, will be regulation; on the other hand, an administrative activity that concretizes what was previously established by a legal rule, will be an administrative act.”**<sup>15</sup>
24. Finally, in connection with the criterion of consumption, he argues that **“the administrative act, be it singular or general in the scope of its addressees, does not exist after its simple compliance, it is consumed by it ; therefore, for a new compliance, a new administrative act is required to be dictated. On the other hand, the regulation as a legal device that is part of the legal system is not consumed by its singular compliance, because it is susceptible to an infinity of compliances, given that as a source of law, it continues ordering social life.”**<sup>16</sup>
25. Supreme Decree No. 083-2007-EM: (i) has a specific addressee (BEAR CREEK) and it refers to an existing legal situation (declaration of the public necessity of the project and the acquisition of seven mining rights); (ii) it makes specific what was already a legally established rule (Article 71 of the Political Constitution of Peru); and, (iii) it is not susceptible of an infinity of compliances , since the declaration is only applicable to BEAR CREEK with respect to the 7 mining rights mentioned in Article 2. In conclusion, Supreme Decree No. 083-2007-EM is an administrative act by application of the criteria developed by Dr. Danos himself in the cited article.

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<sup>13</sup> DANOS, Jorge. *Regulations in the Peruvian Legal System*. In UNAM Institute of Legal Research. Pages 173 and 174. (BULLARD 076)

<sup>14</sup> Ibid, page 173.

<sup>15</sup> Ibid, page 174.

<sup>16</sup> Ibid.

26. Additionally, to question whether Supreme Decree. No. 083-2007-EM is an administrative act, Dr. Danos mentions examples of supreme decrees that by his criteria would have a specific and concrete content and nevertheless would not constitute administrative acts. Thus, he mentions the supreme decrees that establish protected natural areas and those that approve rules for organization and internal operation [of State entities].<sup>17</sup>
27. Nevertheless, a supreme decree that approves the organization of a [State] entity does not constitute an administrative act, not by the instrument used, but because this pronouncement affects the officials of the entity but not the administration's subjects. It is exactly why Article 1 of LPAG expressly denies that this type of pronouncement from the Administration is an administrative act.<sup>18</sup>

With respect to supreme decrees that establish natural areas, these do not constitute administrative acts (at least, not of particular effects) because they do not establish obligations or rights for one (or a group of) subjects of the administration in a concrete situation, as does Supreme Decree. 083-2007-EM. On the contrary, these types of supreme decrees have general effects that rise to a specific situation. Indeed, with the creation of a protected natural area, the universe of those administered (not a certain group alone) will, for example, have to submit themselves to a special regime to take advantage of the natural resources located in this area,<sup>19</sup> or to develop tourist and recreational activities in it.<sup>20</sup>

28. Finally, Danos concludes in his report that Supreme Decree No. 083-2007-EM would be a governmental act issued by the Council of Ministers, exercising the governmental

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<sup>17</sup> See DANOS, paragraphs 50 and 51.

<sup>18</sup> With respect to the concept of administrative act, the Law on General Administrative Procedure– Law No. 27444 states the following:

*“Article 1.- Concept of administrative act*

*(...)*

*1.2 The following are not administrative acts:*

*1.2.1. Internal administration actions of the institutions intended to organize or operate their own activities or services. These actions are regulated by each entity, subject to the provisions of the Preliminary Title of this Law, and of those standards that are expressly so established.*

*1.2.2. The material behavior and activities of the entities.” (BULLARD 005)*

<sup>19</sup>In accordance with Article 27 of Law No. 26834, the Law of Protected Natural Areas, *“exploitation of natural resources in Protected Natural Areas may only be authorized if compatible with the category, assigned zoning, and the Master Plan for the area. The exploitation of resources must not adversely affect compliance with the purposes for which the area has been established.” (BULLARD 077)*

<sup>20</sup> In accordance with Article 30 of Law No. 26834, the Law of Protected Natural Areas, *“the development of tourist and recreational activities must be made on the basis of the corresponding plans and regulations of tourism and recreation, as well as the Master Plan of the Natural Protected Area of the national administration (...)” (BULLARD 077)*

function or policy.<sup>21</sup> Although it is not explained in the report why this type of function would be exercised, it is relevant to bring up what Danos explains in his article “The Regulations Regime in the Peruvian Legal System,” in which he argues that any body of the Public Administration can issue administrative acts regardless of its identity: **“the power to issue administrative acts is a general ability of nearly every instance or body of public administration, because this is its normal way of expressing itself.”**<sup>22</sup>

29. Thus, the fact that the Authoritative Supreme Decree is issued by the Council of Ministers does not mean that this pronouncement is the exercise of the government’s function or policy. This is more evident considering that the mentioned supreme decree is the consequence of an administrative proceeding, as will be explained next.

**B. Supreme Decree No. 083-2007-EM originates from an administrative procedure provided by MEM’s TUPA.**

30. In addition to what was indicated in the previous section, in the present case we are dealing with an administrative act as it has been issued within the framework of an administrative procedure compiled and ruled by the Consolidated Text of Administrative Procedures (TUPA) of MEM.

31. In accordance with Article 37 of LPAG<sup>23</sup> and Article 4 of Supreme Decree 079-2007-PCM that approves guidelines for the preparation and approval of TUPA, TUPAs

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<sup>21</sup> See DANOS, paragraph 56.

<sup>22</sup> DANOS, Jorge. *Regulations in the Peruvian Legal System*. In UNAM Institute of Legal Research. Page 175. **(BULLARD 076)**

<sup>23</sup> About this point, the Law on General Administrative Procedure– Law No. 27444 states the following:

*“Article 37.-Content of the Single Text of Administrative Procedures*

*All entities produce and approve, or manage the approval, according to the case, with their Single Text of Administrative Procedures, that includes:*

*1. All required procedures for initiatives by the administered entity to satisfy their interests or rights by way of the pronouncement of any organ of the entity, provided that this requirement has legal support, which must be expressly stated in the TUPA with indication of the date of publication in the Official Daily.*

*2. Clear and exhaustive description of all requirements for full implementation of each procedure.*

*3. Classification of each procedure, as appropriate, as procedures of prior evaluation or automatic approval.*

*4. In the case of prior evaluation procedures, whether applicable administrative silence is denial or approval.*

*5. In the cases in which a processing fee will be required, indication of the amount and form of payment. The amount of the fees will be expressed in relation to the UIT [taxation unit], to be published in the entities in current legal tender.*

*6. The appropriate paths to access the procedures contained in the TUPA, in accordance with provisions of Articles 116 et seq. of the present Law.*

*7. The authority with jurisdiction at every stage of the proceeding and the appeals to be filed to access them.*

*8. The forms to be used during processing of the corresponding administrative procedure.*

*The TUPA will also include the relationship of those services provided exclusively by the entities, when the administered entity has no way of obtaining them by going to another location or branch. This will be required with respect to them as provided in items 2, 5, 6, 7 and 8, above, as applicable.*

compile, among other matters, the administrative procedures carried out before a certain entity.<sup>24</sup> Also, according to Article 29 of LPAG, the administrative procedures lead to issuance of an “*administrative act that produces individual or identifiable legal effects on the interests, obligations, or rights of those administered.*”<sup>25</sup>

32. Incorporation of this procedure in the MEM’s TUPA of rules out the broadly discretionary character that Dr. Danos<sup>26</sup> and Dr. Eguiguren<sup>27</sup> seek to attribute to Supreme Decree No. 083-2007-EM.
33. Contrary to what Dr. Eguiguren states, the inclusion of the authorization procedure to acquire property for foreigners in the border area in the MEM’s TUPA of not only signifies the existence of a guide of procedures for the administration subjects, but entails imposition of objective parameters on the Administration, such as: (i) the list of requirements that must be demanded of the administered entity to process its application; (ii) the period in which the request should be resolved; and (iii) the identity of the authorities who must answer the request, among others. This pursuant to Article 37 of LPAG.
34. Also, I differ with Dr. Danos when he states that there is a presumed discretionary character of the supreme decree given that the Constitution does not indicate the reasons for which the authorization could be denied. In this respect, it is useful to specify that although the Constitution does not expressly state these reasons, Supreme Decree No. 162-92-EF certainly does.

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*Requirements and conditions for provision of services by entities will be established by Supreme Decree countersigned by the President of the Council of Ministers.*

*For those services that are not provided exclusively, entities will establish the requirements and costs for them through resolution of the Head of the Budget Sheet, and this will be properly disseminated to be public knowledge.”*  
**(BULLARD 005)**

<sup>24</sup> In this respect, Supreme Decree No. 079-2007-PCM that approves guidelines for drawing up and approving the TUPA states:

*“Article 4.-Definitions.*

*(...)*

*Single Text of Administrative Procedures - TUPA: institutional management document created to provide the administered entity or citizens in general information on all administrative procedures that are processed before the authorities.”* **(BULLARD 078)**

<sup>25</sup> About this point, the General Law of Administrative Procedure – Law No. 27444 provides the following definition of administrative procedure:

*“Article 29.-Definition of administrative procedure*

*By administrative procedure is understood the set of acts and procedures transacted in institutions, leading to the issuing of an administrative act that produces individual or identifiable legal effects for the interests, obligations, or rights of the administered entity. (BULLARD 005)*

<sup>26</sup> See DANOS, paragraphs 62, 69, 75, 76, and 78.

<sup>27</sup> See EGUIGUREN, paragraphs 24, 25, 28, 30, 32, and 33.

35. In fact, in accordance with Article 32 of Supreme Decree No. 162-92-EF, the Joint Command of the Armed Forces will only be able to restrict the declaration of public necessity for reasons of national security.<sup>28</sup> Also, according to Article 33, the evaluation of a presumed threat to external defense will be made on the basis of the documentation listed in Annex III of this provision that is also compiled in the MEM's TUPA.<sup>29</sup>
36. I consider pertinent to specify that contrary to what Dr. Eguiguren and Dr. Danos allege, none of my previous reports have maintained that the declaration of public necessity is generated automatically with the presentation of the documentation listed in the MEM's TUPA. The automatic nature is a misrepresentation of what I have stated. I only stated that although a presumption exists in favor of such declaration – by virtue of what is established in Article 13 of Legislative Decree 757 and Part V of the Preliminary Title of the Single Comprehensive Text of the General Mining Law, approved by means of Supreme Decree 014-92-EM,<sup>30</sup> the application should be evaluated on the basis of the external defense of the country, and it requires a pronouncement to have effects.

### C. Judicial control

37. In their reports, Dr. Eguiguren<sup>31</sup> and Dr. Danos<sup>32</sup> deny the administrative nature of Supreme Decree 083-2007-EM, pointing out that it would not be susceptible of judicial control. However, that is not true, since Supreme Decree No. 032-2011-EM that

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<sup>28</sup> In this respect, Supreme Decree No. 162-92-EF states:

*“Article 32.- “In accordance with the requirements of Article 126 of the 1979 Constitution and Article 13 of Legislative Decree No. 757, for the exercise of the rights of ownership or possession of mines, land, forests, water, fuel or energy sources by foreign investors, either directly or indirectly, within fifty kilometers of the country's borders, the corresponding prior authorization must be obtained, for which a supreme resolution will be granted by the Minister holding the Presidency of the Council of Ministers and the Minister of the Sector in question. Such authorization must have the favorable opinion of the Joint Command of the Armed Forces, for the reasons set out in the following paragraphs.*

*The Supreme Resolution mentioned in the preceding paragraph will establish the conditions of or limitations on the exercise of the corresponding rights of ownership or possession, which may only be restricted for reasons of national security.*

*Reasons of national security are understood to be those required to guarantee the independence, sovereignty, and territorial integrity of the Republic, as well as internal order, as prescribed in Article 275 of the 1979 Constitution.”* **(BULLARD 023)**

<sup>29</sup> On this point, Supreme Decree No. 162-92-EF states:

*“Article 33. - In order to obtain the prior authorization referred to in the previous Article, foreign investors or companies in which they participate should file an application with the Minister of the sector pertaining to the economic activity in which they intend to engage. Such application should contain the information indicated in Annex III of the present Supreme Decree, of which it is an integral part.”* **(BULLARD 023)**

<sup>30</sup> On the one hand, Part V of the Preliminary Title of the Single Consolidated Text of the General Mining Law, approved by Supreme Decree 014-92-EM that states that the mining industry is of public utility and that promotion of investment in the mining sector is in the national interest **(BULLARD 031)**, and on the other hand, Article 13 of Legislative Decree 757 and its regulatory standards that declares the national necessity for private, national, and foreign investment in productive activities undertaken or carried out in the country's border areas **(BULLARD 004)**.

<sup>31</sup> See EGUIGUREN 2, paragraph 25.

<sup>32</sup> See DANOS, paragraph 136.

repealed Supreme Decree No. 083-2007-EM, was challenged before judicial courts through an amparo process. If it were an openly political and discretionary act, as Dr. Danos and Dr. Eguiguren allege, BEAR CREEK's claim would not have been admissible. Nevertheless, the claim was not only admitted, but it was upheld in first instance courts.

38. Notwithstanding the above mentioned, it is pertinent to point out that in accordance with Víctor Baca Oneto, cited by Dr. Danos in his report,<sup>33</sup> even acts of political direction are susceptible of being challenged before the administrative contentious courts:

***“Moreover, other acts of political direction by the Government that generate legal effects, infringing subjective rights and legitimate interests, will be contested before the administrative contentious courts that can control their regulated elements. Against the position of those who defend the inadmissibility of the appeal against acts considered «of government» by denying their administrative nature, jurisprudence – and also the majority of doctrine –has acknowledge the possibility of controlling such acts, as well as discretionary administrative acts, judicially. The recognition of the right to effective judicial protection requires it.”<sup>34</sup>***

39. It is also important to bear in mind that there are pronouncements of the Public Administration that fit within the concept of administrative act, but that are not formally suitable to be challenged.<sup>35</sup> Examples of this are the resolutions that resolve claims in complain proceedings which, in application of Article 158.3 of LPAG, cannot be challenged.<sup>36</sup>

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<sup>33</sup> See DANOS, foot of page 31.

<sup>34</sup> BACA, Víctor. 2012. “Acts of the Government in Peruvian Law.” *Revista Ita Ius Esto*. Page 142 (BULLARD 079)

<sup>35</sup> Notwithstanding this fact, I consider that if this administrative act does indeed affect due process it should be susceptible to questioning through a judicial procedure.

<sup>36</sup> About this point, the General Law of Administrative Procedure – Law No. 27444 states:

*“Article 158.- Complaint for processing defects*

*158.1. The administration's subjects may submit a complaint at any time for procedural defects, and in particular, those involving paralysis, violation of legally established deadlines, noncompliance with functional duties or omission of paperwork that must be rectified before final resolution of the issue in the respective instance.*

*158.2. The complaint is presented to the hierarchical superior of the authority that processes the procedure, citing the infringed duty and the required standard. Higher authority resolves the complaint within three days, with prior transfer*

40. Thus, the possibility of challenging or not of a supreme decree before the judicial courts does not in the least affect its nature as administrative act or regulation, whatever the case.
41. In view of all that is explained above, it is clear that Supreme Decree No. 083-2007-EM constitutes an administrative act.

### **III. WE ARE NOT BEFORE A CASE OF ABSOLUTE OR RELATIVE SIMULATION, AND STILL LESS A CASE OF LEGAL FRAUD**

42. As we will see, the mining rights were validly acquired because BEAR CREEK complied with the established legal requirements, without having engaged in an intentional “simulation” or “legal fraud .”
43. Dr. Danos and Dr. Eguiguren Reports accuse BEAR CREEK and Mrs. Villavicencio of an alleged “simulation” or “legal fraud”, but fail in clearly defining the legal basis that supports this accusation.
44. It is striking that none of the reports or briefs presented by the Peruvian State have specifically typified the defect that they claim, the legal requirements for the defect, nor how the facts presented fit within these requirements.
45. Due to this lack of definition, we will assume that the position of the Peruvian State is the one outlined by MEM in the civil process of inefficacy for absolute simulation.<sup>37</sup> In this process, the Peruvian State pointed out that according to Articles 190 and 193 of the Civil Code, BEAR CREEK and Mrs. Villavicencio orchestrated an absolute simulation to deceive the State. It argues that BEAR CREEK was always the owner of the mining rights and that no Option Contracts or transfers of mining rights were actually entered into or executed.

#### **A. Response to the State’s Position: There is No Absolute Simulation**

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*to the complained against, so that he or she or it may present the report deemed appropriate the day following the request.*

*158.3. In no case in which a complained has been filed the procedure will be suspended, and the decision may not be appealed.*

*158.4. The authority hearing the complaint may shift it with cause to another official at a similar hierarchical level.*

*158.5 If the complaint is found to be justified, pertinent corrective measures will be dictated with respect to the procedure, and in the same decision, initiation of the necessary sanctions will be provided to punish those responsible.” (BULLARD 005)*

<sup>37</sup> “Petition for Inefficacy of Legal Act because of absolute simulation,” presented by the MEM Public Prosecutor, File 13458-2011. (BULLARD 080)

*“Article 190.- By absolute simulation ,there is the appearance of executing a legal act when there is no actual will to do so.”<sup>38</sup>*

46. The Peruvian State alleges that this is a case of absolute simulation. It argues that although Mrs. Villavicencio requested the mining petitions as an individual, this was mere appearance, since she always maintained capacity as attorney-in-fact and employee of BEAR CREEK. It was BEAR CREEK that filed the mining petitions (through Mrs. Villavicencio), and consequently, she never entered into any Option Contract and BEAR CREEK never really exercised a purchase option right. In summary, a real legal act never existed, since these were only apparent acts.<sup>39</sup>
47. We are not dealing with a case of absolute simulation. Following Alfredo Soria<sup>40</sup> and Guillermo Lohmann,<sup>41</sup> I will explain that the Peruvian State has not proved that the requirements to apply the figure of absolute simulation to the present case have been satisfied.
48. The first requirement is that the parties should have the will to create an apparent act . However, not a single act or legal transaction between BEAR CREEK and Ms. Villavicencio has been identified where its typical effects have not been desired by them. On the contrary, all the acts and legal transactions carried out by Mrs. Villavicencio herself (mining petitions), and between BEAR CREEK and Mrs. Villavicencio (Option

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<sup>38</sup> Civil Code, Article 190 (**BULLARD 088**)

<sup>39</sup> “Writ Claim for Inefficacy of Legal act for absolute simulation,” presented by the MEM Public Prosecutor, File 13458-2011. See, for example, paragraphs 12, 13, 17, 19, 23, 26. (**BULLARD 080**)

<sup>40</sup> SORIA, Alfredo. The Legal Transaction (Chapter Seven). In *The Deceptive Legal Transaction*. Editorial M.J. Bustamante de la Fuente. Lima: December 2014. Pages 293-294, who states “3 ESSENTIAL ELEMENTS OF SIMULATION. There are three essential elements to a deceptive legal transaction: i) Creation of an apparent transaction, ii) Deceptive agreement, iii) Intention to deceive.” Specifically with respect to absolute simulation, he states “(...) As with all deceptive legal transactions, the appearance has been voluntarily created by the contracting parties through the deceptive agreement precisely revealing that in reality, they engaged in no legal transaction whatever; i.e., absolute simulation merely creates a legal appearance **without any effective legal transaction actually being carried out by the contracting parties.**” (**BULLARD 081**)

<sup>41</sup> LOHMANN, Guillermo. The legal transaction, Editorial Grijley, 2nd Edition, Lima, 1994, pages 364 to 368, who states “CHARACTERISTICS OF SIMULATION. The following are characteristic notes of simulation: A) The purpose of producing, however innocuously, a false belief about the reality of what is stated, to the detriment of law or third parties unrelated to the business. (...) (B) Divergence between what is desired and what is declared must be conscious. That is, knowing that there are two different realities, both known: the truth and the desired falsity, one of these is foreordained not to have legally recognized effectiveness,<sup>12</sup> (...) (C) Pact or agreement to deceive. (...) “This agreement is the understanding among the participants in the simulation (...) to create the appearance, to create a valid but empty transactional structure (in whole or in part, more or less than what is declared) willing the result, because the self-regulation of the interests manifested in the transactional figure does not coincide with the interests – all or part of them – finally desired.” (**BULLARD 082**)

Specifically with respect to absolute simulation, LOHMANN, Guillermo. The legal transaction, Editorial Grijley, 2nd Edition, Lima, 1994, page 371. states that “**absolute simulation** consists of the declaration of a will whose contents are not desired, nor likewise the legal effects typically derived from them. The absolutely deceptive transaction is the mere appearance of will in content expressed by the respondents, who in truth, want neither this nor any other legal transaction.<sup>29</sup> What they want is merely to hide the previous reality, without changing it.” (**BULLARD 082**)

Contracts) are genuine declarations of will that result in typical legal effects and are clearly wanted by the parties.

49. As BEAR CREEK stated in their statement of defense presented in the civil process initiated by MEM, BEAR CREEK and Mrs. Villavicencio arrived at a “Business Agreement” that assumed Mrs. Villavicencio would file two groups of mining rights petitions in her own name. Mrs. Villavicencio executed all the registration steps that formalized them and made them defensible and protected against third parties.<sup>42</sup>
50. Mrs. Villavicencio conceded a time-limited option to BEAR CREEK to acquire these mining rights, on condition of obtaining prior issuance of the Authoritative Supreme Decree established in Article 71 of the Constitution. BEAR CREEK agreed to assume all resultant costs. If this option should not be exercised within the time agreed to, Mrs. Villavicencio would legally be able to dispose freely of those mining rights. This Business Agreement was reflected and made specific in the two Option Contracts by and between Mrs. Villavicencio and BEAR CREEK.
51. In this sense, all indications of absolute simulation disappear. BEAR CREEK obtained the Authoritative Supreme Decree in November 2007 and afterward, regularly exercised, according to law, its purchase options that derived from the Option Contracts. Thus, BEAR CREEK validly and regularly acquired the mining rights identified in such contracts. Its legitimate interest was protected by a transactional structure designed for that end. If BEAR CREEK had not obtained the authorization from the Peruvian State, Mrs. Villavicencio would have been able to dispose freely of the concessions, or even keep them.
52. In accordance with provisions of Article 1361<sup>43</sup> of the Civil Code “(...) *Contracts are obligatory as to what has been expressed in them. It is assumed that the statement expressed in the contract responds to the common will of the parties, and anyone denying this confluence must prove it.*” No counter document, statement, or proof has been identified that shows a different intention of the parties from that of executing the act that was finally executed.

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<sup>42</sup> “Response Document to Complaint” presented by BEAR CREEK, File No. 13458-11. See, for example, page 6 of the Document – “1.4 AGREEMENT OF TRANSACTIONS WITH MRS. JENNY KARINA VILLAVICENCIO GARDINI.” **(BULLARD 083)**

<sup>43</sup> Civil Code, Article 1361. **(BULLARD 088)**

53. The second requirement that should be present for there to be absolute simulation is a deceptive agreement between the involved parties. However, BEAR CREEK and Mrs. Villavicencio were always transparent about the legal effects that they wanted to achieve before the Peruvian State (as a third party linked to these acts and legal transactions) through its acts and legal transactions, proving that such a “deceptive agreement” never existed. It was not discussed (and it was transparently clear and well known) that BEAR CREEK had an interest in obtaining the concessions. It goes without saying that, in fact, in all option contracts whoever has the option has an interest in acquiring the asset that is the object of the option. Existence of this interest does not by itself indicate a deceptive act, but rather confirms the nature of an option contract.
54. The only agreement between them is the one reflected in the Option Contracts and which detailed the Business Agreement between the parties, both used as legitimate ways so that Mrs. Villavicencio, once the Authoritative Supreme Decree was obtained and following the appropriate and transparent terms of these contracts, could validly transfer the entitlements over the mining concessions to BEAR CREEK. This agreement, as well as BEAR CREEK’s option right, was always public and known by the State, which at no moment questioned this situation. This notorious visibility negates the possibility that there was a hidden act or a “deceptive agreement.”
55. Finally, a third requirement is the purpose of the parties to deceive a third party. In this case, there was no will to act wrongfully or to deceive a third party, and less still, to deceive the Peruvian State. Third parties (including the State), were always able to know the “Business Agreement” entered by the parties, which was concretized in the Option Contracts that were not only filed into the respective registry, but rather presented to the State, which finally granted the Authoritative Supreme Decree that allowed BEAR CREEK to regularly exercise its right to buy these mining rights. Thus, there can be no deceit when the third parties have full knowledge of the legal situation of the supposed “perpetrators of the deceit.”

**B. Response to Dr. Eguiguren and Dr. Danos Reports: There is No Relative Simulation through a the use of an Intermediary**

56. Dr. Eguiguren states that BEAR CREEK used Mrs. Villavicencio as an “intermediary” to request the mining petitions, to enter into the Option Contracts and to execute the later transfers of mining instruments. Dr. Eguiguren claims that there was simulation in the

mining petitions and real and anticipated exercise of indirect ownership of the mining concessions by BEAR CREEK, which generates loss of the property in accordance with Article 71 of the Constitution.<sup>44</sup>

57. Dr. Danos likewise states that Mrs. Villavicencio was used as an intermediary because she was BEAR CREEK's employee and representative. He argues that proof of this is the fact that she never acted in her own interests, but rather, in those of the company and also that BEAR CREEK assumed all the costs of the mining petition applications and their maintenance.<sup>45</sup>
58. The arguments raised by Dr. Danos and Dr. Eguiguren appear to be directed to allege relative simulation through an intermediary, regulated in Articles 191 and 192 of the Civil Code:

*“Article 191.- When the parties have wanted to conclude an act different from the apparent one, the hidden act has effect between them whenever the requirements of substance and form converge and do no harm to third-party rights.”<sup>46</sup>*

*“Article 192.- The standard of Article 191 applies when reference is made to inaccurate information or an intermediary intervenes.”<sup>47</sup>*

59. We are not before a case of relative simulation by an intermediary. Next, following Guillermo Lohmann,<sup>48</sup> I will explain that Dr. Eguiguren and Dr. Danos' Reports have not identified the requirements that need to be met, and because of this, they confuse the application of this legal concept.
60. Relative simulation by an intermediary – real interference –entails intervention in the act of an intermediary (proxy) who agrees to act in his or her own name and who, in complicity with the other party (conspirator), really and indeed receives by itself the legal

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<sup>44</sup> See EGUIGUREN 2, paragraphs 55, 56, and 57.

<sup>45</sup> See DANOS, paragraphs 86 to 90.

<sup>46</sup> Civil Code, Article 191 (**BULLARD 088**)

<sup>47</sup> Civil Code, Article 192 (**BULLARD 088**)

<sup>48</sup> LOHMANN, Guillermo. The legal transaction, Editorial Grijley, 2<sup>nd</sup> edition, Lima, 1994, page 371 states that *“Relative simulation is different. This concept is used to explain that behind a structurally correct transaction, but apparent because its content is not in accordance with the real will of the parties, another legal transaction with a different economic and social function is hidden, which does reflect the order of interests that the parties really want to regulate.”* (**BULLARD 082**)

consequences of the act, with the purpose (hidden from third parties) of giving to another the rights that he or she acquires.<sup>49</sup>

61. The central difference between absolute and relative simulation is that in the latter the deceptive agreement hidden between the intermediary and the conspirator clearly reflects that the real and effectively concluded act never had “real” legal effects for the intermediary: he or she always had the hidden purpose of transferring these effects to the conspirator. In what follows, I will show why there is no hidden purpose, in that sense, that this legal concept does not apply to the present case.
62. No such hidden purpose or deceptive agreement exists between BEAR CREEK (as the supposed conspirator) and Mrs. Villavicencio (as the supposed intermediary). The only “Business Agreement” that existed between the parties was concretized in the terms of the two Option Contracts entered into by the parties under the General Mining Law. It must be considered that a party that intends to “shield itself” with an intermediary does not enter into Option Contracts with the “proxy.” In other words, one does not enter into option contracts with its front, and even less, one does not record them with *erga omnes* effects, making them known by the third parties it supposedly seeks to deceive (in this case, the Peruvian State).
63. Does assuming the application costs of the mining petitions or of their maintenance mean that BEAR CREEK, according to the terms that regulate the Option Contracts, indirectly possessed or acquired ownership of the mining petitions, thus reflecting that supposed hidden purpose? This does not have legal basis. BEAR CREEK did not have any form of “possession and/or indirect ownership” in relation with Mrs. Villavicencio, the State, or any third party. All it had was the possibility of exercising a right to purchase those mining rights, subject to the occurrence of the condition established in the contracts: obtaining the Authoritative Supreme Decree.
64. Dr. Eguiguren and Dr. Danos’ Reports alike confuse the existence of a legitimate interest with simulation. It was evident, it was not hidden, and it was unmistakably BEAR CREEK that had an interest in acquiring the concessions. For that a transactional structure was constructed that allowed it to acquire this property once it had the authorization of the State. Nothing prevented that interest from being achieved through

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<sup>49</sup> See LOHMANN, Guillermo. The legal transaction, Editorial Grijley, 2<sup>nd</sup> edition, Lima, 1994, pages 381 to 383. **(BULLARD 082)**

an option contract fully known by the Peruvian State. Dr. Danos and Dr. Eguiguren confuse having an interest with being an owner.

65. The Peruvian State, as a third party, cannot state that the Option Contracts that materializes the “Business Agreement” concrete between BEAR CREEK and Mrs. Villavicencio have been “hidden.” The rights were registered in the name of Mrs. Villavicencio, and the Option Contracts and the decision of the Registry Court that approved the registration were published in the official gazette, “El Peruano,” having the entitlements and the contracts *erga omnes* effects. The supposed “hidden interest” alleged to exist was perfectly identifiable by merely looking at the formalized contracts. BEAR CREEK also presented these Option Contracts when it requested the Authoritative Supreme Decree. (In case it did not obtain this Decree, Mrs. Villavicencio – once the established deadline passed – could dispose of these mining instruments.) Therefore, the Peruvian State always knew BEAR CREEK’s interest and had knowledge of the Business Agreement it had with Mrs. Villavicencio, but never questioned them since they complied with the Law.

**C. Response to Dr. Danos Report: There was no legal fraud in the acts and transactions engaged in**

66. Dr. Danos states that before having obtained the declaration of public necessity, BEAR CREEK had already indirectly acquired or possessed in an indirect way – through Mrs. Villavicencio – the mining rights of the Santa Ana Project. The foregoing would constitute a case of fraud to the Constitution or legal fraud, since Mrs. Villavicencio was used to evade compliance with the prohibition in the second paragraph of Article 71 of the Constitution.<sup>50</sup> This is clearly an error of assessment.
67. The arguments laid out in a theoretical way by Dr. Danos appear directed at alleging the form of legal fraud. Following Guillermo Lohmann,<sup>51</sup> I will show, however, that Dr. Danos has not met the requirements that allow this form to be applied to the present case.

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<sup>50</sup> See DANOS, paragraphs 88 to 93.

<sup>51</sup> LOHMANN, Guillermo. The legal transaction, Editorial Grijley, 2<sup>nd</sup> edition, Lima, 1994, pages 397 to 399 states “*Fraud arises in private law in two ways: a) fraud under the law, and b) fraud of third parties, mainly creditors. (...) the Code omits treatment of the first (...) It is appropriate to point out here the basics of fraud under the law, for which the Code has issued no particular discipline. (a) Fraud under the law transactions. (...) Fraus legis is characterized, then, by improper transactional use of one standard to avoid another. It is (...) a contrivance or ruse to evade the law, for and against the law itself. So, then, apart from the objective disregard of the legal system a legitimate interest is lacking for the transactional agents to prefer one type, and there are different but equally useful negotiations, in essence, for the legally prohibited.*” (BULLARD 082)

68. For there to be legal fraud, interpreting what Guillermo Lohmann says, there need to be two laws: (1) the covering law and (2) the original or defrauded law. The first gives the act an appearance of legality, when in fact it is an act that seeks to avoid an imperative law (defrauded law) that prohibits it.
69. The “covering law” that would offer the acts a mere appearance of legality would be the General Mining Law that regulates application for mining petitions and the Option Contracts. However, the mining petitions were filed and they registered in the name of Mrs. Villavicencio, as personal ownership, for which there is neither possession nor direct nor indirect acquisition by BEAR CREEK. Also, the Option Contracts are legal in structure as well as in result, according to this Law. The existence of BEAR CREEK’s legitimate and evident interest does not mean fraud. Alone it means that there is a transactional structure directed to protect such interest until the authorization is obtained, a transactional structure that is not only allowed by the General Mining Law, but complies with the guidelines and restrictions established in Article 71 of the Constitution.
70. The “defrauded law” for Dr. Danos in this case would be Article 71 of the Constitution. The letter and spirit of Article 71 of the Constitution have not been defrauded by the acts and legal business conducted between BEAR CREEK and Mrs. Villavicencio. On one hand, Mrs. Villavicencio is a Peruvian citizen and can file mining rights petitions. She can do so in her own interest and in the interest of transferring them to third parties. As long as these rights were registered in her name and with effects *erga omnes*, BEAR CREEK could neither acquire them nor possess them directly or indirectly. Thus, it can be concluded that the Article 71 restriction was indeed respected.
71. On the other hand, BEAR CREEK clearly and professedly delineated its interests in these mining rights and made them concrete by entering into the Option Contracts. This does not infringe any law. The law prohibits ownership of property by foreigners in border areas without authorization, but does not prohibit the interest of foreigners in acquiring rights in those border areas. Therefore, it does not prohibit entering into contracts directed to satisfy this interest once the established legal conditions are met, in this case, in Article 71 of the Constitution.

72. Following Manuel De La Puente's definition,<sup>52</sup> and considering the economic function assigned by Javier Talma ,<sup>53</sup> these option contracts were signed as BEAR CREEK wanted to be sure of having an irrevocable offer from Mrs. Villavicencio for future acquisition of the mining rights. However, considering the legal impossibility of acquiring these ownerships immediately without the Authoritative Decree that authorizes BEAR CREEK to obtain them, these terms were projected into the future contracts whose validity and execution would be conditioned on the Peruvian State's granting the Authoritative Supreme Decree. This was not only known by the Peruvian State but was also in agreement with its own General Mining Law, and acting in accordance with the law cannot mean at the same time acting fraudulently under it. The Peruvian State knew about BEAR CREEK's interest in acquiring these rights and knew the transactional structure designed to get them. This does not infringe nor constitute fraud to any law.
73. In summary, neither the mining rights petition filed by Mrs. Villavicencio nor the Option Contracts entered into by the parties are legal acts with illicit ends. None of these acts and legal transactions intended to *"avoid the application of an imperative law."* On the contrary, the acts and transactions were carried out deploying legitimate legal effects and recognized by the legal system in a transparent way and with full knowledge of the State.

#### **IV. THE STATE VALIDATED THE ACTS AND LEGAL TRANSACTIONS BETWEEN MRS. VILLAVICENCIO AND BEAR CREEK BY ISSUING THE AUTHORITATIVE SUPREME DECREE**

74. As I explained in my previous reports, both the mining rights obtained by Mrs. Villavicencio and the option contracts by and between BEAR CREEK and Mrs. Villavicencio were public and the Peruvian Government knew about their existence and content, and they were not intended to avoid the constitutional restriction of Article 71,

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<sup>52</sup> DE LA PUENTE, Manuel. Private Contract Studies, Editorial Cultural Cuzco S.A. Lima: 1983. Page 436 states *"The option is considered as a contract under which one person obliges itself to grant to another, exclusively and for a set period, the right to decide, at its sole discretion, the formalization of a second contract under certain conditions agreed upon in the first contract."* **(BULLARD 084)**

<sup>53</sup> TALMA, Javier. The option contract. Jose María Bosch Editor S.L. Barcelona: 1996. Page 48 states *"(...)The specific function that the business denominated option has in legal affairs is the following: from the point of view of the offeror the offer that it makes becomes irrevocable when a definitive agreement is finalized; and from the point of view of the buyer, it is a matter of what benefit can be obtained with respect to that definitive contract promised by the offeror, security in terms of its effective conclusion, full freedom to decide unilaterally if such definitive contract will finally be awarded or not, and also whether a reasonable length of time has been put at the disposal of the buyer so that this beneficiary can assess whether a particular situation meets its needs."* **(BULLARD 085)**

but only to reassure the company that it could acquire the concessions after obtaining the authorization of the State.

75. It was so evident that the Peruvian State, knowing the connection between BEAR CREEK and Mrs. Villavicencio, decided to grant the authorization to acquire property rights. In this way, the very acts of the State serve as interpretative criteria to demonstrate, once again, that BEAR CREEK validly obtained a property right over the concessions.
76. In any case, even 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, that as an administrative act, was the result of a regular administrative procedure in which the Peruvian Government verified that BEAR CREEK's 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.
77. In the denied scenario that the existence of any irregularity with respect to the obtainment of the mining rights by Mrs. Villavicencio or in the contracting of option rights by and between BEAR CREEK and Mrs. Villavicencio, since that would have established a form of indirect ownership without declaration of public necessity (with which I disagree) is accepted, this would have been validated by 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 State verified that BEAR CREEK's request was a case of public necessity that did not affect national security.
78. Civil law states that validation and confirmation have the relationship of genus and species. Validation has been defined as that fact or act that eliminates the possibility of challenging a legal act.<sup>54</sup> For the purposes of the present analysis, we will treat validation as equivalent to confirmation, specifically applying Article 231 of the Civil Code, which provides that: ***“the act is also confirmed if the party to whom the action for annulment belongs had executed it, totally or partially, knowing the cause, or if there are facts that unequivocally manifest the intention to renounce the action of voidability.”***<sup>55</sup>

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<sup>54</sup> HORNA, Giselle. “Confirmation, Ratification, and Validation of the Legal Transaction” (Chapter Five). In *The Legal Transaction*. Editorial M. J. Bustamante de la Fuente. Lima: December 2014. Page 256. (BULLARD 086)

<sup>55</sup> Civil Code, Article 231. (BULLARD 088)

79. It is important to consider that the authorization for a foreigner to obtain property within 50 km next to the border consists of a declaration of public necessity, involving a high degree of public interest. Once such declaration is granted, all doubts are dissipated about whether the project really represents public necessity, and if it is appropriate to grant the authorization.
80. It is inconsistent to revoke the declaration of public necessity as a consequence of the fact that, at some point, the foreigner became the owner without such declaration. This would leave the declaration of public necessity without effect when, precisely, the alleged failure has been not having such a statement. Therefore, he who has effectively obtained the declaration rectifies the supposed previous situation in which he was an indirect owner without authorization.
81. In particular, issuance of Supreme Decree No. 083-2007-EM as an administrative act was the result of a regular administrative procedure, and this resulted in legal effects “validating/confirming” both the validity of the mining rights obtained by Mrs. Villavicencio as well as of the option contracts on them in favor of BEAR CREEK.
82. In civil matters, any alleged irregularities that could have generated a cause of voidability both in the mining petitions and in the option contracts, were remedied through the confirmation expressed when the Peruvian State learned of both legal acts at the time BEAR CREEK requested the issuance of the Authoritative Decree and despite such knowledge, proceeded to execute the “Confirmatory Act,” which was granting the Authoritative Right; thus ruling out the existence of any voidable defect of these acts that would not allow it to declare the public necessity and therefore, the authorization to acquire the mining rights.
83. The Peruvian State was very clear and with its own deeds showed that it had not found any defect in the form in which BEAR CREEK would obtain ownership of these mining rights. BEAR CREEK presented documentation that proved registration of the mineral rights on behalf of Mrs. Villavicencio and option contracts that would allow ownership of those rights to be obtained after the Authoritative Decree was granted. The Peruvian State considered, expressly or tacitly, depending how one wishes to see it – that the transactional system followed by BEAR CREEK did not invalidated the future obtainment of those mining rights, which was expressly authorized by the Authoritative Supreme

Decree. And it was known that Mrs. Villavicencio was a representative of BEAR CREEK because the file contained the respective powers of attorney.

84. Any doubt disappeared: BEAR CREEK acquired the required authorization to be the legitimate owner of the concessions, even if it occurred at a different moment. This means that the Peruvian State confirmed the validity (and absence of any defect whatever) of the acquisition and can no longer revoke that authorization.

**V. REPEAL OF THE AUTHORITATIVE SUPREME DECREE AND THE JURISDICTIONAL OBJECTION RAISED REFLECT CONTRADICTORY BEHAVIOR THAT IS NOT SUPPORTED BY THE DOCTRINE OF *ACTOS PROPIOS***

85. Dr. Eguiguren<sup>56</sup> and Dr. Danos<sup>57</sup> reports state that BEAR CREEK's lack of good faith does not allow it to apply the doctrine of *Actos Propios* to defend its position. Also, Dr. Eguiguren<sup>58</sup> adds that there can be no confirmation of openly unconstitutional behaviors or the validation of illicit acts such as those described from the fact that some of the officials that evaluated the mining petitions and/or the Authoritative Supreme Decree knew or could have known that Mrs. Villavicencio was an employee or representative of BEAR CREEK and that in spite of this, they allowed the procedures to continue.
86. On the other hand, Dr. Danos<sup>59</sup> states that BEAR CREEK omitted telling the Peruvian State that Mrs. Villavicencio, besides being its representative, was its employee. He also states that even if MEM could have known about this employment relationship, the error does not generate law nor validate fraudulent situations.
87. Dr. Danos' position is incomprehensible. The existence of an employment relationship does not change the situation. The Peruvian State knew a relationship existed between Mrs. Villavicencio and BEAR CREEK, and it knew the proposed transactional structure. It is not understood where its trust was defrauded.
88. The situation is, in fact, the contrary. It is the Peruvian State that defrauds BEAR CREEK's trust.

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<sup>56</sup> See EGUIGUREN 2, paragraphs 61 and 62.

<sup>57</sup> See DANOS, paragraph 110.

<sup>58</sup> See EGUIGUREN 2, paragraphs 61 and 62.

<sup>59</sup> See DANOS, paragraph 104.

89. The Doctrine of *Actos Propios*<sup>60</sup> seeks to encourage people to be consistent in their daily activities to avoid betraying the trust generated in the other party by its previous conduct. Following Morello,<sup>61</sup> it can be explained that contrary to what Dr. Danos and Dr. Eguiguren state, the three elements that allow the application of the Doctrine of *Actos Propios* have been satisfied in the present case and in defense of BEAR CREEK's sphere of interests.
- a. **An original conduct that by its nature, circumstances, and general characteristics, generates trust in the other party that under the principle of good faith, clearly indicates that a commitment (obligation) has been established so that this course of conduct will be maintained.**
90. The first element allows us to identify that the original behavior by the Peruvian State consisted of the series of actions and decisions by MEM up to the moment of evaluating and finally authorizing issuance of the Authoritative Supreme Decree that would allow BEAR CREEK to exercise the purchase options contained in the two previously mentioned option contracts and thus to acquire title of the mining rights under analysis.
91. As is shown by the facts, both MEM, the agency before which the procedure to obtain the authorization was originally filed, and the Council of Ministers, the competent State organ, according to the Constitution and the MEM's TUPA, to finally grant that authorization, had at their disposal all the information needed to make their decision,

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<sup>60</sup> The *Actos Propios* Doctrine is recognized in the Legal Dictionary of the Peruvian Judiciary (**BULLARD 038**) and has been applied by the Supreme Court of Peru in its decision of August 22, 2002, in Case 2849-2001 (**BULLARD 039**), by a number of arbitration courts, and even by State agencies such as the Regulatory Agency for Private Investment in Telecommunications – OSIPTEL, in its Resolution No. 071-2004-OSIPTEL of September 3, 2004 (**BULLARD 040**). Additionally, it should be mentioned that the Doctrine has also been applied in the First Full Sitting of the Court of Cassation derived from Cassation No. 1485-2007-Cajamarca, January 22, 2008 (**BULLARD 087**).

<sup>61</sup> Augusto Morello (in his book MORELLO, Augusto. Dynamics of the contract. Approaches. Buenos Aires: Editorial Platense. 1985. Page 59.) points out that: "*the legal grounds will be given by the reason that a previous behavior has generated -- according to the objective sense that derives from it -- trust in that, he who has engaged in it, will remain in it, because the contrary would imply inconsistent or contradictory behavior emanating from the subject, which unfairly affects the sphere of interest of he who was supposed to be protected because he had relied on what he believed to be behavior flowing from its direction of origin.*" (**BULLARD 041**)

Read also Emilio Betti (cited by DÍEZ-PICAZO, Luis. The doctrine of *actos propios*. A critical study of the jurisprudence of the Supreme Court. Barcelona: Bosch. Page 245), who says "*good faith, we have said several times, implies a duty of consistency in the behavior, which consists in the need to observe in the future which behavior could be foresaw from previous acts.*" (**BULLARD 042**)

Meanwhile, Lehmann (quoted by DÍEZ-PICAZO, Luis. Ibid. Page 245) indicates that "*the need for coherence of behavior limits the subjective rights and powers of the subject, which can only be exercised to the extent that they are consistent or compatible, not contradictory, with previous behavior.*" (**BULLARD 042**)

Similarly Alsina Atienza (cited by BORDA, Alejandro. Theory of *Actos Propios*. Buenos Aires: Abeledo Perrot. Page 41) indicates that the doctrine "*reduces to whoever, by means of certain conduct, positive or negative, gives or creates in another person, establishes trust that he will maintain his behavior in the future, should, indeed, maintain it, although in reality sheltering another prospect in his inner self.*" (**BULLARD 043**)

including the documents that showed the link between Ms. Villavicencio and BEAR CREEK.

92. Indeed, when the Peruvian State, through MEM, evaluated the description of the Project presented by BEAR CREEK as part of the argument for public necessity to obtain the issuance of the Authoritative Supreme Decree. In this description, the company acted with total transparency because it did not exclude, neither did it “hide” any document or information. Thus, it presented before the General Office of Mining of the Ministry of Energy and Mines the seven mining rights petitions requested and obtained by Mrs. Villavicencio, the two Transfer Option Contracts for these petitions and their two respective Addenda, as well as evidence of their recording in Public Registries with *erga omnes* effects. Also among these documents was the structure of powers granted within BEAR CREEK, including the capacity of Mrs. Villavicencio as “representative of the branch” of BEAR CREEK with the established bank authorizations.<sup>62</sup> Finally, the address used by Mrs. Villavicencio when filing the mining petitions and the address given by BEAR CREEK when requesting the Authoritative Supreme Decree, were the same: the address of the Grau Law Firm offices.
93. The Peruvian State carried out an analysis of the information presented and previously described. The Peruvian State had to evaluate the legal viability of the Mining Project that was the object of BEAR CREEK’s request, and thus had the opportunity of raising any red flags to question the transfer of title from Mrs. Villavicencio to BEAR CREEK. Nevertheless, even with this information, MEM did not question the acquisition of ownership rights over of the concessions, either at the beginning or during the procedure given in the TUPA, nor note any irregularity derived from the link between Mrs. Villavicencio and BEAR CREEK.
94. Similarly, the Council of Ministers, who had the same information, did not raise any questions, and granted BEAR CREEK authorization without making observations, so that it could own property within 50 kilometers of the border.
95. I have not been able to identify documents or other indicators on which the alleged existence of simulation or fraud is based and that were not held by the Peruvian State at

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<sup>62</sup> Document “Authorization Request to Acquire Mining Rights in the Border Area” presented by BEAR CREEK December 5, 2006. See Annex VI(b), page 80 that says “*I. Delegate to **JENNY KARINA VILLAVICENCIO GARDINI** (DNI 18133678) the banking powers listed in numbers 6 and 7 of the mentioned power of attorney. II. As of this date, **JENNY KARINA VILLAVICENCIO GARDINI**, in her capacity as branch representative, will exercise the faculties above with double signature (...)*” (BULLARD 089)

the moment it decided to grant authorization by means of Supreme Decree 083-2007-EM. Moreover, all of this information was in the file assembled on the basis of rules established in the TUPA to request and obtain the authorization.

96. The Peruvian State was clear and convincing in its performance by issuing Supreme Decree 083-2007-EM. Through this, it granted approval to the Mining Project and authorized BEAR CREEK to obtain title over mining rights in the border area having all the information it uses today to argue its position, information that it evaluated and did not question. The previously mentioned Supreme Decree generated the legitimate trust with respect to the legal viability of the mining rights whose ownership would later be acquired, in exercising the respective purchase options agreed with Mrs. Villavicencio and that were known to the Peruvian State when evaluating the mentioned documents.

**b. Later conduct that contradicts earlier conduct.**

97. The second element identifies the behavior that contradicts or is incompatible with the original behavior. After having issued the Authoritative Supreme Decree (original behavior), the Peruvian State arbitrarily repealed this Supreme Decree and tried to justify it, not in the same instrument, but later, by saying that BEAR CREEK's title over the mining rights is not valid because it derives from a supposed simulation or legal fraud, infringing Article 71 of the Constitution.
98. In addition to this, a jurisdictional objection has been raised alleging the illegality of acts based on the information that served as basis to grant the act that is now being questioned. In other words, it questions the illegality of an act that was considered licit and legal using the same information that serves as basis for the jurisdictional objection. This is clearly contradictory and contrary to the trust created by its *actos propios*.
99. There is no kind of information about Mrs. Villavicencio, BEAR CREEK, or the relationship between them that was not held by the State at the time the Authoritative Supreme Decree was issued. Furthermore, as the previously exposed facts reveal, the administrative file presented when this Decree was requested contained all the information, including the fact that Mrs. Villavicencio was BEAR CREEK's representative and that BEAR CREEK had a purchase option on the mining rights.
100. As also follows from the facts, both MEM and the Council of Ministers, after not having questioned the acquisition of the property even knowing about the signing of option

contracts and the link between BEAR CREEK and Mrs. Villavicencio, and having granted the authorization to be the owner, now behaves contradictorily, questioning the validity of the form through which BEAR CREEK became owner of the concessions by various routes, and have even eliminated the authorization validly granted to that undertaking.

**c. Both behaviors have been performed by the same subject, understanding subject as the imputation center of the binding nature of behavior.**

101. In the present case, behaviors were performed by the same subject, the State, through the competent bodies to grant the authorization: MEM and the Council of Ministers.
102. At first, both of those organs were the ones that permitted the filing, continuation, and favorable conclusion of the procedure regulated in the MEM's TUPA, being aware of the existence of the option agreements and the link between Mrs. Villavicencio and BEAR CREEK, without raising any objection whatsoever to the manner in which BEAR CREEK was going to obtain a property right over the concessions, and ultimately granting the appropriate authorization.
103. But at a later time, these were the same organs that behaving in a contradictory fashion, surprisingly questioned, in a number of ways, including the present arbitration, the way in which property over the concessions had been acquired, and went so far as to eliminate the authorization to be the owner, thereby expropriating BEAR CREEK.
104. In conclusion, repealing the Authoritative Supreme Decree and raising the jurisdictional objection reflect a contradictory behavior of the Peruvian State that is inconsistent with the Doctrine of *Actos Propios*, because it does not acknowledge the legitimate trust created in BEAR CREEK regarding the validity and enforceability of the title over mining rights legitimately obtained.
105. As we have mentioned, the Peruvian State validated with its own acts that the procedure followed by BEAR CREEK in acquiring the mining rights was perfectly legal and in accordance with the Constitution. Similarly, it declared that the acts it challenges today by its jurisdictional objection were legitimate and legal. Ignoring this leaves no doubt that the State is contradicting its own acts and as a consequence, has lost the possibility of

validly claiming against and/or challenging the mining rights validly obtained by BEAR CREEK.

## **VI. CONCLUSIONS**

My conclusions are those indicated in the introduction to the present opinion, to which I refer.

I affirm that these conclusions reflect my knowledge and understanding, and are based on my academic and professional experience and on a detailed and honest analysis of the information reviewed. On this point, the present report reflects my honest understanding and conviction with respect to the issues submitted to me for my opinion.

I present this report on May 25, 2016.

[signature]\_\_

Alfredo Bullard González

Lima, Peru

Annex I  
List of Documents

- BULLARD 070:** Decision 277-2015-OS/CD of the Board of Directors of the Agency for Investment in Energy and Mining (OSINERGMIN) of November 16, 2015
- BULLARD 071:** Decision 111-2015-OS/GART of the Commission for Energy Rate Regulation of the Agency for Investment in Energy and Mining (OSINERGMIN) of September 8, 2015
- BULLARD 072:** Decision 191-2011-OS/CD of the Executive Council of the Agency for Investment in Energy and Mining (OSINERGMIN) of October 18, 2011.
- BULLARD 073:** Supreme Decree No. 124-2005-EF
- BULLARD 074:** Supreme Decree No. 080-2006-EF
- BULLARD 075:** Supreme Decree No. 016-2003-ED
- BULLARD 076:** DANOS, Jorge. *Regulations in the Peruvian Legal System*. In UNAM Institute of Legal Research. Available on the Web (May 17, 2016 revision)
- BULLARD 077:** Law of Protected Natural Areas – Law No. 26834
- BULLARD 078:** Supreme Decree No. 079-2007-PCM
- BULLARD 079:** BACA, Víctor. 2012. “Acts of the Government in Peruvian Law.” *Revista Ita Ius Esto*. Available on the Web (May 18, 2016 revision):
- BULLARD 080:** “Writ of Complaint for Inefficacy of Absolute Simulation of Legal Act” presented by the MEM Public Prosecutor, File 13458-2011.
- BULLARD 081:** SORIA, Alfredo. “The Simulated Legal Transaction” (Chapter Seven). In *The Legal Transaction*. Editorial M.J. Bustamante de la Fuente. Lima: December 2014. (Extracts)
- BULLARD 082:** LOHMANN, Guillermo. *The Legal Transaction*. Editorial Grijley. 2nd Edition. Lima: 1994. (Extracts)
- BULLARD 083:** “Writ of Reply” presented by BEAR CREEK, File 13458-11.
- BULLARD 084:** DE LA PUENTE, Manuel. *Private Contract Studies*. Editorial Cultural Cuzco S.A. Lima: 1983. (Extracts)
- BULLARD 085:** TALMA, Javier. *The Option Contract*. Editorial Jose María Bosch Editor S.L. Barcelona: 1996. (Extracts)
- BULLARD 086:** HORNA, Giselle. “Confirmation, Ratification and Validation of the Legal Transaction” (Chapter Five). In *The Legal Transaction*. Editorial M.J. Bustamante de la Fuente. Lima: December 2014. (Extracts)

- BULLARD 087:** Decision of the Full Court of Cassation. Cassation of the Supreme Court of Peru of January 22, 2008, Case No. 1465-2007
- BULLARD 088:** Civil Code of Peru. Cited articles.
- BULLARD 089:** Document "Request for Authorization to Acquire Mining Rights Located in the Border Area" presented by BEAR CREEK December 5, 2006.