

## **Second Expert Report**

Hans A. Flury

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## **I. ABOUT THE AUTHOR OF THE REPORT**

1. My name is Hans Albert Flury Royle and I have nearly forty years of professional experience as an attorney in Peru. Since the beginning of my professional career I have been involved with the Peruvian mining industry. In 1972, I began working for the Peruvian branch of the Southern Peru Copper Corporation, a corporation organized in 1952 under the General Corporation Law of the State of Delaware, United States. The branch is known as "SPCC". I have held several legal positions at the organization and, since 1989, I have held the highest corporate position in the company's legal area: Legal Vice President, as executive officer of the corporation. I performed these functions, under the title of Legal Director, and also as the Secretary of the Board of the same mining company, today known as Southern Copper Corporation ("SCC" or the "Corporation") until April 30, 2016. I have performed all of these functions from the city of Lima, Peru, the administrative headquarters of SCC and the Corporation.

2. SCC is one of the largest integrated copper producers in the world and it has one of the largest copper reserves of any publicly traded company. The Corporation is listed on the New York Stock Exchange and the *Bolsa de Valores de Lima* [Lima Stock Exchange]. SCC operates mining and metallurgical units in Peru and Mexico. SCC also carries out exploration activities in Argentina, Chile and Ecuador. SCC's branch in Peru carries out extraction activity in the Toquepala and Cuajone mines, and of smelting and refining in Ilo, located in the Moquegua Region in the south of the Republic of Peru.

3. In these positions, and for more than twenty years, I had managed several departments of the Peru branch of SCC, such as: the Legal Department (in charge of all legal matters), Technical Services Management (in charge of the environmental matters regarding the National and Regional Government, in its different governmental entities, with business associations and other institutions), and the Superintendence of Coordination and Licensing (in charge of the management and maintenance of permits, licenses and authorizations required to legally operate and carry out mining activities in the country). I was also in charge of Environmental Services Department (in charge of the environmental issues relating to SCC's mining operations).

4. Additionally, I held the position of Minister of Energy and Mines between July 2003 and February 2004.

5. Finally, for years I have been actively participating in the Peruvian mining guild, promoting and supporting the development of the national mining activity, participating in various business institutions. For example, since 1987 I have been a member of the Board of Directors of the *Sociedad Nacional de Minería, Petróleo y Energía* [National Mining, Oil and Energy Association] ("SNMPE") since 1987, and I was the President of the SNMPE during two periods, from 1997 to 1998 and from 2009 to 2011. In my role as former President of the institution, I am also part of its Consulting Committee. I have also participated in the *Confederación Nacional de*

*Instituciones Empresariales Privadas* [National Confederation of Private Business Institutions] ("CONFIEP") as the First Vice President (2003) and Second Vice President of the Board of Directors (2011-2012); and I am a member of the *Instituto Nacional de Derecho de Minería, Petróleo y Energía* [National Institute of Mining, Petroleum and Energy Law].

6. I currently work as an independent attorney with the firm Amprimo & Flury, Abogados.

7. Due to my professional experience, I have first-hand knowledge not only of mining legislation in Peru, but also of its concrete application and of common practices in the Peruvian mining industry.

8. And, as a result of having been responsible for the national policy of the Energy and Mining Sector as the Minister, I also directly understand the perspective of the State in the implementation of Peruvian mining legislation.

## **II. INTRODUCTION**

9. I have prepared this Expert Report at the request of the attorneys at King & Spalding and Miranda & Amado, who represent Bear Creek Mining Corporation ("Bear Creek") in an arbitration proceeding against the Republic of Peru before ICSID.

10. My opinion has been requested, as an expert in the sector and in Peruvian mining legislation with respect to the acquisition of mining concessions by foreign investors and, in particular, on the acquisition of the mining concessions of the Santa Ana project by Bear Creek. For this report, Bear Creek's attorneys have asked me to refer specifically to the opinions on these issues contained in the Second Expert Report by doctor Luis Rodríguez-Mariátegui ("Rodríguez-Mariátegui Second Report")<sup>1</sup>, expert from the State.

11. In Section III below, I will describe the mechanisms used by foreign investors to access mining concessions in border areas. Then, in Section IV, I will analyze the specific case of Bear Creek and finally, in Section V, I will summarize the main conclusions of this Second Expert Report. For further details, I refer to my First Expert Report dated January 5, 2016 (the "First Report").

## **III. MECHANISMS USED BY FOREIGN INVESTORS TO ACCESS MINING CONCESSIONS IN BORDER AREAS**

### **3.1 The Requirements for Foreigners to acquire a Mining Concession in a Border Area**

12. In my First Expert Report I pointed out that all foreign natural persons or legal entities have the right to acquire one or more mining concessions in the territory of the Republic of Peru.

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<sup>1</sup> Rodríguez-Mariátegui Second Report (**REX-009**).

But for a foreigner to be able to do so in the border areas, as explained in Section 3.4 of the First Report, it is necessary to obtain an authorization through a supreme decree.<sup>2</sup>

13. Indeed, the Political Constitution of Peru of 1993 (the “Constitution”) establishes as a special condition that, in order for foreigners to acquire property in border areas, they must have an express authorization granted by a supreme decree approved by the Cabinet of Ministers to “acquire or possess, under any title, mines, land, forests, water, fuels or energy sources, directly or indirectly.”<sup>3</sup> The supreme decree must be signed by the President of the Republic in accordance with the Organic Law of the Executive Branch<sup>4</sup> and Article 118 of the Constitution.<sup>5</sup> The conditions and the procedure that must be met in order to obtain the authorization that is granted by means of supreme decree are included in Article 71 of the Constitution; Legislative Decree No. 757<sup>6</sup>, its regulations<sup>7</sup>, and Procedure No. 53 of the Consolidated Text of Administrative Procedures (the “TUPA” [by its acronyms in Spanish]) of the Ministry of Energy and Mines<sup>8</sup>.

### 3.2 The acquisition of a Mining Concession

14. In my First Report, I pointed out that in order to access mining concessions in border areas, in practice, foreigners can decide for one of the following alternatives, both of them valid under Peruvian law: (i) by means of a mining petition that is filed by the foreign investor directly to the Instituto Geológico Minero y Metalúrgico [Geological, Mining and Metallurgic Institute] (the “INGEMMET” [by its acronyms in Spanish]) following the corresponding procedure; or (ii) by means of any contractual mechanism under the provisions of national law through which a Peruvian citizen acquires the mining concession, and then the foreigner will be able to acquire it through contractual mechanisms permitted by the law.<sup>9</sup>

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<sup>2</sup> First Report, paragraph 31 et seq.

<sup>3</sup> Article 71 of the Constitution (**C-0024**).

<sup>4</sup> Article 8.2.e. Organic Law of the Executive Branch, Law No. 29158 dated December 20, 2007 (**R-103**).

<sup>5</sup> Article 118 of the Constitution (**C-0024**).

<sup>6</sup> Article 13 of the Framework Law for the growth of private investment, Legislative Decree No. 757 of November 13, 1991 (**BULLARD 004**).

<sup>7</sup> Article 32 of the Regulations on private investment guarantee regimes, Supreme Decree No. 162-92-EF dated October 12, 1992 (**BULLARD 023**).

<sup>8</sup> Consolidated Text of Administrative Procedures of the Ministry of Energy and Mines passed by Supreme Decree No. 038-2014-EM (**FLURY 040**).

<sup>9</sup> First Report, paragraph 38.

15. For either of these two alternatives, the foreign investor will be required to apply for and to obtain the supreme decree that authorizes him the acquisition of the mining concession, thus complying with the condition set out in Article 71 of the Constitution.<sup>10</sup>

16. In his Second Report, doctor Rodríguez-Mariátegui implies that a foreign investor can only obtain mining rights in border areas where no mining concession has been granted and where there are no pending petitions; thus being able to file the petition directly at INGEMMET, which would hold the process in abeyance while the supreme decree is processed.<sup>11</sup> In other words, in sum it is argued that the only possible way for a foreign investor to acquire these mining rights (in free areas) would be the first alternative that I described in my First Report. Respectfully, I totally disagree with that position. In my opinion, both ways are permitted by law. There is no legal rule that differentiates between the acquisition of mining concessions that have already been granted and new concessions; also, there is no provision that prohibits a foreigner to acquire a concession or petition already granted or under process. What is important, legally speaking, is that the foreigner complies with obtaining the supreme decree required by Article 71 of the Constitution, whether it goes with the first option and files its petition directly to the INGEMMET, or it acquires the right from the person who already is the holder of the concession.

17. Doctor Rodríguez-Mariátegui concludes that “*In this case, Bear Creek had no reason to be worried*” of being at risk of raising competitors’ interest in the area of the Santa Ana mining project, so it should have filed the petitions of the Santa Ana Project concession directly at INGEMMET.<sup>12</sup> However, as I mentioned in my First Report, the abeyance situation that occurs in these cases creates uncertainty for foreign investors because there is always the latent possibility that INGEMMET may change its practice of suspending the process until the foreign investor confirms having the supreme decree authorizing it to acquire the requested mining right and declare abandonment of the procedure.<sup>13</sup> Evidently, when declaring the abandonment of the procedure, there will be other miners who, in due time, will request said petition without having assumed the preliminary evaluation costs which could have been assumed by the foreigner (which, in the economic doctrine, is known as *free riders*) based on the *follow the leader* strategy. Therefore, I consider that this alternative involves taking a high risk; particularly given the possibility that a third party may require INGEMMET to declare the proceeding terminated on the basis of the provisions of the General Administrative Procedure Act (“LPAG,” as per the Spanish acronym).<sup>14</sup>

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<sup>10</sup> *Id.*, paragraph 37.

<sup>11</sup> Rodríguez-Mariátegui Second Report, paragraph 33 et seq.

<sup>12</sup> *Id.* paragraph 23.

<sup>13</sup> First Report, paragraph 42.

<sup>14</sup> *Id.* paragraphs 42, 46-47.

18. Doctor Rodríguez-Mariátegui refers to a report by the Directorate General of Mining Concessions (Report No. 6788-2003-INACC-DGCM-UL of August 21, 2003, the “Report”)<sup>15</sup>. This Report confirms what I stated in my First Report<sup>16</sup>, regarding the risk that Article 191 of the LPAG be applied, which would end the administrative ownership procedure initiated with a petition<sup>17</sup>. That report expressly states that such a legal provision is applicable.<sup>18</sup> Furthermore, on the basis of said legal provision, and considering general principles applicable to administrative procedures (to which I also referred in my First Report),<sup>19</sup> it recommends to request the submission of a copy of the Company’s Stock Leger which will allow to confirm the current composition of the stockholders or the fact that there has not been any variation since the incorporation of the petitioning foreign company under penalty of declaring the abandonment of its mining petition. While the requirement was not referring to the authoritative supreme decree, this Report demonstrates the applicability of the rules and principles to which I referred in the context of the administrative ownership procedure, that is, that the LPAG is a mandatory standard applicable to any administrative proceeding. In my opinion, the risk that those same legal provisions are applied to declare a procedure abandoned over time without the granting of an authoritative supreme decree can not be dismissed. This because, in my opinion, a potential request by a third-party under a provision with status of “law”, such as the LPAG, would have priority over a practice of INGEMMET (although this practice is supported only on regulatory provisions). In fact, in my experience, this is a risk that foreign companies perceive, and it causes many investors to structure the acquisition of mining rights in border areas using alternative mechanisms that are suggested by their Peruvian attorneys; these legal mechanisms are totally valid, as they control a very sensitive contingency; given that, from a legal perspective, the foreign mining company does not acquire the mining concession until after the issuance of the authoritative supreme decree.

### 3.3 Examples presented by Doctor Rodríguez-Mariátegui

19. Doctor Rodríguez-Mariátegui presents seven cases in which he states: “...foreign companies acted correctly”<sup>20</sup> because, “...they did not acquire mining concessions in border areas indirectly before obtaining the declaration of public necessity, and they acquired the

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<sup>15</sup> Report (R-279).

<sup>16</sup> First Report, paragraph 42.

<sup>17</sup> Article 191 of the LPAG: “In the proceedings begun at party’s initiative, when the administration’s subject does not complete with any procedure requested of it which produces the paralyzation thereof for thirty days, the authority, may declare the abandonment of the proceeding at its own initiative or at administration’s subject’s request. Said resolution must be notified, shall be open to the pertinent administrative remedies.” (BULLARD 005).

<sup>18</sup> Report: “...treating the mining petitions for proceedings initiated at the request of a party, Article 191 of Law No. 2744, General Administrative Procedure Act is applicable ...” (R-279).

<sup>19</sup> First Report, paragraph 47.

<sup>20</sup> Rodríguez-Mariátegui Second Report, paragraph 59 (REX-009).

*concessions (directly or indirectly) only after they had the authorization required under Article 71 of the Constitution.*<sup>21</sup> The examples presented by doctor Rodríguez-Mariátegui, confirm the existence of the practice that I described in my First Report, according to which INGEMMET suspends the process of granting mining concession until the foreign investor confirms that it has obtained the supreme decree that authorizes it to hold the mining rights it is requesting.<sup>22</sup> With all due respect for my colleague, doctor Rodríguez-Mariátegui, I consider that there is a conceptual error in his report, which becomes evident when he makes reference to what he calls “*indirect acquisition*”. Indeed, the option contract, as comprehensively and consistently described by both the national and the foreign commentators, is not an indirect acquisition. In an option contract, the ownership is not acquired until the option is exercised, like in the Bear Creek case, after the governmental authorization to have property in the border area. There is no ownership, either direct or indirect, before the option is exercised; there is only an expectation to acquire a future ownership right.

20. Doctor Rodríguez-Mariátegui presents these examples to argue that “the risk Bear Creek was afraid of, was nonexistent”.<sup>23</sup> In my opinion, that conclusion is wrong. The examples only demonstrate that some companies (only seven, to be precise) were willing to take that risk. Their reasons may be various.

21. I reaffirm my opinion that the strategy deployed by foreign companies in these seven cases is one of the possibilities that are available for acquiring mining concessions in border areas. However, it is not the only one, since, as I explained in my First Report, the alternative employed by Bear Creek is also legal and consistent with the practice in the Peruvian mining industry.<sup>24</sup>

### **3.4 Comments on the cases proposed by Bear Creek**

22. In addition to the seven examples mentioned in Section 3.3 above, doctor Rodríguez-Mariátegui refers to four examples that Bear Creek has presented in this case.<sup>25</sup> In two of these cases, the authoritative supreme decrees were issued, declaring public necessity, after the foreign investor had acquired the mining rights.<sup>26</sup> In the other two, Bear Creek states that the competent authority issued supreme decrees in similar circumstances to those of Bear Creek's acquisition of the Santa Ana mining concessions.<sup>27</sup> In my opinion, these four cases clearly and

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<sup>21</sup> *Id.* paragraph 58.

<sup>22</sup> First Report, paragraphs 40 et seq.

<sup>23</sup> Rodríguez-Mariátegui Second Report, paragraph 58 (**REX-009**).

<sup>24</sup> First Report, paragraphs 48-52.

<sup>25</sup> Rodríguez-Mariátegui Second Report, paragraphs 43-57 (**REX-009**).

<sup>26</sup> Reply on the Merits and Counter-Memorial on Jurisdiction, paragraph 47-59.

<sup>27</sup> *Id.* paragraphs 60-65.



unquestionably validate the position that I have maintained, as they show that there are several possible mechanisms for the acquisition of mining rights in border areas, all of which are legal and legitimate.

23. I will address each of the examples proposed by Bear Creek below.

24. First Example<sup>28</sup> (**Supreme Decree No. 024-2008-DE**)<sup>29</sup>: In this case, the foreign investor (Xiamen Zijin Tongguan Investment and Development Co., Ltd.) obtained the declaration of public interest by supreme decree when it was already the indirect owner (through a corporate structure that included intermediate companies) of the mining rights associated with the Rio Blanco Mining project which were within fifty kilometers of the border with Ecuador.<sup>30</sup> This acquisition was public knowledge, and, specifically, was known by the State.<sup>31</sup>

25. This case shows that even an acquisition that has already occurred can be approved by an authoritative supreme decree. It is clear that the investor of Chinese nationality had acquired mining rights in a border area and that the State had full knowledge of it and had no objection to issue the corresponding supreme decree.<sup>32</sup> In this regard, the abovementioned circumstance was not at all an impediment to grant the authoritative supreme decree. This case proves the absolute legality, and common practice, regarding Bear Creek's position, since the Peruvian Government issued the supreme decree to a foreign company that, even, already had the ownership of the mining concession (an indirect ownership, but it already had it after all).

26. Doctor Rodríguez-Mariátegui indicates that, "while the Constitution does not indicate that the declaration of public necessity must be prior to the acquisition of the right, it must be understood that this is the underlying intention in the constitutional text, since the sanction is the loss of the right in favor of the State for being an null and void act as it was acquired by an unauthorized person"<sup>33</sup>. I disagree with that interpretation for various reasons. First, it does not follow the Constitution<sup>34</sup>. Second, examples like the one already mentioned show that the Executive Power's legal interpretation of this provision is in fact different from the alleged "underlying intention" referred to by doctor Rodríguez-Mariátegui, having issued an authorization

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<sup>28</sup> *Id.* paragraphs 47-53.

<sup>29</sup> Supreme Decree No. 024-2008-DE (**C-0204**).

<sup>30</sup> Monterrico Metals Plc 2007 Annual Report, page 54 (**C-0205**) and Supreme Decree No. 024-2008-DE (**C-0204**).

<sup>31</sup> Press Release of the Xiamen Zijin Tongguan Investment and Development Co., Ltd. Consortium from June 11, 2007 (**C-0207**).

<sup>32</sup> *Id.*

<sup>33</sup> Rodríguez-Mariátegui Second Report, paragraph 22 (**REX-009**).

<sup>34</sup> Article 71 of the Constitution (**C-0024**).

subsequent to the acquisition. Third, the provisions that establish limitations upon rights must be interpreted in a restrictive manner, while doctor Rodríguez-Mariátegui's interpretation is extensive.

27. The fact that the transfer of the mining concessions is a result of a forced sale<sup>35</sup> or that a declaration of public necessity had been previously issued in favor of another foreign investor for the same project<sup>36</sup> as is mentioned, is not relevant, as the issuance of the authoritative supreme decree is necessary.

28. First, 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.<sup>37</sup> There is no specific provision relating to certain acquisition methods and that establishes different rules for one approach or another.

29. Second, the declaration of public necessity is specific for each foreign investor. In fact, authoritative supreme decrees expressly so provide, in a consistent way. 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>38</sup>

30. Second Example<sup>39</sup> (**Supreme Decree No. 021-2003-EM**)<sup>40</sup>: This case is very similar to the previous one. Minera IMP-Perú S.A.C., a company incorporated in Peru by foreign shareholders (IMPESA Resources BVI Inc.), obtained a declaration of public necessity by supreme decree when it was already the owner of certain mining concessions located within fifty kilometers of the border (within the Tabaconas River Project).<sup>41</sup> It once again shows that it was

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<sup>35</sup> The Monterrico Metals Plc 2007 Annual Report states that the Zijin Consortium became the owner of Monterrico Metals Plc in April 2007 as the result of a forced sale. The Monterrico Metals Plc 2007 Annual Report, page 1 (**C-0205**). Rejoinder Memorial on Merits and Reply on Jurisdiction, paragraph 87 and Rodríguez-Mariátegui Second Report, paragraph 49 (**REX-009**).

<sup>36</sup> Rejoinder on the Merits and Reply on Jurisdiction, paragraphs 86-87 and Rodríguez-Mariátegui Second Report, paragraphs 46-47 (**REX-009**).

<sup>37</sup> Article 71 of the Constitution (**C-0024**).

<sup>38</sup> Article 4 of Supreme Decree No. 022-2003-EM. "The acquisition of the property referenced in this Supreme Decree or the transfer of position of such property to foreign investors that do not have the corresponding authorization, will be sanctioned with the loss of the acquired right by the investor, to the benefit of the State, in accordance with the provisions of Article of the Political Constitution of Peru" (**R-281**).

<sup>39</sup> Reply on the Merits and Counter-Memorial on Jurisdiction, paragraphs 54-59.

<sup>40</sup> Supreme Decree No. 021-2003-EM (**C-0211**).

<sup>41</sup> "Don Jose" Single Assignment File No. 01-01751-00, pages 31-33 and 39-40 (**C-0212**); Archived Title under Entry No. 8 of File No. 11564463 of Corporate Registry of Public Registry of Lima, pages 4-5 (**C-0213**) and Supreme Decree No. 021-2003-EM (**C-0211**).

not unusual for the State to issue an authoritative supreme decree when foreign acquisition had already occurred.

31. Additionally, this case involves doctor Catalina Tomatis Chiappe, a renowned mining attorney, who filed a petition and then transferred the mining rights to the foreign company (prior to the issuance of the authoritative supreme decree).<sup>42</sup> I have no doubt that officials of the Ministry of Energy and Mines know, if not personally, at least by name and reputation, this prestigious attorney, a specialist in mining issues, since she has made a brilliant career in this sector, having been an advisor to the Office of the Minister and to other agencies within the Ministry of Energy and Mines, in addition to having worked as a member of the Mining Council (the highest body of the mining administrative jurisdiction) which functionally depends on the previously mentioned ministry. No act carried out for this purpose is illegal or punishable, in so much as it always concerns procedures that benefit the country and mining development that is of interest to many. In my opinion, it is very common for attorneys to formulate petitions at the request of their clients and then transfer the concessions obtained, it is also normal that attorneys incorporate companies at the request of their clients. As I explained in my First Report, this is common both in border areas and other areas of the country.<sup>43</sup>

32. In this regard, doctor Rodríguez-Mariátegui notes that officials in charge of performing the procedure would not necessarily have known about the relationship between doctor Tomatis and the foreign company.<sup>44</sup> In my experience, it is not common for attorneys to engage in mining business on their own and, therefore, when a mining attorney submits a petition for the border area, it is common that the attorney is doing it at the request of a client. This occurs very often and is completely legal. In any case, this attorney-client relationship is irrelevant, since, what is important is, as I mentioned, if the authoritative supreme decree was granted or not.<sup>45</sup>

33. The fact that the mining rights had expired years later (which is usually the result of a decision made by the owner to stop paying the validity fee for having lost any interest in the area)<sup>46</sup> and, therefore, are not in force today, does not affect my analysis.

34. Third Example<sup>47</sup> (**Supreme Decree No. 041-94-EM**)<sup>48</sup>: In this case, doctor Hugo Forno, another well-known Peruvian corporate attorney who had a close relationship with the Compañía

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<sup>42</sup> “Don Jose” Single Assignment File No. 01-01751-00, pages 39-40 (**C-0212**).

<sup>43</sup> First Report, paragraph 51.

<sup>44</sup> Rodríguez-Mariátegui Second Report, paragraph 50 (**REX-009**).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* paragraph 51.

<sup>47</sup> Reply on the Merits and Counter-Memorial on Jurisdiction, paragraphs 60-61.

<sup>48</sup> Supreme Decree No. 041-94-EM (**C-0217**).

Minas Ubinas S.A. (“CMU”)<sup>49</sup>, a company incorporated in Peru whose shareholder was Colorrobia Holding S.P.A., an Italian company, personally acquired mining concessions that were within fifty kilometers of the border.<sup>50</sup> He later transferred them to CMU, once the company had obtained the declaration of public necessity by supreme decree to acquire such mining rights.<sup>51</sup>

35. In my opinion, the legal structure used by this foreign investor is similar to the one used by Bear Creek to acquire the Santa Ana Project. Both are part of the second alternative that I described in my First Report, which consists of ensuring, through contractual mechanisms, that ownership of the mining concessions may be obtained in the future once the authorization is processed before the Ministry of Energy and Mines; thus avoiding this way the sensitive contingency already mentioned above.<sup>52</sup>

36. In both cases a Peruvian citizen had ownership of the mining rights while the investor was processing the declaration of public necessity. Once the supreme decree was granted, ownership of the mining concessions was transferred.

37. In doctor Rodríguez-Mariátegui's opinion, this case is not comparable with that of Bear Creek because mining concessions acquired by doctor Forno had an owner, meaning that they were already granted, and did not concern freely available areas.<sup>53</sup> In my opinion, 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.<sup>54</sup> 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. Once again, what is important is the issuance of the supreme decree; the legal structure through which the mining company acquires the mining concession is not relevant.

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<sup>49</sup> He was a shareholder and general manager of CMU and, in turn, a representative for the shareholders. See Archived Title of Entry No. 1 of File No. 01186245 of the Corporate Registry of the Public Registry of Arequipa, page 10 (**C-0218**) and File No. 02002531 of the of the Corporate Registry of the Public Registry of Lima, pages 1-2 (**C-0219**). According to Article 2012 of the Civil Code, the content of public registries is presumed known to all (without admitting evidence to the contrary), including by officials of the State (**C-0198**).

<sup>50</sup> “La Solución” Single Assignment File No. 14003327x01, pages 85-92 (**C-0221**).

<sup>51</sup> “La Solución” Single Assignment File No. 14003327x01, pages 114-117 (**C-0221**) and Article 4 of Supreme Decree No. 041-94-EM (**C-0217**).

<sup>52</sup> First Report, paragraphs 48-52.

<sup>53</sup> Rodríguez-Mariátegui Second Report, paragraph 53 (**REX-009**).

<sup>54</sup> Article 71 of the Constitution (**C-0024**).

38. In addition, doctor Rodríguez-Mariátegui states that in the case of CMU, the existence of an agreement between CMU and doctor Forno for the acquisition of concessions has not been demonstrated, nor has it been proven that the State had knowledge of such a relationship.<sup>55</sup> As I explained above, in my experience and based on the information presented by Bear Creek,<sup>56</sup> it seems undeniable that there was some similar agreement between doctor Forno and the foreign company (as often happens between a client and an attorney; and the agreement could even be oral and not written). Again, this is not relevant, as we are facing a totally legal mechanism and therefore it is natural that it has not been questioned by the competent authorities.

39. Similar to the previous case, the fact that mining rights expired years later (in the absence of payment of the validity fee by the owner)<sup>57</sup> and therefore are not in force today, does not affect my analysis.

40. Fourth Example<sup>58</sup> (**Supreme Decree No. 013-97-EM**)<sup>59</sup>: In this case, the Empresa Minera Coripacha S.A. (“EMC”) was incorporated by three Peruvian attorneys members of the firm Rubio, Leguía & Normand, a well-known Peruvian law firm with one of the most prestigious mining practices in the country (the “Rubio Firm”).<sup>60</sup> EMC petitioned and obtained 18 mining concessions within fifty kilometers of the border.<sup>61</sup> Later, Río Blanco Exploration LLC obtained the declaration of public necessity by supreme decree and then the shares from EMC were transferred to it.<sup>62</sup>

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<sup>55</sup> Rodríguez-Mariátegui Second Report, paragraph 53 (**REX-009**).

<sup>56</sup> Reply on the Merits and Counter-Memorial on Jurisdiction, paragraphs 60-61. See, Supreme Decree No. 041-94-EM (**C-0217**), Archived Title under Entry No. 1’ of File No. 01186245 of the Corporate Registry of the Public Registry of Arequipa, page 10 (**C-0218**) and Registration No. 02002531 of the Corporate Registry of the Public Registry of Lima, page 1-2 (**C-0219**).

<sup>57</sup> Rodríguez-Mariátegui Second Report, paragraph 54 (**REX-009**).

<sup>58</sup> Reply on the Merits and Counter-Memorial on Jurisdiction, paragraphs, paragraphs 62-64.

<sup>59</sup> Supreme Decree No. 013-97-EM (**R-283**).

<sup>60</sup> Archived Title of Entry No. 1 of File No. 02021527 of the Corporate Registry of the Public Registry of Lima, pages 6-7 (**C-0222**).

<sup>61</sup> “Mojica 1” Single Assignment File No. 01-02296-93 pages 2-11 and 35-36; “Mojica 2” No. 01-02297-93 pages 2-11 and 36-37; “Mojica 3” No. 01-02298-93 pages 2-11 and 34-35 ; “Mojica 4” No. 01-02299-93 pages 2-11 and 35-36; “Mojica 9” No. 01-02304-93 pages 2-10 and 34-35; “Mojica 10” No. 01-00793-95 pages 2-11 and 32-34; “Mojica 11” No. 01-00792-95 pages 2-12 and 53-55; “Mojica 12” No. 01-07757-95 pages 2-10 and 26-28; “Mojica 13” No. 01-08578-95 pages 2-13 and 31-33; “Mojihua 1” No. 01-02424-93 pages 2-12 and 35-36; “Mojihua 2” No. 01-02425-93 pages 2-8 and 35-36; “Mojihua 3” No. 01-02426-93 pages 2-8 and 34-35; “Mojihua 4” No. 01-02427-93 pages 2-8 and 35-36; “Mojihua 5” No. 01-02428-93 pages 2-8 and 35-36; “Mojihua 6” No. 01-02429-93 pages 2-8 and 35-36 (**C-0224**).

<sup>62</sup> Archived Title under Entry No. 0010 of File No. 02021527 of the Corporate Registry of the Public Registry of Lima, page 5 (**C-0228**).

41. As in the previous case, doctor Rodríguez-Mariátegui has stated that this case is not comparable to that of Bear Creek. He indicates that in this one, no agreement has been proven between the attorneys from the Rubio Firm and Río Blanco US for the acquisition of concessions<sup>63</sup>; nor has it been proven that public officials were aware of such a relationship.<sup>64</sup> This, as I have already mentioned, is not relevant.

42. In my opinion, this example, along with the previous case of CMU, confirm that this type of practice is common in the Peruvian mining industry, that it 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 probably were not worried about having many details because there is no illegality in this type of operation.

#### **IV. THE CASE OF BEAR CREEK**

##### **4.1 Bear Creek was transparent in its proceedings before the mining authority.**

43. Bear Creek is a Canadian company, therefore, as a foreigner, it had to obtain authorization from the Peruvian Government, issued through a supreme decree, to be able to acquire properties within 50 kilometers of the border.<sup>65</sup> This authorization was granted for the concessions associated with the Santa Ana Project, located in Puno, through Supreme Decree No. 083-2007-EM.<sup>66</sup>

44. In the proceedings before the Ministry of Energy and Mines, starting with the initial request and up to the obtainment of the authoritative Supreme Decree, Bear Creek disclosed the existence of the option contracts with Ms. Jenny Karina Villavicencio Gardini (“Ms. Villavicencio”), without concealing or disguising the relationship between the parties. Among the documents provided to the ministry was even a copy of the bank powers of attorney granted by Bear Creek in favor of Ms. Villavicencio, an indication of the existence of a relationship of trust between the parties.<sup>67</sup> In other words, the Peruvian government cannot act as “surprised” by Bear Creek.

45. In line with the abovementioned, the mining option contract is not only a legal but a valid mechanism, which use is very common in Peru. It can be used to achieve the acquisition of mining rights in the future, even with respect to mining rights located in border areas. In this manner, protection is sought against the risks that I have described in paragraphs 45, 46 and 49

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<sup>63</sup> Rodríguez-Mariátegui Second Report, paragraph 56 (**REX-009**).

<sup>64</sup> Rodríguez-Mariátegui Second Report, paragraphs 55-57 (**REX-009**).

<sup>65</sup> Article 71 of the Constitution (**C-0024**).

<sup>66</sup> Supreme Decree No. 083-2007-EM (**C-004**).

<sup>67</sup> See Request for acquiring mining rights located in the border area presented by Bear Creek before the Ministry of Energy and Mines on December 4, 2006 (**C-0017**).

of my First Report. And the mining option contract is not only used to acquire future mining rights in border areas, but it is used in general in any type of transaction in which the buyer is interested in a mine, but, due to various reasons, cannot or it is not convenient to make the purchase immediately.

46. It can clearly be concluded that the Ministry of Energy and Mines fully understood the structure through which Bear Creek was acquiring the mining rights. In my opinion, with such a structure being completely compatible with the legal framework, and carried out in a transparent manner, nor was it reason for questioning. In fact, no one questioned the relationship between the parties or the contractual structure employed, and the corresponding authorization was legitimately issued.

#### **4.2 The contractual structure employed by Bear Creek for the acquisition of the Santa Ana Project**

47. Under the provisions of Peruvian legislation, Bear Creek entered into contracts regulated by the General Mining Law, first the Option Contract in which its counterpart is obliged to transfer to Bear Creek a number of mining concessions in the Puno region, in the area of the border with the Republic of Bolivia.<sup>68</sup> And, once Supreme Decree No. 083-2007-EM<sup>69</sup> was issued in its favor, which, in accordance with Article 71 of the Constitution<sup>70</sup> authorizes the acquisition of such mining rights, Bear Creek exercises its right to purchase.<sup>71</sup> Thus, after the publication of the aforementioned supreme decree, Bear Creek enters into the “Transfer Agreement” to acquire the mining rights<sup>72</sup>. Finally, these contracts are registered in the Registry of Mining Rights of the National Superintendence of Public Registry.<sup>73</sup>

48. These types of mining contracts are natural and common in the Republic of Peru, being of constant use in mining activities.

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<sup>68</sup> The Option and Transfer of Mining Rights Contracts were celebrated on November 17, 2004, and on September 5, 2006, between Ms. Villavicencio and Bear Creek (**C-0016**).

<sup>69</sup> On November 29, 2006, Supreme Decree No 083-2007-EM was published in the Official Newspaper El Peruano (**C-0004**).

<sup>70</sup> Constitution (**C-0024**).

<sup>71</sup> On November 30, 2007, Bear Creek exercised the option before its contractual counterpart, Ms. Villavicencio (**C-0018**).

<sup>72</sup> On December 5, 2007 the transfer of Mining Rights between Jenny Karina Villavicencio and Bear Creek took place (**C-0015**).

<sup>73</sup> The transfer of mining rights in favor of Bear Creek was registered with the Public Registry between February 26, 2008 and February 28, 2008 (**C-0020**) (**C-0021**).

49. It is usual and accepted by the authorities and legislation that the “petition” that represents the right for a particular area that are in process of both the petition and title as a mining concession, may be transferred to third parties (in Peru, contractual freedom is guaranteed at a constitutional level). Historically, it has been very common in Peru entering into contracts including option contracts and transfer agreements, on petitions (formerly called “denouncements”) before the concession is granted. Said contracts are perfectly valid as long as they are not prohibited by any provision in the legal system; and their provisional registration with the Public Registry is even regulated despite the fact that the mining title has not yet been granted.<sup>74</sup> There is no doubt that the holder of a mining petition has a priority right on the area requested and an expectative right to obtain, in the future, the mining concession, all within an administrative procedure. In accordance with Article 162 of the General Mining Act,<sup>75</sup> mining contracts (or those that deal with mining rights) are governed by the general rules of common law [*derecho común*], in everything that is not contrary to the provisions of said Act. And, indeed, the common law does not prohibit such contracts; on the contrary, the option contract is regulated in the common (civil) law.

50. Doctor Rodríguez-Mariátegui opines that the contractual mechanism employed by Bear Creek was not “correct”, which is a respectable opinion, but not the legal rule under Peruvian law.<sup>76</sup> The constitutional requirement is to obtain the supreme decree as complied with, in due time, by Bear Creek.

## **V. CONCLUSIONS**

51. The main conclusions of this Expert Report are as follows:

- (i) The Peruvian legal system allows: (a) that, the foreign investor file the petition directly before the INGEMMET, or (b) that, by means of any contractual mechanism provided for in the national legislation, such as the mining option contract, the foreign investor assures that will obtain, in the future, the mining concession of its interest, regardless of the fact that it is for already existing mining rights or for new rights on new areas. There is no legal reason that can justify making a difference between the acquisition of mining concessions that have already been granted and new concessions.
- (ii) Upon a request for abandonment of the mining concession granting procedure filed by a third party under the LPAG, the request of the third party would take priority over INGEMMET’s practice, as it would be based on a higher legal level provision. In other words, due to the potential declaration of abandonment in the mining right acquisition proceeding because of the excessive delay in the issuance of the

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<sup>74</sup> Article 7(b) of Resolution No. 052-2004-SUNARP-SN, (R-145).

<sup>75</sup> General Mining Law, Article 162 (BULLARD 031).

<sup>76</sup> Rodríguez-Mariátegui Second Report, paragraph 32 (REX-009).



authoritative supreme decree, there is a considerable risk for the feasibility of the acquisition of the mining right.

- (iii) The mining option contract is a legal, valid and common manner to ensure the acquisition, in the future, of mining rights in Peru.
- (iv) From the file it is clear that the Ministry of Energy and Mines never questioned the relationship between the parties or the contractual structure used by Bear Creek, so much so that the corresponding authorization to acquire mining concessions in the border area was issued.
- (v) In Peru, the conclusion of contracts, including option and transfer contracts, even based on petitions (formerly called “denouncements”) that do not yet have the concession title, is very frequent. This is perfectly valid as long as they are not prohibited by any provision in the legal system; its registration with the Public Registries is even regulated.
- (vi) Based on the above, my independent opinion is that Bear Creek validly acquired its mining rights.

## **VI. STATEMENTS**

52. I declare that I am independent of the Parties involved in the arbitration process and of its legal advisors and the Arbitration Tribunal.

53. In addition to the statements made in my First Report about my past and present relationships with the Parties, their legal advisors and the Arbitration Tribunal, I declare the following:

- As I indicated in my First Report, I have been on the Board of Directors of several mining companies. Among them is Rio Cristal Resources Corporation, a company incorporated in Canada. I was part of its Board of Directors between 2008 and 2014. Mr. Andrew Swarhout, CEO of Bear Creek and witness in the arbitration, and Mr. Kevin Krause, CFO of Bear Creek, were also on that company’s Board of Directors during this period.
- Mr. Kevin Morano, member of the Board of Directors of Bear Creek, was member of the Board of Directors of SCC until 1999. As I mentioned in my First Report, as Legal Vice-President, and later as Legal Director, I was the Secretary of the Board of Directors of SCC and, therefore, I attended meetings of the Board of Directors. However, I have never been a member of the Board of Directors of SCC.

The opinions expressed in this Expert Report reflect my genuine beliefs.

Lima, May 25, 2016.

\_\_\_\_\_[signed]\_\_\_\_\_  
Hans A. Flury