

REX-001

Expert Report of Francisco José Eguiguren Praeli

October 6, 2015

English Translation

**UNDER THE RULES OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

**Bear Creek Mining Corporation**  
*Claimant,*

v.

**The Republic of Peru**  
*Respondent*

ICSID Case No. ARB/14/21

**OPINION OF EXPERT IN PERUVIAN CONSTITUTIONAL LAW**

**FRANCISCO JOSÉ EGUIGUREN PRAELI**

**OCTOBER 6, 2015**

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## **I. INTRODUCTION**

1. My name is Francisco José Eguiguren Praeli. I am a lawyer, graduated from the Pontifical Catholic University of Peru in 1977. I have a Master's degree in Constitutional Law and a Doctorate in Humanities, both obtained at the Pontifical Catholic University of Peru. I am currently a member-elect of the Inter-American Commission on Human Rights, appointed by the General Assembly of the Organization of American States at the meeting held in Washington on June 16, 2015. I will take up these duties as of January 1, 2016.

2. I have more than 33 years' experience of teaching Peruvian Constitutional Law and have practiced for more than 35 years as a lawyer and researcher. I am the author of numerous publications on the subject and have been a speaker at many seminars and conferences on constitutional law. I am also Director of the Masters in Constitutional Law at the Pontifical Catholic University of Peru's Graduate School and Senior Professor of Constitutional Law at the same University.

3. I have held several public positions inside and outside Peru. I was appointed Ambassador of Peru to the Kingdom of Spain (January 2012 - August 2014), and Minister of Justice and Human Rights (July-December 2011). I was appointed Judge ad hoc to the Inter-American Court of Human Rights from December 2000 to September 2001. I have also been an advisor to various national and international public and private bodies and institutions on constitutional matters. For example, in 2001 I was a member of the Executive Committee of the Study Group on the Foundations of Constitutional Reform in Peru, formed in President Valentin Paniagua's transition government.<sup>1</sup>

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<sup>1</sup>My curriculum vitae is attached as Exhibit 1 to this opinion.

4. In view of the above, I declare that I am capable of undertaking the task of preparing the opinion requested by Sidley Austin LLP. The law firm Sidley Austin LLP has asked me to issue an expert report to be used in the *Bear Creek Mining Corporation v. The Republic of Peru* arbitration proceedings. In particular, it has asked me for an opinion regarding the analysis and interpretation of the content and scope of Article 71 of the Constitution of Peru and of Supreme Decree No. 032-2011-EM (“Supreme Decree No. 032”), in which the State repealed the declaration of public necessity granted to Bear Creek Mining Company Sucursal del Peru, a subsidiary of the Canadian company Bear Creek Mining Corporation (“Bear Creek”), in Supreme Decree No. 083-2007-EM (“Supreme Decree No. 083”).

5. In accordance with Article 71 of the Constitution, Bear Creek requested authorization to acquire rights over mining concessions in two districts of the Chucuito Province in the Department of Puno, located within 50 kilometers of the border with Bolivia.<sup>2</sup> Supreme Decree No. 083, approved by the Council of Ministers, authorized said company to acquire the rights and initiate the procedure for the exploitation of the requested mineral rights.<sup>3</sup>

6. Some years later, due to the social conflict in the region following violent demonstrations by sectors of the population opposed to mining in the area, the Government issued Supreme Decree No. 032, which repealed Supreme Decree No. 083.<sup>4</sup> It was repealed because: (i) the Government considered that new circumstances had arisen which terminated the grounds for the declaration of public necessity that led to the approval of Bear Creek’s application; and (ii) of the State’s duty to preserv peace and the environmental conditions in the

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<sup>2</sup> See Constitution of Peru, December 29, 1993 (Constitution of Peru 1993), Art. 71 [Exhibit R-001].

<sup>3</sup> See Supreme Decree No. 083-2007-EM, November 29, 2007 (Supreme Decree No. 083) [Exhibit C-0004].

<sup>4</sup> See Supreme Decree No. 032-2011-EM, June 25, 2011 (Supreme Decree No. 032) [Exhibit C-0005].

area.<sup>5</sup> This Decree also prohibited mining in the districts of Huacullani and Kelluyo in Chucuito Province, Department of Puno.<sup>6</sup>

7. Bear Creek filed for a constitutional remedy of *amparo* against Supreme Decree No. 032-2011-EM, and obtained a favorable judgment in a court of first instance.<sup>7</sup> That ruling was appealed, but the claimant then decided to withdraw from said proceedings to initiate these arbitration proceedings before the International Centre for the Settlement of Investment Disputes (ICSID).<sup>8</sup>

8. In this opinion, I shall respond to the expert report of Dr. Alfredo Bullard submitted by Claimant. In particular, I will examine the language and scope of Article 71 of the Peruvian Constitution of 1993. I will also discuss whether, from the point of view of Peruvian constitutional law, Supreme Decree No. 032, which repealed Supreme Decree No. 083, is in accordance with Peru's Constitution and legal system. Finally, I will examine the first instance court's judgment in the *amparo* filed by Bear Creek against Supreme Decree No. 032 and explain that it is not a final and unappealable decision, that it does not have the status of *res judicata*, and that it has no legal effect since it was appealed and Bear Creek then withdrew from the judicial proceedings.

## **II. EXAMINATION AND INTERPRETATION OF THE CONTENT AND SCOPE OF THE SECOND PARAGRAPH OF ARTICLE 71 OF THE CONSTITUTION**

9. The current 1993 Constitution of Peru establishes equal treatment before the law as a principle of the legal system and a fundamental right of every person, and forbids any form

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<sup>5</sup>See Supreme Decree No. 032 [Exhibit C-0005].

<sup>6</sup>See Supreme Decree No. 032 [Exhibit C-0005].

<sup>7</sup>See Claimant's Memorial of May 29, 2015 (Claimant's Memorial), para. 84-86.

<sup>8</sup>See Claimant's Memorial, para. 88.

of discrimination of any nature, including national origin (Article 2.2).<sup>9</sup> The Constitution also recognizes property as a fundamental personal right (Article 2.16).<sup>10</sup> In accordance with these provisions, the Constitution provides that foreigners, whether natural or artificial persons, have the same right of property as Peruvians (first paragraph of Article 71).<sup>11</sup> At the same time, Article 63 of the Constitution provides that “national and foreign investments are subject to the same conditions.”<sup>12</sup>

10. However, in the second paragraph of Article 71, the Constitution expressly imposes a special restriction on foreigners by prohibiting them from acquiring or possessing, under any title, whether directly or indirectly, individually or in association with others, rights over mines, land, and various other natural resources, located within 50 kilometers of the border areas.<sup>13</sup> The paragraph states:

However, within a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.<sup>14</sup>

11. I will now explain in greater detail the scope and implications of the restriction on the acquisition of property by foreigners and foreigners’ rights in border areas imposed by the second paragraph of Article 71 of the Constitution and the State’s discretionary power to lift this restriction in exceptional circumstances.

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<sup>9</sup>Constitution of Peru of 1993, Art. 2.2 [Exhibit R-001].

<sup>10</sup>Constitution of Peru 1993, Art. 2.16 [Exhibit R-001].

<sup>11</sup> Constitution of Peru 1993, Art. 71 [Exhibit R-001].

<sup>12</sup>Constitution of Peru 1993, Art. 63 [Exhibit R-001].

<sup>13</sup>Constitution of Peru 1993, Art. 71 [Exhibit R-001].

<sup>14</sup>Constitution of Peru 1993, Art. 71 [Exhibit R-001].

**A. THE CONSTITUTION ESTABLISHES A SPECIAL RESTRICTION FOR FOREIGNERS, WHICH PROHIBITS THEM FROM ACQUIRING OR POSSESSING CERTAIN PROPERTY AND NATURAL RESOURCES WITHIN 50 KILOMETERS OF THE BORDER AREAS**

12. There is no doubt that the rule set forth in the second paragraph of Article 71 of the Constitution expressly provides an exception to the rule of equal treatment for foreigners and nationals regarding access to ownership or possession of land, mines, water, forests, fuels, and energy sources located within 50 kilometers of the border areas. It is a restriction or limitation on foreigners that is only applicable to access to the ownership, possession, or exploitation of certain properties and natural resources, if they are located within 50 kilometers of the border. It should also be noted that this restriction is imposed expressly on direct and indirect actions of foreigners in the border areas.

13. It should be mentioned that this constitutional rule has its roots in Article 39 of the Constitution of 1920,<sup>15</sup> with a very similar language. The same provision was repeated in Article 36 of the Constitution of 1933<sup>16</sup> and in Article 126 of the Constitution of 1979.<sup>17</sup> Consequently, the second paragraph of Article 71 of the 1993 Constitution has its origins in a provision that was incorporated and conserved in Peru's four 20th-century constitutions. The

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<sup>15</sup> Constitution of 1920 Art. 39. "With regard to property, foreigners are in the same position as Peruvians, although in no case may they invoke exceptional circumstances or claim diplomatic protection. In an area of fifty kilometers from the borders, foreigners may not directly or indirectly acquire or possess, under any title, land, water, mines or fuels, whether individually or in association with others, under penalty of forfeiting the property acquired to the State, except in case of national necessity declared by a special law." Constitution of Peru, January 18, 1920 ("1920 Constitution of Peru"), Art. 39 [Exhibit C-0025].

<sup>16</sup> Constitution of 1933. Art. 36. - "Within fifty kilometers of the borders, foreigners may not directly or indirectly acquire or possess, under any title, land, water, mines, or fuel, whether individually or in association with others, under penalty of forfeiting the property acquired to the State, except in case of national necessity declared by express law." Constitution of Peru, March 29, 1933 (1933 Constitution of Peru), Art. 36 [Exhibit R-030].

<sup>17</sup> Constitution of 1979. Art. 126. - "Property is governed exclusively by the laws of the Republic. With regard to property, foreigners, whether natural or artificial persons, are in the same situation as Peruvians, and under no circumstances may they invoke special circumstances or claim diplomatic protection. However, within fifty kilometers of the borders, foreigners may not directly or indirectly acquire energy sources, whether individually or in association with others, under penalty of forfeiting the right acquired to the State, except in the case of national necessity declared by express law." Constitution of Peru, July 12, 1979 (1979 Constitution of Peru), Art. 126 [Exhibit R-031].

present wording made only two changes to the three previous constitutions. The first is that this restriction imposed on foreigners may be waived only for a reason of public, rather than national, necessity. The second is that these grounds will be declared by supreme decree approved by the Council of Ministers, rather than the declaration by law passed by Congress that was previously required.

14. Marcial Rubio Correa, explains that the purpose of this constitutional rule was to ensure that,

“in the event of a border dispute, the border strip would be under total and unrestricted national control so that foreigners could not harm Peru by associating with the enemy, allowing espionage, etc., by making use of the rights acquired in said areas. This restriction, therefore, is appropriate and necessary for national security, and should be treated as part of the general policy on borders, which is also referred to in Article 44.”<sup>18</sup>

15. The origin of this rule is to be found in Peru’s history. For example, in the 19th- and 20th-centuries armed conflicts with neighboring countries, foreign companies and persons living in border areas collaborated in acts of aggression against our country. It is based, therefore, on principles of protecting internal security, territorial unity and national defense.

16. The Peruvian Constitutional Court (TC), in its judgment in Case No. 04966-2008-PA/TC, explained and justified the reason for the existence of this constitutional rule to safeguard national security when it stated that:

“If *National Security* (which is the State’s duty under Article 44 of the Constitution) is to be protected, it must be taken into account that the border areas are the areas at greatest risk of being harmed by a foreign invasion, which could be carried out indirectly if foreigners were to acquire land in the area. Because of this, they require special protection. This, therefore, explains the restriction

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<sup>18</sup> Marcial Rubio Correa, TO KNOW THE 1993 CONSTITUTION (excerpts) [Exhibit R-094].

on the right to property in favor of the optimization of another legally-protected interest of constitutional significance – National Security – which is directly related to the protection of the sovereignty of the State.”<sup>19</sup>

17. The Constitutional Court has ruled on the scope of certain points in the second paragraph of Article 71 of the Constitution. So, for example, when the paragraph specifies that “within fifty kilometers of the borders, *foreigners may not directly or indirectly acquire or possess under any title,*” the Court has held that the legislature wished to emphasize the prohibition on any form or mode of acquiring or conveying ownership that might benefit foreigners by allowing them to own or possess land or rights over natural resources in the border areas. It can be gathered from this that foreigners “may not directly or indirectly acquire or possess, in other words, that they are prohibited from doing so through companies or other artificial persons, or through any intermediary; because such acts would be tainted by deception and unconstitutional fraud.”<sup>20</sup>

18. Therefore, the Constitution expressly specifies that foreigners may only directly or indirectly acquire or possess rights over land, mines, or natural resources in border areas in exceptional circumstances, provided that they have previously obtained special authorization from the State in a Supreme Decree approved by the Council of Ministers.

**B. THE AUTHORIZATION GRANTED IN A SUPREME DECREE THAT ALLOWS FOREIGNERS TO ACQUIRE OWNERSHIP, POSSESSION OR RIGHTS OVER LAND, MINES, OR NATURAL RESOURCES LOCATED WITHIN 50 KILOMETERS OF THE BORDERS IS A POLITICAL AND DISCRETIONARY POWER OF THE STATE**

19. The second paragraph of Article 71 of the present 1993 Constitution, like the other 20th-century Peruvian constitutions, expressly provides that the State may authorize

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<sup>19</sup> Constitutional Court Decision, Exp. 04966-2008-PA/TC, April 13, 2009, April 13, 2009 (Judgment of the Constitutional Court 2009), p. 4 [Exhibit C-0028]

<sup>20</sup> Judgment of the Constitutional Court 2009, p. 3 [Exhibit C-0028] (emphasis supplied).

exceptions to the prohibition that prevents foreigners from acquiring or possessing rights over mines, land, and natural resources located within 50 kilometers of the border areas. For this to be warranted, there must be a reason of public necessity (previously referred to as national necessity), and the measure must be approved by a supreme decree adopted by the Council of Ministers (previously, a law passed by Congress was required).

20. To understand the legal nature and the scope of this authorization by the Council of Ministers, it is necessary to refer to discretionary State powers. In its ruling on Case No. 0013-2003-CC/TC, the Constitutional Court stated that a discretionary State power is:

“One in which the Constitution and other provisions in the constitutional corpus declare that a political faculty may be exercised, while leaving the operator or agent free to choose the manner of the State’s action; in this case, specific conditions, requirements, or procedures are not laid down in the constitutional framework, which only specifies that faculties are granted, thereby leaving the mode, timeliness, advisability, or inadvisability of their exercise subject to the political judgment of whoever utilizes them.”<sup>21</sup>

21. The Constitutional Court has pointed out that discretion is justified in a State under the rule of law, since it relates to the elements of timeliness, advisability, necessity, or usefulness, in addition to the technical judgments that play a role in many of the government’s proceedings.<sup>22</sup>

22. On the other hand, in the literature on Constitutional and Administrative Law, discretionary power is essentially defined as “freedom to choose between equally fair alternatives, or, if you prefer, between options where the law is neutral, because the decision is

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<sup>21</sup>Decision of the Constitutional Tribunal, EXP.N.° 0013-2003-CC/TC, December 29, 2003 (Judgment of the Constitutional Court 2003), p. 7 [Exhibit R-095].

<sup>22</sup>Decision of the Constitutional Tribunal No.° 0090-2004-AA/TC, July 5, 2004 (Judgment of the Constitutional Court 2004), p. 4 [Exhibit R-096].

usually based on extra-legal criteria (criteria of timeliness, economic criteria, etc.) that are not included in the law, but are left to the subjective judgment of the Government.”<sup>23</sup>

23. According to the definitions found in the applicable case law and literature, the Executive is exercising a discretionary power when it issues a supreme decree approved by the Council of Ministers authorizing a foreign company to acquire ownership or possession of land, mines, or natural resources located within 50 kilometers of the border area. I maintain that this is so because:

- a) The power to grant the authorization is entrusted by the Constitution to the Council of Ministers. This implies that approval is granted at a meeting between the President of the Republic and the Ministers of State, in other words, by the highest deliberative and determinative authority of the Executive.
- b) The Council of Ministers is an essentially political body, where Government decisions or regulations to laws are approved. This is different from the administrative tasks performed by other Government agencies.
- c) It will be the Council of Ministers’s function to determine whether a request made by a foreign person, company, or investor to acquire ownership or possession of mines, land, or natural resources located within 50 kilometers of the borders conforms to a public necessity. This means that the Council of Ministers will study the application or the investment project and determine whether it is justified on the grounds that it meets a need for development in the border area and for the inhabitants there and also provides benefits for the country. This is, undoubtedly, an evaluation of the advisability and political and economic timing of the acquisition or investment and of its compatibility with the Executive’s national and border area development policies; as well as a conclusion that the activity will not jeopardize national security. The political and economic nature of this evaluation clearly indicates that it is a decision made by National Government in the exercise of a discretionary faculty.
- d) Like the decision to enact a law or approve an international treaty, the promulgation of a supreme decree is recognized as a discretionary power of the State since it is not obliged to issue it. Although the Constitution establishes a regulated procedure for the adoption of any of these decisions, their issuance depends on a political decision by the Government, which is free to issue them or not.

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<sup>23</sup> Eduardo García de Enterría and Tomás-Ramón Fernández, ADMINISTRATIVE LAW COURSE, Volume I 466-467 (2006) [Exhibit R-097].

24. Consequently, the constitutionally imposed requirement of prior express authorization from the Executive's highest political authority clearly confronts us with an exceptional circumstance to overcome the prohibition specified in the Constitution itself (second paragraph of Article 71). This means that the State may freely decide whether or not it will grant such authorization to a foreign person or company that applies for it. This is a characteristic feature of discretionary State powers. It is not, therefore, the case that a foreigner is entitled to obtain this authorization automatically, but that he is able to apply for and obtain it, if the Council of Ministers determines that the application meets a public necessity.

**C. THE DECLARATION OF THE EXISTENCE OF A PUBLIC NECESSITY DOES NOT RESULT FROM THE COUNCIL OF MINISTERS'S AUTOMATIC APPROVAL, BUT INVOLVES AN EVALUATION OF ITS ADVISABILITY AND TIMELINESS ON POLITICAL AND ECONOMIC GROUNDS**

25. Dr. Bullard states in his expert report that public necessity is presumed to exist and the declaration of the same is granted automatically.<sup>24</sup> In my opinion, this assertion is not correct. Public necessity is not presumed and a declaration of the same is not made automatically by the simple merit of the petitioner's claim. Public necessity is declared by the State at its discretion, once its existence has been evaluated and approved by the Council of Ministers. If this were not the case, it would make no sense for the Constitution to make the authorization subject to a decision by the Council of Ministers (a political body), more so still if we take into account that this is the authorization of an exception, for which provision is made in the Constitution, to a ban imposed by the Constitution itself.

26. It should be borne in mind that the Constitution, in Article 66, addresses the matter of natural resources and their exploitation as follows:

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<sup>24</sup> See *Expert Report of Alfredo Bullard González, May 29, 2015 (Bullard's Expert Report)*, paras. 18.d, 108-110.

“Renewable and non-renewable natural resources are the property of the Nation. The State has a sovereign right to govern their use. The conditions for their use and their assignment to private parties are specified by statute. The concession grants its holder a right *in rem*, subject to said statute.”<sup>25</sup>

27. Consequently, the decision on the use of natural resources, such as mines and minerals, and the granting of concessions over the same to a private party, whether national or foreign, is a prerogative of the State.

28. Public necessity is a vague legal concept. According to Víctor García Toma (former President of the Constitutional Court) public necessity is often related to measures or activities that:

“benefit the public; for example, the completion of public works. Strictly speaking, in this specific aspect it is related to the actions that the State takes by constructing infrastructure that it then makes available to the people.”<sup>26</sup>

29. The second paragraph of Article 71 of the Constitution provides that, in case of public necessity, the Council of Ministers may approve a supreme decree authorizing foreigners to acquire ownership or possession of land, mines, or natural resources located within 50 kilometers of the border areas. This implies that it will be appropriate for the Government to grant such authorization only if it is considered that the acquisition of a property or right by foreigners in the border area will result in the satisfaction of a public necessity. On the other hand, if the Council of Ministers does not consider that the activity will result in the satisfaction of this public necessity, it will uphold the prohibition imposed by the Constitution. The determination of whether or not a foreigner’s application meets a public need is to be made by

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<sup>25</sup> Constitution of Peru 1993, Art. 66 [Exhibit R-001].

<sup>26</sup> Víctor García Toma, *Análisis sistemático de la constitución peruana de 1993* [Systematic Analysis of the Peruvian Constitution of 1993], Volume II 139-140 (1993) [Exhibit R-098].

the Council of Ministers, *i.e.* by a decision adopted at the meeting of the President of the Republic with all his Ministers.

30. The Constitution establishes the rule that foreigners may not directly or indirectly acquire ownership of land or exploit certain natural resources within 50 kilometers of the border areas. Consequently, such authorization by the Council of Ministers is an exception to this rule and is made conditional upon the existence of circumstances of public necessity that justify and support it. Therefore, the granting of the authorization is not a mere formality nor can it be said that any application for such authorization by a foreigner will necessarily have to be approved. On the contrary, applications are evaluated and decisions made on a case by case basis, and an analysis must be made of whether or not a specific application made by a foreigner satisfies a public necessity.

31. There is no doubt that foreign investment is important and useful for the country's development and that it can also extend to investment in mining in border areas. Moreover, it might also be mentioned that Article 13 of Legislative Decree No. 757, "Framework Law for the Growth of Private Investment," states that both national and foreign private investment are a public necessity in productive activities in border areas.<sup>27</sup> However, it should not be inferred from this general statement that there is a public necessity for all and any foreign investment in border areas. If that were the case, the Council of Ministers approval required by the Constitution would be a mere formality, a simple process that would necessarily conclude with the granting of the authorization. It would be absurd if the Constitution were to require the indispensable involvement of the highest political authority of the Executive Branch of the State, including the

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<sup>27</sup> Law to Encourage Private Investment, Legislative Decree N°. 757, November 13, 1991, Art. 13 [Exhibit R-099].

President of the Republic himself, in order to make a decision of an exceptional nature, if it were only a mere formality.

32. When determining whether or not an application for authorization to invest in the border areas satisfies a public necessity, the Council of Ministers, before issuing a supreme decree granting authorization, must have made a favorable evaluation of factors such as:

- Whether there is a public interest, in accordance with the Government's development policy for the economic sector in question or the border area in which the investment or acquisition will be made;
- Whether it will benefit the country (by creating higher levels of income, employment, better living conditions, infrastructure works, etc.) and the inhabitants of the area, by making a positive contribution to community relations;
- Whether the activity and its title holder pose a risk to national security, internal order, and stability in the area;
- Whether the activity may harm or compromise the good relations and agreements with the neighboring State; and
- Whether the activity to be engaged in by the foreigner respects the State's policies regarding the proper exploitation of natural resources and protection of the environment.

33. To the extent that the application submitted by the foreign person or company satisfies a public necessity, *i.e.*, to the extent that it satisfies and contributes positively to factors such as those indicated in the previous point, the Executive (by a Council of Ministers resolution expressed in a Supreme Decree) will authorize the acquisition of ownership or the exploitation of natural resources within 50 kilometers of the border area. If these requirements are not met, the application will not be authorized.

34. However, the Constitutional Court, in its judgment in Case No. 0090-2004-AA/TC, states that the Executive's discretion to adopt certain rules or Government decisions is classified by the Constitution and the Law as follows:

- Higher level of discretion: This is the level at which the margin of discretion to decide is not subject to any legal limitation or restriction whatsoever. Therefore, an administrative body that is endowed with unregulated powers has total freedom to choose.
- This discretion, in essence, is subject to political control and also, to judicial review, in order to confirm its legal or institutional existence, its spatial and material range, the time during which it may be exercised, the form in which it legally appears, and the completion of procedural formalities.
- Intermediate level of discretion: This is the level at which the margin of discretion is contingent upon its logical consistency and coherence with an undefined legal concept of content and range.
- Lower level of discretion: This is the level at which the margin of discretion is limited to choosing between variables that are predetermined by the law.<sup>28</sup>

35. I consider that the Executive has an intermediate level of discretion in respect of a declaration of public necessity in a supreme decree that authorizes a foreigner to acquire or possess land, mines and natural resources located within 50 kilometers of the border area. As I stated above, this is an exceptional act that is granted if, and only if, there is a public necessity to authorize the presence of the foreigner in the border area.

36. Although public necessity is a vague concept, its essence may not be established with a margin of discretion that is too large or unlimited, since this would allow the State authority to make arbitrary decisions. For the authority to determine that it exists, certain parameters or standards must be met that make it logically and reasonably possible to classify a project or initiative as destined to meet a public necessity, e.g. its relationship or adaptation to specific development plans or public policies for the region. Just as I maintain that not every foreign investment meets the requirement of public necessity, nor can the declaration of public necessity be subject to a large or absolute margin of discretion by the political authority. There

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<sup>28</sup> Judgment of the Constitutional Court 2004, p. 5 [Exhibit R-096].

must be a reasonable relationship between the project and the proposed public interest and benefits.

**D. THE RESTRICTION IMPOSED ON FOREIGNERS IN THE SECOND PARAGRAPH OF ARTICLE 71 OF THE CONSTITUTION IS BASED ON A PRINCIPLE OF PROTECTING NATIONAL SECURITY AS A WHOLE. THIS CANNOT BE RESTRICTED SOLELY TO A MATTER OF NATIONAL DEFENSE AGAINST THE RISK OF EXTERNAL OR INTERNATIONAL AGGRESSION**

37. There is no doubt that the main political and legal foundation for the second paragraph of Article 71 of the 1993 Constitution, as well as for the similar provisions in the constitutions of 1920, 1933, and 1979 that preceded it, has been the need to protect and guarantee national security, both internal and external. Dr. Bullard, on the other hand, claims that the second paragraph of Article 71 exists solely because of a notion of protecting national security from external aggression.<sup>29</sup> This assertion is not correct, because it includes only one of the features involved in national security (national defense against the risk of external aggression), while leaving aside the undoubted impact of the internal situation in the border areas (in terms of public order and freedom from social unrest) on the protection of national security which is now of a comprehensive nature.

38. Although some may consider the continued existence of this constitutional rule an “anachronism” or challenge the present justification for such a restriction, the truth is that it is a provision that has been present in all the Peruvian constitutions throughout the 20th century and remains in full force and effect in the 1993 Constitution that governs us. It is a constitutional rule that must be followed by State agencies and all foreigners wishing to acquire land or invest in the exploitation of mines or natural resources in the border areas.

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<sup>29</sup> See Bullard’s Expert Report, para. 18 f.

39. There is no doubt that the origin of this constitutional rule, as stated in the written records of the debates in the legislature and in research by experts, was influenced by Peru's unfortunate experience with the conduct of some foreigners in international armed conflicts involving our country, such as the war of the Pacific with Chile and other armed conflicts with neighboring countries at the end of the 19th century and part of the 20th century. The fact that foreign persons or companies with rights or economic interests near the border area collaborated with the external aggressor played a part in the loss of territory and caused great harm to our country's people and economy. This explains why the ban was included in the Constitution and continues to be a part of it.

40. However, the legislature's intent and the historical background to a constitutional rule are only some of the elements and criteria to be considered when interpreting and applying the rule to analyze and solve a particular current problem. Moreover, Article 71 of the Constitution does not state that the ban on foreigners is based on preserving the national defense against an external threat or aggression. This is only one of the implicit grounds for the constitutional rule, but National Security, which is of an all-embracing nature, cannot be confused with National Defense, and even less can it be limited to external defense or protection from external aggression.

41. Chapter XXII, of Title IV of the 1993 Constitution deals exclusively with Security and National Defense. Article 163 states that:

“The State guarantees the security of the nation with the National Defense System. National Defense is comprehensive and permanent. It is carried out in the internal and external spheres. Every natural or artificial person is obliged to participate in National Defense, in accordance with the law.”<sup>30</sup>

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<sup>30</sup>Constitution of Peru 1993, Art. 163 [Exhibit R-001].

42. According to the constitutional lawyer and expert on national defense Alfredo Quispe Correa, National Security refers to a situation to be achieved, an ideal which is necessary to enable the State to act with freedom and autonomy in the internal and external spheres. National Defense, on the other hand, is the means of achieving National Security.<sup>31</sup>

43. According to the Manual of the Center for Advanced National Studies, National Defense is

“the combination of actions and precautions that the Government constantly adopts so that the State can survive and endure unbroken, with the unity and the power to act autonomously internally and with complete independence externally, so that the Development process is conducted in the best circumstances, i.e., in conditions that ensure that, despite external or internal antagonism or pressure, the State will achieve and maintain the CONN [unknown abbreviation].”<sup>32</sup>

44. As already mentioned, National Security involves the internal and external spheres, which are encompassed by National Defense. The preservation of Internal Security, through the maintenance of social stability and public order, is a necessary condition for preventing attacks that may take place within the country, whether their origin is internal or external.<sup>33</sup> Obviously, any serious breach of the peace or social unrest in the border areas may result in a situation of vulnerability that could put national security at risk from both domestic and foreign threats.

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<sup>31</sup>See Alfredo Quispe Correa, CONSTITUTION AND NATIONAL DEFENSE 195 (1994) [Exhibit R-100].

<sup>32</sup>Manual of the Center for Advanced National Studies, (Caen Manual), cited by Alfredo Quispe Correa, CONSTITUTION AND NATIONAL DEFENSE 164 (1994) [Exhibit R-100].

<sup>33</sup> See Caen Manual cited by Alfredo Quispe Correa, CONSTITUTION AND NATIONAL DEFENSE 166 (1994) [Exhibit R-100].

45. The Constitutional Court, in its judgment in Case No. 00002-2008-PI/TC, reaffirms that the all-embracing nature of National Security covers defense on both the internal and external fronts:

“[N]ational defense is conducted in both the internal and external spheres. Internal defense is the means of supporting and ensuring the environment of normality and public calm that is required for the performance of the activities and efforts that contribute to securing general welfare in a scenario of security. It also involves carrying out the preventive and corrective actions that the Government is constantly taking in all areas of national activity to ensure the internal security of the State. That security can be harmed by any form of threat or aggression that occurs in the country, whether it comes from inside or outside, whether it is man-made or caused by nature. The purpose of internal defense activities is to guarantee the country’s economic and social development, prevent attacks inside the country, enable everyday life and the actions of the State to continue normally, and guarantee the full exercise of fundamental rights and freedoms.”<sup>34</sup>

46. Consequently, the purpose of the restriction specified in the second paragraph of Article 71 of the Constitution is to help protect National Security both internally and externally. The control of internal public order in border areas has an impact on the maintenance of normal relations with neighboring countries. On the other hand, the existence of internal social unrest in the border areas can generate a situation in which national security is jeopardized. This leads to the conclusion that the motive and purpose of this constitutional rule which restricts the economic activity of foreigners in border areas is not only to prevent the risk of external aggression but also to keep internal public order and social stability normal and under control in these areas, given that it has a significant effect on the protection of the overall security of the State.

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<sup>34</sup> Decision of the Constitutional Tribunal, EXP. N.º 00017-2003-AI/TC, Judgment of March 16, 2004, conclusion 32 [Exhibit R-102].

**III. IF A FOREIGN COMPANY HAS ACQUIRED OWNERSHIP, POSSESSION, OR RIGHTS OVER LAND, MINES, OR NATURAL RESOURCES LOCATED WITHIN 50 KILOMETERS OF A BORDER AREA BEFORE BEING AUTHORIZED TO DO SO BY SUPREME DECREE APPROVED BY THE COUNCIL OF MINISTERS, THIS CONSTITUTES AN ILLEGAL SITUATION THAT ENTAILS FORFEITURE OF THE RIGHT OVER THE PROPERTY TO THE STATE**

47. As mentioned earlier, Article 71 of the Constitution expressly and clearly establishes that foreigners may not acquire or possess, under any title, mines, land, or natural resources located within 50 kilometers of the border area, under penalty of forfeiting such rights to the State.<sup>35</sup> The same article specifies that the only way in which a foreigner may obtain exemption from this prohibition is by obtaining authorization from the Council of Ministers, approved in a supreme decree, to acquire rights over the property. This authorization will be granted if the application is for a case of public necessity.

48. The aforementioned article also expressly provides that this ban imposed on foreign persons or companies means that they may not acquire or possess, under any title, whether directly or indirectly, individually or in association with others, rights over property or natural resources located within 50 kilometers of the border area, without prior authorization from the State.

49. According to the facts described by Bear Creek in its Memorial on the Merits, after holding meetings with the company, Ms. Jenny Karina Villavicencio, a Peruvian citizen, applied (in 2004) to acquire the seven mining concessions that make up the Santa Ana Project.<sup>36</sup> All these concessions are located within 50 kilometers of the border area with Bolivia. Furthermore, in the same year Bear Creek signed two option contracts with Ms. Villavicencio under which, if the company obtained the appropriate authorization, she would transfer the rights

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<sup>35</sup> See Constitution of Peru 1993, Art. 71 [Exhibit R-001].

<sup>36</sup> See Claimant's Memorial, para. 26.

to the seven mining concessions to said company.<sup>37</sup> Bear Creek maintains that it acquired these rights validly, because the option was only exercised after the promulgation of Supreme Decree No. 083-2007-EM, which authorized it to acquire and exploit these mineral rights within 50 kilometers of the border area.<sup>38</sup> However, it should be noted that the Peruvian State has initiated legal proceedings against Bear Creek, on the grounds that it acquired the mineral rights illegally.<sup>39</sup>

50. If it is proven on the facts that Bear Creek indirectly exercised, under any title, acts or rights of ownership or possession over the mining concessions before the promulgation of the aforementioned supreme decree, this will constitute an illegal situation that would lead to said rights being forfeited to the State. In other words, if it were proven that the company acted indirectly through the actions of a Peruvian citizen, it would have committed a flagrant violation of Article 71 of the Constitution, which would disqualify it from validly obtaining the declaration of public necessity and the authorization to acquire the aforementioned mining concessions directly.

51. It would constitute deception and evasion of the Constitution if, for example, a Peruvian person had previously arranged with a foreign company to request and obtain the mineral rights as if he were the holder of the same, when in fact he was acting as a “front man” or intermediary for the company, to which the rights would be transferred once it obtained authorization. There would also be deception or evasion of the Constitution if, prior to the granting of the Government’s authorization, the foreign company had covertly behaved as the

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<sup>37</sup>See Claimant’s Memorial, para. 28.

<sup>38</sup>See Claimant’s Memorial, para. 42.

<sup>39</sup>See Claimant’s Memorial, para. 89.

holder of the mining rights, by performing acts, making decisions, or taking on expenses or investments that are the responsibility of the holder of the rights.

52. Consequently, if these or other similar circumstances existed, the prohibition specified in Article 71 of the Constitution would be violated, since it would follow that the foreign company was using a third party or intermediary to indirectly exercise rights corresponding to the owner of the mining concessions located within 50 kilometers of the border area, although it had not obtained the Council of Ministers's authorization.

#### **IV. SUPREME DECREE NO. 032-2011-EM, WHICH REPEALED SUPREME DECREE NO. 083-2007-EM, IS NOT CONTRARY TO THE PERUVIAN CONSTITUTIONAL SYSTEM**

53. Supreme Decree No. 083-2007-EM, issued on November 28, 2007 and published on November 29, 2007, authorized Bear Creek to carry out mining activities within fifty kilometers of Peru's border with Bolivia.<sup>40</sup> The preamble to the Supreme Decree refers to the characteristic of public necessity granted by Legislative Decree No. 757 to national or foreign private investment in productive activities carried out in border areas; to the fact that this activity contributes to the development of the border areas; to its contribution in the improvement of the local standard of living; and to the favorable opinion announced by the Joint Command of the Armed Forces.<sup>41</sup>

54. Article 1 of Supreme Decree No. 083 declares that it is of public necessity that the company Bear Creek be allowed to acquire and possess concessions and rights over mines located within fifty kilometers of the border with Bolivia, while Article 2 names the seven specific mineral rights located in the districts of Huacullani and Kelluyo in the Chucuito

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<sup>40</sup> See Supreme Decree No. 083-2007-EM, November 29, 2007 [Exhibit C-0004].

<sup>41</sup> See Supreme Decree No. 083-2007-EM, November 29, 2007 [Exhibit C-0004].

province, Department of Puno.<sup>42</sup> Article 3 provides that the authority will grant authorization for the company's mining activities, subject to prior compliance with the legal requirements.<sup>43</sup>

55. Some years later, intense social conflict flared up in the area, following violent demonstrations and protests by sectors of the population opposed to mining activities in Puno. Faced with this situation, the Government issued Supreme Decree No. 032-2011-EM on June 24, 2011 (published on June 25, 2011), Article 1 of which repeals Supreme Decree No. 083.<sup>44</sup>

56. The preamble to this Supreme Decree explains some of the reasons for its issuance and for the repeal of the previous supreme decree, namely:

“Circumstances have been made known that would imply the disappearance of the legally required conditions for the issuance of the mentioned act;

It is the State's duty to ensure that the granting of rights for the sustainable

exploitation of natural resources is conducted in harmony with the Nation's interest,

the common good and within the limits and principles established by law and the regulatory provisions on the matter;

As such, given the existence of these new circumstances, it is necessary to issue the corresponding act;

Additionally, it was deemed pertinent to provide that the Executive Power, for the purpose of safeguarding the environmental and social conditions in the areas of the Huacullani and Kelluyo districts in the Chucuito province of the Puno department, studies

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<sup>42</sup>See Supreme Decree No. 083-2007-EM, November 29, 2007, Articles 1-2 [Exhibit C-0004].

<sup>43</sup>See Supreme Decree No. 083-2007-EM, November 29, 2007, Art. 3 [Exhibit C-0004].

<sup>44</sup>See Supreme Decree No. 032-2011-EM, June 25, 2011, Art. 1 [Exhibit C-0005].

and, where appropriate, dictates provisions for the purpose of prohibiting mining activities in the aforementioned areas; (...)"<sup>45</sup>

57. At the same time, the operative part of this Supreme Decree states that its purpose is to repeal Supreme Decree No. 083-2007-EM (Article 1) and provides that the illegal extraction of minerals in the districts of Huacullani and Kelluyo in the Chucuito province, Department of Puno will be subject to police intervention and reported to the Office of the Public Prosecutor (Article 2). The Sole Additional Provision stated that within a period of no more than sixty calendar days orders were to be issued to prohibit mining in the areas of the districts of Huacullani and Kelluyo in the Chucuito province, Department of Puno.<sup>46</sup>

58. Furthermore, on June 25 and 26, the Government issued a series of supreme decrees aimed at controlling the critical social situation in Puno. In addition to Supreme Decree No. 032, these were Supreme Decree No. 033-2011-EM (Supreme Decree No. 033), which ordered the modification of mining concession applications and a moratorium on the admission of new applications in the Department of Puno; Supreme Decree No. 034-2011-EM (Supreme Decree No. 034), which made it mandatory to hold a prior consultation with the local communities before starting mineral exploration or exploitation; and Supreme Decree No. 035-2011-EM (Supreme Decree No. 035), which ordered environmental restoration programs for the Ramis River Basin that had been damaged by illegal mining.<sup>47</sup>

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<sup>45</sup>Supreme Decree No. 032-2011-EM, June 25, 2011, Preamble [Exhibit C-0005].

<sup>46</sup> See Supreme Decree No. 032-2011-EM, June 25, 2011, Art. 1-2 [Exhibit C-0005].

<sup>47</sup>See Supreme Decree No. 032-2011-EM, June 25, 2011 [Exhibit C-0005]; Supreme Decree on the Adjustments of Mining Petitions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM, June 25, 2011 [R-011]; Decree that Issues Provisions with Respect to Mining and Oil Activities in the Puno Department, Supreme Decree No. 34-2011-EM, June 25, 2011 [Exhibit R-027]; Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 [Exhibit R-014].

59. In the following sections, I will explain the legal nature of Supreme Decree No. 083, and then go on to explain why Supreme Decree No. 032 was not at variance with the Peruvian legal system, and, in particular, with national constitutional law.

**A. WHAT IS THE LEGAL NATURE OF SUPREME DECREES NOS. 083-2007-EM AND 032-2011-EM, AND TO WHAT EXTENT IS THEIR CONTENT IN AGREEMENT WITH THE LAW AND THE CONSTITUTION?**

60. The supreme decree is the highest ranking ordinary order that can be issued by the Executive. It bears the signature of the President of the Republic and of one or more Ministers of State. The supreme decree is defined as one of the regulatory powers of the President of the Republic, in Article 11.3 of the Organic Law of the Executive Branch, law N° 29158, which states that:

“they are orders of a general nature that supplement laws with regulations or regulate functional or multifunctional sectoral activities at national level. They may or may not require approval by the Council of Ministers, depending on the provisions of the law. They are signed by the President of the Republic and endorsed by one or more Ministers with jurisdiction in the sphere in question.”<sup>48</sup>

61. The Executive Branch exercises different types of functions and powers by issuing supreme decrees. For example, pursuant to Article 118.8 of the Constitution, the power to supplement laws is exercised by issuing regulations, which are approved by supreme decrees.<sup>49</sup> Also, in accordance with the Constitution (Article 137), the declaration of a state of emergency is approved by supreme decree.<sup>50</sup> Moreover, as we have already seen, Article 71 of the Constitution provides that authorization for a foreigner to acquire ownership or possession of

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<sup>48</sup>Executive Power Organic Law, Law No. 29158, December 20, 2007, Art. 11.3 [Exhibit R-103].

<sup>49</sup>See Constitution of Peru 1993, Art. 118 [Exhibit R-001].

<sup>50</sup>See Constitution of Peru 1993, Art. 137 [Exhibit R-001].

land, mines, or natural resources located within 50 kilometers of the border areas requires Council of Ministers approval in the form of a supreme decree.<sup>51</sup>

62. In other words, although supreme decrees are usually rules of a general nature, there are special cases contemplated in the Constitution or the law, in which supreme decrees with specific content may be issued. A supreme decree that is issued to declare the activities of a foreign investor in a border area of public necessity, pursuant to the express provision of Article 71 of the Constitution, is an example of supreme decree with content of a specific nature. It is true that this supreme decree is not meant to be a regulation to a law and that strictly speaking its content is not of a general nature, given that it does no more than authorize the foreign company Bear Creek to acquire mining rights within fifty kilometers of the border with Bolivia.

63. Dr. Bullard argues in his expert report that supreme decrees of a specific nature, such as Supreme Decree No. 083, are actually administrative decisions, which should be governed by the rules applicable to such decisions.<sup>52</sup> Dr. Bullard also asserts that, because it was an administrative decision, it was not appropriate to repeal it. Instead, it should have been declared void or revoked in court proceedings.<sup>53</sup> I believe that this assertion is incorrect, because the special legal nature of a Supreme Decree like 083-2007-EM should not be confused with an administrative decision simply because the content of both is specific and not general. I support my assertion as follows:

- a) It is the Constitution itself that specifies that authorization for a foreign company to acquire or own rights over mines, land, and natural resources located within 50 kilometers of the border may only be granted by supreme decree approved by the Council of Ministers, thus reserving this power to a body of the State Executive Branch whose nature is political and not administrative. The decisions and resolutions

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<sup>51</sup>See Constitution of Peru 1993, Art. 71 [Exhibit R-001].

<sup>52</sup>See Bullard's Expert Report, paras. 163-169.

<sup>53</sup>See Bullard's Expert Report, para. 169.

of the Council of Ministers must be adopted and approved by supreme decree and not by administrative decisions.

- b) The concept of an administrative decision is defined in Article 1 of the Law on General Administrative Procedure (Law No. 27444) as follows: “1.1 Administrative decisions are the declarations of the agencies which, within the framework of the rules of public law, are intended to cause legal effects on the interests, obligations, or rights of citizens in a specific situation.”<sup>54</sup>
- c) Although, as a rule, concessions or mining rights are granted to a private party by means of an administrative decision, the situation is different when a foreigner acquires mineral resources located within 50 kilometers of the border. In such cases, the acquisition, which will be set forth in specific administrative decisions, may only be made after the foreigner has previously obtained an authorization granted by the Council of Ministers, which is approved in a supreme decree and not in an administrative decision.
- d) The issuance of authorization for a foreign investor, which the Council of Ministers grants at its discretion and which is set forth in a supreme decree with specific content, should not, therefore, be confused with the subsequent specific administrative decision, which will give effect to the political authorization conferred in the supreme decree and which will be issued by the appropriate administrative authority.
- e) Supreme decrees, whether of a general nature or with specific content, like the granting of the authorization to Bear Creek, are left without effect by being repealed. Administrative decisions, on the other hand, may be subsequently revoked or cancelled. Consequently, as Dr. Bullard argues, the appropriate constitutional and legal way of leaving Supreme Decree No. 083-2007-EM without effect, was repeal and not revocation or cancellation.

64. As a result, the issuance of a supreme decree of a specific nature which declares that authorization for a foreign investor to acquire or own rights over mineral resources located within fifty kilometers of the border area is of public necessity is an example of the State’s exercise of a discretionary power; and the issuance of the decree is an essential prerequisite for the subsequent issuance (by the appropriate administrative authority) of the specific administrative decision that grants the mining concessions to the foreign company. While a

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<sup>54</sup>Law of General Administrative Procedure, Law No. 27444, April 10, 2001, Art. 1.1 [Exhibit R-104].

supreme decree is left without effect by being repealed by another decree, an administrative decision can be left without effect by being revoked or canceled.

**B. SUPREME DECREE NO. 032-2011-EM, WHICH REPEALED SUPREME DECREE NO. 083-2007-EM, IS IN ACCORDANCE WITH THE CONSTITUTION AND THE LAW BOTH PROCEDURALLY AND SUBSTANTIVELY**

65. According to the system of priority in the Peruvian legal system, the way to leave Supreme Decree No. 083-2007-EM without effect was for the Council of Ministers to approve another supreme decree repealing it. Consequently, Supreme Decree No. 032-2011-EM is in accordance with the Constitution and the law from the procedural point of view, because it was the appropriate way of repealing Supreme Decree No. 083. Since Supreme Decree No. 032 is of a general not a specific nature, not only does it annul the authorization granted to Bear Creek by Supreme Decree No. 083, but it also contains measures to prevent illegal mining of ore and prohibits all mining activity in the area. Its issuance, which was in accordance with the exercise of a discretionary power by the Executive Branch, did not require the intervention of persons that may consider themselves interested parties or affected by its contents.

66. With regard to the substantive content of Supreme Decree No. 032-2011-EM, the reasons and grounds for its issuance and for the repeal of Supreme Decree No. 083-2007-EM are set forth in its preamble. It states (i) that publicly-known new circumstances have arisen which mean that the conditions required for the issuance of Supreme Decree of authorization no longer exist; (ii) that is the duty of the State to ensure the reasonable and sustainable use of natural resources for the benefit of the nation and the public interest; and, (iii) that to protect the environmental and social conditions in the area, it is necessary to order the prohibition of mining in some districts of the province of Chucuito in Puno.<sup>55</sup>

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<sup>55</sup>Supreme Decree No. 032-2011-EM, June 25, 2011, Preamble [Exhibit C-0005].

67. Although it can be seen that the explanation given in Supreme Decree No. 032-2011-EM of the reasons for its issuance and the repeal of Supreme Decree N° 083-2007-EM (which authorized Bear Creek to acquire certain mining concessions) is not entirely clear on the specific details, it is, however, clear that it was not an arbitrary act. It refers expressly to the occurrence or to the public knowledge of specific events or unexpected circumstances that, according to the government authority, terminated the existence of the reasons that served as the basis for declaring that the approval of the authorization requested by the company Bear Creek was of public necessity.

68. Unlike court rulings or administrative decisions, for which the Constitution and the law require a statement of grounds (the lack or inadequacy of which will allow their validity to be questioned and a petition to be filed for their cancellation), in the case of a supreme decree, insufficient justification in its statement of purpose or preamble does not affect the validity or effectiveness of the decree or cause it to be void.

69. However, it must not be forgotten that the Council of Ministers may only authorize a foreign company to acquire land or rights to exploit mines or other natural resources within 50 kilometers of the border areas if it considers that such activity will result in the satisfaction of a public necessity. Just as the Council of Ministers's assessment of the existence of a public necessity justified the issuance of the supreme decree in which authorization was granted, if new circumstances arise, or are discovered, that demonstrate that there is no longer a public necessity or that it has ceased to exist because of the occurrence of serious social conflicts or environmental impacts in the area, this change in the situation provides reasonable grounds for cancelling the authorization by repealing the Supreme Decree which granted it.

70. I also consider that there are certain overarching factors which deserve special attention for a proper assessment of the impact of these circumstances on the disappearance or severe impairment of the existence of the public necessity of the project that was originally approved. First, I understand that in June of 2011, officials from the Ministry of Energy and Mines learned of reliable evidence which revealed that Bear Creek had indirectly acquired the mining concessions, before it obtained the declaration of public necessity.<sup>56</sup> This alone would be sufficient reason to repeal the declaration of public necessity and the authorization for the acquisition of the mining concessions granted by the Council of Ministers. If it were the case, the mining company would have committed a flagrant violation of the Constitution.

71. However, even without taking these factors into account, the protests were angry and violent. They were led by people from the Aymara community, who are a majority not only in Puno and southern Peru, but also form the clearly predominant ethnic group in the neighboring region of Bolivia. Accordingly, a conflict led by the Aymara not only affected the Peruvian side of border, but could also have spread to, or had an impact on, the neighboring country, and might have jeopardized political relations between the two nations, as well as the national security of Peru. Therefore, if the presence or activity of the foreign company Bear Creek in the border area was in some way causing conflict or serious civil unrest, the State could not remain indifferent and refrain from adopting the necessary measures to restore public order and calm in the area.

72. Furthermore, as mentioned in the report produced by the Peruvian Ministry of Foreign Affairs, which was issued together with the favorable report of the Joint Command of the Armed Forces prior to the issuance of Supreme Decree No. 083, Peru and Bolivia have signed several bilateral agreements for environmental preservation and sustainable use of Lake

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<sup>56</sup>See Witness Statement of Fernando Gala, October 6, 2015, para. 35 [Exhibit RWS-001].

Titicaca and its rivers. The environmental protection of these water resources, which are essential for the inhabitants and agriculture of the region and both countries, as well as the implementation of these international agreements, could be seriously damaged by pollution resulting from mining.<sup>57</sup>

73. Because of that, not only did Supreme Decree No. 032 repeal Supreme Decree No. 083, and thereby cancel the authorization granted to Bear Creek for mining in the border area, it also prohibited all mining activities in two districts of the province of Chucuito in Puno. It was a decree whose scope encompassed the region as a whole, for social and environmental reasons, and was not only aimed at Bear Creek. As we have already mentioned, it was supplemented at the same time with Supreme Decrees Nos. 033, 034, and 035, which were issued to calm the critical social situation in Puno.

74. As I explained previously, foreigners may only acquire rights over land, mines or natural resources within 50 kilometers of the border areas, if, and only if, there is a public necessity that supports their presence and activity in said area. Therefore, if the circumstances supporting the declaration of public necessity cease to exist, whether because of unexpected occurrences or because of defects whose existence was unknown when the authorization was granted, both the declaration of necessity and the resulting authorization can and must be repealed by another supreme decree.

75. In conclusion, Supreme Decree No. 032-2011-EM does not violate Peruvian constitutional law, because it was not issued arbitrarily, given that the events that preceded its promulgation justified the repeal of Supreme Decree No. 083. The circumstances which had supported the declaration of public necessity had ceased to exist, thus making it necessary to

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<sup>57</sup>See Opinion by Ministry of Foreign Affairs to the Ministry of Energy and Mines Regarding Bear Creek's Declaration of Public Necessity, OF.RE (VSG) No. 2-13-17/43, September 26, 2007, p. 2 [Exhibit R-105].

repeal said declaration in order to maintain public order and social stability in an area that is particularly sensitive.

**V. THE JUDGMENT OF THE COURT SPECIALIZING IN CONSTITUTIONAL MATTERS, WHICH GRANTED BEAR CREEK'S PETITION FOR AMPARO DOES NOT CONSTITUTE RES JUDICATA, SINCE IT WAS A JUDICIAL DECISION PRONOUNCED BY A COURT OF FIRST INSTANCE THAT WAS APPEALED, AND THE PETITIONER THEN WITHDREW FROM THE PROCEEDINGS**

76. In July 2011, Bear Creek, filed a petition for Amparo against the Council of Ministers, the Ministry of Energy and Mines, and the Ministry of Defense with the First Court Specializing in Constitutional Matters of Lima (Case No. 13303-2011-0-1801-JR-CI-01).<sup>58</sup> Its principal request was for Article 1 of Supreme Decree No. 032 not to be enforced, since it considered that it violated the principle of legal certainty, the principle prohibiting arbitrariness, and its right to freedom of industry, and also that its ownership of the mining rights be recognized and that it be allowed to exercise said rights.<sup>59</sup>

77. On May 12, 2014, the Court granted the petition and ruled that Article 1 of Supreme Decree No. 032 was not applicable to Bear Creek, which it recognized as the owner of the mineral rights granted by Supreme Decree No. 083-2007-EM with the right to exercise the same. This judgment by a Court of First Instance was appealed by the State. However, the company then abandoned the appeal, withdrew from the proceedings, and chose to resort to arbitration before the ICSID.<sup>60</sup>

78. In its Memorial, Bear Creek apparently seeks to rely on the decision of the Court of First Instance to argue that Supreme Decree No. 032 is unconstitutional. However, from a

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<sup>58</sup>See Claimant's Memorial, para. 84.

<sup>59</sup>See Claimant's Memorial, para. 84.

<sup>60</sup>See Claimant's Memorial, paras. 86, 88

preliminary review of the decision and of the appeal lodged by the State, I consider that the State had sufficient arguments for the appeal court to overturn the decision of the lower court.

79. It must, for example, be taken into account that the purpose of amparo proceedings is to protect and restore a clear and certain constitutional right that has been manifestly violated or threatened, and which can be proved without elaborate argument, evaluation of facts, or examination of evidence. The main request in the petition, though, was that Article 1 of Supreme Decree 032-2011-EM, not be made applicable to Bear Creek, because it considered that it was unconstitutional and violated its rights. However, it is impossible to prove that this was the case without discussing and examining the evidence in which there is no doubt as to the existence and magnitude of the events cited in the supreme decree to justify its issuance. Among other factors, these included the severity of the social conflict and violence in the area; the existence of what the public claimed were negative effects caused by mining, which led the National Government to prohibit mining in the region; and the damage or risks caused by mining to the environment in the area.

80. This type of explanation, with enough information to issue a judgment as to the grounds of the petition, has no place in amparo proceedings, which are constitutional proceedings of an exceptional nature with no evidentiary stage. Therefore, proceedings of another kind, in which the evidence is examined and the facts argued, should have been initiated. Indeed, Article 5.2 of the Code of Constitutional Procedure says that amparo proceedings will not be justified when there are other forms of proceedings that are just as adequate for the protection of the right.<sup>61</sup>

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<sup>61</sup>See Constitutional Procedural Code, Law No. 28237, May 28, 2004, Art. 5 [Exhibit R-106] “Grounds for Invalidity: Constitutional proceedings are inadmissible when:... 2 there are specific procedural proceedings that are equally satisfactory for the protection of the threatened or violated constitutional right, except in the case of proceedings for a writ of habeas corpus.”

81. Consequently, it is very probable that the higher court would have been able to weigh up this procedural situation better, declare the amparo invalid, and rule that the petitioner should initiate the correct proceedings.

82. Despite the questions that can be made regarding that judgment, it would, in fact, not be necessary to analyze its constitutional basis or grounds to detract from its effectiveness. The fact is that the decision of the First Court Specializing in Constitutional Matters of Lima is a ruling by a court of first instance which, as such, lacks mandatory value and has no legal effect. The fact that an appeal against it was lodged before the higher court means that it has not acquired the status of *res judicata*. Hence, it was not a final and unappealable decision on the merits of the case.<sup>62</sup> Furthermore, the petitioner decided to withdraw from the judicial proceedings, thus making it impossible for a judgment to be pronounced that would bring them to a conclusion.<sup>63</sup>

83. For these reasons, the judgment pronounced by the court of first instance is merely referential and is not binding on or enforceable against the Peruvian State. The responsibility for this lies entirely with the petitioner, which voluntarily decided to withdraw from the proceedings.

## **VI. CONCLUSIONS**

84. The current 1993 Constitution of Peru establishes equal treatment before the law as a principle of the legal system and a fundamental right of every person, and also forbids any form of discrimination for reasons of any nature, including national origin (Article 2.2). In accordance with this provision, Article 63 of the Constitution provides that “national and foreign

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<sup>62</sup>See Constitutional Procedural Code, Art. 6 [Exhibit R-106] “*Res judicata*: In constitutional proceedings only the final decision on the merits acquires the status of *res judicata*.”

<sup>63</sup>See Voluntary dismissal writ filed by Bear Creek requesting the court to discontinue the amparo proceeding challenging the issuance of Supreme Decree 032-2011-EM, August 11, 2014 [Exhibit C-0009]; See also Claimant’s Memorial, para. 88.

investment are subject to the same conditions” while Article 71 states that “with regard to ownership, foreigners, whether natural or artificial persons, are in the same situation as Peruvians, and under no circumstances may they invoke diplomatic immunity or claim diplomatic protection.”

85. However, the second paragraph of Article 71 contains a special prohibition on foreigners to the effect that within fifty kilometers of the border, foreigners may not directly or indirectly acquire or possess under any title mines, land, forests, water, fuel or energy sources, whether individually or in association with others, under penalty of forfeiting the right thus acquired to the State. Nevertheless, the Constitution provides an exception to this ban, which exception will be valid provided that the Council of Ministers declares that the acquisition of rights or investment by a natural or artificial person is of public necessity. This authorization will be granted by supreme decree.

86. The purpose of this constitutionally imposed restriction, which is found in the four Peruvian constitutions of the 20th century, is to contribute to the protection of national security, by ensuring that the State exercises greater and better control over foreigners’ economic activities linked to strategic resources located near the border and surrounding areas. With this, the State seeks to sustain normal relations with neighboring nations and to maintain public order and social stability internally, since the comprehensive nature of national security encompasses defense activities both inside and outside the country. Therefore, regardless of the purpose that may have originally been behind this constitutional provision, it is now interpreted as not being confined to reasons of national defense related only to preventing the risk of external aggression; it is also understood to comprise the safeguarding of order and defense inside the country.

87. The granting of authorization by the State in a Supreme Decree approved by the Council of Ministers is a discretionary State power. This means that the Executive can evaluate each particular case and decide freely whether or not to grant its authorization, depending on the way in which the foreign acquisition or investment conforms to national development plans and policies. It is not the case, therefore, that foreigners have the right to automatically obtain the authorization that will exempt them from the prohibition specified in the Constitution. What foreigners do have though is the ability to apply for and obtain the authorization, provided that the Council of Ministers considers that their request satisfies and is in keeping with a public need, in accordance with criteria of advisability and economic and political appropriateness for the development of the country and the border areas.

88. Even though foreign investment is essential for the development of the country, it cannot be argued on the basis of Article 13 of Legislative Decree No. 757, the Framework Law for the Growth of Private Investment, (a law which, moreover, predates the current Constitution) that every foreign investment in productive activities in border areas automatically qualifies to be declared as of public necessity. To attribute the characteristic of public necessity to all foreign investment in border areas would completely nullify the discretionary and exceptional meaning attached to the requirement of Article 71 of the Constitution, the logic behind which can only be to reserve the analysis of each specific case to the evaluation and judgment of the Council of Ministers before specific authorization is granted for a foreigner to engage in economic activity within 50 kilometers of the border area.

89. The prohibition specified in Article 71 of the Constitution prevents foreigners from acquiring or possessing, under any title, directly or indirectly, rights over mines, land, or

natural resources located within 50 kilometers of the border area, unless they have obtained authorization to do so from the Council of Ministers.

90. Consequently, if it is proven that – as the Republic of Peru asserts – Bear Creek, through some sort of agreement or sham transaction with Ms. Villavicencio, exercised de facto the control pertaining to the holder of the mining concessions before the date of issuance of the supreme decree in which the declaration of public necessity was made and the authorization granted, then this foreign company will have acted deceitfully by using a Peruvian citizen to act as the apparent holder of said rights. This would be evasion of the Constitution and of the law, an offense which is constituted by the situation of indirect acquisition or possession by a foreign party and is expressly forbidden by Article 71 of the Constitution. This indirect pre-emptive acquisition or possession, because of its fraudulent nature, represents a flagrant violation of Article 71 of the Constitution, which would be sufficient grounds for the State to cancel the authorization granted and for the company to forfeit the illegally acquired rights to the State.

91. Supreme Decree No. 032-2011-EM, which repealed Supreme Decree No. 083-2007-EM, is in accordance with the Constitution and the law both procedurally and substantively.

92. The supreme decree is the highest ranking ordinary order that can be issued by the Executive and is issued following a resolution adopted by the President of the Republic and the Council of Ministers. Supreme decrees are normally of a general nature and are used to exercise the statutory power to supplement laws with regulations or to issue autonomous regulations. However, the Constitution and the law provide that there may also be special cases of supreme decrees that refer to a particular type of content. This is the case, for example, with Article 71 of the Constitution, which requires that a supreme decree approved by the Council of Ministers be

the instrument used to authorize a foreign person or company to acquire rights over land, mines, or natural resources located within 50 kilometers of the border areas. It was in accordance with this constitutional requirement that Supreme Decree 083 – a supreme decree with specific content and not an administrative decision – was issued.

93. Although administrative decisions are made by the government agencies that decide on citizens' specific rights or interests, they should not be confused with or equated to a supreme decree (with an uncharacteristic content) like the one that grants authorization to a foreign company (pursuant to Article 71 of the Constitution), simply because the content of the latter is also specific rather than general.

94. As a general rule, concessions or mining rights are granted to a private party by means of an administrative decision. However, the situation is different when a foreigner wishes to acquire mineral resources located within 50 kilometers of the border. In this case, the acquisition, which will subsequently be given effect in specific administrative decisions, may only be made after the Council of Ministers has authorized the foreigner to do so, because it meets a public necessity. This authorization is granted by means of a supreme decree of a specific nature, not an administrative act.

95. Therefore, the legal nature of the supreme decree that contains the authorization for a foreign investor to acquire rights over mining concessions within 50 kilometers of the border must not be confused with that of the subsequent and separate specific administrative decision which makes the acquisition effective. Although its content is specific rather than general, the supreme decree is a discretionary decision of a political nature issued by the Council of Ministers when it considers it warranted by a public necessity. On the other hand, the subsequent specific administrative decision, which will be issued by the appropriate

administrative authority, is intended to give effect to the authorization granted previously and separately in the supreme decree.

96. In accordance with the system of legislative priority in the Peruvian constitutional and legal system, supreme decrees, whether of a general or specific nature, are left without effect by being repealed. Administrative decisions, on the other hand, may be subsequently revoked or declared void. Consequently, in accordance with the Constitution and the law, the valid and appropriate way of leaving Supreme Decree No. 083 without effect was repeal and not revocation or cancellation. Therefore, from the procedural point of view, Supreme Decree No. 032-2011-EM is in full accordance with the Constitution and the law.

97. To issue a supreme decree (like Supreme Decree No. 032-2011-EM) of general scope that repeals another, there is no requirement for a prior procedure in which those who consider themselves interested parties or affected by its content can take part, be heard, or defend their interests. This requirement is more appropriate for administrative procedures, especially when they are revoked.

98. Since the existence of a public necessity is the only assumption that enables the Council of Ministers to approve authorization for a foreigner to acquire rights or to make investments in land, mines, or natural resources located within 50 kilometers of the border area, a subsequent change in these circumstances that makes it clear that the public necessity has ceased to exist or that it is no longer advisable to continue with the initially approved activity justifies the State in cancelling the authorization.

99. Although it may well be considered that Supreme Decree No. 032-2011-EM could have been more explicit or specific in describing the reasons for its issuance and the repeal of Supreme Decree No. 083-2007-EM (which had authorized Bear Creek to acquire mining

concessions on the border with Bolivia), it can also be perceived that it does refer to certain grounds and reasons that support it, and it cannot therefore be classified as a decision that is arbitrary or completely devoid of a statement of grounds.

100. The due statement of grounds is a constitutional requirement for the validity of judicial and administrative decisions, but the validity or effect of a regulation or supreme decree will not be impaired by lack of clarity in its statement of grounds.

101. Supreme Decree No. 032-2011-EM refers expressly to the occurrence or to the public knowledge of specific events or unexpected circumstances that terminated the existence of the reasons that served as the basis for declaring that the approval of the authorization requested by Bear Creek was of public necessity. The preamble to this supreme decree also mentions that the basis for its issuance was the State's duty to protect the environmental conditions and social stability in the area, since it was well known that there was intense social conflict and violent protests by sectors of the population opposed to mining in the region.

102. Because of that, Supreme Decree No. 032-2011-EM is of a general nature and scope, because not only did it repeal Supreme Decree No. 083, and thereby cancel the authorization granted to Bear Creek for mining in the border area, it also included other general measures, such as the prohibition of the illegal extraction of minerals in the region and all mining activities in two districts of the province of Chucuito in Puno. It was a decree based on social and environmental reasons whose scope encompassed the region as a whole and not just Bear Creek.

103. The favorable judgment won by Bear Creek in the constitutional proceedings for a writ of amparo that it initiated against the Council of Ministers, the Ministry of Energy and Mines, and the Ministry of Defense, in which the court declared that Article 1 of Supreme Decree No. 032-2011-EM would not be applicable to Bear Creek and recognized the validity of

its mineral rights authorized by Supreme Decree No. 083-2007-EM, lacks legal validity and is not enforceable or binding on the Peruvian State. This is so, first, because the judgment did not bring the proceedings to an end or constitute res judicata, since it was a decision by a court of first instance that was being appealed to a higher court. Secondly, because when the appeal was pending and before it was decided, the petitioner, on its sole responsibility, decided to abandon the appeal, withdrew from the proceedings, and chose to resort to arbitration before the ICSID.

This Opinion is based on my professional experience and I certify that its content is in accordance with the best of my knowledge and belief

[signature]

Francisco José Eguiguren Praeli

Date: October 6, 2015

# FRANCISCO JOSÉ EGUIGUREN PRAELI

## CURRICULUM VITAE

(Executive summary)

### I. PERSONAL INFORMATION:

- NAME: FRANCISCO JOSÉ EGUIGUREN PRAELI.
- PLACE AND DATE OF BIRTH: Miraflores (Lima, Peru), April 12, 1953.
- TELEPHONES: (51-1) 2267811 - Cell 999098044.
- E-mail: [feguiguren@speedy.com.pe](mailto:feguiguren@speedy.com.pe); [feguigu@pucp.edu.pe](mailto:feguigu@pucp.edu.pe); [feguigurenpraeli@gmail.com](mailto:feguigurenpraeli@gmail.com)
- OCCUPATION: Attorney; Lima Bar Association Reg. No. 7908.
- ACADEMIC DEGREES AND PROFESSIONAL QUALIFICATIONS: PhD in Humanities; Masters in Constitutional Law; Attorney; Bachelor's degree in Law; all obtained from the Pontifical Catholic University of Peru.
- SPECIALTY: Legal advisor and consultant for national and international public and private institutions on matters of Constitutional Law, Constitutional Procedural Law, Administrative Law, Human Rights, Administration of Justice; development and evaluation of international cooperation projects.
- PRESENT OCCUPATION: Professor of the Pontifical Catholic University of Peru; independent legal consultant and adviser.

### II. UNIVERSITY STUDIES:

- LAW: Pontifical Catholic University of Peru, Faculty of General Studies, Arts, and Law (1971-76); I graduated as BACHELOR OF LAW, on December 22, 1977 and received the professional title of ATTORNEY on April 7, 1978.
- MASTER'S DEGREE IN CONSTITUTIONAL LAW: Pontifical Catholic University of Peru, Graduate School (1990-92); I received the degree of Master of Law with honorable mention in Constitutional Law on March 16, 2004.
- DOCTORATE: Pontifical Catholic University of Peru, graduate school. I received the Academic Degree of Doctor in Humanities on April 17, 2007.

### **III. PROFESSIONAL AND WORK ACTIVITY:**

#### **3.1. PRESENT ACTIVITY:**

- Legal consultancy and advice. Practicing law as an independent adviser and consultant, providing services to State institutions and private companies.
- **Pontifical Catholic University of Peru [PUCP]:**
  - Director of the Master’s in Constitutional Law at the Graduate School of the PUCP: February 2005 – June 2008. Confirmed for the periods July 2008 – July 2011; July 2011 – July 2014; I currently hold the post for the period August 2014 – July 2017.
  - Senior Professor of the Academic Department of Law of the PUCP, teaching Constitutional Law from 1983 to the present.
  - Former Head of the Academic Department of Law of the PUCP: July 2000 to June 2002; re-elected for the period July 2002 to June 2005.
  - Former member of the Academic Committee of the PUCP.

#### **3.2. OFFICIAL POSTS:**

- **Ambassador of Peru to the Kingdom of Spain**, appointed in Supreme Resolution N° 007-2012-RE, published on January 20, 2012, holding the position from January 23, 2012 to August 31, 2014.
- **Minister of State at the Office of Justice**, appointed by President of the Republic Ollanta Humala Tasso, holding the position from July 28 to December 11, 2011. I was the first Minister of Justice and Human Rights in Peru.

#### **3.3. PREVIOUS PROFESSIONAL AND WORK EXPERIENCE:**

- **INTER-AMERICAN COURT OF HUMAN RIGHTS:** Judge ad hoc appointed by the State of Peru for the case of “Hermanos Gómez Paquiyauri” (2002 - 2004). Representative of the Peruvian State before the Court in several cases (Dec. 2000 – Sept. 2001).
- **LEGAL CONSULTANT, in the area of judicial reform and human rights for international organizations, and technical and financial cooperation agencies**, such as:  
  
**Ministry of Justice and Human Rights of Ecuador:** (Dec. 2008 – January 2009); **German Technical Cooperation for Development (GTZ):** various consultancy projects in Peru and elsewhere, between March 1999 and January 2005; **Office of the United Nations High Commissioner for Human Rights:** (Bolivia) Sept. to Dec. 1999 and August 2004 to May 2005; **USAID:** Feb – Mar 2000 and October 2000 to September 2001; **International Organization for Migration:** 1988-90.
- **MINISTRY OF JUSTICE OF PERU:** External legal advisor of the Ministerial Office (December 2000 – July 2001). Member of the Commission to Study and Review the Legislation promulgated since April 5, 1992 (Dec. 2000 – May 2001). Member of the Coordination Committee and member of the Commission to Study the Basis of Constitutional Reform in Peru (May – June 2001).
- **JUDICIARY ACADEMY OF PERU [AMAG]:** Director-General and Chairman of the AMAG Reorganization and Government Commission: February 1996 – May 1998:

- **ANDEAN COMMISSION OF JURISTS:** Deputy Director and Executive Director, from August 1991 to January 1996. Member for Peru from January 1996 to 2011.
- **DESCO, Center for the Study and Promotion of Development:** February 1977 to July 1985.

#### **IV. PARTICIPATION IN ACADEMIC SEMINARS AND EVENTS**

- **EVENTS ABROAD:** speaker or participant in 125 international seminars and conferences, or meetings of experts held abroad.
- **INTERNATIONAL EVENTS HELD IN PERU:** speaker at 56 international seminars, forums, and courses/workshops held in Peru.
- **NATIONAL EVENTS:** speaker at more than 600 academic events held in Peru.

#### **V. PUBLICATIONS:**

- **Books:** author or co-author of the following books:
  1. “Constitucion: ¿qué y para qué? [*The Constitution, what is it and what is for?*]: MARCIAL RUBIO, CESAR LUNA VICTORIA, FRANCISCO EGUIGUREN. DESCO, 152 pp (1978).
  2. “Experiencias de promoción del Desarrollo y Organización Popular” [*Experiences in the Promotion of Development and Popular Organization*]: FRANCISCO EGUIGUREN and others. DESCO, 136 pp (1984).
  3. “Los sucesos de los penales: Nueva abdicación de la autoridad democrática - un enfoque jurídico” [*Prison incidents: a further abdication of democratic authority - a legal viewpoint*] CARLOS CHIPOCO, FRANCISCO EGUIGUREN AND MIGUEL TALAVERA; IDL, 118 pp (1986).
  4. “La Constitución Peruana de 1979 y sus problemas de aplicación. 11 estudios interpretativos” [*The Peruvian Constitution of 1979 and problems of enforcing it. 11 interpretative studies*] FRANCISCO EGUIGUREN (Editor) 782 pp Cultural Cusco SA (1987).
  5. “Los retos de una democracia insuficiente: diez años de régimen constitucional en el Perú (1980-1990)” [*The challenges of an inadequate democracy: ten years of constitutional regime in Peru (1980-1990)*] FRANCISCO EGUIGUREN; Andean Commission of Jurists. 276 pp (1990).
  6. “Violencia estructural en el Perú: Derecho” [*Structural violence in Peru: Law*] FRANCISCO EGUIGUREN, WALTER ALBÁN AND SAMUEL ABAD: Asociación Peruana de Estudios e Investigación para la Paz - APEP (December 1990).
  7. “¿Qué hacer con el sistema judicial?” [*What to do with the judicial system?*] FRANCISCO EGUIGUREN PRAELI; Agenda Perú (Lima, Oct. 1999).
  8. “Los Tribunales Constitucionales en Latinoamérica: una visión comparativa” [*Constitutional Courts in Latin America: a comparative view*]; FRANCISCO EGUIGUREN PRAELI; CIEDLA, Konrad Adenauer Foundation; Buenos Aires (Argentina); September 2000; 333 pp.
  9. “La Reforma Judicial en la Región Andina: qué se ha hecho, dónde estamos, adonde vamos” [*Judicial Reform in the Andean Region: what has been done, where we are, where we are going*]; Andean Commission of Jurists; Francisco Eguiguren, research coordinator; Lima (December 2000); 325 pp.
  10. “Estudios Constitucionales” [*Constitutional Studies*], ARA Editores; May 2002; 558 pp.
  11. “Gobierno y administración del Poder Judicial, organización de la función jurisdiccional y sistema de carrera judicial. Propuesta para la reforma de la Ley Orgánica del Poder Judicial” [*Government and*

*administration of the Judiciary, organization of the jurisdictional function and judicial career system. Proposal for the reform of the Judiciary Act*], FRANCISCO EGUIGUREN (Coordinator); Pontifical Catholic University of Peru – Publishers; Lima; July 2002; 392 pp.

12. “Código Procesal Constitucional. Anteproyecto y legislación vigente” [*Code of Constitutional Procedure. Preliminary draft bill and current legislation*]; Samuel Abad, Jorge Danós, Francisco Eguiguren, Domingo García Belaunde, Juan Monroy, Arsenio Oré; PALESTRA Editores; (Nov. 2003); 184 pp.
  13. “La libertad de expresión e información y el derecho a la intimidad personal. Su desarrollo actual y sus conflictos” [*Freedom of expression and information and the right to privacy. Its present development and its conflicts*]; Palestra Editores; Lima, May 2004; 282 pp.
  14. “Código Procesal Constitucional: Comentarios, exposición de motivos, dictámenes e índice analítico” [*Code of Constitutional Procedure: Commentaries, statement of legislative purpose, Opinions and analytical index*]; Samuel Abad, Jorge Danós, Francisco Eguiguren, Domingo García Belaunde, Juan Monroy, Arsenio Oré; Palestra Editores; Lima, August 2004; 486 pp (Second Edition).
  15. “Código Procesal Constitucional: Estudio introductorio, Exposición de Motivos, dictámenes e índice analítico” [*Code of Constitutional Procedure: introductory study, Statement of Legislative Purpose, Opinions and analytical index*]; Samuel Abad, Jorge Danós, Francisco Eguiguren, Domingo García Belaunde, Juan Monroy, Arsenio Oré; Palestra Editores; Lima, July 2005; 532 pp. (Second revised edition).
  16. “La responsabilidad del Presidente. Razones para una reforma constitucional” [*The responsibility of the President. Reasons for a constitutional reform*]. Pontifical Catholic University of Peru Publishers; Sept. 2007; 270 pp.
  17. “Código Procesal Constitucional: Estudio introductorio, Exposición de Motivos, dictámenes e índice analítico” [*Code of Constitutional Procedure: Introductory Study, Statement of Legislative Purpose, opinions and analytical index*]; Samuel Abad, Jorge Danós, Francisco Eguiguren, Domingo García Belaunde, Juan Monroy, Arsenio Oré; Constitutional Court of Peru, Center of Constitutional Studies; Lima, February 2008; 532 pp. (third edition).
  18. “Los derechos fundamentales en la jurisprudencia del Tribunal Constitucional. Análisis de los artículos 1, 2 y 3 de la Constitución” [*Fundamental rights in the case law of the Constitutional Court. Analysis of articles 1, 2, and 3 of the Constitution*] Marcial Rubio Correa, Francisco Eguiguren Praeli, Enrique Bernalles Ballesteros; Pontifical Catholic University of Peru – Publishers; Lima; June 2010; 828 pp.
- **Studies and essays:** author of 129 works published in national and foreign books and academic magazines on matters of Constitutional Law, Constitutional Procedural Law, administration of justice, human rights, fundamental rights, political system and democratic institutions.

## VI. MEMBERSHIP OF ACADEMIC, PROFESSIONAL AND SOCIAL INSTITUTIONS

- International institutions:
  - Comisión Andina de Juristas [*Andean Commission of Jurists*] (member for Peru from 1996 to 2011).
  - Instituto Iberoamericano de Derecho Constitucional [*Latin American Institute of Constitutional Law*]
  - Instituto Iberoamericano de Derecho Procesal Constitucional [*Latin American Institute of Constitutional Procedural Law*].
  - International Academy of Comparative Law (France)
- **National academic, professional and social institutions:**
  - Peruvian Association of Constitutional Law: Charter Member and President from 2005 until July 2013.

- Lima Bar Association: Member of the Order since 1978.
- Latin American Institute of Constitutional Law – Peruvian Section: Member since 1987.
- National University of San Agustín de Arequipa: Senior Honorary Professor, since 1991.
- Lima Regatta Club: member since 1995.
- César Vallejo de Trujillo University: Honorary Professor, since November 1997.
- Member of TRANSPARENCIA, a civil association, since 1999.
- Inca Garcilaso de la Vega University: Honorary Professor, since July 12, 2001.
- Arequipa Bar Association: Honorary Member of the Order since September 24, 2005.
- Catholic University of Santa María, Arequipa: Visiting professor since September 18, 2008.

**Membership of academic publications:**

- International academic publications: Member of the Editorial Board of the *Anuario de Derecho Constitucional Latinoamericano [Yearbook of Latin-American Constitutional Law]* (CIEDLA - Konrad Adenauer Foundation); of the *Anuario Iberoamericano de Justicia Constitucional [Latin-American Yearbook of Constitutional Justice]* (Spanish Institute for Constitutional Studies); *Revista Iberoamericana de Derecho Procesal Constitucional [Latin-American Journal of Constitutional Procedural Law]*.
- Editor of the magazine “Pensamiento Constitucional” [*Constitutional Thought*], of the Masters in Constitutional Law of the Pontifical Catholic University of Peru Graduate School (since 2005).

Member of the Advisory Boards of the journals “Ius et Veritas” and “THEMIS” of the PUCP School of Law and of the Constitutional Court’s Palestra Magazines and Jus Constitucional.