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

BEAR CREEK MINING CORPORATION
Claimant

v.

THE REPUBLIC OF PERU
Respondent

EXPERT REPORT

May 26, 2015

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I. INTRODUCTION

1. My name is Alfredo Bullard González and my address is Las Palmeras 310, San Isidro, Lima Peru.
2. The author of this report declares that it has been issued independently of the parties, their counselors and the members of the Arbitral Tribunal, and that it fully reflects his understanding of the matters that were submitted for his opinion. The content and conclusions of this report are attributable to the author's own knowledge and analysis, and reflect his strong conviction concerning his statements therein. Additionally, he represents that the purpose of his opinion is to inform the Tribunal and provide an analysis that may contribute to the assessment of the case.
3. Notwithstanding the above, I consider it convenient to inform the Tribunal of the following facts:
 - a) In the past five (5) years: (i) I have issued two (2) reports for different clients counseled by the firm Estudio Miranda & Amado Abogados, the attorneys who represent the Claimant in this arbitration; and (ii) the law firm of which I am member was counselor of a client in an arbitration, in which the firm Estudio Miranda & Amado Abogados represented the other party to such arbitration. These activities have finalized and, to my knowledge, are unrelated to the present arbitration.
 - b) During the past five (5) years, I represented a client in an arbitration in which Dr. Juan Luis Avendaño Valdez, a partner of the firm Estudio Miranda & Amado Abogados, was an arbitrator. Said arbitral proceedings have concluded and, to my knowledge, are unrelated to the present arbitration.

- c) I am presently advising a client in an arbitration in which Dr. Juan Luis Avendaño Valdez, a partner of the firm Estudio Miranda & Amado Abogados is president of the Arbitral Tribunal. To my knowledge, said arbitral proceedings are unrelated to the present arbitration.

- d) Currently, the law firm of which I am a member is counseling a company in an arbitration in which the firm Estudio Miranda & Amado Abogados represents the other party. Nevertheless, to my knowledge, said arbitral proceedings are unrelated to the facts and to the parties of the present arbitration.

- e) I have currently been appointed as a member of the Arbitral Tribunal for a dispute in which the firm Estudio Miranda & Amado is counselor to the party that did not appoint me. To my knowledge, said arbitration is unrelated to this dispute.

- f) In the past I have issued four (4) expert reports at the request of the defense attorneys for the Republic of Peru before the ICSID in investment arbitrations, which, to my knowledge, are unrelated to the present arbitration. In one of those cases, the firm representing the Republic of Peru was Sidley Austin LLP, who represents the Respondent in the present arbitration.

- g) In the past I have been a consultant for the Peruvian government in the development of the legal framework for the State coordination and response system in international investment disputes and in several supplementary consultations concerning such system.

- h) In the past five (5) years I have produced a legal report for a company in the context of an international arbitration in which the firm Sidley Austin LLP represented the other party. It is unrelated to the present dispute.

4. This report is produced in response to a consultation made referring to the analysis of the legality S.D. 032-2011-EM¹ that revokes the rights conferred upon the company BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ (hereinafter, BEAR CREEK) to develop mining activities in the border area by S.D. 083-2007-EM.²
5. This report will analyze the constitutional framework, specifically, Article 71 of the Constitution³, and subsequently of the administrative legal framework regulating the revocation of authoritative legal instruments.
6. The author of this report holds a Master of Laws (LL.M.) from Yale University in the United States, and is an Attorney that graduated from Pontificia Universidad Católica del Perú.
7. He has been a professor since 1988 at Pontificia Universidad Católica del Perú, and since 2012 at Universidad del Pacífico, teaching several courses, including Economic Analysis of Law, Civil Liability (torts), Procedural Strategy and Oral Litigation, Competition Law, Contracts, and National and International Commercial Arbitration.
8. Since 2007, he is a professor at the School of Economics and Business (ESEN) of El Salvador, teaching the course on Economic Analysis of Law.
9. He has been a professor at Universidad Torcuato Di Tella of Buenos Aires, Argentina, teaching the course Competition Law, and at the Universidad de Puerto Rico, teaching the course on Economic Analysis of Law.
10. He is author and coauthor of several books and articles on his area of specialization, the most noteworthy including *Derecho y Economía. Análisis*

¹ (BULLARD 001)

² (BULLARD 002)

³ (BULLARD 003)

Económico de las Instituciones Legales y La Relación Jurídico Patrimonial. Reales vs. Obligaciones (Law and Economics. Economic Analysis of Legal Institutions and The Patrimonial Legal Relationship. Real vs. Obligations).

11. He is currently Partner at the law firm Estudio Bullard Falla Ezcurra+, in Lima, Peru, where he specializes in Arbitration, Competition Law, Economic Regulation, Investment Law, Commercial Law and Civil Law (Contracts, In Rem Rights, and Civil Liability).
12. He has been and is an arbitrator in over 250 national and international arbitrations, including ICC, CIAC, and Chamber of Commerce of Lima arbitrations, among others.
13. He has been the President of the Tribunal for the Defense of Competition and Intellectual Property of the National Institute for the Defense of Competition and Intellectual Property Protection – INDECOPI.
14. He has also been President of Technical Commission that drafted Peru's current Arbitration law.
15. For three terms he has held the office of President of the Asociación Latinoamericana e Ibérica de Derecho y Economía (Latin American and Iberian Association of Law and Economics) – ALACDE.
16. His detailed curriculum vitae are attached as Annex I to this report.
17. The analysis and conclusions are based on the information and documentation received to date, as well as with respect to the understanding of the case.
Any changes to the information received, or any new information that may be provided in the future, affecting the understanding of the situation would require a

new analysis, as well as a review of the conclusions. Annex II lists the documentation cited in this report.

II. SUMMARY OF CONCLUSIONS

18. Pursuant to the corresponding analysis, I have reached the following conclusions:

- a) Article 71 establishes, as a general rule, equal treatment between foreigners and nationals, in addition to respect to the general property regime. This rule is inviolable and must be privileged in order to foster investment and free private initiative.
- b) The second paragraph of Article 71 establishes an exception, whose purpose is national security, strictly understood as external defense. Property of foreigners is prohibited near the border to prevent external threats to the territory's integrity.
- c) Nevertheless, to prevent such limit from becoming an excessive obstacle to investment and private initiative, the Administration may authorize the acquisition of property within said territory with a declaration of public necessity.
- d) In that sense, public necessity in Article 71 is actually a synonym for "promoting private investment", allowing foreign investors to be placed in the same general protection regime granted to national investors. Public necessity for private investment is presumed and its existence may only be excluded for external defense reasons.
- e) A different interpretation would allow the State to use public necessity to legitimate populist and arbitrary measures, producing risks and a serious disincentive against the legal security required by private investments. Public necessity, instead of extending the regime for promoting investment, would be transformed into a Sword of Damocles against investment and would strip the second part of Article 71 of substance.

- f) Consequently, the existence of public necessity can only be questioned or rejected if there is a danger to territorial integrity due to an external threat. This restrictive interpretation of public necessity endows useful content to the second sentence of Article 71, paragraph two.
- g) The State's power to revoke exists, but it must necessarily be exercised within the Peruvian legal framework, which restricts its application to exceptional cases. For that purpose, legal security and the prohibition of arbitrariness must be considered, as well as constitutional guarantees provided by the general property regime. It is not possible to exercise said power of revocation without legal grounds and without conforming to the principle of reasonability.
- h) The enactment of the authoritative supreme decree referred to in Article 71 of the Constitution corresponds to a regulated power and not to a discretionary power. The Administration does not have discretionary power to authorize property of foreigners within 50 kilometers from the border. The Administration must verify the existence of public necessity in the meaning set forth by Article 71 of the Constitution and Article 13 of Decree Law 757,⁴ the Framework Law for the growth of Private Investment (Legislative Decree 757), taking into account, in addition, the objective of such rules, which is to safeguard external defense without harming private investment.
- i) With the issuance of the authoritative supreme decree referred to in Article 71 of the Constitution, a foreigner is entitled to acquire or possess mines, land, forests, water, fuels or energy sources within fifty kilometers from the borders. In this manner, the authoritative decree grants an authorizing title in favor of a foreigner that is integrated into the same property right.

⁴ (BULLARD 004)

- j) In addition to the provisions set forth in our Constitution, Legislative Decree 757 and Law 27444,⁵ the Law on General Administrative Procedure, establish principles and regulations aimed at protecting investments. With respect to Law 27444, the Law on General Administrative Procedure, the principles of legality and reasonability are especially relevant, as well as the figure of revocation regulated in Articles 203 and 205.
- k) The Peruvian legal framework particularly and very clearly restricts the authorities' discretion, especially when its decisions affect the rights or interests previously granted to the administration's subjects.
- l) While under Peruvian law it is possible for the State to amend its decision granting the authorization referred to in Article 71 of the Constitution, this may only be applicable provided (i) that the existence of any of the three (3) grounds established by Article 203 of Law 27444 is proven, and (ii) that an impact on external defense is reasonably proven in the terms of Article 71 of the Constitution. The revocation need can not respond to reasons of opportunity, merit or convenience of the authorities.
- m) Additionally, for a revocation of rights to be in accordance with the Peruvian legal framework, it must follow a procedure that guarantees the right to defense of the administration's subject and grants, according to that established in the law, a compensation attending to the economic damages resulting from the revocation. Further, the revocation must be issued by the highest authority of the entity that granted the right that was left without effect.
- n) The derogation does not constitute a proper procedure to withdraw an authorization granted under Article 71 of the Constitution, as is the case of SD. 083-2007-EM. The derogation is a legal concept solely applied to leaving without effect regulations possessing a regulatory nature.

⁵ (BULLARD 005)

- o) If there were defects during the issuance of the authorization under the terms of Article 71 of the Constitution, then the figure of annulment and not that of derogation should be applied.
- p) S.D. 032-2011-EM irregularly and arbitrarily disregards the right formerly granted to BEAR CREEK by way of S.D. 083-2007-EM.
- q) S.D. 032-2011-EM does not fit into any of the grounds for revocation provided by Article 203.2 of Law 27444. Nor is it justified in reasons of national defense, which is the objective sought by Article 71 of the Constitution, therefore the principle of reasonability is not respected either.
- r) What has actually occurred is that, for reasons beyond those that served as grounds for granting the authoritative decree, the State has intended to invalidate an authorization. The State has acted motivated by problems of a social nature unrelated whatsoever to national security, the objective sought by Article 71 of the Constitution. A deviation of powers has occurred violating the principles of legality and reasonability consecrated in the Preliminary Title of Law 27444.
- s) S.D. 032-2011-EM does not respect the revocation procedure provided in Articles 203 and 205 of Law 27444. BEAR CREEK has not been allowed to exercise its right to a defense. Neither has compensation for economic damages resulting from the revocation been granted.

III. FACTUAL BACKGROUND

19. BEAR CREEK and Mrs. Karina Villavicencio entered into option agreements to obtain seven (7) mining rights. The legality of these contracts was validated by the Registration Court's Resolution No. 193-2005-SUNARP-TR-A, published on December 22, 2005 in the Official Gazette El Peruano.⁶
20. S.D. 083-2007-EM was published on November 29, 2007, which authorized BEAR CREEK to acquire mining rights and property located within 50 kilometers from the border. Such instrument indicated the following:

“Article 1 – Purpose

Declare the private investment in mining activities as a public necessity allowing BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ to be able to acquire and possess concessions and rights over mines and supplementary resources within fifty (50) kilometers from the southern border of the country, in areas in which the mining rights detailed in Article 2 of this Supreme Decree are located.

Article 2 – Authorization to acquire mining rights

Authorize BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ to acquire seven (7) mining rights, located in the Puno department, in the border zone with Bolivia, detailed as follows: [...]

[Emphasis added]

21. BEAR CREEK activated the option rights to acquire mining rights from Ms. Villavicencio on December 6, 2007, having complied with the condition of obtaining the authorizing title. The company subsequently made investments under such ownership.

⁶ (BULLARD 006)

22. On June 25, 2011, S.D. 032-2011-EM was published, invalidating S.D. 083-2007-EM and the rights granted therewith. The only justification set forth in the Supreme Decree is the presence of a “change in circumstances”; nevertheless, the State does not specify what circumstances it refers to or the implications of such circumstances as observed from the following text:

“Circumstances have been made known implying that the legally required conditions for the enactment of the mentioned act no longer exist;

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 within the regulatory norms on the matter;

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

Additionally, it is deemed pertinent for 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, to study and, where appropriate, dictate provisions for the purpose of prohibiting mining activities in the aforementioned areas; [...]

[Emphasis added]

IV. ANALYSIS OF ARTICLE 71 OF THE 1993 POLITICAL CONSTITUTION OF PERU

23. The purpose of this section of the Report is to determine the scope of Article 71 of the Constitution in Peruvian Law.
24. To determine its scope, it is necessary to resort to the methods or criteria for the legal interpretation of rules: (i) the literal method; (ii) the systematic method, (iii) the

historical method and (iv) the teleological method. These four methods are accepted by the Peruvian legal system.⁷

A. Literal Method

25. Through the literal method, the interpreter seeks the significance and meaning of the specific rule based on its express wording.⁸
26. The literal criterion will also become a limit for all the possible meanings that may be construed from the remaining interpretation criteria. The meaning found through the interpretation cannot surpass the express wording.⁹
27. Let us review the express wording of Article 71 of the Constitution:

***“Article 71. Regarding property, foreigners, whether individuals or legal entities, are in the same condition as Peruvians, without the ability to, under any circumstances, invoke exception or diplomatic protection.*”**

⁷ In this regard, the Decision of the Constitutional Court of Peru issued in Case No. 0008-2003-AI/TC, dated November 11, 2003: “4. Prior to the hermeneutical analysis of the constitutional economic model, it must be specified that, although it is possible to utilize the interpretative criteria applicable to rules with legal status over the Fundamental Rule (namely, the literal, systematic, historical and sociological methods), it is nonetheless true that the Constitution also possesses a relevant political content, since it not only includes imperative rules for immediate or self-applicative requirements and efficiency, but also a number of regulations advocating for the “social program” of the State, in which one of its main aspects includes the constitutional economic regime. [...] Therefore, to the classic interpretation criteria, those allowing the more adequate implementation of the principles inspiring the sociopolitical and economic political principles of the Constitution, must be added. Thus explaining the relevance in providing, on the one hand, an institutional interpretation of its clauses and, on the other, a social interpretation.” (BULLARD 007)

⁸ To that effect, national doctrine states: “For the literal method, the interpretation procedure consists in determining what the rule defines by means of using its own linguistic rules in common understanding of the written language in which the rule was created, unless the terms used possess a specific legal meaning different to the common one, in which case one will have to determine which of the two meanings is being used by the rule.” RUBIO CORREA, Marcial. “El sistema jurídico. Introducción al Derecho.” 10th Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 238. (BULLARD 008).

⁹ LARENZ states in this regard: “Therefore, the literal meaning that may be inferred from the general use of the language or, as long as it exists, of the special use of the language of the law or the use of legal language in general, is useful for interpretation, first, as an initial guidance, second, as a possible literal meaning—either according to the use of the language of the past, or its present use—the limit of the interpretation per se. In a certain manner he marks the way in which the subsequent work of the interpreter is conducted.” LARENZ, Karl. “Metodología de la ciencia del Derecho”. Translated by Marcelino Rodríguez Molinero. 2nd. Edition of the fourth definitive German edition. Barcelona: Editorial Ariel, 1980; p. 320. (BULLARD 009)

However, within the fifty kilometers from the borders, foreigners cannot acquire or possess under any title, mines, lands, forests, waters, fuels or energy sources, directly or indirectly, individually or in partnership, under penalty of losing that so acquired right to the State. Sole exception are cases of public necessity expressly determined by supreme decree approved by the Council of Ministers in accordance to the law.”

28. Article 71 includes two rules, a general rule and an exception:
 - a. General rule: Equal treatment of rights between Peruvians and foreigners with respect to property rights.
 - b. Exception: Limitation to the acquisition and possession of property by foreigners within the 50 km adjacent to the border.
29. The first paragraph of the regulation establishes that all foreigners are in the same position as nationals regarding the property regime. This implies a reiteration of the principle of equality for the specific case of foreigners before nationals. Said right is considered by the Constitution as a fundamental right.¹⁰
30. Thus, in principle, the law may not establish any kind of special or differentiated regime for natural persons or legal entities that do not have the Peruvian nationality.
31. Paragraph two of Article 71 incorporates an exception to the general rule of equality between foreigners and nationals. It sets forth a different rule (a differentiation) for a more restricted assumption of fact.

¹⁰ Fundamental rights are institutions or supreme values deriving from human dignity, therefore they receive the maximum protection from the whole legal body. The State's actions and policies, as well as legal regulations, must respect them and aimed toward advancing their exercise. Decision of the Constitutional Court of Peru issued in Case No. 3330-2004-AA/TC, dated July 11, 2005; grounds 9 (**BULLARD 032**). Any act or rule that unduly restricts fundamental rights is forbidden and must be suppressed by way of the mechanisms and processes provided by the Constitution and the law.

32. Effectively, paragraph two circumscribes its scope of application to foreigners in the territory corresponding to the 50 km adjacent to the border, while the rule of paragraph one applies to all foreigners in any area of the territory. It subsequently establishes a prohibition for foreigners to acquire or possess property within those 50 km adjacent to the country's border, a prohibition that does not exist for nationals. Said rule contradicts the principle of equality between nationals and foreigners as established in the first paragraph.
33. The qualification of a rule as an exception implies two consequences: (i) the exception rule must be restrictedly interpreted¹¹ and (ii) it cannot be applied by analogy to other similar factual assumptions.¹²¹³
34. In short, the prohibition for foreigners to acquire or possess property in the border must be read restrictively and may not be applied to other assumptions that are different from those specifically stated in the first sentence of paragraph two. Consequently, being an exception to the application of a fundamental right (non-discrimination), it must be applied in such a way as to affect as little as possible said fundamental right.
35. Lastly, the second sentence of paragraph two incorporates an assumption in which the exception is inapplicable:

¹¹ LARENZ states that, "One must avoid, through an excessively broad interpretation of the exceptional regulations, or through its analogical application, the lawmaker's intention from ultimately being exchanged for something contrary to it." LARENZ, Karl. "Metodología de la ciencia del Derecho". Translated by Marcelino Rodríguez Molinero. 2nd Edition of the fourth definitive German edition. Barcelona: Editorial Ariel, 1980; p.353. **(BULLARD 009)**

¹² RUBIO expresses: "It is not appropriate to use analogy on the basis of prohibitive, exceptional or special rules, or of those restricting rights, since they are rules whose *ratio legis* essentially implies a restrictive and not extensive application." RUBIO CORREA, Marcial. "El sistema jurídico. Introducción al Derecho." 10th Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 269. **(BULLARD 008)**

¹³ This principle is followed by several regulations, for example the Constitution forbids the analogy of rules restricting rights as a principle of the jurisdictional function: "Article 139.- Principles and rights of the jurisdictional function are: [...] 9. the principle of the inapplicability by analogy of criminal law and of rules restricting rights". Article IV of the Preliminary Title of the Civil Code expresses the following: "Article IV. The law establishing exceptions or that restricts rights is inapplicable by analogy". **(BULLARD 010)**

“[...] Sole exception are cases of public necessity expressly determined by supreme decree approved by the Council of Ministers in accordance to the law.”

[Emphasis added]

36. This provision excludes the exception within the 50 km adjacent to the border with the issuance of an authoritative Supreme Decree. When the Administration has expressly declared public necessity¹⁴ in accordance to the law, the exception is no longer applicable and the general property regime will be in force once again based upon the general principle of equality before the law. Upon the occurrence of this event, the fundamental right of a foreigner to not be discriminated is fully born in reference to the specific rights whose acquisition is authorized by way of the Supreme Decree, and enjoys the same scope as [the foreigner] would have in any other area of the national territory.
37. This issue is crucial for a proper interpretation of Article 71. **Once the exception of paragraph one is declared inapplicable, the foreigner shall be entitled to all freedoms and constitutional rights to property granted to nationals.** The foreigner is once “*again*” entitled to the general property regime in relation to that included in the authoritative supreme decree.
38. Along the same lines, it is necessary to highlight that paragraph two of Article 71 allows the Executive Power to declare public necessity pursuant to law, so that the exception of the 50 km ceases to be applicable. Nevertheless, no express power is granted to the Executive Power allowing it to revoke or contradict its initial declaration. A special revocation regime is inexistent. Therefore, in light of an eventual revocation scenario, it must be ruled by the general legal framework. Otherwise, the principle of legal security would be affected and a second-class property right would be created, which is not the Constitution’s intention. Property,

¹⁴ The delimitation of this concept is analyzed in further detail in the teleological analysis of Article 71 in paragraph IV.D of the report.

as such, must be stable. An unstable property is not strictly property. For this reason, legal security becomes an essential element for its existence.

39. In reference to this proposition, it must be noted that the Public Administration rules under the principle of legality.¹⁵ The Executive may only execute what the law authorizes it to execute, unlike private entities, who can carry out all actions that are not prohibited by law.
40. In sum, Article 71 of the Constitution allows the State to authorize foreigners to acquire and possess property within the 50 Km adjacent to the border, but it does not have the powers to revoke such authorization. Consequently, the State shall only be empowered to exceptionally revoke such authorization, if it is compatible with the general regime. If an act cannot affect property in general, then said act cannot affect a foreigner's property within the 50 km of the border that has already been authorized by the State either.

B. Systematic Method

41. The second stage of the interpretation is applying the Systematic Method, in order to verify the coherence of the rule being subjected to an interpretation with the legal system as a whole. This criterion begins by considering the legal system as an orderly, unitary and coherent system of rules regulating human relations.
42. In this sense, in a same legal order no contradictions or incoherence should exist between different regulations. Accordingly, since there are diverse possible

¹⁵ Concerning the Principle of Legality, the Law of General Administrative Procedure– Law No. 27444 **(BULLARD 005)** states the following:

“Article IV. Principles of the administrative process
(...)”

1.1. Principle of legality. Administrative authorities must respect the Constitution, laws and right, within the powers they are vested with and in accordance with the purposes for which they were conferred.”

interpretations of the same regulation, preference should be given to the interpretation that is in agreement with the other regulations of the legal order.¹⁶

43. The interpretation should certainly consider the regulatory hierarchy and specialty criteria. This implies that the content of a rule of higher hierarchy should take precedence over the content of another of a lesser hierarchy.
44. In addition, the interpreter must be quite cautious when seeking the coherence of rules applicable to different regulatory sectors or scopes. Similar terms of different branches could render different implications and different uses depending on the internal logic of each branch of Law.¹⁷
45. Consequently, the conclusions on the scope of Article 71 reached through the literal interpretation should be contrasted with other relevant provisions of the Constitution. In addition, rules of legal status must be reviewed.¹⁸
46. For such purposes, the following analysis will focus on two relevant and inseparable issues of Article 71: (i) the principle of equality before the Law; and, (ii) the economic regime of the Constitution.

(i) The principle of equality before the Law

¹⁶ RUBIO emphasizes on this point: “*For the Systematic Method, in comparison to other rules, its interpretation procedure consists in clarifying «the meaning» of the rule, attributing thereto the principles or concepts which are clear in other rules and not clearly expressed therein*”.

RUBIO CORREA, Marcial. “El sistema jurídico. Introducción al Derecho”. 10th Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 242. **(BULLARD 008)**

¹⁷ On this point, RUBIO highlights the national doctrine: “In accordance with the Systematic Method by location of the rule, its interpretation should consider the corpus, subset, group of rules, etcetera, in which it is included, so that «what is its meaning» may be clarified by the conceptual elements pertaining to said regulatory structure”. RUBIO CORREA, Marcial. “El sistema jurídico. Introducción al Derecho”. 10th Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 245. **(BULLARD 008)**

¹⁸ In this regard, the Peruvian Constitutional Court has already ruled to that effect, stating that the Constitution must be interpreted under an institutional logic, seeking to provide internal coherence to its provisions, on the basis of the political institutions it seeks to establish in the decision issued in Case No.0008-2003-AI/TC, dated November 11, 2003: “*Effectively, constitutional provisions cannot be understood as atoms that are not interrelated, since this would lead to incongruent conclusions. On the contrary, its internal system forces to consider the Fundamental Rule as a whole, as a sum of institutions possessing a uniform inclusive logic.*” **(BULLARD 007)**

47. The principle of equal treatment before the Law has different applications or manifestations for different scopes of the Law. The paragraph one of Article 71 applicable to the economic regime of property, for example, is one of them.
48. Nevertheless, the clause or general rule is included in Article 2, paragraph 2 of the Constitution, stating the following:

“Article 2. All persons have the right:

[...]

2. To equality before the law. No one should be discriminated on grounds of origin, race, sex, language, religion, opinion, economic status or any other grounds”.

49. The principle of equal treatment before the law is of utmost relevance to the economic regime of the Constitution, which seeks to guarantee free private initiative and private investment based on the free play between supply and demand. Privileges or arbitrary restrictions are contrary to this logic.¹⁹
50. The principle of equal treatment before the law is specifically expressed in the case of foreigners with respect to nationals in reference to the property regime.
51. The national treatment, as a new expression of the principle of equal treatment before the law and as a pillar of the economic regime of the Constitution, has been acknowledged as such in Article 63, establishing the following:

“Article 63. National and foreign investment is subject to the same conditions. The production of goods and services and foreign trade are free. If another country or countries adopt protectionist

¹⁹ This has also been expressed by jurisprudence of the Constitutional Court: “15. *The economic constitutional order must also be interpreted in light of the principle of equality, acknowledged in paragraph 2) of Article 2 of the Constitution. On that particular matter, in the Case ‘Association of Notaries of Lima’ (Accumulated Cases No. 0001-2003-AI/TC and No. 0003-2002-AI/TC), this Court indicated that “(...) the principle of equality in the Constitutional State, requires from the legislator a negative or refraining relation and another which is positive or interventionist (...).” Decision of the Constitutional Court of Peru issued in Case No. 0008-2003-AI/TC, dated November 11, 2003. (BULLARD 007)*

or discriminatory measures harming national interests, the State may, in its defense, adopt analogous measures.

In all contracts of the State and of public law persons with domiciled foreigners, their submission to the laws and jurisdictional bodies of the Republic and their waiver of all diplomatic claim is recorded. Contracts of a financial nature may be exempted from national jurisdiction.

The State and other public law persons may submit the disputes originating from the contractual relationship before the courts constituted under the treaties in force. The disputes may also be submitted to national or international arbitration, as provided for by law.”

[Emphasis added]

52. Accordingly, because it is an exception, the limit to foreigners' property specified in Article 71, paragraph two must be interpreted restrictively. Conversely, paragraph one and the second sentence of paragraph two must be understood in such a way that allows them to potentiate the Constitution's general regime of equality.

(ii) The economic regime of the Constitution

53. Additionally, it is necessary to consider that Article 71 is part of the constitutional economic regime. As a result, said rule should be consistent with the Constitution's entire general regime of equality. This consideration is essential for a systematic and institutional analysis.
54. Below I will set out the main characteristics of the economic regime of the Constitution.
55. The first sentence of Title III corresponding to the economic regime of the Constitution expresses the following:

“Article 58. Private initiative is free. It is exercised within a social market economy. Under this regime, the State guides the development of the country and it is principally active in promoting employment, health, education, security, public services, and infrastructure.”

[Emphasis added]

56. The State is no longer the engine of the economy; rather, it is the private individual or the organization of such individuals (companies). The State, on its part, now assumes a subsidiary role.

57. Such principle of private initiative of the economy is reinforced by the provisions of Article 59 of the Constitution that again limits State participation. The text of said Article states the following:

“Article 59. The State promotes the creation of wealth and guarantees the freedom to work, as well as free enterprise, trade, and industry. The exercise of these freedoms must not be harmful to the public morals, health, or safety. The State provides opportunities to those sectors suffering from unequal opportunity for advancement. In this spirit, it promotes small businesses of all types.”

[Emphasis added]

58. Meanwhile, a regime protecting the private initiative as a pillar for the development and creation of wealth protects private property.

59. It is an inviolable right, expressly guaranteed by the State that can only be revoked on grounds of national security or public necessity declared by law, following the payment, additionally, of fair value. Namely, expropriations can only be carried out by law and on grounds of the reasons set forth in Article 70, which states the following:

“Article 70. The right to property is inviolable. It is guaranteed by the State. It is exercised in harmony with the common good, and within the limits of the law. No person may be deprived of his property, except, exclusively, on the grounds of national security or public need determined

by law, and following payment in cash of the fair value indemnification, which must include compensation for eventual injuries. Actions may be instituted before the Judiciary to challenge the property value that the State established in the expropriation procedure.”

[Emphasis added]

60. This article has a similar structure to Article 71. It establishes a general rule guaranteeing the inviolability of property and subsequently an exception referring to expropriation by law.
61. This implies that only by an act of Congress can an individual be deprived of his or her property. Thus, the Constitution seeks to provide the private party with assurances and guarantees for purposes of creating investment incentives.
62. For this reason the Constituent has chained the State’s powers and established limited reasons for public necessity and national security, in addition to a strict procedure that requires broad consensus at a political level: the enactment of a law of Congress.
63. And protection does not only end there; rather the State must compensate the value of the property that was stripped from the private party by paying a fair value.²⁰

²⁰ Constitutional Court case law underscores the following: “21. The guarantee provided for by the Constitution to prevent [a private party] from being arbitrarily deprived of its property, for mere reasons of national security or public necessity declared by law, following payment in cash of a fair value indemnification, derives from the property right. This is what is called expropriation, which consists of the forced transfer of the private property right, solely authorized by an express act of Congress in favor of the State, at the initiative of the Executive Power, Regions or Local Governments and following payment in cash of the fair value indemnification that includes compensation for eventual injuries (Article 2 of the General Expropriations Law, Law No. 27177). In this manner, a power of the State depriving the title over such right must be understood as against the will of the title holder.” Decision of the Peruvian Constitutional Court of Peru issued with respect to Case No. 0864-2009-PA/TC, dated August 28, 2009; grounds 21 (BULLARD 011).

In this same sense, the national doctrine KRESALJA and OCHOA is notable: “- Property as an inviolable right. The Constitution recognizes this nature whose origin is the cited Article 17 of the Declaration of the Rights of Man and the Citizen.

- Exceptionality of domain limitations. Drawing from the rule of inviolability that protects the property right versus intromissions of the state power, the limitations to this right are considered as something abnormal or exceptional, such as the derogation of a rule, and, consequently, as something subject to a restrictive interpretation. The 1992 Peruvian Constitution in its Article 70 contains a reservation clause of law when it declares that; “It is exercised in harmony with the common good and within the limits of law.” KRESALJA

64. Article 72 of the Constitution follows the same line of property protection and guarantee. Only by law granted for reasons of national security can restrictions and prohibitions to the transfer and exercise of property over certain assets be established:

“Article 72. The law can, solely for reasons of national security, temporarily establish specific restrictions and prohibitions for the acquisition, possession, exploitation and transfer of certain assets.”

65. Article 72 is a specific application of the guarantee regime in the face of expropriation and of the exceptional nature of the limitations within the framework of Article 70 of the Constitution.

66. All forms of privation of property are regulated by the legal order.²¹ There is no arbitrariness, violation of legitimate expectations nor subjection to the State’s absolute will.

67. What is indicated with respect to the economic Constitution’s internal system confirms the literal interpretation analyzed in the preceding section: (i) the restriction of the 50 km from the border is an exception to the general regime of property that must be restrictively interpreted; and (ii) the Executive Power can only revoke such authorization by conforming to the legal procedures without incurring in arbitrariness.

68. One implication arising from the foregoing is that, in order to be consistent with the Constitution’s economic regime as a whole, the second sentence of Article 71, paragraph two must be interpreted in the sense that facilitates and promotes

ROSELLÓ, Baldo and César OCHOA CARDICH. “Derecho constitucional económico”. 1st Edition. Lima: Fondo Editorial de la PUCP; 2009; pages 255-256. **(BULLARD 012)**

²¹ Notwithstanding the exceptional legal provisions of restriction on property set forth by the Law on General Administrative Procedure – Law No. 27444. **(BULLARD 005)**

private initiative and private investment. Authorization can only be refused in exceptional cases.

69. The authorization by the Executive Power that resolves to not apply the exception regime within the 50 km from the border is in keeping with the economic Constitution. It extends and facilitates the possibility for private parties to develop their private initiative based on property protection.
70. On the other hand, the possibility that the Executive Power could revoke the authorization must remain reduced to exceptional cases in which the legal order allows such revocation for any private party. By reentering the general regime of equality and guarantee to property, the foreigner should enjoy the same legal protections against the State's arbitrariness that discourages investment and wealth production.

C. Historical Method

71. The historical method comprises two meanings. On the one hand, it seeks the will of the legislator expressed in the text that is interpreted. Namely, it tries to find the meaning or logic that those that created the rule in particular, the legislator or in this case the constituent, wanted to grant it.
72. This task comprises reviewing the preparatory works up to the enactment of the final rule. An understanding of the changes made to the drafting of the rule from the bill, the committee project, the project discussion held before assembled Congress and the final approved and enacted draft, can shed light on the meaning of the terms used and the purpose sought with the rule.²²

²² National doctrine follows the same line: *"For the historical method, the interpretation is made by resorting to the content that provides legal background directly linked to the rule it entails. This method is founded on the fact that the legislator always has a certain intention by giving the legal rule, called the legislator's intent, which must decisively contribute to explaining its meaning"*. RUBIO CORREA, Marcial. "El sistema jurídico. Introducción al Derecho". 10th. Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 248 (**BULLARD 008**). Similarly, LARENZ sets out the following: *"With that we come to the "historical" element of the interpretation, which, as we stated in the beginning, must be taken into account by ascertaining the meaning of the law that is legally decisive. Above all, the regulating intention of the legislator and the evaluative decisions found by it to*

73. On the other hand, the historical method can also be understood as an inquiry into the evolution of specific provisions over the years, and of the social context of the period in which they were initially thought of. This can help to reexamine the meaning that should be afforded to it hereunder through an understanding of the historical and evolutionary values included in certain provisions.
74. There are constitutional provisions that concern special imposed conditions for owning the title of territorial property by foreigners since the 1839 Constitution.²³ Since then, while the constitutional treatment has varied substantially, all the constitutions of our country have had some provision in that regard.
75. The 1839 Constitution included for the first time a provision that established a special regime for foreigners that had territorial property in Peru.²⁴
76. This provision, in essence, determined that foreigners who acquired property within the Peruvian territory would be subject to the same rights and obligations as Peruvian citizens. A specific restriction, consequently, was not applied to foreigners nor was a differentiated treatment afforded with respect to the property rights of a foreigner vis-à-vis a Peruvian.
77. The 1856 Constitution introduced slight amendments to said Article²⁵ and the two subsequent Constitutions (1860²⁶ and 1867²⁷) essentially maintained the same provision.

manifestly achieve that intention, continue to be a binding guideline for the judge, even when the law adjusts—through the teleological interpretation or through the development of Law—to new circumstances not provided by the legislator, or when it supplements it. LARENZ, Karl. “Metodología de la ciencia del Derecho”. Translation by Marcelino Rodríguez Molinero. 2nd edition of the fourth definitive German edition. Barcelona: Editorial Ariel, 1980; p. 325 (**BULLARD 009**).

²³ 1839 Constitution (**BULLARD 013**).

²⁴ Article 168 of such constitutional text established the following:

“Art. 168. No foreigner can acquire under any title territorial property in the Republic, without remaining, by such act, subject to citizen obligations, whose rights [such foreigner] shall simultaneously enjoy.”

²⁵ 1856 Constitution (**BULLARD 014**):

“Art. 26. Any foreigner may acquire, pursuant to law, territorial property in the Republic, whereby all that refers to said property is subject to the obligations and use of Peruvian rights.”

²⁶ 1860 Constitution (**BULLARD 015**): “Art. 26. Any foreigner may acquire territorial property in the Republic, whereby all that refers to said property is subject to the obligations and use of Peruvian rights.”

78. The 1920 Constitution²⁸ was the first to introduce a provision establishing a special rule governing foreigners' properties. The adopted text was the following:

“Article 39. Foreigners, with respect to property, are in the same condition as Peruvians, and in no case may invoke an exceptional situation or resort to diplomatic claims. Within an extension of fifty kilometers from the border, foreigners may not acquire or possess, by any title, land, water, mines and fuel, directly or indirectly, either individually or in a partnership, under penalty of losing that acquired property to the State. Sole exception is the case of national necessity declared by special law.”

79. In the first place, as a general rule, said Article maintained the principle of equitable treatment for nationals and foreigners with respect to property. Nevertheless, it introduced an exception rule preceding the one that appears in the Constitution that is currently in force. For the first time a special regime was to be applied within fifty kilometers next to the border, wherein foreigners were restricted from owning or holding any right over “land, water, mines and fuel.” In order to overcome this requirement, a special law had to be issued, allowing an exception to the rule on grounds of national necessity. Such provision arose due to considerations referring to national security and protection within the territory, in the face of the possibility of a foreign invasion.
80. What had taken place between the Constitutions of 1860 and 1920 that may explain this shift in their wording? Peru had suffered several confrontations with border countries before 1920: the devastating Pacific War with Chile, between 1879 and 1883; tensions with Ecuador in 1910 that almost resulted in an armed conflict; and La Pedrera conflict with Colombia in 1912. At that time, diplomatic relations between Peru and its bordering countries were unstable.

²⁷ 1867 Constitution (BULLARD 016)

²⁸ 1933 Constitution (BULLARD 017)

81. Moreover, it should be noted that in 1920, such restriction was significantly less burdensome, since the levels of foreign investment were considerably lower. The restriction did not influence economic activities, as is the case today. Furthermore, at that time the models of economic openness or of attracting foreign investments had not been adopted. Finally, the degree of development and growth of cities near the borders was quite inferior, and the cost thereto of the restriction was insignificant compared to present times.
82. Throughout the 20th century, Peru would be involved in a considerable number of armed conflicts with border countries. In addition to those mentioned above, between the 1932 and 1933 Peru confronted Colombia in a war, and Ecuador during three separate occasions: 1941, 1982 and 1995. Based on the foregoing, this may easily explain why all constitutions of the 20th century maintained the same position with respect to the restriction for foreigners from owning property close to the borders.
83. The Constitution of 1933²⁹ included equal provisions. Nevertheless, beyond variations in wording, the position assumed in that Constitution was identical to that of its predecessor of 1920. As a general rule, equitable treatment was established; nevertheless, the restriction with respect to the fifty kilometers near the border was maintained. The Constitution of 1979³⁰ followed the same approach.
84. Finally, the Constitution of 1993,³¹ in force to date, included the following text:

²⁹ 1920 Constitution (**BULLARD 018**):

“Article 31. Property, regardless of the proprietor, is exclusively ruled by the laws of the Republic and is subject to the taxes, encumbrances and limitations they establish.

Article 32. Foreigners, in what refers to property, are in the same condition as Peruvians, and in no case may invoke an exceptional situation or resort to diplomatic claims.

Article 36. Within fifty kilometers from the border foreigners may not acquire or possess, by any title, water, mines or fuel, directly or indirectly, individually or in partnership, under penalty of losing the acquired property to the benefit of the State. Sole exception is the case of national necessity declared by express law.”

³⁰ 1979 Constitution (**BULLARD 019**):

“Article 126- Property is exclusively ruled by the laws of the Republic. Foreigners, in what refers to property, are in the same condition as Peruvians, and in no case may invoke an exceptional situation or resort to diplomatic protection.

However, within fifty kilometers from the border, foreigners may not acquire or possess, energy sources, directly or indirectly, individually or in partnership, under penalty of losing the acquired right to the benefit of the State. Sole exception is the case of national necessity declared by express law.”

³¹ 1993 Constitution (**BULLARD 003**)

“Article 71. Regarding property, foreigners, whether individuals or legal entities—are in the same condition as Peruvian nationals and in no case may invoke an exception or diplomatic protection.

However, within the fifty kilometers from the border, foreigners may not acquire or possess, by any title, land, water, mines and fuel, directly or indirectly, either individually or in a partnership, under penalty of losing that acquired right to the State. Sole exception is the case of national necessity expressly declared by supreme decree approved by the Council of Ministers in accordance to the law.”

85. In light of that set out above, Article 71 of the 1993 Constitution may be understood as the last of a series of constitutions of the 20th century that sought protection of national sovereignty by introducing an exemption to the general rule of equitable treatment to nationals’ and foreigners’ property. To a great extent, this occurred given the context of conflicts occurring throughout that century, many of them not so long ago.
86. Nevertheless, transcriptions of the discussions held by the constituents prior to the enactment of our Constitution documented that the article at issue raised considerable debate.
87. A relevant group of constituents adopted the position of the proposal (which would later become a constitutional text), namely, that the restriction of foreigners’ property within fifty kilometers from the borders constituted an anachronism that would cause negative effects on economic development. As an example, the constituent Carrión Ruiz stated the following:

“That they may not own property within less than fifty kilometers from the border, President, seems to me an anachronism. In

present times it is not effective. We are in an era of integration, who do we mistrust? Our neighbors?³²

88. The constituent Sotomarino Chávez emphasized that the special treatment would negatively affect foreign investment and therefore should be ruled out:

“The second part of the article (...) expresses a chauvinism that is clearly inconvenient for the country. This article discourages any possibility of foreign investment, or of investments of any nature, within the fifty kilometers from the borders, especially when there are oil resources, and in addition, probably gold. (...) Peru may become a very important country in gold mining if we disregard that type of chauvinisms.”³³

89. It was further maintained that the context of that time did not pose serious risks to external security that would justify such restriction, and it was explained that changes in the nature of armed conflicts were such, that a 50 kilometers restriction was irrelevant. The constituent Flores-Araoz, for example, stated the following:

“Defensive criteria had precedence for establishing that exception within fifty kilometers from the border. Today it is not warranted: a missile travels from continent to continent (...). Then, which is the defensive criterion maintained in this Constitution for the consideration of the fifty kilometers? It has no purpose, other than maintaining criteria, which at least in my opinion, are completely outdated, fictitious and currently have no basis. It would be more logical to delete this constitutional Article.”³⁴

90. Nonetheless, the position that sought maintaining the provision prevailed. The arguments for its defense were, precisely, linked to national security under the possibility of a foreign invasion. The constituent Ferrero Costa, for example, maintained that foreign interests in areas near the border could imply a pressure

³² *Constitutional Debate – 1993*. Volume IV. Session of Wednesday, April 21, 1993 Official Publication of the Congress of the Republic, pp. 1965-1966. (BULLARD 020)

³³ *Constitutional Debate – 1993*. Volume III. Session of Tuesday August 24, 1993. Official Publication of the Congress of the Republic, p. 2269. (BULLARD 021)

³⁴ *Constitutional Debate – 1993*. Volume III. Session of August 10, 1993. Official Publication of the Congress of the Republic, p. 2259.

for neighboring countries to invade, citing to that effect saltpeter companies in the context of the Pacific War.³⁵ Furthermore, it was affirmed that foreigners' properties in the borders could entail difficulties for the defense of the territory or become a sensitive issue requiring consultation with the Armed Forces.³⁶

91. The prevailing position meant maintaining the same provision established in the 1920 Constitution with a few minor variations. Nevertheless, the discussion arising in the constituent process reveals that reasons causing those restrictions were, to a great extent, outdated. National security was not a preeminent constitutional principle during the drafting and approval of the 1993 Constitution text, and its prevalence over the need to support investments and economic openness was directly and intentionally encouraged.
92. Precisely, providing flexibility to a law declaring the national necessity of the 1979 Constitution in a Supreme Decree that declares public necessity in the 1993 Constitution points to that. The objective of the legislator was to restrict the limitation to a minimum and encourage the general regime of promoting private investment.
93. Although the Constitution upholds the exception, it clearly exhibits a shift in balance between the right to non-discrimination and protection of national security, reflected in a more flexible regime and appearing favorable to granting the exemption, and at the same time reflects the evolution of geopolitical relations (including a change in the meaning and scope of national security), together with with an evolution of the regime promoting foreign investments to attract them. It must also be noted that this historical evolution has further developed since the enactment of the 1993 Constitution.

³⁵ *Constitutional Debate – 1993*. Volume III. Session of August 24, 1993. Official Publication of the Congress of the Republic, p. 2271.

³⁶ *Constitutional Debate – 1993*. Volume V. Session of May 21, 1993. Official Publication of the Congress of the Republic, p. 3016.

94. For these reasons we consider that the 1993 Constitution must be interpreted more restrictively with respect to the exception included in Article 71. Even if the text has maintained the same literal meaning of the other constitutional texts since 1920, the underlying values and principles in that text have varied considerably.
95. In the 1993 Constitution, the general rule of equitable treatment for nationals and foreigners has greater value, while the rule establishing a special regime within 50 kilometers near the border, based on national security, has been reduced to a wholly exceptional nature with a much more flexible and relaxed applicability. This was also supported by the consecration of the values of freedom and economic openness in other provisions.

D. Teleological method

96. Using the teleological criteria, a connection must be found between the meaning of the rule with the fulfillment of its purpose, the *telos* or ultimate purpose sought by the rule. Accordingly, preference is given to the more consistent and effective interpretation or meaning for achieving the identified objective.³⁷
97. This purpose can be understood as the *ratio legis* or rationale behind the particular rule. Its identification requires resorting to the remaining interpretative criteria. The pursued purpose or objective may be expressed in the preamble or introduction of such rule, thus a literal interpretation will suffice for its interpretation.
98. Additionally, it may be necessary to carry out the task of deducing the system to which the analyzed rule belongs as a whole, in order to find its general objective. In that respect, the specific rule must also respond to the same logic and the same objective.³⁸

³⁷ To that effect, within national doctrine, RUBIO CORREA expresses: "According to the teleological criteria, the interpreter assumes that the interpretation must be conducted to obtain a predetermined objective, if possible, from applying the legal provision." RUBIO CORREA, Marcial. "El sistema jurídico. Introducción al Derecho". 10th. Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 235. **(BULLARD 008)**

³⁸ RUBIO CORREA has stated that "According to the ratio legis method, the provision's «what does it mean» is obtained by unraveling its intrinsic rationale, which may be extracted from its own." RUBIO CORREA, Marcial.

99. Another criterion for finding the purpose the rule must respond to is searching for the will of the legislator or the historical spirit of the rule over time.
100. In Article 71 of the Constitution, inferring the meaning of the system and analyzing the historical will of the legislator will provide insight on the purpose of said rule. Specifically, I will focus on paragraph two of the article.
101. As previously mentioned, absolute restrictions on property may only be based on public necessity or national security. As such, the exception regime established by paragraph two can only be based on one of such fundamental interests of the State.
102. The legislator's historical will reinforces that position. Pursuant to that concluded in the preceding section, since its creation in the original version of the 1920 Constitution, the paragraph two of Article 71 aims at protecting the integrity of the State under external threats.
103. Consequently, what is the purpose of the second sentence of paragraph two of Article 71? It relates to the purpose of all economic regimes: promoting private initiative.
104. To the extent that the first sentence is an exception to the general regime of equality before the law and to the property regime, the second sentence aims at restricting the scope of said exception to the bare minimum.
105. As such, it seeks to maximize guarantees for private investment by establishing a flexible regime that does not obstruct lifting the ban of the exceptional regime within the 50 km. Accordingly, an Executive supreme decree as an authorization mechanism is the manner in which to impulse at a maximum protection to private initiative as an engine of economy.

"El sistema jurídico. Introducción al Derecho". 10th. Edition. Lima: Fondo Editorial de la PUCP, 2009; p. 240. (BULLARD 008)

106. Bearing this in mind, it is possible to understand the scope of the concept of “public necessity” included in the second sentence. The authoritative decree must declare public necessity in accordance to law. What does this mean?
107. Public necessity is an undetermined legal concept or open regulatory clause, because its content shall be limited and will depend on the interpretation criteria for each particular case. In general terms, it denotes a great interest from the entire State.
108. In the case of Article 71, in the face of the concept of public necessity the exception is not applied (based on reasons of external defense) to the general property regime. This seeks to reduce the exceptional regime to the bare minimum so as not to affect private initiative. Public necessity was included in Article 71 to allow foreigners’ investments in the border area. Public necessity of Article 71 is the State’s major interest: promoting foreign investment.³⁹
109. Consequently, in Article 71 public necessity and promoting private investment become synonymous. The property regime and the promotion of private investment (national and foreign) are fundamental pillars of the economic regime of the Constitution. As a result, public necessity is actually presumed in the case of investments. Public necessity is included in Article 71 precisely for investments in the border area.
110. For this reason, the authorization is really a form of verification, in the specific case that there is no danger to external defense. A high potential of external threat would be the only premise by which the declaration of public necessity could be excluded. This is the only interpretation that allows reducing the exception of the constitutional regime protecting investments to its bare minimum.

³⁹ It should be noted that the concept of “public necessity” is also used in the context of the regulation applicable to expropriations. In this case, the interpretation of the term must be restrictive, given that under the Peruvian constitutional scheme, expropriation is an *ultima ratio* recourse. This is in keeping with the logic of the economic regime consecrated in the Constitution under which property is unalienable, because it seeks to incentivize private investment and, consequently, economic development.

111. As I will analyze further below in this report, this interpretation is also in keeping with the legal and regulatory regime of the rule under analysis.

112. Therefore, the purpose of the authoritative regime is to include the foreigner in the general property regime, in relation to the acquisition the regime authorizes in the border zone, because its non-existence completely deprives substance from the right for the foreigner. This explains why, systematically and continuously, the reason of public interest on which the authorizations have been based has been to promote and protect investments that allow the exploitation of natural resources located near the border. It is precisely the creation of investment incentives and the use and the enjoyment of resources that property creates.

E. Conclusions on the interpretation of Article 71

113. The joint implementation of the different methods of regulatory interpretation has drawn certain conclusions with respect to the content and limits of the Constitution's Article 71, which can be summed up in the following points:

- a. Article 71 establishes, as a general rule, equal treatment between foreigners and nationals, in addition to respect for the general property regime. This rule is inviolable and must be privileged to encourage investment and private free initiative.
- b. Paragraph two of the article sets forth an exception whose purpose is national security, strictly understood as an external defense. The property of foreigners is limited close to the border to avoid external threats to the territory's integrity.
- c. Nonetheless, to prevent such limit from being an excessive obstacle to investment and private initiative, the Administration can authorize the acquisition of property inside that territory with a declaration of public necessity contained within a supreme decree.

- d. In this sense, the public necessity of Article 71 in actuality is synonymous with private investment that serves to place the foreigner within the same regime of protection that is applicable to nationals. In this manner, the exceptional assumptions under which property can be deprived under the general regime, also become the same for the case of foreigners that have an authoritative supreme decree. The public necessity of private investment is presumed and its existence can only be excluded for reasons of external defense.
- e. In light of this, the existence of public necessity can only be questioned or rejected if there exist a risk to the territorial integrity due to an external threat. This interpretation of the concept of public necessity is the only one that carries substance useful to the second sentence of Article 71, paragraph two.

V. THE STATE'S REVOKING POWER

114. Given that the Constitution seeks to encourage investment, our legal framework protects legal stability and reduces the State's revoking power. This power is neither discretionary nor much less arbitrary. On the contrary, the revoking power is exceptional and must comply with a legally established procedure, as we will observe below.

115. Our legislation protects investments through various institutions. It is clear that property rights, already extensively addressed in the initial part of this Report, are the most relevant source of protection; notwithstanding, legal security and the prohibition of arbitrariness also fulfill a fundamental role. In effect, an investment may be affected not only by a physical expropriation but also by an unjustified change in the conditions under which a private party decided to invest in a relevant market.

116. In addition to the provisions contained in our Constitution, Legislative Decree 757—the Framework Law for the growth of Private Investment—and Law 27444—

the Law on General Administrative Procedure—set forth principles and regulations aimed at protecting investments.

117. On the one hand, Legislative Decree 757, among others: guarantees private property with no other limitations other than those contained in the Constitution;⁴⁰ it declares private investment, both national and foreign, in productive activities conducted or to be conducted in the border zone of the country to be of national necessity;⁴¹ and, it enables investors to enter into agreements of legal stability.⁴²
118. On the other, Law 27444, upon developing Title IV of Legislative Decree 757 (Legal Security of Investments in Administrative Matters), sets forth guidelines for protecting the rights and interests of the administration's subjects and guarantees that the Public Administration's acts will respect the legal and constitutional framework.⁴³
119. Along these lines, Law 27444 consecrates the principles of Legality and Reasonability according to which ***“the administrative authorities must act respecting the Constitution, the law and the legal system, within the powers granted to them and in accordance with the purposes for which they were***

⁴⁰ Article 8. The State guarantees private property with no other limits other than those set forth in the Political Constitution.

In accordance with Article 131 of the Political Constitution, that recognizes entrepreneurial freedom, and in accordance with the provisions of this Chapter, the State shall not expropriate companies nor shares or participations therein, except in the cases of national interest duly founded by Law of the Congress of the Republic. **(BULLARD 004)**.

⁴¹ Article 13. Pursuant to that set forth in the final paragraph of Article 126 of the Political Constitution the private investment, national and foreign, in productive activities conducted or to be conducted in the border areas of the country is hereby declared as a national necessity. Consequently, individuals and legal entities may acquire concessions and rights over mines, lands, woods, water, fuel or energy sources and other resources, necessary for the development of their productive activities within the fifty kilometers from the border of the country border, with prior authorization granted by way of a Supreme Resolution endorsed by the Minister that holds the office of President of the Council of Ministers and the Minister of the Corresponding Sector. Such Supreme Resolution may establish the conditions to which the acquisition or exploitation is subject.

The competent sectorial authorities shall grant the concession and other forms of authorization for the exploitation of natural resources located within the fifty kilometers from the country's border in favor of individuals or legal entities that request it, subject to compliance with the applicable legal provisions and prior verification that the supreme resolution referred to in the preceding paragraph has been issued. **(BULLARD 004)**

⁴² Title V of Legislative Decree 757. **(BULLARD 004)**

⁴³ Article III. Purpose

The purpose of the present Law is to establish the applicable legal regime in order for the Public Administration to serve the protection of the general interests, guaranteeing the rights and interests of the administration's subjects and in compliance with the constitutional and legal system in general.

granted”⁴⁴ and “the decisions of the administrative authority, when (...) they set forth restrictions on the administration’s subjects, shall adapt to the limits of the granted power and maintain due proportion between the means deployed and the public purposes it must protect (...)”⁴⁵.

120. Likewise, Law 27444 prohibits the amendment or substitution of the rights or interests conferred upon the administration’s subjects, for reasons of opportunity, merit or convenience; and it sets forth that the impact on such prerogatives shall be legal only under certain exceptional scenarios, provided that a procedure that guarantees the right to defense of the administration’s subjects, and which compensates the economic damages produced, is followed. In this respect, Articles 203 and 205 of the law set forth the following:

“Article 203. Revocation

203.1 Declarative administrative acts or acts that constitute rights or legitimate interests cannot be revoked, amended or replaced ex officio for reasons of opportunity, merit or convenience.

203.2 Exceptionally, the revocation of administrative acts is applicable, with future effects, in any of the following cases:

203.2.1 When the revocation power has been expressly set forth by a norm with legal status and provided that the requirements set forth in such legal norm are met.

203.2.2 When the conditions legally required for the issuance of the administrative act, whose permanence is indispensable for the existence of the created legal relationship, cease to exist.

203.2.3 When, upon assessing subsequent criteria elements, the recipients of the act are legally favored, provided that no third parties are injured.

⁴⁴ Article IV. Principles of the administrative procedure

(...)

Principle of legality. The administrative authorities must act respecting the Constitution, the law and the legal system, within the powers granted to them and in accordance with the purposes for which they were granted. (BULLARD 005)

⁴⁵ Article IV. Principles of the administrative procedure

(...)

1.4. Principle of reasonability. The decisions of the administrative authority, when they create obligations, qualify breaches, impose sanctions, or set forth restrictions on the administration’s subjects, shall adapt to the limits of the granted attribution and maintain due proportion between the means deployed and the public purposes it must protect, in order for them to respond to what is strictly necessary for the satisfaction of their purpose. (BULLARD 005)

203.3 The revocation set forth in this numeral may only be declared by the highest authority of the competent entity, after the possible affected parties had the opportunity to present their allegations and evidence in their favor.

“Article 205. Indemnification for revocation

205.1 When the revocation results in economic damages for the administration’s subject, the resolution that decides the revocation shall set forth what is convenient in order to proceed with the corresponding indemnification in the administrative proceedings.

205.2 The acts that have grounds for their revocation or annulment ex officio, but whose effects have expired or lapsed, shall be the object of indemnification in the judicial area [courts], and the indemnification shall be declared when the revocation or annulment is administratively final.”

[Emphasis added]

121. As shown above, the rule is that the authorizing titles conferred to the administration’s subjects cannot be annulled (revoked) by a simple change in criteria by the authorities, or by any change in circumstances. In privilege of legal security, Law 27444 demands that the Administration proves that the following is found in the legal assumptions: (i) that there is a norm with legal status that expressly authorizes the revocation and provided that the requirements set forth in such norm are met; (ii) that the conditions legally required for granting the title and whose permanence is indispensable for the existence of the created legal relationship have ceased to exist; or, (iii) when assessing subsequent criteria elements, the recipients of the act are legally favored, provided that no third parties are injured.

122. Thus, the award of an indemnification (set forth in Article 205.1) is not an open letter for the Administration to carry out any type of revocation in exchange for granting compensation. The Administration can only carry out those [types of revocations] that the Law expressly authorizes.

123. The logic behind Articles 203 and 205 of Law 27444 is to reduce the Public Administration's discretion, to the extent that the figure of the revocation limits the property right of the administration's subjects and acts as a disincentive to private investment.

124. Based on the above we can draw the following conclusions:

- a) The Peruvian legal framework curtails the authorities' discretion, especially when through its decisions the rights or interests that were previously granted to the administration's subjects are affected. The Administration must act in adherence to the principles of legality and reasonability consecrated in the Preliminary Title of Law.
- b) While the revocation of previously conferred prerogatives is allowed, such limitation to property rights must respect those grounds legally set forth in Article 203.2 of Law 27444 and must not be in response to the authorities' reasons of opportunity, merit or convenience.
- c) In those cases in which there are grounds for a revocation, the Administration must guarantee the revoked private party's right to defense and grant compensation for economic damages caused.

VI. SUPREME DECREE 083-2007-EM

125. To assess the legality of S.D. 032-2011-EM, it is necessary to analyze S.D. 083-2007-EM. If S.D. 083-2007-EM has the nature of an authoritative decree, the previously described legal framework for revocations must be applied.

A. Procedure for the enactment of the authoritative supreme decree

126. We need to begin by looking at that indicated in Article 71 of the Constitution, which we have already analyzed. Subsequently, we need to refer to Article 13 of Legislative Decree 757 that establishes at a legal level the regulation of the acquisition of properties and rights within the 50-kilometer area from the border for foreigners.

127. Such regulation sets forth the following:

***“Article 13. Pursuant to that set forth in the final paragraph of Article 126 of the Political Constitution, the private investment, national and foreign, in productive activities conducted or to be conducted in the border areas of the country is hereby declared as a national necessity. Consequently, individuals and legal entities may acquire concessions and rights over mines, lands, woods, water, fuel or energy sources and other resources, necessary for the development of their productive activities within the fifty kilometers from the country’s border, with prior authorization granted by way of a Supreme Resolution endorsed by the Minister that holds the office of President of the Council of Ministers and the Minister of the Corresponding Sector. Such Supreme Resolution may establish the conditions to which the acquisition or exploitation is subject.*”**

The competent sectorial authorities shall grant the concessions and other forms of authorization for the exploitation of natural resources located within the fifty kilometers from the country’s border in favor of individuals or legal entities that request it, subject to compliance with the applicable legal provisions and prior verification that the supreme resolution referred to in the preceding paragraph has been issued.”

[Emphasis added]

128. The regulation was created within the framework of the 1979 Constitution; therefore reference to its terms must be understood as referring to the terms used by the 1993 Constitution.

129. Bearing this in mind, we underscore the fact that the legal regulation does not delve much further into that established by Article 71 of the Constitution. It declares national and foreign investment in border territory as a national necessity (understood as a “public necessity” based on the 1993 Constitution) and repeats the requirement of an authorization by the Executive for the foreign investor to exercise property rights. Also, it does not establish further details for the issuance procedure of such supreme decree.
130. Nevertheless, the declaration of public necessity of an investment made by Legislative Decree 757 creates a presumption in favor of the foreign investor. Namely, the investor does not need to provide further elements of proof in that respect given the declaration contained in the regulation.
131. As previously mentioned, this is coherent with the purpose of including the public necessity in Article 71. Private investment is the highest interest the State seeks to guarantee, restricting the exceptional regime for external defense to a bare minimum. Consequently, private investment equates to the public necessity of Article 71.
132. The sole criterion to be taken into consideration to refuse the existence of public necessity is the existence of a risk to external defense. This is confirmed by the regulatory procedure of S.D. 162-92-EF for granting the authoritative decree. There is a regulatory declaration of public necessity of private investment on the border.
133. So true is the interpretation of the presumption of public necessity, and the external defense as the sole reason to refuse it, that the petition form to request the authoritative decree (Annex III of S.D. 162-92-EF)⁴⁶ does not demand further requirements other than the name of the investor, the description of the investments and the location of the rights to be acquired.

⁴⁶ (BULLARD 023)

134. No other type of evidence or documentation is required with respect to factors other than the investment itself—clearly because the public necessity of the investment is presumed.
135. The same Statement of Legal Reasons of S.D. 083-2007-EM,⁴⁷ upon justifying the declaration of public necessity for the acquisition of BEAR CREEK’s rights in the border, limited itself to describing the investment project and its positive effects. The Administration corroborated that the acquisition of the rights in the border area was aimed at private investment as an engine of development and economic growth in the border area, which is what Article 71, paragraph two seeks to guarantee.
136. Nowhere does the Statement of Legal Reasons incorporate factors linked to the social protest in the considerations of the public necessity. The acts of the Administration itself demonstrate that the only aspects to be considered are the promotion of private investment and external defense.
137. Consequently, Article 32 of the referred to regulation incorporates into the procedure the requirement for the Joint Command of the Armed Forces to provide a favorable opinion, confirmed pursuant to the following:

“Article 32. Pursuant to that provided in Article 126 of the 1979 Constitution and Article 13 of Legislative Decree 757, in order for foreign investors to exercise the property or possession rights over mines, lands, forests, water, fuel or energy sources, whether directly or indirectly, in the areas included within the fifty kilometers of the country’s borders, the prior corresponding authorization must be obtained, which shall be granted by a supreme resolution endorsed by the Minister that holds the office of President of the Council of Ministers and the Minister of the corresponding Sector. Such authorization must have the favorable opinion of the Joint Command of the Armed Forces, for the considerations established in the following paragraphs.”

⁴⁷ (BULLARD 002)

In the Supreme Resolution referred to in the preceding paragraph, the conditions or limitations for exercising the corresponding property or possession rights shall be established, which may only be restricted for reasons of national security.

Reasons of national security are understood as those required to guarantee the independence, sovereignty and territorial integrity of the Republic, in addition to domestic order, pursuant to that provided in Article 275 of the 1979 Constitution.”

[Emphasis added]

138. Thus, the only valid reason for refusing the public necessity is a high risk to external defense, and, as such, the opinion of the Joint Command of the Armed Forces is necessary.⁴⁸
139. Nevertheless, we need to underscore on this point that the referenced Article 32 sets forth a definition at a regulatory level of “*national security*” as “*independence, sovereignty and territorial integrity*”, “*in addition to domestic order, pursuant to that provided in Article 275 of the 1979 Constitution.*” This could lead to confusion with respect to the purpose of Article 71 of the Constitution. But this is not the case due to the reasons indicated below.
140. To the extent this rule is a regulation, its provisions must conform to the constitutional regime. Not the other way around. If we were to understand that one can assess domestic order succinctly in order to limit a foreigner’s right to hold property within the border zone, the rule would be in contradiction with the Constitution that regulates, as we have seen, national security.

⁴⁸ The Joint Command of the Armed Forces is a dependent organ of the Ministry of Defense, regulated by Legislative Decree 1136, responsible for planning, preparing, coordinating and conducting joint military operations and actions of the Armed Forces, according to the objectives of the National Security and Defense Policy, in order to guarantee the independence, sovereignty and territorial integrity of the Republic. In this sense, the opinion with respect to the authorization for the acquisition of rights within the border area is framed within the competencies the law provides, which are to guarantee the integrity of the territory and national security (against external threats). The Joint Command simply inspects and corroborates that the foreigner’s investment does not represent an external threat.

141. Following this line of thought, in order to prevent the interpreter from considering that the rule is unconstitutional, it is the interpreter's duty to identify an interpretation that is consistent with the Constitution.
142. In this sense, the domestic order mentioned in Article 32 of S.D. 162-92-EF must be understood as referring to those situations in which an internal conflict may debilitate national integrity against an external threat. For example, should an internal armed conflict or a civil war debilitate state control over the border, a foreign country could present itself as a threat against external defense.
143. Consequently, the reference to domestic order can only be interpreted as that which is relevant for external defense. For this reason the rule alludes to situations of state of siege or state of emergency when referring to "*domestic order, pursuant to that provided in Article 275 of the 1979 Constitution*". Article 275 of the 1979 Constitution sets forth the following:

"Article 275. The Armed Forces are constituted of the Army, the Navy and the Air Force.

Their primary objective is to guarantee the independence, sovereignty and territorial integrity of the Republic. They assume the control of domestic order in emergency situations, pursuant to Article 231."

[Emphasis added]

144. The 1993 Constitution contains a similar rule in Article 165, setting forth the following:

"Article 165. The Armed Forces are constituted of the Army, the Navy and the Air Force. Their primary objective is to guarantee the independence, sovereignty and territorial integrity of the Republic. They assume the control of domestic order pursuant to Article 137 of the Constitution."

145. According to this, domestic order must be understood as such order involved in emergency situations such as a state of emergency or state of siege.⁴⁹

146. In the case of the border, such restriction only makes sense if the emergency situation represents an external threat. Namely, national security only entails domestic order in emergency situations where the internal conflict could debilitate the external defense on the borders.

(i) What is the Administration's degree of discretion?

147. The fact that the regulations provide that public necessity is the sole criterion for approving the Authoritative Decree would seem to imply a certain degree of discretion in the Administration's decision. However, this is not true.

148. The reason for this is that the decision of approving the authoritative supreme decree is regulated by the Constitution and law: the Administration must conform to public necessity limited by external defense. While these concepts entail open regulatory clauses (or undetermined legal concepts) whose content is not entirely defined in legislation, this does not imply the full discretion of the Administration.

149. Conceptually, the discretionary decision power counters a regulated power of the Administration. With respect to the first, the state body has a series of possibilities

⁴⁹ This last concept is defined in our constitution in Article 137, which provides the following:

"Article 137. The President of the Republic, with the agreement of the Council of Ministers, may decree, for a determined period of time, in the entire national territory, or in part of it, and informing Congress or the Permanent Commission, the states of emergency provided for in this article:

1. State of emergency, in the case of a disturbance of the peace or of domestic order, a catastrophe or grave circumstances that affect the life of the Nation. In this case, the exercise of constitutional rights relating to personal freedom and security, the inviolability of domicile, and the freedom of assembly and of transit provided for in paragraphs 9, 11 and 12 of Article 2, and in paragraph 24, letter f of the same article, may be restricted or suspended. Under no circumstance may anyone be exiled.

The term of the state of emergency may not exceed sixty days. Its extension requires a new decree. In a state of emergency, the Armed Forces assume the control of domestic order if ordered by the President of the Republic.

2. State of siege, in the event of an invasion, external war, civil war or the imminent danger that these may arise, whereby the exercise of fundamental rights shall not be restricted or suspended. The corresponding term may not exceed forty-five days. Upon decreeing the state of siege, Congress shall assemble ipso jure. The extension requires approval from Congress."

within which the law permits it to opt for any of them.⁵⁰ The Jurisdictional Power cannot submit to its criteria whether or not the decision was appropriate, to the extent that the law does not establish any rule to follow. Consequently, regulated powers are subject to the control of legality, while discretionary powers are only subject to the prohibition of arbitrariness.⁵¹

150. A clear example of a discretionary power is when a pardon is granted by the President of the Republic according to that established by Article 118 of the Constitution.⁵²

151. The President cannot grant a pardon to any person according to his or her will. There is no rule to follow in order to make such decision. As such, there is no possibility of exercising a control or review over the same.

⁵⁰ On this particular subject, national doctrine sets out on such point: *“An administrative act is discretionary when the Administration, upon making it effective, can opt for different solutions, all of which are formally valid. Its application resolves those assumptions in which the Law cannot, in general and anticipated terms, define and regulate all the conditions for exercising a power or all its consequences, because both are unforeseeable or variable according to the circumstances. In these cases, the Law itself ascribes to the Administration the possibility of valuating, according to such circumstances, such conditions and effects, whereby it can, consequently, act in one sense or the other.*

The discretionary power does not imply, however, that the Administration shall have an unconditioned freedom to act, insofar as the scope of discretion that the law provides does not affect as a whole all those elements of the administrative act, but rather only some of them, where the remaining are regulated and excluded from the free administrative assessment.” EFFIO ORDOÑEZ, Augusto and Alexander PAJUELO

ORBEGOZO. “Principios Rectores de la Contratación Pública”. Lima: OSCE; **(BULLARD 024)** p. 7. In the same vein, GARCÍA DE ENTERRÍA states the following: *“[...] the exercise of the Administration’s discretionary powers bears a substantially different element: the inclusion of a subjective estimation of the Administration itself in the applicatory process of the Law with which the legal framework that conditions the exercise of the power or its particular content is provided for.”* GARCÍA DE ENTERRÍA, Eduardo and Tomás-Ramón FERNÁNDEZ. “Curso de derecho administrativo”. Volume I. Lima, Bogotá: Palestra – Temis, 2011; pages 491-492. **(BULLARD 025)**

⁵¹ In this regard, the Peruvian Constitutional Court states that:

“8. State activity is governed by the principle of legality, which admits the existence of regulated acts and unregulated or discretionary acts.

Concerning unregulated or discretionary acts, the administrative entities enjoy freedom to decide on a specific matter given that the law, in its broadest sense, does not determine what they must do or, by default, how they must do it.

Strictly speaking, it entails a juridical tool to the effect that the administrative entity may carry out a procedure concordant with the necessities of each moment.”

Decision of the Peruvian Constitutional Court dated July 5, 2004, issued in Case No. 0090-2004-AA/TC. **(BULLARD 026)**

⁵² “Article 118. The [power to perform] the following rests with the President of the Republic:

[...]

21. Grant pardons and commute sentences. Exercise the right of pardon in benefit of accused persons in those cases when the pre-trial stage of the proceedings has exceeded twice that of its term, plus the extension thereof.

[...]

152. Conversely, a regulated power expressly establishes the criteria to be following by the Administration to make a decision. In this sense, the entity must verify that the concrete deed fits into the factual assumption provided for in the regulation and must issue a decision that the regulation itself requires of it. In this sense, the entire administrative action is found provided for in the law.⁵³
153. For example, a regulated power entails the registry qualification for registering a title in the public records. In that respect, the registrar must consider the rules established in Article 32 of the Regulations of Public Records, approved by Resolution No. 195-2001-SUNARP/SN.⁵⁴
154. The registrar must simply adhere to that set out by the regulation applicable to him or her. The registrar has no further room for discretion.
155. In the case of an undetermined legal concept or an open regulatory clause, the factual assumption and the juridical consequence are established in the

⁵³ National doctrine highlights that: “Regulated powers are those in which the law exhaustively determines the conditions for its exercise and regulates the consequences or effects it produces. In such cases, the Administration is limited to applying the law in its own terms.” EFFIO ORDÓÑEZ, Augusto and Alexander PAJUELO ORBEGOZO. “Principios Rectores de la Contratación Pública”. Lima: OSCE; p. 6. **(BULLARD 024)**. Similarly, GARCÍA ENTERRÍA indicates in that respect: “There is an applicatory process of the Law that leaves no loophole for subjective judgment, save for the confirmation or verification of the assumption itself to contrast it with the ‘tipo legal’ or description of the legal norm. The decision in which the exercise of power consists is mandatory in the presence of such assumption and its content cannot be freely configured by the Administration, but rather has to be limited to what the Law itself has provided on this content in a precise and complete manner.” GARCÍA DE ENTERRÍA, Eduardo and Tomás-Ramón FERNÁNDEZ. “Curso de derecho administrativo”. Volume I. Lima, Bogotá: Palestra – Temis, 2011, p. 491 **(BULLARD 025)**.

⁵⁴ “Article 32. Scope of qualifications

The registrar shall qualify the legality of the titles, for which it must:

Ensure that the titles match the inscription records of the corresponding registration and complementarily with the registry background, notwithstanding the legitimation of such background;

Verify the validity and registrable nature of the act or contract that, contained in the title, constitutes the direct and immediate cause of the registration;

Establish that the act or right complies with the legal provisions on the matter and meets the requirements set forth in such provisions;

Verify the competence of the administrative official or notary that authorizes or certifies the title;

Verify the capacity of the grantors arising from the title or its registry background.

In the cases of judicial resolutions that order a registration, the qualification shall be carried out with respect to whether the registration matches the Register background, the formality it must comply with, and to the jurisdiction of the corresponding judicial authority, save in those cases of extendable competence, and the registrable nature of the respective act or right. Additionally, the Registrar can require the fulfillment of the registration of prior acts that are indispensable for the registration of the judicial resolution.”

legislation.⁵⁵ In this case, the Administration must verify the existence of public necessity within the meaning of Article 71 of Constitution and must later enact the Authoritative Decree. There is no room for discretion, the instructions are indeed set forth in the legal norms; as such, a control of the legality of the administrative decision can be conducted.

156. With regard to the powers regulated by undetermined legal concepts, the Peruvian Constitutional Court has stated that the actions of the administration must be subject to the reasonable appreciation of a reality that conforms to the regulatory concept. Otherwise, it must be subject to control. In this sense, the Court sets out the following:

“10. Doctrine accepts the existence of concepts with variable content and extension; namely, it recognizes the legal presence of determinable concepts through legal reasoning that, nonetheless, vary in content and extension according to the context in which they are found or in which they shall be used.

It is evident that the legal concepts purport [to be] the intellectual representation of reality; namely, they are mental entities referring to valuable aspects or situations and that impress legal quality on certain contents of social life.

The legal concepts possess a content, because the latter implies the set of essential and particular notes or signs that such intellectual representation confines, and an extension, that determines the amount of objects or situations adhered to the concept.

In the same vein, the law concedes a margin of appreciation to an authority to determine the content and extension of the concept applicable to a particular and specific situation, provided that such

⁵⁵ GARCÍA DE ENTERRÍA indicates in that respect that: “If the defining feature of every undetermined legal concept, in any sector of the [legal] order, is that its application only allows a single fair solution, the exercise of a discretionary power permits, conversely, a plurality of fair solutions or, in others, terms, opting between alternatives that are equally fair from the perspective of Law.” GARCÍA DE ENTERRÍA, Eduardo and Tomás-Ramón FERNÁNDEZ. “Curso de derecho administrativo”. Volume I. Lima, Bogotá: Palestra – Temis, 2011; page 497. (BULLARD 024)

decision is not manifestly unreasonable or disproportionate with the circumstances in which it shall be used.⁵⁶

[Emphasis added]

157. While the Constitutional Court is in agreement in that the Administration is subject to the subsumption of the situation in the undetermined regulatory concept, the Court has decided to name this power as “*intermediate discretion*.”⁵⁷ In any event, and regardless of the name, the administrative decision must be confined to that set forth by the legal norm.
158. Therefore, the Administration does not have discretionary power to authorize the property of foreigners within the 50 kilometers from the border. The Administration must verify the existence of public necessity with respect to the meaning of Article 71 of the Constitution and of Article 13 of Legislative Decree 757, taking heed of, also, the purpose of such legal norms, which is to safeguard the external defense without harming private investment.
159. In this sense, if public necessity is already presumed according to that established by Legislative Decree 757, the only objection the Administration could present is the existence of some form of danger to the State’s external defense.

⁵⁶ Decision of the Peruvian Constitutional Court dated July 5, 2004, issued in case No. 0090-2004-AA/TC. (BULLARD 026)

⁵⁷ Decision of the Peruvian Constitutional Court dated July 5, 2004, issued in case No. 0090-2004-AA/TC. (BULLARD 026)

“9. Discretion has its justification in the rule of law itself, given that it concerns the elements of expediency, convenience, necessity or use; as well as the technical valuations that concur in large part from the state administration’s actions.

Pursuant to the mandates of the Constitution or law, discretion is subject to the degrees of criteria granted, which can be greater, intermediate or minor.

The greater discretion is that in which the margin of criteria to decide is not delimited or restricted by any legal concept. Therefore, the administrative entity that has unregulated competencies finds itself with the freedom to fully choose.

Such discretion, in essence, is subject to political control and, residually, jurisdictional control as to the corroboration of its institutional or legal existence, its spatial and material extension, the permitted period of time for exercising it, the form of legal manifestation and compliance with the procedural formalities.

The intermediate discretion is that in which the margin of criteria is conditioned to its logic consistency and coherence with an undetermined legal concept in content and extension.

The minor discretion is that in which the margin of criteria is constrained to the selection of some of the variables predetermined by law.” [Emphasis added.]

160. It is also necessary to highlight that, in any case, the revocation regime is applicable to any act by the Administration, whether corresponding to a discretionary power or to a regulated power. It is applied to all acts by the administration of a particular nature.
161. Specifically, the prohibition to revoke based on reasons of merit, opportunity or convenience, makes no difference nor restricts in any way the powers on which it is applied.
162. This is also coherent with the principle of legal security that the revocation regime intends to protect. The impact on the legitimate expectation of individuals occurs both when a discretionary act is revoked and when a regulated act is revoked. In both cases the State's arbitrariness is prohibited.

B. Legal nature of the Authoritative Decree

163. Once the characteristics of the administrative procedure and the Administration's powers to approve the Authoritative Decree referred to in Article 71 of the Constitution have been examined, it is necessary to clarify the nature of such Authoritative Decree. Depending on its legal nature, the legal effects and the applicable legal regime will differ.
164. For such purposes, it is convenient to examine DS 083-2007-EM's text, which authorized BEAR CREEK to acquire mining rights and property within the area of 50 kilometers from the border. Such instrument sets forth the following:

“Article 1. Purpose

Declare the private investment in mining activities is a public necessity, for BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ to acquire and possess concessions and rights over mines and supplementary resources for the better development of its productive activities, within the fifty (50) kilometers from the

southern border of the country, in areas where the mining rights detailed in Article 2 of this supreme decree are located.

Article 2. Authorization to acquire mining rights
Authorize BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ to acquire seven (7) mining rights, located in the department of Puno, in the zone of the border with Bolivia, detailed as follows: [...]⁵⁸

[Emphasis added]

165. The highlighted provisions show that the Authorization Decree has generated a right in favor of a particular company: BEAR CREEK. Namely, it is a specific and concrete legal instrument, enabling BEAR CREEK to acquire mining rights in the zone of the border with Bolivia pursuant to Article 13 of Legislative Decree 757 and Article 71 of the Constitution.
166. As indicated, this authorization integrates itself as part of the property right so that the subsequently acquired property is an authentic property, with all the attributes [property] provides. It is not, therefore, a second class property. The authorization act is, therefore, a specific act with particular and specifically defined effects: it integrates the property as a component thereof.
167. The foregoing denies the possibility of affording S.D. 083-2007-EM a regulatory nature. For a supreme decree to be considered as a regulatory legal norm, it must be formulated in a general and abstract manner.⁵⁸ Namely, it must be applicable to

⁵⁸ On this point, national doctrine notes the following: “*the regulatory activity translates a materially legislative or normative activity, given that it entails the dictation of legal norms of a general and mandatory nature by the administrative bodies acting within their regulatory competence, translating a legal activity of the Administration that differs from the administrative [activity], whereby the latter is an immediate, practical and concrete activity aimed at satisfying public necessities, framed within the legal system.*” HUAPAYA TAPIA, Ramón. “Administración pública, derecho administrativo y regulación”. Estudios y cuestiones. 2nd Edition. Lima: ARA Editorial, 2013; pages 83-84. (BULLARD 027) Along the same lines, CASSAGNE indicates that: “*From the realistic standpoint, regulations translate the exercise of the legislative activity, whereby they are unilateral acts of the Administration that create general and mandatory legal provisions, and their effects operate in the external scope through the regulation of impersonal and objective situations.*” CASSAGNE, Juan Carlos. “Derecho administrativo”. Volume II. First Edition. Lima: Palestra Editores, 2010; page 130. (BULLARD 028). With respect to the characteristics that make a legal norm, LARENZ states that these must have “*the purpose of having validity not only precisely for a determined case, but rather for all the cases of “that class” within their spatial and time validity scope—its general nature.*” LARENZ, Karl. Metodología de la ciencia del Derecho. Translation by Marcelino Rodríguez Molinero. Second Edition of the fourth final German [edition]. Barcelona: Editorial Ariel, 1980; page 242. (BULLARD 009)

an undetermined group or genre in a hypothetical situation that, when found in reality, produces certain legal effects. The factual assumption of the provision cannot refer to any specific individual. But in this case the supreme decree specifically refers to BEAR CREEK.

168. S.D. 08-2007-EM clearly is not a regulation given that it is not a general and abstract legal norm. It is a legal instrument exclusively applicable to the case of BEAR CREEK and has legal effects exclusively for BEAR CREEK's patrimonial sphere. In general terms, it is a very specific and clear instrument. Therefore, it does not fit within the definition of regulations as a legal norm with general and abstract effects.
169. Denying the legal nature of a regulation has a clear consequence regarding this case: only legal norms may be derogated. The acts of the Administration of a particular nature cannot be derogated. They must be annulled or revoked.⁵⁹
170. Acts of a particular nature that create rights or authorizing titles for private parties can only be left without effect through the figure of a revocation.⁶⁰
171. The apparent "derogation" of S.D. 083-007-EM carried out by way of S.D. 032-2011-EM in reality entails an illegal revocation of the rights acquired by BEAR CREEK, in accordance with the explanation set out hereafter.

VII. SUPREME DECREE 032-2011-EM

A. The effects of S.D. 032-2011-EM

⁵⁹ In this regard, national doctrine also states: "*The regulations may be fully or partially repealed by the Administration at any time, as they are not governed by the principle of stability acknowledged for administrative acts.*" HUAPAYA TAPIA, Ramón. "Administración pública, derecho administrativo y regulación". Estudios y cuestiones. 2nd Edition. Lima: ARA Editorial, 2013; page 85. (BULLARD 027)

⁶⁰ Or, in any case, the annulment, if it had existing defects when it was issued.

172. S.D. 032-2011-EM irregularly disregards the right previously granted to BEAR CREEK through S.D. 083-2007-EM. Consequently, the investments made and the existing expectations on the basis of the conferred authorizing title are affected. In other words, the effect of S.D. 032-2011-EM is to strip BEAR CREEK from its property.

173. In this particular case, S.D. 032-2011-EM, expressly, left without effect the authorizing title previously granted to BEAR CREEK.

174. Consequently, it is impossible for BEAR CREEK to legally use the properties acquired under the authorization granted by way of S.D. 083-2007-EM.

B. Norms and principles violated by S.D. 032-2011-EM

175. Given that S.D. 032-2011-EM revokes the rights conferred by S.D. 083-2007-EM, the legality of the first is subject to the observance of the regulatory framework applicable to the State's revoking power, developed in section VI of this report. As explained in the following paragraphs, S.D. 032-2011-EM is illegal because it violates the grounds and the procedure of revocation set forth in Articles 203 and 205 of Law 27444. Moreover, S.D. 032-2011-EM transgresses the principles of legality and reasonability.

(i) Grounds for revocation

176. To determine whether S.D. 032-2011-EM fits into any of the grounds set forth in Article 203.2 of Law 27444,⁶¹ it is necessary to analyze the reasons that propelled the issuance of said supreme decree.

⁶¹ Exceptionally, the revocation of administrative acts is applicable, with effects for the future, in any of the following cases:

203.2.1 When the revocation power has been expressly set forth by a norm with legal status and provided that the requirements set forth in such norm are met.

203.2.2 When the conditions legally required for the issuance of the administrative act, whose permanence is indispensable for the existence of the created legal relationship, cease to exist.

203.2.3 When, upon assessing subsequent criteria elements, the recipients of the act are legally favored, provided that no third parties are injured.

177. In this specific case, the State has limited itself to claiming a change in circumstances: ***“Circumstances have been made known implying that the legally required conditions for the enactment of the mentioned act no longer exist (...) as such, given the existence of these new circumstances, it is necessary to enact the corresponding act.”*** However, it failed to explain and, least of all, prove: (i) specifically which were these circumstances; or, (ii) to what extent they would affect the declaration of public necessity made through S.D. 083-2007-EM (a condition necessary for the subsistence of the authorization conferred upon under the terms of Article 71 of the Constitution).

178. This lack of justification is sufficient to conclude that the revocation is not framed within any of the exhaustive grounds of Article 203.2 of Law 27444, but rather is grounded on reasons of “opportunity, merit or convenience”. Therefore, a violation of Law 27444 has occurred.

179. Notwithstanding the above, even the allegedly real reasons behind S.D. 032-2011-EM fail to meet the grounds set out in Article 203.2, as the “new circumstances” did not imply the disappearance of the conditions legally required for the issuance of S.D. 083-2007-EM. Nor have these conditions represented a danger to the country’s external defense.

180. Despite the fact that S.D. 032-2011-EM is not clear in this regard, after reviewing its Statement of Legal Reasons one can assume that the “new circumstances” were linked to the dissatisfaction of part of the Aymara population of Puno:

“After the corresponding evaluation, on the merits of the submitted documents, Supreme Decree No. 083-2007-EM was issued. However, during the dialogue process conducted with the representatives of the Aymara population of the department of Puno, circumstances have been made known implying that the

legally required conditions for the enactment of the mentioned act no longer exist.

Given that the State is the entity responsible for ensuring that the granting of the right to sustainably use the natural resources is performed in harmony with the interests of the Nation, the common good, and within the limits and principles set forth in the law and regulations on the matter, it is necessary to derogate Supreme Decree No. 083-2007-EM and, consequently, all the administrative procedures aimed at obtaining the authorizations that BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ initiates before the Ministry of Energy and Mines.⁶²

[Emphasis added]

181. Similar references (referring to social issues) are also present in other supreme decrees issued after S.D. 032-2011-EM, by way of which the acceptance of mining petitions and the development of mining activities in the department of Puno are regulated. Examples of these are Supreme Decrees 033-2011-EM⁶³ and 034-2011-EM.⁶⁴

⁶² (BULLARD 001)

⁶³ Supreme Decree 033-2011-EM, Adaptation of Mining Petitions and Suspension of the Acceptance of Mining Petitions in the department of Puno:

“Whereas, ILO Convention 169 acknowledges and guarantees the right of indigenous and tribal peoples to decide on their own priorities regarding the development process, to the extent the latter affects their lives, beliefs, institutions and spiritual wellbeing and to the lands they occupy or use in any manner, and to control, to the extent possible, their own economic, social and cultural development.

Whereas, notwithstanding the actions adopted by the Ministry of Energy and Mines in the application of the corresponding regulations so that the mining and/or energetic projects are carried out in a transparent manner, without affecting the environment and the social surroundings, the necessity of issuing measures that effectively protect the populations located in the department of Puno and of the country in general has presented itself.” (BULLARD 029)

⁶⁴ Supreme Decree 034-2011-EM, dictates provisions relating to exploration or exploitation mining or oil activities in the department of Puno within the framework of the ILO Convention No. 169 and Law No. 24656 – Law on Peasant Communities:

“That, on the other hand, number 1 of Article 6 of the Convention No. 169 sets forth that the governments shall consult with the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.” (BULLARD 030)

182. However, this social discontent does not invalidate in any way the declaration of public necessity based on which S.D. 083-2007-EM was issued, nor does it place at risk the country's external security.
183. As previously stated, the public necessity of Article 71 is the promotion of foreign private investment whose sole limitation is the risk to external defense. The analysis of other factors, such as social conflicts or environmental considerations, does not enter into the concept's specific content.
184. This has been interpreted as such by the Administration itself, as confirmed by S.D. 083-2007-EM⁶⁵ that encompasses the reasons for authorizing the acquisition of rights on the border by BEAR CREEK. The considerations of the State were exclusively the amounts the company would allocate to the project and its positive effect as an engine for growth in the border area.
185. The Administration highlighted how the investment project would bring benefits with respect to sustainable development, the reduction of poverty, jobs, health, nutrition, education and a strengthening of the institutions. These are the economic effects of private investment and are the same that the Constitution's economic regime desires to promote and that Article 71, paragraph two seeks to guarantee on the border. The social protests are not a factor to be considered.
186. In fact, the social movements or dissatisfaction could have presented itself in any part of the territory and not only in the border area. However, there is no special provision in the entire Peruvian legal system that authorizes the revocation of a concession or stripping someone from their property as a result of the population's social dissatisfaction. By doing so would imply that the social dissatisfaction or protests were grounds for expropriation, which would have no legal support in the Peruvian legal system.

⁶⁵ (BULLARD 002)

187. Additionally, as explained above, the Constitution enshrines the principle of equitable treatment between nationals and foreigners, and Article 71 establishes a limited exception to this general rule. Therefore, a differentiated treatment toward foreigners is not allowed with respect to social conflicts, and these issues must be resolved through legally provided general mechanisms, where appropriate.
188. The reason for this is because it is not consistent with the purpose of Article 71, and the analysis of other factors not set forth in the text would imply an unconstitutional application of the regulation. The wide margin of decision by the administration would be too great a risk for private investment and would render useless the inclusion of public necessity. Under such regime, property would not be property. Instead of guaranteeing the continuation of private investment on the border, it would eliminate an existing incentive to do so.
189. We must recall that such declaration of public necessity was founded on: a) that number V of the Preliminary Title of the Ordered Unique Text of the General Mining Act, approved by Supreme Decree 014-92-EM,⁶⁶ sets forth that the mining industry is of public use and the encouragement of investments in mining activities is of national interest; and, b) Article 13 of Legislative Decree 757, and its regulatory norms, declares private investment, national and foreign, in productive activities conducted or to be conducted in border areas of the country, to be of public necessity.
190. Notwithstanding, the social dissatisfaction to which the statement of legal reasons seems to refer to has not invalidated the mentioned normative provisions: the importance of mining activity and of private investments in border zones; therefore we cannot discern the disappearance of the public necessity that founded the issuance of the authorizing title in favor of BEAR CREEK. In other words, we are not in the second assumption of Article 203.2, which authorizes the revocation

⁶⁶ (BULLARD 031)

when the disappearance of the legally required conditions for the issuance of the authorizing title occurs.

191. Also, even in the denied assumption of the disappearance of the legal provisions contained in the General Mining Act and in Legislative Decree 757, the State would have had to prove that “national security” was being affected, given that, as previously explained, the limitation on the property of foreigners in the border zone—set forth in Article 71 of the Constitution—has the sole purpose of counteracting risks to territorial integrity due to an external threat. What is sought is to prevent foreigners from taking advantage of their property in strategic areas in order to debilitate the country’s sovereignty. In fact, the authoritative supreme decree passes through the prior opinion of the Armed Forces, but not through other sectors or entities that do have competence on matters regarding rights of the communities or populations of the area.
192. In this particular case, the State has not proven to what extent the social dissatisfaction of the people implies that BEAR CREEK’s property in the border area places the external defense of the country at risk.
193. Based on the above, we can conclude that in this case there is a misuse of powers. The State has used its revoking powers for purposes that were not provided for by the law and the Constitution.
194. In this sense, we are facing a violation of the principles of legality and reasonability consecrated in Law 27444, by virtue of which administrative authorities must act within the powers granted to them, and when they impose restrictions they must do so based on the purposes for which such powers were granted.
195. The principle of legality was affected because the authority acted outside of the framework of the powers set forth by Article 203.2 to initiate the revocation procedure (3 exhaustive clauses), and by Article 71 of the Constitution to limit the property rights of foreigners. Also, S.D. 032-2011-EM transgressed the purposes

for which the revocation/limitation power over property rights was granted, whereby in this specific case an impact on public necessity, or the impact on the country's external defense, that propelled the issuance of Supreme Decree 083-2007-EM, was not accredited.

(ii) Revoking procedure

196. On the other hand, we cannot discern that, prior to the revocation carried out by way of S.D. 032-2011-EM, the State granted BEAR CREEK a right to defense in order to substantiate its position with respect to the alleged change in circumstances that would have affected the validity requirements of its authorizing title.

197. Let alone can we discern that the State granted compensation for the economic damages resulting from the revocation, as expressly required by Article 205.1 of Law 27444.

198. Therefore, S.D. 032-2011-EM has breached the provisions of Articles 203 and 205 of Law 27444 and the conditions required by Article 71 itself of the Constitution to limit the property of foreigners in border zones: namely, an impact on the country's external defense.

199. Based on the foregoing we can also conclude that when S.D. 032-2011-EM was issued, a deviation of powers occurred, contravening the principles of legality and reasonability consecrated in the Preliminary Title of Law 27444.

200. In sum, Supreme Decree 032-2011-EM has breached the constitutional protection granted to property rights.

C. S.D. 032-2011-EM does not fit into the figure of derogation

201. As indicated in this report, in our legal system the “derogation” is a juridical figure through which a regulatory norm of general application is invalidated. As such, the “derogation” is applied when the State is exercising legislative or regulatory activities. The “derogation” is not applicable if what is being sought to invalidate are the legal instruments of a particular nature that affect the patrimonial sphere of certain individuals.
202. For example, a “derogation” would be applicable when the Ministry of Education decides to change the Government’s Policies relating to basic education and leaves without effect the grading criteria in primary schools (grades from 0 to 20) in order to move on to more subjective criteria that take into account the various capabilities of the students. Notwithstanding, a “derogation” would not be applicable when the Ministry of Education decides to invalidate a prior authorization granted to an educational institute for the development of its basic education activities.
203. If what is being sought is to invalidate an authorizing title such as the one described in the second example, the legal system provides other legal channels other than the derogation, such as the revocation or annulment.
204. As explained above, the annulment is appropriate when entailing defects existent at the time the authorizing title was issued, provided that such defects aggrieve the public interest. A revocation, conversely, does not entail “initial defects”, but rather a change in circumstances that imply the disappearance of the conditions legally required for the issuance of the authorizing title whose permanence is indispensable.
205. In this case, the apparent derogation of S.D. 083-2007-EM is an illegal act because such device has no general and abstract effects. It is illegal to repeal a very specific and clear act of the Administration.

VIII. **CONCLUSIONS**

My conclusions are those indicated in the introduction of this opinion, to which I remit.

I declare that the referred to conclusions reflect the best of my knowledge, are based on my academic and professional experience, and on the detailed and honest analysis and conviction of the matters presented for my opinion.

I submit this report on May 26, 2015.

(signature)

Alfredo Bullard González
Lima, Peru

Annex I
Curriculum Vitae
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EDUCATION

DOCTOR HONORIS CAUSA UNIVERSIDAD CONTINENTAL
(Peru) (2012)

MASTER IN LAW (LL.M.), YALE SCHOOL OF LAW
(Connecticut - U.S.A.)

- Fulbright Scholarship Recipient (September 1990 – May 1991)

INTRODUCTORY ECONOMIC STUDIES, ECONOMIC INSTITUTE (Boulder
Colorado U.S.A.)

- Fulbright Scholarship Recipient (July 1990 – August 1990)

PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ

- Law degree with Outstanding mention (June 1989)
- Baccalaureate degree with Outstanding mention (March 1989)
- School of Law. Graduated first in his year (March 1984 – August 1988)

CURRENT EMPLOYMENT

BULLARD, FALLA & EZCURRA ABOGADOS
Partner (August 2000 – to date)

PROFESSIONAL EXPERIENCE

NATIONAL INSTITUTE FOR THE DEFENSE OF COMPETITION AND
INTELLECTUAL PROPERTY (INSTITUTO NACIONAL DE DEFENSA DE LA
COMPETENCIA Y DE LA PROTECCIÓN DE LA PROPIEDAD INTELECTUAL –
INDECOPI)

- President of the Competition Chamber of the Tribunal for the Defense of Competition and Intellectual Property (July 1996 - 1998)
- Member of the Antitrust Chamber of the Tribunal for the Defense of Competition and Intellectual Property (July 1996 - August 2001)
- Senior Counselor (June 1995 - June 2000)
- Advisory Council member representing the Ministry of Justice. (January 1993 - August 1994)
- Adjunct member of the Commission for Consumer Protection (March 1993 - May 1994)

ESTUDIO RODRIGO, ELIAS & MEDRANO ABOGADOS
Partner (January 1990 - May 1995)

ESTUDIO JAVIER DE BELAUNDE ABOGADOS
Assistant (March 1986 – March 1989)

ARBITRATION ACTIVITY

Experience in international arbitrations:

- ICC arbitration between a Peruvian party and a North American party
- ICC arbitration between a company from El Salvador and a company from Brazil
- Ad-hoc international arbitration between a party from Japan and a party from El Salvador
- Arbitration under UNCITRAL rules between a Peruvian party and an international body
- Arbitration under UNCITRAL rules between a Peruvian party and an international body
- Arbitration under the rules of the Chamber of Commerce of Lima between a Panamanian party and a Peruvian party
- CIAC Arbitration between a State Agency of El Salvador and a Colombian company.
- CIAC Arbitration between a State Agency of El Salvador and a Colombian company
- Expert witness in Peruvian law in an ICSID arbitration between the Government of Peru and an American company
- Expert witness in an ICSID arbitration between the Government of Peru and an Argentinean company
- Expert witness in an ICSID arbitration between the Government of Peru and a Spanish company
- Expert witness in an ad hoc arbitration between two Swiss companies.

Experience as an arbitrator and litigator in cases administered by:

- International Court of Arbitration of the International Chamber of Commerce in Paris – ICC
- Center for Conciliation and National and International Arbitration of the Chamber of Commerce of Lima
- Arbitration Center of the American Chamber of Commerce - Amcham
- National System of Conciliation and Arbitration of the High Council of State Procurement and Acquisitions – CONSUCODE
- Lima Bar Association
- Arbitration Center of the Pontifica Universidad Católica del Perú
- Arbitration Center of the Guayaquil Chamber of Commerce
- Inter-American Commercial Arbitration Commission (CIAC)
- Center for Conciliation and Arbitration of Panama

President of the Technical Commission of the Ministry of Justice that drafted the Peruvian Arbitration Act currently in force, Legislative Decree No. 1071.

Independent consultant to the Ministry of Economy and Finance for the institutionalization of management of Investor/State disputes, in order to establish coordinated and consistent forms to manage mechanisms adequate to meet demands in the Investor-State area by the Peruvian State, 2005

He has participated as arbitrator in more than 200 arbitrations, including cases before the International Court of Arbitration of the International Chamber of Commerce in Paris (ICC), the Arbitration Center of the Chamber of Commerce of Lima, the Center for Conciliation of the Bar Association, the Arbitration Center of the Pontifica Universidad Católica del Perú, and “ad hoc” arbitrations.

Member of the Latin American Group of Arbitration of the International Chamber of Commerce in Paris (ICC).

Professor of the Course on National and International Commercial Arbitration at the Pontifica Universidad Católica del Perú

Professor of the Specialization Course on Arbitration, Conciliation Center, Pontifica Universidad Católica del Perú

Professor of the Course on Arbitration Practice organized by the Center of Arbitration of the Chamber of Commerce of Lima.

Professor of the Diploma on Arbitration organized by the Universidad del Pacífico and the Peruvian-American Chamber of Commerce.

Professor of the Diploma on Arbitration organized by the University of Lima.

Ordinary Member of the Latin American Arbitration Association (ALARB)

ACADEMIC ACTIVITY

- Professor of Civil Law, Economic Analysis of Law, National and International Arbitration, Competition Law, Contracts, Torts, and Film and Law, Pontificia Universidad Católica del Peru (1988 to date) and University of Lima (1993-1996)
- Professor of Private Law and Economic Analysis of Law, Universidad Peruana de Ciencias Aplicadas (1999 - present)
- Professor of Master of Law in Civil Law, Pontificia Universidad Católica del Perú (1992 - 2003)
- Professor of Graduate Studies in Law of Civil Liability for Environmental Damage, Pontificia Universidad Católica del Perú (2004 - 2006)
- Visiting Professor of Competition Law, Universidad Torcuato di Tella, Buenos Aires, Argentina. (2002 - 2009)
- Visiting Professor of Law and Economics at the School of Economics and Business, El Salvador, 2007 to date
- Visiting Professor of Economic Analysis of Law, University of Puerto Rico, 2005
- Exhibitor in Internship Programs of the Andean Community / BID-INTAL. Training program for professionals of the Andean Community (1999 - present)

OTHER ACTIVITIES

- Consultant to the Inter-American Development Bank (IDB), Support in the Review Process of the Bill on Reform of Secured Transactions, May 2012 to December 2012
- Consultant to the Inter-American Development Bank (IDB), to assess issues in the Draft Law on Secured Transactions, November 2011 to January 2012
- Consultant of PROINVERSION in matters of competition and economic regulation to the PRO PUERTOS Committee during the promotion of the Multipurpose North Terminal at the Callao Port Terminal, February 2011
- Consultant to the Inter-American Development Bank (IDB), to assess issues

in the Draft Law on Secured Transactions, 2010

- Consultant to the Ministry of Finance - General Directorate of International Economic Affairs, Competition and Private Investment (DGAEICIP) for the development of Diagnostics and Improvement Schemes of Quality Control Standards of the Ministry of Economy and Finance, Ministry of Health and Ministry of Labor and Employment Promotion, 2008
- Consultant to the Supervisory Agency for Investment in Transport Infrastructure for Public Use – OSITRAN, for the preparation of the reference document used to draw guidelines for the review of the clauses of the concession contracts and addenda, 2006
- Chairman of the Technical Commission of the Ministry of Justice for review of Arbitration Act No. 26572, 2006
- Consultant of the Andean Community for the drafting of the Bolivian Competition Act within the Harmonization Project of Competition Rules in the Andean region, 2005
- President of the Latin American and Caribbean Law and Economics Association ALACDE, 2004-2005; 2008-2009; 2010
- World Bank consultant on the evaluation of the use of best corporate governance practices in various sectors, such as investment companies, banks, insurance companies and pension management companies, 2003
- Coordinator and member of the Peruvian Delegation of the Latin American Seminar on Constitutional Theory and Policy SELA, organized annually by Yale University, 2001-present
- Member of the Draft Committee of the Reform Project of the Guarantee System on behalf of the Ministry of Economy, January - December 2003
- Consultant of the Andean Community and the European Union for the preparation of the Bolivian Antitrust Project, 2003
- Independent consultant to the government of Ecuador for the preparation of the Competition Act Draft, 2003
- Advisor to the Commission for the Reform of the Civil Code assigned to the Subcommittee on Rights En Rem, chaired by Jorge Avendaño, 1998 - 2002
- External legal advisor of the Committee on the Promotion of Private Investment - COPRI in Competition, Arbitration and Other Alternative Dispute Resolution Methods, September 2001 - September 2002
- Consultant to the Supervisory Agency for Investment in Transport Infrastructure for Public Use - OSITRAN for the development of the Framework Regulation on Access to Transport Infrastructure for Public Use, September 2001 - December 2001
- Board Member of Editora Peru S.A. responsible for the publication of the official

gazette El Peruano, October, 1995-2001

- Board Member of the National Superintendence of Public Registries SUNARP, May 1996 to October 2001
- Consultant to the Special Project on Transport Infrastructure Rehabilitation-PERT of the Ministry of Transport and Communications, to advise the General Directorate of Land Circulation in the identification, design and formulation of policy proposals aimed at the improvement of the National Transport Administration Regulations, October 2001 - December 2001
- Consultant to the Supervisory Agency for Investment in Transport Infrastructure for Public Use - OSITRAN in the study and amendment project of Law 26917 within the framework of the Fund for Technical Support of the Reform Program in the Investment Sector, June 2000
- Consultant in charge of reviewing the System of Costs of Procedures managed by the Center for Conciliation and Arbitration of the SEPS, developed within the framework of the Agreement on Non-refundable Technical Cooperation, November 2000
- Member of the Peruvian delegation in charge of the FTAA negotiations, actively participating in work groups on issues related to consumer protection, competition, dumping and subsidies, January 1997 - May 2000
- Representative of Peru to the Committee of Experts in charge of the negotiation of the New Decision on Free Competition in the Andean Community of Nations, 1999-2000
- Consultant to the Commission on Antitrust and Consumer Affairs of Panama for the drafting of the Regulations of Law 29, in regard to Consumer Protection and Advertising, July 1999 - to date
- Consultant to the Ministry of Planning and Economics of Panama in the drafting of the new Medicines Act (funded by UNDP), December 1998 - January 1999
- Consultant to the National Congress - Technical Assistance Project to Improve Projects in Laws of Land Transport and Transit, financed by the World Bank, March-May 1998
- Legal consultant to the Supervisory Agency for Private Investment in Telecommunications - OSIPTEL, in developing the approach, conceptual framework and guidelines for the reforms to be introduced in the telecommunications legislation on competition, Project PER/94/042, March - July 1998
- Team Leader of the preparation of the Bill which gave rise to Legislative Decree 807, regarding the Law of Powers and Functions of Indecopi, including consumer protection rules, administrative procedures and alternative means of dispute resolution, 1996
- Advisor to the Institute for Liberty and Democracy in the drafting of Legislative

Decree 803 regarding Access to Formal Property, 1996

- Cofopri Advisor in preparing the Draft Regulations of Legislative Decree 803 regarding Access to Formal Property, 1996
- National Consultant in Legal Advice to the National Congress, Project PER / 94/007 “Institutional Development of the Legislative Power”, July - September 1996
- World Bank Consultant reporting to Department III for Latin America and the Caribbean, to design and implement institutional reforms at the National Institute for the Defense of Competition and Protection of Intellectual Property INDECOPI, July 1995 to January 1996

LANGUAGES

Spanish and English

RECOGNITION

- Incorporated as Academician of the Peruvian Academy of Law
- Earned the qualification of leadership in Regulation and Competition, Regulation on Transport, Telecommunications Regulation, Energy Regulation and Dispute Resolution (Arbitration) in the ranking of the legal services market in Latin America compiled by Chambers & Partners, 2008, 2009-2012
- Under the Judicial Competition of 2009, the Foundation Manuel J. Bustamante de la Fuente awarded the Legal Area Award 2009 to Dr. Alfredo Bullard González in recognition of his outstanding career during the last two years.
- “Andrés Roemer/Microsoft” award for his contribution to the Development of Economic Analysis of Law in Latin America (2008)
- Listed as a “Leader” in Competition & Antitrust in Which Lawyer Practical Law Company (2006-2010)
- Listed as a “Leader” in Dispute Resolution in Which Lawyer Practical Law Company (2006 - 2010)
- Listed as “Recommended” in Restructuring and Bankruptcy Which Lawyer Practical Law Company (2007-2010)
- Listed among the 34 best-known referees in Latin America in the International Magazine Latin Lawyer (2006)
- Listed first among the 10 most requested arbitrators, Semana Económica (December 5, 2004)

Memberships:

- Member of the International Bar Association
- Member of the National Institute of Mining, Oil and Energy Law (Instituto Nacional de Derecho de Minería, Petróleo y Energía – INDEMIPE)

PUBLICATIONS

Books:

1) Author

“Derecho y Economía. El Análisis Económico de las Instituciones Legales”.

Palestra Editores. First Edition, 2003. Second Edition, 2006

“Estudio de Análisis Económico del Derecho”. Ara Editores, 1996

“La Relación Jurídica Patrimonial. Reales vs. Obligaciones”. Lluvia Editores (1st Edition 1990), Sponsored by Concytec and Ara Editores (2nd Edition 1991)

2) Co-Author

“Un derecho de ciencia ficción. De la distopía socialista a la utopía capitalista”.

Article contained in Libro El Derecho va al Cine. Intersecciones entre la visión artística y la visión jurídica de los problemas sociales. Editor: Cecilia O’Neill de la Fuente – 1st Edition. Lima, Universidad del Pacífico, March 2013

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“Es el arbitraje un juicio?” Article contained in the book Arbitraje Comercial y Arbitraje de Inversión. El Arbitraje en el Perú y el Mundo, Instituto Peruano de Arbitraje, April 2008

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“Reivindicando a los Piratas: ¿Es la Propiedad Intelectual un Robo?” Article contained in the book Anuario Andino de Derechos Intelectuales. Palestra Editores, January 2005

“Código Civil Comentado Tomo VII – Contratos en General”. Gaceta Jurídica, November 2004

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“La enseñanza del derecho: ¿Cofradía o archicofradía?” Article contained in the book El Derecho como Objeto e Instrumento de Transformación, SELA 2002”

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Articles:

• **THEMIS**. Revista de Derecho (Law Magazine) edited by students of the School of Law of Pontificia Universidad Católica del Perú:

“No Cometerás Actos Impuros”: El Orden Público y el Control Judicial del Laudo Arbitral. Themis 63, 2013

“In God We Trust, All Others Bring Data ¿Debe haber un control de fusiones empresariales en el Perú?”, co-author. Themis No. 62, 2012

“La Carreta delante de los Bueyes: El Olvido de la Competencia en los Procesos de Selección”, co-author. Themis No. 56, 2008

“Comprando Justicia ¿Genera el Mercado de Arbitrajes Reglas Jurídicas Predecibles? Themis 53, 2007

“Kelsen de Cabeza: Verdades y Falacias sobre el Control Difuso de las Normas por las Autoridades Administrativas”. Themis No. 51, 2006

“Cuando las cosas hablan: el res ipsa loquitur y la carga de la prueba en la responsabilidad civil”. Themis No. 50, 2005

“El Regreso del Jedi (O de la Discrecionalidad en la Aplicación de las Normas de Libre Competencia)”. Themis No. 47, 2003

“¿Prohibido Prohibir!: el Fantasma de los Precios Sugeridos y la Fijación de Precios de Reventa en el Derecho de la Competencia”, co-author. Themis No. 45, 2002

“Esquizofrenia Jurídica: El Análisis Económico del Derecho en el Perú”. Themis No. 44, 2002

“La Parábola del Mal Samaritano. Apuntes sobre la Lesión en el Derecho de Contratos”. Themis No. 43, 2001

“El Otro Poder Electoral: Apuntes Sobre la Experiencia Peruana en Materia de Protección Contra la Competencia Desleal”, co-author. Themis No. 39, 1999

“¿Dejar Competir o No Dejar Competir? He ahí el Dilema. Las Prácticas Predatorias y el Abuso de Posición de Dominio”. Themis No. 37, 1998

“¿Cómo Vestir un Santo Sin Desvestir a Otro? La Responsabilidad Limitada de las Sociedades y los Accidentes”. Themis No. 33, 1996

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“¿Hay Algo Imprevisible? La Excesiva Onerosidad y la Impracticabilidad Comercial”. Themis No. 25, 1993

“La Responsabilidad Civil Extracontractual: El Derecho de una Sociedad Mixta”, translation of article written by Guido Calabresi. Themis No. 23, 1992

“Reglas de Propiedad, Reglas de Responsabilidad e Inalienabilidad: Un Vistazo a la Catedral”, translation of article written by Guido Calabresi and Douglas Melamed. Themis No. 21, 1992

“Al Fondo Hay Sitio ¿Puede el Teorema de Coase Explicarnos el Problema del Transporte Publico?”. Themis No. 21, 1992

“Contratación en Masa ¿Contratación?” Themis No. 15, 1989

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“Acción Cambiaria y Vías Procesales. Comentario de Jurisprudencia”, co-author. Themis No. 10, 1987

“Títulos Valores: Conversión en Moneda Extranjera y Aceleración Automática de Vencimientos. Comentario de Jurisprudencia”, co-author. Themis No. 6, 1987

“La Prescripción Adquisitiva y la Prueba de la Propiedad Inmueble”. Themis No. 7, 1987

“¿Es el Acreedor Prendario Poseedor?” Themis No. 4, 1986

• **IUS ET VERITAS.** Law Magazine edited by students of the School of Law of Pontificia Universidad Católica del Perú.

“Los fantasmas sí existen: La doctrina de los Actos Propios”, edition No. 40, 2010

“Sepultando a los muertos vivos: Réquiem para los precios abusivos” Boletín Lente Jurídico, 2008

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Annex II

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