

REX-006

Expert Report of Jorge Danos Ordóñez

April 11, 2016

English Translation

BEFORE THE INTERNATIONAL CENTER FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**Bear Creek Mining Corporation**

*Claimant,*

v.

**Republic of Peru**

*Respondent.*

ICSID Case No. ARB/14/21

**REPORT OF PERUVIAN CONSTITUTIONAL AND ADMINISTRATIVE LAW  
EXPERT**

**JORGE DANOS ORDÓÑEZ**

**April 11, 2016**

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## **I. INTRODUCTION**

1. My name is Jorge Danos Ordóñez, attorney from the Pontificia Universidad Católica del Perú, graduated in 1985. I completed doctoral studies in Constitutional Law at Universidad Complutense de Madrid (1991-1993). Additionally, I pursued the Masters in Constitutional Law at the Pontificia Universidad Católica del Perú between 1990-1991; a Certificate in Constitutional Law from the Center for Constitutional and Political Studies in Madrid (1991-1993); and a Certificate in Human Rights at the Human Rights Institute of Universidad Complutense de Madrid (1991-1992).

2. Currently, I am the President of the Peruvian Association of Administrative Law; Vice President of the Ibero-American Forum of Administrative Law, which brings together professors of the specialty from Spain, Portugal and Latin America; and President of the Ibero-American Association of Regulations Studies (ASIER for its name in Spanish). Since 2006 I have been a partner at the Ehecopar law firm in Lima, Peru, a firm associated with Baker & McKenzie, having my practice specialized in Administrative Law and Constitutional Law

3. I have over 20 years of experience in teaching Peruvian Administrative Law and over 30 years as attorney and researcher. I am the author of several publications on Administrative Law, and I have been a speaker at many seminars and conferences on issues of Administrative Law.

4. I have held public office within Peru. I was advisor to the Commission appointed by the Executive Branch for the Study of the Reform of the 1993 Constitution. From 2001-2002, I was a member of the Advisory Committee of the Constitutional Committee of Congress for the development of a constitutional reform project. I was also a member of the

Commission of Jurists that prepared the draft that gave rise to the current Code of Constitutional Procedure, and I chaired the committees appointed by the Ministry of Justice to draft bills that led to the current Law of General Administrative Procedure, Law No. 27444, and the Law Regulating the Administrative Procedure, Law No. 27584. Moreover, I was an adviser in Congress for 11 years and Chief of Staff of advisers of the Presidency of the Council of Ministers from December 2003 to August 2005. Finally, I also hold academic positions that include teaching Administrative Law at the Pontificia Universidad Católica del Perú and Universidad del Pacífico. Attached to this report is my CV as Annex A.

5. In view of the foregoing, I hereby declare that I am qualified to assume the commission from Sidley Austin LLP to prepare this Expert Report within the framework of the arbitral proceedings pursued by *Bear Creek Mining Corporation v. the Republic of Peru*. In particular, the law firm of Sidley Austin LLP has requested from me a report regarding the analysis and interpretation of Article 71 of the 1993 Constitution of Peru and regarding the arguments put forth by Dr. Bullard in his respective expert opinions on constitutional and administrative law matters. For transparency purposes, I note that my law firm has provided services to the Republic of Peru in other investor-State arbitrations. My firm has not been involved in this case. In addition, I did not have any role in the work that my firm performed in the other arbitral proceedings.

6. In this report, I will respond mainly to the expert opinions submitted by the Claimant's expert, Dr. Alfredo Bullard. First, I will analyze the purpose and scope of Article 71 of the Constitution, determining the legal nature of the supreme decree to which that provision applies. Second, I will analyze whether Bear Creek breached the general prohibition in the aforementioned constitutional provision. Finally, I will address the validity of Supreme

Decree No. 032-2011-EM, which repealed Supreme Decree No. 083-2007-EM authorizing the acquisition of rights to mining concessions in two districts of the province of Chucuito, department of Puno, located within fifty kilometers of the border with Bolivia.

## **II. ARTICLE 71 OF THE CONSTITUTION RESTRICTS THE ECONOMIC ACTIVITY OF FOREIGNERS IN THE BORDER AREA**

7. This section aims to determine the purpose of Article 71 of the 1993 Constitution of Peru (hereinafter, the “Constitution”) and its implications. It is therefore necessary to quote the text of the Article, which reads as follows:

“With regard to property, aliens, whether natural or artificial persons, are in the same situation as Peruvians, and under no circumstances may they invoke diplomatic immunity or protection.

However, within a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.”<sup>1</sup>  
(emphasis added).

8. The first paragraph of the abovementioned Article is a manifestation of the principle of equality before the law applied to the treatment of foreigners as compared to Peruvians. Thus, under the principle of equality, it is recognized that foreigners enjoy the same conditions as Peruvians vis-à-vis their rights.

9. However, this provision contains an exception that establishes different treatment for foreigners and nationals with regard to, for example, the right to natural resources on lands located within fifty kilometers of borders. So, within said area, foreigners cannot acquire or possess mines, lands, forests, waters, fuel or energy sources, directly or indirectly.

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<sup>1</sup> Constitution of Perú, December 29, 1993 (“1993 Constitution of Peru”), Art. 71 [Exhibit R-001].

They may only acquire or possess properties in said territory in the event that public necessity is expressly recognized through a supreme decree approved by the Council of Ministers.

10. As illustrated by Dr. Eguiguren,<sup>2</sup> the purpose of this rule is to preserve and protect National Security, understood as an integral legal right, which includes both internal and external national security, as has been recognized by the Constitutional Court (supreme interpreter of the Constitution):

“To protect of the constitutional right to National Security (Article 44 of the Constitution) it must be taken into account that the border areas are the areas at greatest risk of being harmed by a foreign invasion, which could be carried out indirectly if foreigners were to acquire land in the area. Because of this, they require special protection. This, therefore, explains the restriction on the right to property in favor of the optimization of another legally-protected interest of constitutional significance–National Security–which is directly related to the protection of the sovereignty of the State.”<sup>3</sup>

11. The Constitutional Court, in its judgment in Case No. 00002-2008-PI/TC, also established the following:

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

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<sup>2</sup> See Expert Report of Francisco Eguiguren, October 6, 2015 (“First Eguiguren Report”). para. 16 [Exhibit REX-001].

<sup>3</sup> Constitutional Court Decision, EXP. 04966-2008-PA/TC, April 13, 2009, Conclusion of law 6 [Exhibit C-0028].

and guarantee the full exercise of fundamental rights and freedoms.”<sup>4</sup> (emphasis added).

12. The inclusion of Article 71 of the Constitution is explained by the wars that Peru faced in the nineteenth and twentieth centuries with neighboring countries, where foreign companies located at the border played an important role to the detriment of the country's interests, thus evidencing the existing threat that foreign companies or citizens in a context of conflict do not maintain neutral behavior.

13. However, the origin of this rule should not be confused with the purpose which seeks to protect, *i.e.*, to preserve National Security. Moreover, the Constitutional Court, supreme interpreter of the Constitution, has expressly recognized that such is the purpose of Article 71 of the Constitution (to preserve National Security), which is not limited to defending against threats of external aggression, but also includes internal security.

14. As has been pointed out both in the reports of Dr. Bullard and Dr. Eguiguren, this provision was included in the four Constitutions that Peru has had in the twentieth century,<sup>5</sup> which shows that the various Constituent Powers that drafted the text of the supreme law of the Peruvian legal system deemed this rule as necessary. Therefore, it remained in the different Peruvian Constitutions despite the different political and historical contexts in which the various constitutional texts were drafted and approved.

15. Particularly in the case of the 1993 Constitution, the inclusion of Article 71 was preceded, like any other constitutional provision, by a constitutional debate in which different

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<sup>4</sup> Decision of the Constitutional Tribunal, EXP. N° 00002-2008-PI/TC, September 9, 2009, Conclusion of law 14 [Exhibit R-348].

<sup>5</sup> Political Constitution of Peru, January 18, 1920, Art. 39 [Exhibit C-0025], Political Constitution of Perú, March 29, 1933, Art. 36 [Exhibit R-030], Political Constitution of Perú, July 12, 1979, Art. 126 [Exhibit R-031].

positions were expressed. However, contrary to Dr. Bullard's assertions,<sup>6</sup> this debate is not evidence that the reasons for that rule are no longer valid.

16. Thus, for example, constituent Cáceres Velásquez stated the following:

“I think that it is a national imperative to safeguard the heritage of our country. The border areas are where most conflicts of interest between private parties arise. We must remember why we lost Leticia. It was precisely due to circumstances of that nature.”<sup>7</sup>

On the other hand, there were those who thought that maintaining this provision was an anachronism. Thus constituent Carrión Ruiz stated that:

“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?”<sup>8</sup>

17. Indeed, the fact that there was debate between those who justified the need to maintain this provision in the 1993 constitutional text and those who advocated its elimination does not evidence, as Dr. Bullard claims, that in the 1993 Constitution, National Security is subordinate to the protection and promotion of private investment or is conditioned against said interests of the state.

18. On the contrary, the constitutional debate only evidences the existence of different positions of the members of the Constituent Assembly on the inclusion of that rule and, ultimately, the preponderance of the majority decision in favor of maintaining this

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<sup>6</sup> See Expert Report of Alfredo Bullard, May 26, 2015 (“First Bullard Report”). para. 91.

<sup>7</sup> Constitutional Debate - 1993, Commission on Constitution and Regulation, Volume IV, p. 1966 [Exhibit C-0027].

<sup>8</sup> Constitutional Debate - 1993, Commission on Constitution and Regulation, Volume IV, p. 1968 [Exhibit C-0027].

provision. Unlike what was stated by Dr. Bullard, it is a clear proof of the validity and relevance of that provision, which, as noted, is intended to ensure National Security.

19. The fact is that, despite differences of opinion regarding the validity or need to include Article 71 of the Constitution, is not feasible to hold that the mere existence of this debate is evidence that the provision under analysis is no longer valid, much less that there is primacy of other constitutionally recognized legal rights.

20. The Peruvian legal system does not allow for hierarchy between fundamental and constitutionally protected rights, as, in principle, they all have the same relevance. Only in the event of conflict, through weighing techniques recognized by the Constitutional Court,<sup>9</sup> is it possible to determine what legal right or interest takes precedence over the other in each particular case. Therefore, we disagree with Dr. Bullard's assertion:

“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.”<sup>10</sup>

21. What are the implications of said provision? As developed below, Article 71 determines that, as a rule, the Constitution prohibits foreigners from acquiring or holding, directly or indirectly, lands within fifty kilometers of the border. Exceptionally, the ban will be lifted only if there is a case of public necessity previously identified and declared as such by the Council of Ministers through a Supreme Decree.

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<sup>9</sup> See Decision of the Constitutional Tribunal, EXP, N° 06089-2006-AA/TC, April 17, 2007 [Exhibit R-349].

<sup>10</sup> See First Bullard Report, para. 91.

**A. THE DECLARATION OF PUBLIC NECESSITY FOR FOREIGN INVESTMENT IN BORDER AREAS IS AN EXCEPTIONAL EVENT**

22. As was mentioned above, as a rule, foreign citizens are prohibited from acquiring or holding, directly or indirectly, lands within fifty kilometers of the border. If, and only if, it is determined that such acquisition or possession is a public necessity declared by the Council of Ministers through supreme decree may rights of ownership or possession of land within that area be validly acquired. In this regard, issuance of a supreme decree authorizing the acquisition or use of land within fifty kilometers from the border is an exceptional act given in exercise of government power.

23. In this section I will focus on the exceptional nature of the Supreme Decree referred to in Article 71 of the Constitution. From a literal interpretation of that rule, it follows that the authorization to acquire or own land within fifty kilometers of the border is an exception to the general prohibition in the second paragraph of that Article:

“However, within a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.”<sup>11</sup>(emphasis added).

24. Evaluation of the public necessity is done, however, by the Council of Ministers on a case by case basis. At this point, it should be noted that, contrary to what Dr. Bullard alleges, the public necessity is not presumed regarding foreign private investment.<sup>12</sup> On the contrary, as established in the Constitution, the Council of Ministers, the highest political

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

<sup>12</sup> See First Bullard Report, para. 18.d.

authority of the government formed by the President of the Republic and the Ministers of State, evaluates on a case by case basis whether a given foreign private project is a public necessity. Dr. Bullard's statements that the supreme decree referred to in the provision under analysis is a simple verification that in a particular case there is no danger for external defense is also incorrect.<sup>13</sup> I believe that this error is due to a confusion of concepts.

25. First, it is unfounded to claim that there is a presumption of public necessity for any foreign private investment because the Constitution itself establishes the requirement that said public necessity be evaluated and declared as such by the Council of Ministers. It makes no sense that the Constitution would establish such provision if there were a presumption of public necessity in all cases. This, even more so when, as I have noted, the Council of Ministers is the highest political body of the government, so it would not be reasonable to require prior authorization if it were in fact automatic.

26. The Supreme Decree provided for in Article 71 of the Constitution is exceptional, given that it is issued only if there is a public necessity in a particular case. Note that foreigners do not have a pre-existing right to acquire or own property within fifty kilometers of the border. Therefore, since there is not a pre-existing right, the supreme decree which Dr. Bullard referred to as the authoritative administrative act is not limited to removing legal obstacles to exercise an existing right, but rather it grants that right. That is, it is not declaratory in nature, but constitutive: shortly after issuance thereof, it can be stated that the foreign citizen requesting said supreme decree may acquire or own land within fifty kilometers of the border.

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<sup>13</sup> See First Bullard Report, paras. 18.d, 109 and 110.

27. Therefore, the supreme decree does not constitute an administrative authorization, as it is not a condition precedent to exercising a pre-existing right, rather it is an act dictated in the exercise of the Council of Ministers' governmental function, under which authorization is granted to a given foreign citizen so that as from such authorization, they may acquire or own land within fifty kilometers of the border.

28. Clearly, determining whether a project is a public necessity is not automatic. The State has the power to analyze each specific case and, based on that, determine whether or not to issue said decree. In this analysis, the State weighs potential conflicts with the National Security and other elements of public interest that a project may involve, against the potential benefits that the project could create for the promotion of development and general welfare of the population.

29. Finally, it should be noted that no part of Article 71 of the Constitution provides that "the existence of public necessity can only be questioned or rejected if there is a danger to territorial integrity due to an external threat," as stated by Dr. Bullard.<sup>14</sup> While it is true that the purpose of Article 71 of the Constitution is the protection of National Security, this does not mean that the State must issue the respective decree provided there is no risk of an external threat.

30. There are different situations and conflicts, both internal and external, that can motivate the decision of the State, as one of its functions is to ensure internal order, which is part of the overall concept of National Security. Therefore, the State, represented by the Council of Ministers, must determine when it is appropriate to issue said declaration of public

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<sup>14</sup> See First Bullard Report, para. 18.f.

necessity so that subsequently foreigners may proceed with the acquisition of rights to land located within fifty kilometers from the border.

**B. ARTICLE 71 OF THE CONSTITUTION EXPRESSLY PROHIBITS THE INDIRECT ACQUISITION OF MINES AT THE BORDER AREA**

31. Article 71 of the Constitution prohibits foreigners from acquiring or disposing of properties within fifty kilometers from the border directly or indirectly. Thus, as a general rule, foreign individuals or legal entities cannot own or possess such land. Neither may they do so through the participation of a third person as a strawperson or intermediary.

32. It must be noted that the indirect holding or acquisition raised by Article 71 of the Constitution is not limited to the concept used by the Peruvian Securities and Exchange Regulator (“SMV” in Spanish), whereby indirect ownership is exercised through related companies, or interest in a legal entity.<sup>15</sup> In the case of Article 71, the concept of ownership is broader and includes acting through an intermediary, even if there is no kinship with the title owner. The rules of the SMV provide the scope of indirect ownership, associations, control, economic group and financial conglomerate applicable to individuals and matters subject to the oversight of the SMV (operations carried out within the framework of the stock market, products market and collective funds systems). The SMV has a particular function in a very specific area of Peruvian law, therefore there is no reason why its rules and regulations would be applicable to a constitutional provision dealing with issues of national security and public necessity. In other words, there is no reason why the concept of indirect ownership applicable to Article 71 of the Constitution is restricted by a definition that is only applicable and

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<sup>15</sup> Resolution on Indirect Property, Related Parties and Economic Groups, Resolution No. 019-2015-SMV-01, September 18, 2015, Art. 3 [Exhibit R-350].

developed by a public entity whose mandate is not focused on the protection of national security or the determination of public needs of the State.

33. Ultimately, that is not the case of property rights acquired under Article 71 of the Constitution. Therefore, the prohibition established in said constitutional provision regarding the acquisition by foreigners, either directly or indirectly, within fifty kilometers of the border, cannot be interpreted according to the scope of the concept of indirect ownership provided for under the rules of the SMV. On the contrary, such acquisition or possession can arise through different persons, in different scenarios. This being the case, the prohibition in Article 71 of the Constitution includes not only the direct acquisition or possession by foreigners, but also includes the actions of anyone who intervenes and participates in the acquisition or possession of properties located within fifty kilometers of the border for the benefit of foreigners.

34. In fact, the inclusion of indirect holding or acquisition in the text of Article 71 was intended to prevent evasion of the prohibition established in the constitutional rule through third parties, such as through fraudulent actions or attempts to hide the true beneficiaries of rights. It is therefore important to determine whether a Peruvian citizen who acquires rights to land located within fifty kilometers from the border, did so for their own benefit or for [the benefit of] someone abroad. If it were established that, through a national citizen or legal entity, rights were acquired for the benefit of a foreigner, this acquisition would have previously required the issuance of the supreme decree under Article 71 of the Constitution.

**C. DECLARATION OF PUBLIC NECESSITY UNDER ARTICLE 71 OF THE CONSTITUTION IS A DISCRETIONARY ACT OF THE STATE—IT IS NOT AN ADMINISTRATIVE ACT**

35. Having defined the scope of the prohibition in Article 71 of the Constitution and its purpose, we must now refer to the legal nature of the supreme decree which, exceptionally, declares the public necessity of a particular economic interest of a foreigner in the border area, as well as the discretionary or regulated nature of said declaration.

36. With regard to the first, one of the cornerstones of the dispute submitted to the Arbitral Tribunal involves determining the legal nature of the supreme decree referred to in Article 71 and, consequently, establishing the legal rules for issuance and repeal thereof. Particularly, it is discussed whether this supreme decree is a *legal norm issued at the discretion of the State* or an *administrative act*. In this regard, in order to support our position, it is necessary to define the characteristics and differences of both concepts.

37. According to RUBIO CORREA, renown scholar and jurist, a legal norm is a source of law defined as a “mandate that given a certain supposition, legally a consequence must logically follow, such mandate being backed by the force of the State in the event of possible violation thereof.”<sup>16</sup> Understood as such, the legal norm is to regulate social behavior.

38. The supreme law of the Peruvian legal system is the Constitution, as expressly recognized in Article 51 of the same.<sup>17</sup> In the same vein, rules with legal status (such as laws, legislative decrees and urgent decrees) take precedence over regulatory rules (such as supreme decrees and supreme resolutions). These regulatory rules are not administrative acts.

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<sup>16</sup> Marcial Rubio Correa, THE LEGAL SYSTEM: INTRODUCTION TO LAW, 10 MA, LIMA EDITION: PUCP EDITORIAL FUND (2009) (Excerpts) [Exhibit R-397].

<sup>17</sup> 1993 Constitution of Peru, Art. 51 [Exhibit R-001].

39. Among the vast variety of regulatory rules—the proliferation of which is explained, among other factors, by the regulatory role assumed by the State and, in particular, by the Executive Branch—the main regulatory legal norm is the supreme decree. According to paragraph 8 of Article 118 of the Constitution, the President of the Republic is responsible for exercising the power to regulate the laws without violating or distorting them and, within those limits, issue decrees and resolutions.

40. As noted on another occasion, regulations constitute sources of law that establish general rules, which are subordinate to or of a lower hierarchy than the laws or norms of such rank, which form part of the legal system. They are issued in the exercise of regulatory and discretionary authority which can only be explicitly attributed to the public authorities and other entities of the State by the Constitution or by law.<sup>18</sup>

41. It is important to note that, in the Peruvian legal system, unlike other countries, the process for producing regulations is subject to a regulatory framework that is different than that which governs the procedure for issuing administrative acts.

42. In fact, while issuance of administrative acts is subject to the Law of General Administrative Procedure, Law No. 27444 (“LPAG”), the exercise of regulatory authority of the three levels of government of the State (national government, regional governments and local governments) is governed by their respective organic laws (Organic Law of the Executive Branch, Law No. 29151, Organic Law of Regional Governments, Law No. 27867, and Organic

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<sup>18</sup> See Jorge Danos Ordoñez, *The Peruvian Legal System Regulations*, MEMOIR OF THE FORUM ON ADMINISTRATIVE LAW AND VIII ROUNDS ON ADMINISTRATIVE AND CONSTITUTIONAL LAW, Universidad Externado de Colombia, p. 207-287 (2007) [Exhibit R-351].

Law of Municipalities, Law No. 27972) which establish the structure and functioning of said levels of government.<sup>19</sup>

43. Regulations are characterized by their general and abstract nature, by incorporation into the legal system—modifying, repealing, or creating new relations of law—and finally, because their effect is not limited to enforcement or implementation, rather they are rules framed in the long-term.

44. For its part, Article 1 paragraph 1.1. of the LPAG defines administrative acts as “declarations of entities that, within the framework of public law, are intended to have legal effects on the interests, rights or obligations administered within a particular situation.”<sup>20</sup>

45. From the abovementioned rule, we can define the administrative act as any manifestation of will, general or special, of a public entity or public official, in the exercise of their functions, which produces public law effects vis-à-vis those under their administration in a specific case.

46. Doctrine has identified three criteria for distinguishing between a legal norm and an administrative act: i) its generality; ii) its relation to the legal system; and, iii) the exhaustion of its effects..

47. It should be noted that the criterion of generality is not sufficient to distinguish between regulations and administrative acts, as there are general administrative acts, such as the public call for bids which, despite being a concrete decision, is directed at an indeterminate group of those under the administration.

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<sup>19</sup> See Jorge Danos Ordoñez, *The Peruvian Legal System Regulations*, MEMOIR OF THE FORUM ON ADMINISTRATIVE LAW AND VIII ROUNDS ON ADMINISTRATIVE AND CONSTITUTIONAL LAW, Universidad Externado de Colombia, p. 207-287 (2007) [Exhibit R-351].

<sup>20</sup> Law of General Administrative Procedure, Law No. 27444, April 10, 2001, (“Law No. 27444”), Title I, Chapter I, Art. 1.1 [Exhibit Bullard-005].

48. While this is true, it is undeniable that the supreme decree, by which the Council of Ministers declares the public necessity of a project for the acquisition or possession of land within fifty kilometers of the border, is of a specific or one-time nature, as it refers to a particular foreign company or foreign citizen. Therefore, it does not qualify legally as an administrative act. Actually, we are facing a phenomenon of a *sui generis* nature that has characteristics specific to a legal norm and a specific act, whereby it cannot be fully defined as a legal norm or as an administrative act.

49. This is because, despite the fact that the supreme decree of Article 71 of the Constitution is a specific declaration with a concrete effect on the applicant, it is approved by way of the typical [regulatory] legal norm: a supreme decree. Note that this *sui generis* concept is not the only case in Peruvian law. On the contrary, there are other cases of supreme decrees that have a specific and concrete content and yet, they do not lose their status as legal norms.

50. For example, in the Peruvian legal system, under Article 7 of Law No. 26834,<sup>21</sup> protected natural areas are created by supreme decree. In that case, the supreme decree has a specific and concrete content. However, the mechanisms for challenging it and the legal system to determine its validity is that which is applicable to the production of regulatory legal norms and not administrative acts.

51. Similarly, in accordance with the Organic Law of the Executive Branch, Law No. 29151, public entities approve the rules of organization and internal operation by supreme decree. These are not general, but are specifically applicable to a certain public entity.

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<sup>21</sup> 2016 Law on the National System for Environmental Evaluation and Fiscalization, Law No. 26834, February 25, 2016, Article 7.- “The creation of Natural Protected Areas of the SINANPE and Regional Conservation Areas is accomplished by Supreme Decree, approved in the Council of Ministers, endorsed by the Minister of Agriculture, except for the creation of marine ecosystem protection areas or those that include continental waters where the exploitation of hydrobiological resources is possible, in which case the Minister of Fisheries also endorses it.” [Exhibit R-352].

According to GASPAR ARIÑO, a renowned Spanish jurist whose doctrine inspired Peruvian Administrative Law, there are numerous examples of such rules, such as

“(…) the numerous authorizations of financial/economic operations, from the adoption of the State Budget to the authorization of unexpected expenditures, the issuance of public debt, the disposal of certain assets, the granting of guarantees, the approval of financial transactions, the granting of tax exemptions or moratoriums, or the law approving the General Accounts of the State”.<sup>22</sup>

52. Moreover, the case raised in Article 71 of the Constitution does not differ from the so-called singular laws, which, despite not having a general or abstract content, do not lose their status as laws. Such rules are, exceptionally, permitted under Article 103 of the Constitution.<sup>23</sup>

53. In this regard, MORON URBINA, recognized legal expert on the subject, has stated that:

“(…) the regulatory function of the State is also exercised when the administrative bodies approve “special regulations” aimed at citizens of a given category that have a singular or special situation in relation to the administration. E.g. Regulation of a public university. Here we find what doctrine recognizes as “singular regulations,” i.e., provisions that provide an abstract or general discipline or system to specific or perhaps unique subjects.”<sup>24</sup>

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<sup>22</sup> Gaspar Ariño Ortiz, *Singular laws, Único Case Laws*, 18 REVISTA DE ADMINISTRACIÓN PÚBLICA 75 (Excerpts) (1989) [Exhibit R-353].

<sup>23</sup> 1993 Constitution of Peru, Article 103.- “Special laws may be passed because they are required by the nature of things, but not because of differences between persons. Since the entry of force, the law is applied to the consequences of existing legal relations and situations and it does not have retroactive force and effects, except in both cases in criminal matter when it favors the defendant. A law is repealed only by another law. A law is null by declaration of unconstitutionality. The Constitution does not protect abuse-of-rights doctrine.” [Exhibit R-001]

<sup>24</sup> Juan Carlos Morón Urbina, *Case-Law Analysis on the Acción Popular Proceedings in Perú: Proposal to Improve Judicial Review on Regulatory Norms*, PUCP THESIS (Excerpts) 103 (2013) [Exhibit R-354]. In this thesis, the author quotes: Santamaría Pastor, Juan A.; *General Principle of Administrative Law*, Volume I, Iustel, p. 334.

54. Specifically, the supreme decree referred to in Article 71 of the Constitution is a singular rule for approval and authorization. These kinds of rules have been defined in doctrine as “regulatory acts with force of law that do not affect legal relationships between individuals and/or the State, or innovate the law, but approve or authorize any action taken by a constitutional body other than the legislator.”<sup>25</sup>

55. There is no doubt that these approval rules are rules in a formal sense, as “The strict distinction between the act of approval (without legal content) and the approved act (which is not absorbed by the first), as from the inclusion of the regulatory act of approval in the category of law in the formal sense, is a fundamental element and characteristic of this type of law. Thus, laws of approval (laws in the formal sense) contain a mere authorization or approval of the actions of the Administration with the form of law.”<sup>26</sup>

56. In conclusion, I believe that the supreme decree referred to in Article 71 of the Constitution is a decision with specific content adopted by the Council of Ministers in exercise government or political power. This being the case, the declaration of public necessity is not an administrative act, but an act or decision issued in exercise of the governmental function approved by an instrument of a regulatory nature. As I will elaborate in Section IV of this Report, that means that the rules established in the LPAG are not applicable for determining their validity, as those rules have been provided specifically for administrative acts.

57. With respect to the *discretionary or regulated* nature of the supreme decree referred to in Article 71 of the Constitution, we believe that the Constitution itself determines that it involves a discretionary power attributed to the Council of Ministers, while the public

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<sup>25</sup> Jose Antonio Montilla Martos, THE SINGULAR LAWS IN THE SPANISH CONSTITUTIONAL SYSTEM (Excerpts) 127 (“Martos, SINGULAR LAWS”) (1994) [Exhibit R-355].

<sup>26</sup> Martos, SINGULAR LAWS, p. 128 [Exhibit R-355].

necessity is an unspecified legal concept whose content needs to be defined in each specific case by the public authorities that have been given such authority.

58. In fact the Peruvian legal system accepts the existence of unspecified legal concepts such as public necessity, the assessment and valuation of which is issued by the discretionary authority of the State. The exercise of discretion means for the State:

“(…) a freedom, an option, a choice in the opportunity to give effect to the attributive rule of the authority, which, according to the Spanish and French majority doctrine, and part of the Italian, operates in view of the assessment of essentially extrajudicial variables (economic, social, political, etc.) that can and generally do give rise to a set of alternatives, all equally valid, from which the Administration chooses one, none of which is linked to any legal norm. The framework of these alternatives ranges from no action to the adoption of the decision. Precisely this choice, which is basically a subjective assessment of the competent body, materializes the exercise of discretionary authority.”<sup>27</sup>

59. In this regard, the public necessity is an unspecified legal concept that requires the Administration to necessarily make administrative policy choices and judgments about what is best for the satisfaction of the public interest. In fact, “the discretionary authority grants a margin of freedom of assessment to the authority, which in making a somewhat subjective assessment, exercises its powers in specific cases.”<sup>28</sup>

60. Therefore, there is no doubt that the supreme decree issued by the Council of Ministers under Article 71 of the Constitution is purely discretionary, as it is issued in exercise of government power, regulating political interests. It is precisely unanimous in doctrine that,

“the discretionary powers are very different. They serve different types. For example, discretion that is regulatory, planning,

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<sup>27</sup> José Peña Solís, *The Principio de Legalidad y and Discretionality in Venezuela*, VENEZUELA: FONDO EDITORIAL 53 (1998) [Exhibit R-356].

<sup>28</sup> Grethel Arias Gayoso and Jorge Luis Borges Frías, *DISCRETION AND LEGALITY (Excerpts)* 6 (2009) [Exhibit R-357].

initiative, policy strictly speaking, technical, tactical, management, etc. Even the level of discretion which is usually recognized for the Administration (also by our jurisprudence) for the realization of unspecified legal concepts in different cases meets the typical structure of a discretionary power, of a technical or evaluative type.”<sup>29</sup>

61. It should also be noted that the position of Dr. Bullard, which is to consider that the declaration of public necessity is of a regulated nature, and therefore, once it is verified that there is an interest from a foreigner to invest within 50 kilometers from the border, the Council of Ministers must directly and automatically declare said investment a public necessity, starts from a mistaken premise. And, the difference between the regulated and discretionary powers of the Public Administration is used to distinguish between discretionary and regulated administrative acts. In this regard, BREWER-CARIAS, prestigious academic and Venezuelan lawyer, citing the former Federal Court of Venezuela, writes that:

“Administrative acts are of two categories: those that are discretionary, when the administration is not subject to compliance with special rules for the opportunity to act, without meaning that it acts arbitrarily, avoiding any rule of law, for the administrative authority must always observe the legal provisions regarding formalities for the act; and those that are regulated, also termed mandatory and conditioned, when the official cannot exercise them except with strict adherence to the law, under penalty of lack of jurisdiction, abuse of power or generically illegality or violation of the law.”<sup>30</sup>

62. However, those criteria are not applicable for determining whether the declaration of public necessity is discretionary or not, because, unlike the administrative acts that are issued in the exercise of the administrative function, the declaration of public necessity

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<sup>29</sup> Miguel Sánchez Morón, SEVEN THESIS ON JUDICIAL CONTROL OVER ADMINISTRATIVE DISCRETIONALITY 4-5 (1997) [Exhibit R-358].

<sup>30</sup> Allan R. Brewer-Carías, *On the Limits to the Discretionary Exercise of Power*, LEGAL STUDIES IN HONOR OF PROFESSOR MARIANO R. BRITO, 610 (2007) [Exhibit R-359]. The author cites the judgment of the former Federal Court of Venezuela on July 17, 1953 in *Gaceta Forense*, 2ª etapa, No.1, Caracas 1953, p. 151.

is issued in the exercise of government power attributed to the highest political body of the Peruvian State. As pointed out by BACA, a prominent attorney and author of numerous articles on Peruvian Administrative Law:

“The dividing line between Government and Administration would be drawn through the Minister, who at the same time forms part of the Government, as a member of the Council of Ministers, and the Administration, as being head of one of the ministerial Departments in which he/she operates. Consequently, the Minister would be the link between these two constitutionally different institutions.”<sup>31</sup> (Emphasis added)

63. Furthermore, even if we apply the distinction between regulated and discretionary powers, it could not be validly claimed that the declaration of public necessity referred to in Article 71 of the Constitution constitutes a regulated power. This is because, these [regulated powers] assume that, once the configuration of the factual circumstances described by the respective rule is verified, the public authority will be required to apply, directly and automatically, the consequence provided for by said rule.

64. In the case at hand, the factual circumstance described in the second paragraph of the rule is that foreigners cannot acquire or own by any means mines, land, forests, water, fuel or energy sources, directly or indirectly, individually or in partnership. The consequence for the breach of that prohibition is the loss of acquired rights to the State. Now, as to the exception provided for this general prohibition, the factual circumstance is that a case of public necessity is declared, and the consequence will be the authorization to acquire rights within 50 kilometers of the border.

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<sup>31</sup> Víctor Baca Oneto, GOVERNMENT ACTS, LEGAL COLLECTION, UNIVERSITY OF PIURA (Excerpts) 56 (2003) [Exhibit R-360].

65. As can be seen, in order to apply the abovementioned consequence, it is necessary to have evaluated and declared public necessity for a certain foreign investment in a particular case. The assertion by Dr. Bullard would lead to the argument that, once the request is made for private investment by a foreigner within fifty kilometers of the border, then the declaration of public necessity must necessarily and automatically be granted, which does not stand up to any analysis whatsoever. The public necessity is not presumed. There is no presumption that any foreign private investment within fifty kilometers of the border will be of public necessity for the Peruvian State. Otherwise, the provisions of the Constitution itself would lack support, insofar as the requirement to issue a supreme decree has been established for the declaration of such need.

66. Actually, the declaration of public necessity is an exceptional and discretionary decision of the Council of Ministers. Contrary to what is stated by Dr. Bullard, this does not mean that the Council of Ministers has “absolute freedom to decide whether or not to declare public necessity.”<sup>32</sup> Discretion is not synonymous with arbitrariness. In fact, discretion allows a public authority to make a decision due to other circumstances beyond the regulatory provisions, which serve to complete the definition of the factual circumstance or legal consequences that are applicable to the specific case. The above definition of discretion is consistent with intermediate discretion as defined by the Constitutional Court in the Judgment, according to which:

“Intermediate discretion: is that where the margin of discretion is conditioned upon its logical consistency and adherence to an indeterminate legal concept of content and scope.”<sup>33</sup>

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<sup>32</sup> See the Expert Report of Alfredo Bullard, January 6, 2016, (“Second Bullard Report”), para. 11.

<sup>33</sup> Decision of the Constitutional Tribunal, EXP N.º 0090-2004-AA/TC, July 5, 2004, p. 5 [Exhibit R-096].

67. One of the typical areas where the State exercises discretion is in the functions related to the course of political action, the objectives of government and dynamics of governmental power. In effect, as has been recognized by the Constitutional Court, one of the areas in which discretion is exercised is political. This is understood as “the discretion of the determination of the direction and progress of the State,” which operates in the field of the so-called “political matter,” and for which, there is the highest degree of discretion or freedom to decide, and this refers to the functions related to the course of political action, the objectives of government and dynamics of governmental Power.<sup>34</sup> In that sense, it applies “in matters related to foreign policy and international relations, national defense and the domestic system, the granting of pardons, commutation of sentences, etc.(...).”<sup>35</sup>

68. This being so, it is clear that the power granted to the Council of Ministers to determine in which cases a particular foreign private investment within fifty kilometers of the border is a public necessity for the State and thus enable the acquisition of rights in that area, is discretionary. The constitutional rule does not stipulate the reasons why such authorization may be refused. However, to the extent that, as has been recognized by the Peruvian Constitutional Court, the purpose of the prohibition in that rule is the preservation of National Security, a particular project could not be declared a public necessity if it poses a danger to national security.

69. In this regard, I do not share the view that the State can only refuse the declaration of public necessity for reasons of external defense,<sup>36</sup> because, as we have

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<sup>34</sup> Víctor Sebastián Baca Oneto, *Administrative Discretionality and Constitutional Tribunal Jurisprudence*, CÍRCULO DE DERECHO ADMINISTRATIVO 182 (Revisa 2012) (“Baca Oneto, *Discretionality*”) [Exhibit R-361].

<sup>35</sup> Baca Oneto, *Discretionality* 182 [Exhibit R-361].

<sup>36</sup> See First Bullard Report, para. 142.

mentioned, National Security is a comprehensive concept that encompasses not only external defense, but also internal order.

70. With regard to the Supreme Decree No. 162-92-EF, which approved the Regulation of the Private Investment Guarantee Schemes,<sup>37</sup> which was mentioned by Dr. Bullard,<sup>38</sup> referring to the alleged procedure for the issuance of the Supreme Decree that declares public necessity, it must be stated that said rule was issued under the Constitution of 1979. Therefore, those provisions that are contrary to the current Constitution are not applicable. Notwithstanding the foregoing, it can be observed that from the Regulation itself of the Private Investment Guarantee Schemes, it is clear that National Security includes both internal order and external defense, thus it is contradictory that Dr. Bullard would subsequently hold that national security only includes external defense.<sup>39</sup>

71. Moreover, the supreme decree approving a declaration of public necessity is not an administrative act because it is included in the Consolidated Text of Administrative Procedures (hereinafter “TUPA”) of the Ministry of Energy and Mines (hereinafter “MINEM”), as alleged by Dr. Bullard.<sup>40</sup> Dr. Bullard argues that it is a regulated authority to be granted

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<sup>37</sup> Supreme Decree No. 162-92-EF, Article 32.- “In accordance with the requirements of Article 126 of the 1979 Constitution and Article 13 of Legislative Decree No. 757, for the exercise of the rights of ownership or possession of mines, land, forests, water, fuel or energy sources by foreign investors, either directly or indirectly, within fifty kilometers of the country's borders, the corresponding prior authorization must be obtained, for which a supreme resolution shall be granted by the Minister holding the Presidency of the Council of Ministers and the Minister of the Sector in question. Such authorization must have the favorable opinion of the Joint Command of the Armed Forces, for the reasons set out in the following paragraphs.

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

*Reasons of national security is understood as that required to guarantee the independence, sovereignty and territorial integrity of the Republic, as well as internal order, as prescribed in Article 275 of the 1979 Constitution.”* (Emphasis added) [Exhibit Bullard-023].

<sup>38</sup> See First Bullard Report, paras. 128-138.

<sup>39</sup> See First Bullard Report, para. 140.

<sup>40</sup> See Second Bullard Report, paras 12-21.

automatically once compliance with the requirements of the TUPA is verified. Dr. Bullard's conclusion is wrong.

72. First, as stated in Article 37 of the LPAG,<sup>41</sup> the TUPA is merely a compilation of procedures by State entities governed by different rules. It is therefore an instrument to serve the public, which aims to simplify administrative procedures that citizens need to follow with State entities, according to their interests.

73. In this regard, the TUPA does not have its own content, rather it systematizes in one regulatory corpus the procedures previously regulated by other legal norms. That is, the TUPA does not create law, but simply collects various existing rules on administrative procedures.

74. This being so, the inclusion of the procedure for approval of investment for the acquisition of mining properties and investments by foreigners in border areas (Procedure 53) in the TUPA of the MINEM does not imply that the issuance of the supreme decree declaring

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<sup>41</sup> Law No. 274444 Article 37.- Content of the Consolidated Text of Administrative Procedures

"All entities are to prepare and approve or manage the approval, as appropriate, of their Comprehensive Text of Administrative Procedures, which comprises:

1. All required procedures for initiatives by those under its administration to satisfy their interests or rights by way of the pronouncement of any organization of the entity, provided that this requirement has legal support, which must be expressly stated in the TUPA with indication of the date of publication in the Official Gazette.
2. The clear and precise description of all the requirements for the full implementation of each procedure.
3. The classification of each procedure, as appropriate, as prior evaluation or automatic approval procedures.
4. In the case of prior evaluation procedures, whether applicable administrative silence is denial or approval.
5. The cases in which a processing fee will be required, indicating the amount and form of payment. The amount of the fees shall be expressed in relation to the UIT, to be published at the entities in current legal tender.
6. The appropriate paths to access the procedures contained in the TUPA, in accordance with the provisions of Articles 116 et seq. of this Law.
7. The authority with jurisdiction at every stage of the proceeding and the appeals to be filed to access them..
8. The forms to be used during the processing of the corresponding administrative procedure. (...)" [Exhibit Bullard-005].

the existence of public necessity is regarded as an administrative act, much less an established regulatory framework.

75. It follows that the existence of a regulated administrative procedure for the issuance of the declaration of public necessity does not negate the discretionary nature of the decision. As we know, the administrative procedure is the channel that serves for action by public entities. The fact that the procedure for requesting the declaration of public necessity under Article 71 of the Constitution is regulated and included in the TUPA of the MINEM does not evidence its regulated nature, but, on the contrary, evidences that the Administration, in order to facilitate legal certainty and order, has established the steps and requirements for requesting such declaration. The TUPA does not establish that once compliance with the requirements is verified, the application is to be approved.

76. Furthermore, the TUPA, or specifically, the regulation of an administrative procedure, does not determine the legal nature of the decision issued by the Administration as a result of this procedure, nor its regulated or discretionary nature. Proof of this is that there are administrative acts that are unquestionably of a discretionary nature, the issuance of which is subject to a procedure regulated as to which requirements and deadlines are established.

77. This is the case of the private initiatives regulated by Legislative Decree No. 1224, the process for which is included in a TUPA. Private initiatives are defined by law as requests for favor;<sup>42</sup> that is to say, they are the ultimate manifestation of state discretion

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<sup>42</sup> Legislative Decree No. 1224, *Legislative Framework for the Promotion of Private Investment*, February 25, 2016.

“Article 33.4.- Private initiatives have the nature of requests for favor under article 112 of Law No. 27444, Law on General Administrative Procedure, as applicable. Consequently, the right of the petitioner ends with the filing of the private initiative with the Agency for Private Investment, without the possibility of questioning or challenging the ruling in administrative or judicial proceedings. Private initiatives retain their petition for leniency nature until the corresponding selection process is convened, in which case the provisions of the respective

because the State can reject them without even justifying its decision. However, the Regulation of Legislative Decree No. 1224 approved by Supreme Decree No. 410-2015-EF regulates the procedure for processing, evaluation and eventual approval. It cannot be argued that since there is a regulated procedure, this makes the approval of a private initiative automatic and mandatory once it is verified that the individual has met the requirements of this rule.

78. Therefore, the existence of a procedure in the TUPA of the MINEM regarding the request for declaration of public necessity does not contradict the discretionary nature of the decision, much less does it determine that asserting such condition is contrary to the Peruvian legal framework.<sup>43</sup>

### **III. BEAR CREEK VIOLATED ARTICLE 71 OF THE CONSTITUTION**

79. In the case at hand, as has been recognized in the Memorial of the Claimant, in early May 2004, César Ríos (geologist employed by Bear Creek) contacted Jenny Karina Villavicencio, Peruvian citizen, to acquire concessions for the Santa Ana Project and subscribe option agreements with Bear Creek.<sup>44</sup>

80. Thus, Jenny Karina Villavicencio, employee and legal representative of Bear Creek, filed for mining concessions before the National Institute of Concessions and Mining Register on May 26, 2004 (Karina 9A, Karina 1, Karina 2 and Karina 3 concessions) and November 29, 2006 (Karina 5, Karina 6 and Karina 7 concessions).<sup>45</sup>

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conditions and/or applicable law apply, as applicable; or until the signing of the corresponding contract if it is awarded directly due to lack of interested third parties” [Exhibit R-362].

<sup>43</sup> See Second Bullard Report, paras. 12 and 13.

<sup>44</sup> See Claimant’s Memorial, May 29, 2015, para. 25.

<sup>45</sup> See Claimant’s Memorial, May 29, 2015, para. 26.

81. Jenny Karina Villavicencio signed option agreements with Bear Creek on November 17, 2004<sup>46</sup> (Karina 9A, Karina 1, Karina 2 and Karina 3 concessions) and December 5, 2004<sup>47</sup> (Karina 5, Karina 6 and Karina 7 concessions) under which Bear Creek was granted an option for exclusive and irrevocable transfer so that within the period specified in the respective agreements, Bear Creek could decide at its sole discretion to acquire for its own account or for a third party one hundred percent (100% ) of the mining property.<sup>48</sup>

82. Now then, Jenny Karina Villavicencio obtained the mining rights on July 5, 2006 (Karina 2 and Karina 3), August 8, 2006 (Karina 1), September 26, 2006 (Karina 9A), and February 28, 2008 (Karina 5, Karina 6 and Karina 7).<sup>49</sup>

83. Bear Creek requested the declaration of public necessity on December 5, 2006. Supreme Decree No. 083 of 2007 declared the public necessity of the Bear Creek investment, and authorized the company to obtain mining concessions Karina 9A, Karina 1, Karina 2 Karina 3, Karina 5, Karina 6 and Karina 7. Bear Creek acquired all of the mining concessions on December 3, 2007.

84. Dr. Bullard argues that Bear Creek did not violate Article 71 of the Constitution because: i.) The State was already aware of the option agreements with Jenny Karina Villavicencio; ii) The option agreements were not simulatory acts; and, iii) Any irregularity was remedied by the declaration of public necessity granted by the State.<sup>50</sup> However, as will be shown below, these arguments lack solid legal basis.

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<sup>46</sup> See Option Contract, November 17, 2004 [Exhibit C-0016]

<sup>47</sup> See Option Contract, December 5, 2004 [Exhibit C-0016].

<sup>48</sup> See Option Contract, December 5, 2004, Clause 2; Option Contract, November 17, 2004, Clauses 1 and 2 [Exhibit C-0016].

<sup>49</sup> See Claimant's Memorial, May 29, 2015, para. 27.

<sup>50</sup> See Second Bullard Report, paras. 56-99.

**A. JENNY KARINA VILLAVICENCIO ACTED AS INTERMEDIARY IN THE INDIRECT ACQUISITION OF MINING CONCESSIONS BY BEAR CREEK**

85. As noted, Article 71 of the Constitution stipulates that a foreigner cannot acquire or possess, under any title, directly or indirectly, mines or land unless a declaration of public necessity is obtained. That rule expressly prohibits indirect acquisition, individually or in partnership, of rights within fifty kilometers of the border.<sup>51</sup>

86. In the case at hand, Bear Creek indirectly acquired, through Ms. Villavicencio, the mining rights of the Santa Ana Project, before having obtained the required declaration of public necessity. Proof that Ms. Villavicencio was used as an intermediary includes the following facts: i) Ms. Villavicencio was an employee of Bear Creek; ii) Ms. Villavicencio was a legal representative of Bear Creek; and iii) Bear Creek assumed all costs for the acquisition and maintenance of the mining rights and carried out all of the activities within the properties.

87. The concept of intermediary refers to the simulation of legal transactions. According to LOHMANN, important Peruvian jurist and author of numerous articles on the subject, the characteristics of a simulated act are: i) the purpose of causing, either innocuously, or to the detriment of the law or third parties not part of the transaction, a false belief about the reality of the statement; ii) the divergence between that which is desired and that which is stated must be known, that is, [one must be] aware of the existence of two different realities; and, iii) the agreement or simulation arrangement (simulatory agreement) between the participants in the simulation.<sup>52</sup>

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

<sup>52</sup> Guillermo Luca de Tena Lohmann, THE LEGAL TRANSACTION, 2<sup>ND</sup> EDITION (Excerpts) 364-366 (1994) [Exhibit R-363].

88. Although it is true, Ms. Villavicencio requested and acquired the mining rights to the Santa Ana Project in her own name, the one that would in fact exercise ownership of those rights was Bear Creek.

89. In fact, from the facts described by Bear Creek it has been proven that Ms. Villavicencio did not have full freedom in her actions with respect to the mining concessions obtained.<sup>53</sup> Moreover, it has also been recognized that Ms. Villavicencio requested the mining concessions following the steps taken by Mr. Cesar Ríos who held the position of geologist employed by Bear Creek.<sup>54</sup>

90. Bear Creek alleges that during the time in which Ms. Villavicencio held the concessions in her “own name,” the company always acted on behalf and in representation of Ms. Villavicencio.<sup>55</sup> However, this does not stand up to scrutiny since it is clear that Bear Creek did not act in the best interests of Ms. Villavicencio, but, on the contrary, Ms. Villavicencio acted on behalf and in representation of Bear Creek serving the interests of the company and not hers. Furthermore, Ms. Villavicencio maintained a working relationship with Bear Creek, therefore she did not have full freedom to decide whether or not to follow the instructions of Bear Creek with respect to the mining concessions.<sup>56</sup> Moreover, it is recognized that the mining concessions were requested by the efforts of another employee of Bear Creek, and they did not cover the project costs, as these were assumed by Bear Creek.

91. Thus, to the extent that the mining rights were acquired in 2006 before Supreme Decree No. 083 of 2007 was issued, they were obtained in violation of the prohibition

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<sup>53</sup> See Claimant’s Memorial, paras. 25-32, 39-43.

<sup>54</sup> See Claimant’s Memorial, paras. 20-32.

<sup>55</sup> See Claimant’s Reply, paras. 29-30.

<sup>56</sup> See Claimant’s Memorial, p. v.

contained in Article 71 of the Constitution. In other words, under the provisions of this rule, the mining rights obtained by Ms. Villavicencio on behalf of Bear Creek in 2006 would become state property, since the rule states that “under penalty of forfeiture to the State the right so acquired.”<sup>57</sup>

92. Again it must be emphasized that obtaining mining concessions through Ms. Villavicencio constitutes fraud under the Constitution, as has been recognized by the Constitutional Court:

“(…) It follows that they cannot be acquired or held directly or indirectly, i.e., it is prohibited to do so through companies or other legal persons, or intermediaries; as said acts would constitute simulation and unconstitutional fraud.”<sup>58</sup> (Emphasis added).

93. It is fraud under the Constitution because, by virtue of the rule governing the application and acquisition of mining concessions, the violation of the prohibition in Article 71 of the Constitution regarding the acquisition of rights over natural resources by foreigners within fifty kilometers of the border was intended.

94. Further evidence of this is the option agreements entered into between Ms. Villavicencio and Bear Creek on November 17, 2004 (Karina9A, Karina 1 Karina 2 and Karina 3 concessions) and December 5, 2004. These agreements were signed even before Ms. Villavicencio obtained the title to mining concessions, making it clear that she never had an unencumbered right to the concessions.

95. The aforementioned option agreements show that Ms. Villavicencio never truly intended to obtain for herself the mining concessions for the Santa Ana Project. On the

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<sup>57</sup> 1993 Constitution of Peru, Art. 71 [Exhibit R-001].

<sup>58</sup> Constitutional Court Decision, EXP. 04966-2008-PA/TC, April 13, 2009, Conclusion of law 5[Exhibit C-0028].

contrary, she applied for and obtained such mining rights for the benefit and at the request of Bear Creek, so that it was Bear Creek who actually exercised the powers as holder of mining concessions for the Santa Ana Project even before exercising the option.

96. Thus, the option agreements were used to circumvent the constitutional requirement to obtain a declaration of public necessity for a foreigner to directly or indirectly own mining rights in border areas. Contrary to claims by Bear Creek, Ms. Villavicencio did not have full freedom to decide whether or not to follow the instructions of Bear Creek regarding the mining concessions. This is because, as we have noted, Ms. Villavicencio was employed by Bear Creek and, therefore, was under the control of the company.

97. In addition, the option agreements show that Bear Creek had control over the concessions and the activities that were carried out in the concession area, even before obtaining the declaration of public necessity. For example, under the terms of the Option Agreements, Bear Creek assumed all costs associated with applications for mining concessions by Jenny Karina Villavicencio and with the maintenance of the concessions. That is, Jenny Villavicencio was only a vehicle through which Bear Creek indirectly owned mining rights in the border area.

**B. DECREE NO. 083 DID NOT VALIDATE THE CONSTITUTIONAL VIOLATION**

98. Bear Creek alleges that it obtained the mining rights only after having obtained the declaration of public necessity by Supreme Decree No. 083-2007-EM (“Supreme Decree No. 083”).<sup>59</sup> Bear Creek also argues that for this reason it did not violate the provisions of Article 71 of the Constitution of Peru. This is incorrect.<sup>60</sup>

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<sup>59</sup> See Claimant’s Reply, para. 195.

<sup>60</sup> See Claimant’s Reply, para. 195.

99. As noted in the foregoing sections, the transfer of mining rights to Bear Creek was flawed because Ms. Villavicencio obtained the mining rights, yet it is established that the application for the mining concessions and their subsequent acquisition for the Santa Ana Project were carried out to benefit Bear Creek, that is, not on behalf of Ms. Villavicencio, but on behalf of the company.

100. Moreover, this constitutes fraud under the law because Ms. Villavicencio was used as a vehicle to evade compliance with the prohibition in the second paragraph of Article 71 of the Constitution, so that Bear Creek could indirectly acquire, through Ms. Villavicencio, rights over mining concessions for the Santa Ana Project without getting a declaration of necessity approved by supreme decree.

101. In this regard, Dr. Bullard argues that there is no basis to indicate that because Bear Creek had exercised indirect ownership of concessions before a declaration of public necessity, it cannot then legally obtain said declaration and legally exercise ownership over the concessions.<sup>61</sup> That is, according to Dr. Bullard, any irregularity was remedied once the declaration of public necessity was granted.

102. I disagree with the statement by Dr. Bullard since:

(i) The Constitution expressly prohibits the direct or indirect ownership or possession of land or resources within fifty kilometers of the border by foreign citizens.

(ii) It has been shown that the transfer of mining rights to Bear Creek was flawed because Ms. Villavicencio obtained the mining concessions but was acting as an intermediary on behalf of Bear Creek.

(iii) Therefore, Bear Creek directly acquired mining concessions for the Santa Ana Project, located within fifty kilometers from the border with Bolivia, without there being a prior declaration of public necessity for such investment

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<sup>61</sup> See Second Bullard Report, paras. 89-96.

that would allow the company to make such acquisition, thus violating the second paragraph of Article 71 of the Constitution.

(iv) The Peruvian legal system does not provide for the recognition of unconstitutional or illegal acts; rather, it only provides for ratification<sup>62</sup> (for flaws in representation or acts performed without standing) and confirmation<sup>63</sup> (for vices of nullity). Consequently, the fact that the State in 2007 authorized Bear Creek to acquire mining concessions for the Santa Anta Project does not mean that it has “validated” the violation of Article 71 of the Constitution by indirectly acquiring, through an employee of its company, mining rights within fifty kilometers of the border with Bolivia without the declaration of public necessity.

Moreover, under no circumstances does the issuance of Supreme Decree No. 083 imply that the State renounces its right to sanction the violation committed prior to the application for the acquisition of mining concessions.

(v) The purpose of Supreme Decree No. 083 was to declare public necessity for the mining investment project presented by Bear Creek. What was evaluated for the issuance thereof was not the legality of the option agreements or the acquisition of the mining rights by Ms. Villavicencio, rather only whether or not the project submitted constituted a public necessity for the Peruvian State. Thus, after the evaluation made at the discretion of the Council of Ministers, it was decided to declare the public necessity of the acquisition by Bear Creek of Mining rights to the Santa Ana Project. In no way can it be argued that the declaration of public necessity had the effect of validating the illegal acquisition of mining rights by Ms. Villavicencio when it was not discussed by the Council of Ministers.

103. On the other hand, Bear Creek argues that the MINEM was fully aware of the option agreements signed with Mrs. Villavicencio when it issued the declaration of public necessity, therefore the Peruvian State cannot claim that such agreements are a violation of Article 71 of the Constitution.<sup>64</sup>

104. In this regard, it should be noted that, from the facts put forth by Bear Creek, it is understood that Bear Creek did not inform the MINEM that Ms. Villavicencio, besides being its legal representative, was an employee of the company at that time. Moreover, the powers of

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<sup>62</sup> Civil Code of Perú, Art. 162 [Exhibit R-033].

<sup>63</sup> Civil Code of Perú, Art. 230 [Exhibit R-033].

<sup>64</sup> See Claimant’s Reply, paras. 35-38; See Second Bullard Report, para. 85-104.

representation granted to Ms. Villavicencio were in Annex IV of the application for a declaration of public necessity, amid hundreds of pages that accompanied said application. Notwithstanding this, the fact is that Bear Creek did not inform the MINEM of the full extent of its relationship with Ms. Villavicencio as it failed to make known the employment relationship maintained with Ms. Villavicencio. Therefore, it is not reasonable to argue that the MINEM approved the declaration of public necessity knowing of the relationship that existed between Ms. Villavicencio and Bear Creek.

105. Now then, even if the Ministry of Labor, or other government entities, had information on the employment relationship between Ms. Villavicencio and Bear Creek, the company cannot claim that the MINEM knew of this working relationship, because although it is true the State is one and the same, it is divided into different branches and different entities that act independently of each other, so it cannot be argued that since the Ministry of Labor was aware of the employment relationship, then the MINEM was also aware of it.

106. Notwithstanding the foregoing, it should be noted that even if the MINEM had knowledge of the employment relationship between Ms. Villavicencio and Bear Creek, the error does not create any right or validate fraudulent situations. In fact, even if the MINEM should have known about the relationship between Jenny Karina Villavicencio and Bear Creek, approval of the declaration of public necessity is not a waiver by the State to a future claim due to the existence of a breach of the constitution.

107. At this point, it is necessary to refer to the doctrine of estoppel, cited by Dr. Bullard as an argument to claim that once the State approved the declaration of public necessity, it was unable to revoke the declaration due to defects that may have existed before

the declaration. In this regard, authors such as ORTIZ, commentator on the doctrine of estoppel, states the following:

“The Estoppel doctrine originated in the desire to prevent a lawful response from being, at the same time, the unjust solution for a specific case.”

108. Thus, under the Estoppel Doctrine is not permissible for a same party to act in a certain way—usually called “original conduct”—generating legitimate expectations in the other party, as a result of good faith, and then to pretend to ignore such conduct by subsequently acting in another way that openly contradicts the previous conduct. As is clear from the foregoing, the Estoppel Doctrine intends to defend the good faith and legitimate expectations that arise from those acts generating obligations and rights, which would be infringed upon in the event of a possible change of the original conduct.

109. Indeed, as recognized by CLEVES, a renowned jurist, “Good faith is defined as synonymous with probity. (...) The principle of good faith requires legal subjects to be loyal, honest and sincere in the fulfillment of their duties toward others, and also loyal, honest and sincere in the exercise of their rights.”<sup>65</sup> Although CLEVES is versed in the doctrine of Colombia, the principle of good faith has the same definition in Peruvian law.

110. In view of this, in the present case, application of the Estoppel Doctrine cannot be invoked, as there was no conduct in good faith by Bear Creek, insofar as the company indirectly acquired mining rights for the Santa Ana Project located within fifty kilometers from the border with Bolivia, through Ms. Villavicencio, before having the declaration of public

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<sup>65</sup> María José Vivianna Cleves, *THE PRINCIPLE OF LEGITIMATE EXPECTATIONS IN COLOMBIAN ADMINISTRATIVE LAW*, Universidad Externado de Colombia 48 (2007) [Exhibit R-364].

necessity in Supreme Decree No. 083 of 2007. Therefore, since good faith is the foundation of the Estoppel doctrine, it cannot be invoked if it is established that a party acted in bad faith.

111. In view of the foregoing, the declaration of public necessity for the investment project presented by Bear Creek, approved by Supreme Decree No. 083, does not automatically validate the prior vices of unconstitutionality arising from the acquisition of mining rights by Ms. Villavicencio, as Article 71 of the Constitution grants the State the opportunity to decide at any time what does or does not constitute a public necessity. If the State is deprived of that opportunity, as occurred in this case between 2004 and 2007 when Ms. Villavicencio appeared to be the beneficiary of the mining rights, the State is entitled to review its declaration of public necessity of 2007 and sanction, due to any vices that may exist, as the acquisition by Ms. Villavicencio constituted indirect acquisition by Bear Creek.

#### **IV. DECREE 032 OF 2011 IS NOT CONTRARY TO PERUVIAN LAW**

##### **A. THE STATE PROPERLY EXERCISED ITS DISCRETION IN ISSUING DECREE NO. 032 OF 2011**

112. While it is true that by Supreme Decree No. 083 of 2007, the State recognized the public necessity nature of the private investment proposed by Bear Creek on the border with Bolivia, thus enabling the acquisition by the company of mining concessions for the development of production activities within fifty kilometers of the southern border, it must be noted that this does not encumber the discretion of the Peruvian State to nullify said declaration of public necessity, in the event of confirmation of a change in the circumstances that led to its classification as such.

113. According to the Preamble of said rule, the reasons that motivate such declaration are basically socio-economic.<sup>66</sup> Thus, the State identified a public interest in the

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<sup>66</sup> See Supreme Decree No. 083-2007-EM, November 29, 2007 (“Supreme Decree No. 083”) [Exhibit C-0004]

development of the proposed Bear Creek project, insofar as it was thought that this would contribute to the rational use of natural resources through exploration and mining activities, which would encourage economic activities related to the mining, such as the entry of foreign capital in cases of export, tax revenue, job creation (the multiplier effect by providing good paying jobs to those in the area).<sup>67</sup>

114. However, subsequently, due to a series of social conflicts, Supreme Decree No. 032-2011-EM was issued, which repealed the abovementioned Supreme Decree No. 083-2007-EM. Supreme Decree No. 032-2011-EM was issued in order to safeguard the social conditions of the areas of the districts of Huacullani and Kelluyo in the province of Chucuito, Department of Puno, i.e., the area in which Bear Creek had planned to make their investments.

115. I agree with Dr. Bullard in that the state could not validly repeal the declaration of public necessity on the Bear Creek project for the simple fact of having changed its mind about the public necessity represented by its project for the population of the country. This could be considered arbitrary action that would exceed the limits of discretion attributed to the Council of Ministers to make such an assessment. But this is not what happened in this case.

116. Supreme Decree 032 of 2011 was not issued without grounds. On the contrary, there are factual, economic and social reasons for the validity of the repeal of the previously declared public necessity. I believe that changes occurred in 2011 in the social context of the area which, causing a critical social situation in the region, prompted the investment project proposed by Bear Creek to no longer be consistent with the public interest of the State.

117. Thus, by issuing Supreme Decree No. 032-2011-EM, the State did not act unlawfully, rather its decision to repeal Supreme Decree No. 083-2007-EM was properly

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<sup>67</sup> See Supreme Decree No. 083 [Exhibit C-0004].

supported. The various social conflicts generated by the opposition of the Aymara people (the majority ethnic group in Bolivia, with a presence in Puno-Peru) to the development of mining activities in the area, including the Santa Ana Project, caused the State to repeal Supreme Decree 083 of 2007.

118. The existence of social conflicts in the area where the investment of Bear Creek was to be made involved the disappearance of the conditions that were taken into account for the issuance of Supreme Decree 083 of 2007,<sup>68</sup> as the socio-economic benefits considered for that decree would no longer be produced given the social context that existed within fifty kilometers of the southern border of the country, and throughout the Department of Puno.

119. Even if we refer to the request submitted by Ms. Villavicencio in 2004, it can be noted that the process took longer than it should have due to a boundary dispute in the Aymara Lupaca Reserved Zone. It is therefore evident that the community that would be most impacted by the Bear Creek investment would be Aymara, precisely the community that opposed the development of mining activities and is the largest ethnic group in Bolivia.

120. Therefore, by way of Supreme Decree 032 of 20011, the State sought to protect internal order and prevent an external threat, thereby safeguarding national security. I believe that during that time Peru experienced a series of social conflicts in the Puno area caused by the opposition of indigenous communities to the mining projects in the border area, whereby the issuance of Supreme Decree 032 was not in response to an isolated case, rather it was part of a government policy adopted in response to these social conflicts. Thus, Supreme Decrees

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<sup>68</sup> See Supreme Decree No. 032-2011-EM, June 25, 2011 (“Supreme Decree No. 032”) [Exhibit C-0005].

No. 033-2011-EM and No. 034-2011-EM were issued in the same context in which Supreme Decree 032 was issued.<sup>69</sup>

121. In addition, in the particular case of Supreme Decree 032, I understand that the repeal of the declaration of public necessity was also in response to the fact that the State discovered that Bear Creek had indirectly acquired the mining concessions, through Ms. Villavicencio, before obtaining the declaration of public necessity required by Article 71 of the Constitution.<sup>70</sup>

122. Therefore, contrary to the assertions of Dr. Bullard,<sup>71</sup> the State did not act arbitrarily in issuing Supreme Decree 032 of 2011, rather its decision was motivated on grounds that merited the loss of public necessity in the acquisition or possession of land within fifty kilometers of the border by Bear Creek.

123. Now, as mentioned, both Supreme Decrees No. 083-2007-EM and No. 032-2011-EM regulate political interests of the country. Precisely for this reason, they are approved by the Council of Ministers, the highest political body of the government.<sup>72</sup> In this regard, as has been mentioned in the second paragraph of this Report, the declaration of public necessity, and its repeal, constitute discretionary decisions issued in exercise of the function of government attributed to the Council of Ministers.

124. As such, there is a wide range of freedom—using arbitrariness as the limit—to support both the decision to declare the public necessity of a given project and to render it

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<sup>69</sup> See Respondents Counter-Memorial, paras. 125-127.

<sup>70</sup> See Respondents Counter-Memorial, paras. 145-148.

<sup>71</sup> See Second Bullard Report, para. 136-158.

<sup>72</sup> 1993 Constitution of Perú

“Article 119.- The administration and management of public services are entrusted to the Council of Ministers and to each minister in the matters of his portfolio.” [Exhibit R-001].

ineffective. Therefore, even if it is considered that there is possible insufficient reasoning for Supreme Decree No. 032-2011-EM, this is not a cause for invalidity thereof. Notwithstanding this, I believe that the State did specify the main reason that warranted said repeal by referring to “the existence of circumstances involving the disappearance of the conditions required by law for the issuance of that act.”<sup>73</sup>

125. Furthermore, it must be remembered that there is no legal provision establishing the requirement to support the repeal of a Supreme Decree issued under Article 71 of the Constitution solely with reasons of threat or risk of external defense. The State can make that decision based on the absence of public necessity (essential requirement under Article 71 of the Constitution), in the event of a potential threat to national security, which is the legal right that Article 71 of the Constitution seeks to protect, as has been recognized by the Constitutional Court.

126. Finally, it should be noted that the lower court decision issued in the amparo proceedings initiated by Bear Creek lacks legal effect. This is because Bear Creek withdrew the suit, therefore there is not a final judgment that can be considered *res judicata*. In accordance with Article 6 of the Constitutional Procedural Code, “in constitutional proceedings, only final decisions ruling on the merits acquire the status of *res judicata*.”<sup>74</sup> Thus, the judgment of the first instance court lacks the force of *res judicata*.

127. On the other hand, Article 343 of the Code of Civil Procedure, applicable supplementarily to amparo proceedings, states that withdrawal of the proceedings concludes the matter without affecting the claim. Therefore, by virtue of the withdrawal by Bear Creek,

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<sup>73</sup> See Supreme Decree No. 032 [Exhibit C-0005].

<sup>74</sup> Constitutional Procedural Code, May 28, 2004, Art. 6 [Exhibit R-106].

the amparo proceeding initiated by the company is understood as never initiated, therefore the proceedings and the judgment handed down in the lower court lack legal effect.

128. In addition, the first instance court that reviewed the amparo action of Bear Creek was wrong to conclude that Supreme Decree No. 032 was in violation of the Constitution of Peru. As already mentioned above, Supreme Decree No. 032 was a government act that was issued in the non-arbitrary and proper exercise of its discretionary power of the State in view of a critical social situation and the discovery of a constitutional violation by Bear Creek.

**B. THE DECLARATION OF PUBLIC NECESSITY IS NOT AN ADMINISTRATIVE ACT, THEREFORE ITS REPEAL—NOT REVOCATION—IS NOT REQUIRED TO FOLLOW THE PROCEDURES AND REQUIREMENTS OF THE LAW OF GENERAL ADMINISTRATIVE PROCEDURE (LPAG).**

129. In the previous section we showed that, just as the State exercises discretion to grant the declaration of public necessity in a foreign border zone, the State may exercise its discretion to nullify the declaration of public necessity. For example, if the circumstances in the area change and if the activity of foreigners is unnecessary and adversely affects the public interest, the State can nullify the declaration of public necessity to, among other reasons, safeguard other constitutionally protected legal interests, as is the case of National Security.

130. Now, according to Dr. Bullard, the State is only empowered to revoke the authorization of Article 71 in exceptional cases, if it is consistent with the general system. If an act cannot affect the property in general, then neither can that act affect the property of the foreigner already authorized by the State within 50 km of border.<sup>75</sup>

131. However, as I explain below, that assertion starts from a mistaken premise, consisting of attributing to the declaration of public necessity in Article 71 of the Constitution

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<sup>75</sup> See Second Expert Report of Alfredo Bullard, January 6, 2016 (“Second Bullard Report”), paras. 114–135.

the status of an administrative act and, therefore, to apply the rules contained in the LPAG for the nullification or revocation of such acts.

132. The supreme decree by which the Council of Ministers declares the public necessity of a particular foreign investment project and authorizes the acquisition of rights within fifty kilometers of the border is not an administrative act. While this is true, said supreme decree lacks one of the main features of legal norm, as it is not general in nature, but specific, nevertheless it must not be treated as an administrative act.

133. As has been extensively developed in the second section of this Report, the Supreme Decree referred to in Article 71 of the Constitution is a *sui generis* concept in Peruvian law that does not strictly fit the definition of a legal norm or an administrative act. It involves a regulatory instrument that, with regard to form, is a typical regulatory standard but has specific content. Therefore, we have qualified the supreme decree referred to in Article 71 of the Constitution as a decision issued by the Council of Ministers in exercise of the function of government through a regulatory instrument.

134. Thus, Supreme Decree 083 of 2007 is not governed by the provisions of the LPAG, the application of which is restricted to administrative acts (defined as concrete actions of public entities issued in exercise of administrative functions imposed by a legal norm).

135. To hold that by having a specific content Supreme Decree No. 083 constitutes an administrative act and therefore is governed by the LPAG would imply accepting that this supreme decree is likely to be contested in administrative proceedings, as occurs with administrative acts. Moreover, the exhaustion of administrative remedies is required to access the jurisdictional forum to challenge the validity of a specific administrative act.

136. In this scenario, I wonder, what would be the procedure for challenging, administratively, Supreme Decree 032 or 083? Could any administrative entity nullify a supreme decree issued by the Council of Ministers? Obviously, the answer is no. Therefore, since it involves a *sui generis* concept that has elements of both a legal norm and an administrative act, the form determines the mechanisms for appeal, as well as the applicable legal regime to determine its validity. Thus, the grounds for revocation provided for in the LPAG do not apply, much less the statute of limitations period for an ex officio declaration of nullity provided for in said rule. In this regard, I should note that Bear Creek believed that Supreme Decree No. 032 was not an administrative act when it was issued, because, as I understand, Bear Creek did not challenge the decree in administrative proceedings. On the contrary, it challenged the decree through an amparo action.

137. In view of this, Supreme Decree 032 has not “revoked,” within the meaning established in the LPAG, the decision by Supreme Decree 083, but has quashed said declaration of public necessity by its repeal. Dr. Bullard argues that if it is determined that the State could actually affect the property of Bear Creek through a repeal, the disappearance of public necessity must have been given through a legal norm. This, considering that the declaration of public necessity was based on two such rules (Legislative Decree 757 and the Consolidated Text of the General Mining Law).

138. However, whether Legislative Decree 757 generally recognizes the public interest in private investments, both domestic and foreign, that does not mean that the declaration of public necessity provided in Supreme Decree No. 083 of 2007 has been based on said rule or that the provisions of this rule have been applied. Therefore, it is incorrect to hold that in order to repeal Supreme Decree No. 083, a legal norm would be required. At this point,

it should be clear that, Supreme Decree 032 of 2011 was not intended to repeal Legislative Decree 757, but, rather, to nullify the decision adopted by way of Supreme Decree No. 083 of 2007, which specifically referred to the public necessity for the proposed investment by Bear Creek.

139. Finally, even if it is considered that Supreme Decree No. 083 of 2007 is an administrative act and therefore is subject to the grounds for revocation provided for in the LPAG, Supreme Decree No. 032 of 2011 fits the factual circumstance provided for in Article 203, paragraph 203.2.2 of the LPAG. That provision authorizes the State to revoke administrative acts “when there is the disappearance of the conditions legally required for the issuance of the administrative act whose presence is indispensable for the existence of the legal relationship created.”<sup>76</sup> In this case, such grounds for revocation arose due to the social conflicts in the region, as public order disappeared, which is a prerequisite for the development of mining activities, therefore the validity of mining concessions acquired by Bear Creek could not be maintained.

## V. CONCLUSIONS

140. Article 71 of the Constitution establishes, as a general rule, a prohibition for foreigners to acquire or hold, directly or indirectly, land within fifty kilometers of the border. Exceptionally, the prohibition will be lifted only if there is a case of public necessity previously identified and declared as such by the Council of Ministers through a Supreme Decree.

141. The Supreme Decree, provided in Article 71 of the Constitution, is a *sui generis* concept characterized by being a singular authoritative rule, to the extent that it is a supreme

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<sup>76</sup> Law No. 27444, Art.203.2.2 [Exhibit Bullard-005].

decree (regulatory rule) with specific and concrete effects on a party subject thereto, which authorizes the exercise of rights by foreigners within 50 kilometers of the border. However, the authoritative nature of the Supreme Decree does not cause it to lose its nature of singular authoritative rule. Indeed, it is an act dictated in the exercise of the governmental function of the Council of Ministers approved by way of a legal instrument of a regulatory nature.

142. The State, through the Council of Ministers, can assess both internal and external factors to support its decision to declare the public necessity of an investment, as one of its functions is to ensure internal order, which is part of the overall concept of National Security. The power granted to the Council of Ministers to determine in which cases a particular foreign private investment within fifty kilometers of the border is a public necessity for the State is a discretionary decision, which does not mean that it is an arbitrary decision, rather the Council of Ministers has a broad range of assessment to determine what would benefit the population in general.

143. The inclusion of the procedure for the declaration of public necessity for the acquisition of mining properties and investments by foreigners in border areas in the TUPA of the MINEM does not mean that the supreme decree referred to in Article 71 of the Constitution is of the nature of an administrative act, much less a regulated administrative act. The TUPA is not a source of law, but rather a compilation of existing rules for the purpose of administrative simplification. Therefore, the TUPA does not determine the legal nature of an administrative act.

144. It is not disputed that Ms. Villavicencio acquired the mining concessions for the Santa Ana Project, acting on behalf and in representation of Bear Creek and serving the interests of the company and not hers. This is because she requested the mining concessions

following the steps taken by Mr. César Ríos who held the position of geologist employed by Bear Creek, she did not have full freedom in her actions with respect to the mining concessions obtained, and she maintained an employment relationship with Bear Creek, therefore she was not completely free to decide whether or not to follow the instructions of Bear Creek regarding the mining concessions; she did not cover the project costs, rather these were assumed by Bear Creek. In other words, Ms. Villavicencio acted as an intermediary for Bear Creek, therefore there is a constitutional violation of Article 71.

145. It is not valid to invoke the Estoppel doctrine to argue that the Peruvian government would have validated the vices of unconstitutionality for the acquisition of mining rights by Ms. Villavicencio through Supreme Decree No. 083 of 2007, as the foundation of said doctrine is the principle of good faith and legitimate expectations by both parties in a legal relationship. Therefore, by having indirectly acquired through Ms. Villavicencio the mining concessions for the Santa Ana Project, Bear Creek did not act in good faith and therefore it is not feasible to apply the Estoppel doctrine. In addition, the Constitution does not provide for recognition of acts that violate it, nor does any rule in the Peruvian legal system.

146. The State validly exercised its discretion authority in issuing Decree No. 032 of 2011, by which it nullified Supreme Decree 083 of 2007, as arguments that supported such decision were outlined. The State did specify the main reason that justified nullifying the declaration of public necessity contained in Supreme Decree No. 083 by invoking “the existence of circumstances that would cause the disappearance of the conditions required by law to issue said act.”

147. Supreme Decree 032 of 2011 has not “revoked,” within the meaning established in the LPAG, the decision by Supreme Decree 083, but has nullified the declaration of public

necessity by its repeal. The provisions of the LPAG are not applicable for said supreme decrees because these do not constitute administrative acts.

148. Notwithstanding this, even if it is considered that Supreme Decree No. 083 of 2007 is an administrative act and therefore is subject to the grounds for revocation provided for in the LPAG, Supreme Decree No. 032 of 2011 rests on the factual circumstance provided under subsection 203.2.2 of Article 203 of the LPAG, according to which it is valid to revoke administrative acts “when there is the disappearance of the conditions legally required for the issuance of the administrative act whose presence is indispensable for the existence of the legal relationship created.”

This Opinion is based on my professional experience, and I hereby certify that its contents are in accordance with the best of my knowledge and understanding.

\Signature\

Jorge Danos Ordóñez

Date: April 11, 2016

## Annex A

**Legal Area**

Regulatory

**Areas of Practice**

Administrative Law  
 Regulatory  
 Regulation of Utilities  
 Public-Private Partnerships  
 Telecommunications  
 Concessions and Infrastructure  
 Constitutional Law  
 Environment

**Languages**

Spanish  
 English

Estudio EcheCopar  
 Member Firm Of Baker &  
 McKenzie International  
 Av. La Floresta 497, 5<sup>th</sup> Floor  
 San Borja, Lima 41 – Peru

Tel: +51 1 618 8500  
 Fax: +51 1 372 7374  
[www.echecopar.com.pe](http://www.echecopar.com.pe)

## Jorge Danós Ordóñez

Partner

Lima, Peru

Tel.: 51 (1) 618-8514

[Jorge.danos@bakermckenzie.com](mailto:Jorge.danos@bakermckenzie.com)

He has extensive experience in administrative law in general, regulated markets law, infrastructure and utilities concessions, and constitutional law, especially with reference to constitutional processes and economic and tax constitutional law. He has advised many public entities on administrative proceedings, judicial processes, as well as aspects of administrative law, regulation of economic activities, and constitutional law. He has represented interests of economic agents and important private companies with regard to government entities, both in administrative and judicial processes. He has participated in drawing up various regulations in force, as well as in the legal design of various processes to promote private investment in utilities and public infrastructure. Chambers and Partners stated that “He is a specialist in public law, recognized for his skill and experience in administrative law. He has great academic knowledge, his clients say enthusiastically, and he knows how to use it to solve problems.”

**Education**

- Universidad Complutense de Madrid, completed doctoral studies in Constitutional Law, Madrid, (1991–1993)
- Institute for Human Rights of the Universidad Complutense de Madrid, Diploma in Human Rights, (1991–1992)
- Center for Constitutional and Political Studies of Madrid, Diploma in Constitutional Law, Madrid (1991–1993)
- Pontificia Universidad Católica del Perú, completed master’s studies in Constitutional Law, Lima, (1990–1991)
- Pontificia Universidad Católica del Perú, law degree, Lima (1985).

**Memberships**

- President of the Peruvian Association of Administrative Law
- Vice President of the Latin American Forum on Administrative Law - FIDA, which brings together professors of the specialty in Spain, Portugal, and Latin America
- President of the Latin American Association of Regulatory Studies - ASIÉR
- Member of the Peruvian Institute of Tax Law

## Experience

- Partner in the Estudio Ehecopar since 2006
- Law partner in the Estudio Benites, De la Casas, Forno y Ugaz (1994–2005)
- Head of the Advisory Board of the Presidency of the Council of Ministers (Dec. 2003–Aug. 2005)
- Advisor in the Congress of the Republic for 11 years
- Member of the Commission on Technical and Commercial Regulations in the Institute for the Defense of Competition and the Protection of Intellectual Property – INDECOPI for 11 years
- Former member of the Adversarial, Sanctioning, and Arbitration Courts of the Lima Stock Exchange
- Has been Chair of the Commissions appointed by the Ministry of Justice in charge of drawing up the preliminary drafts that resulted in the General Administrative Procedure Act and the Law regulating Administrative Proceedings in force
- Member of the Commission of Legal Scholars that drew up the draft that resulted in the Code of Administrative Constitutional Procedure in force
- Former member of the Commission of the Ministry of Justice for preparing the draft Law on Rules Governing Conflicts of Interest of Public Officials
- Former member of the Board of Directors of the National Sanitation Services Authority – SUNASS (2001)
- Member of the Commission on Foundations for Constitutional Reform appointed during the transitional government in June 2001
- Member of the Advisory Committee of the Congressional Constitution Commission to draw up a draft for constitutional reform (2001–2002)
- Advisor to the Commission appointed by the Executive Branch for the Study of the Reform of the 1993 Charter
- Former advisor for the Peruvian Internal Revenue Service (1985–1987)
- Member of the team that, in its capacity as Consultant to the World Bank, has provided advice to the Republic of Guatemala in the creation of an entity that would centralize the roles of the Tax Authority (1996)
- During his management as Head of the Advisory Board of the Presidency of the Council of Ministers, he took care of matters connected with general legal services to the Government, especially matters related to the reform of the State, modernization of the government, administrative simplification, and coordinated the team of legal scholars that drew up the drafts of laws for the reform of public employment.
- He has more than 30 years of experience providing ongoing advice to various government companies and public entities, not to mention his ongoing participation on the different Congressional commissions created to draw up regulations with regard to administrative law.

## Operations

- Mr. Danós has frequently been requested by the State, governmental organizations, and private companies to act as principal advisor in processes to designate the best implementation of regulatory administrative procedures and internal organization of administrative institutions.
- Mr. Danós has given legal advice in various infrastructure concessions and projects, such as the Lima-Huacho-Pativilca Highway (Network 5); the transport, loading/unloading of minerals in the port of Callao, among others.
- In the private sector, he has advised TELEFONICA DEL PERU with respect to various state entities. To KALLPA in disputes with administrative bodies on issues related to administrative processes, licenses, and administrative sanctions, among other companies in the private sector.
- He participated on the team that advised the Regional Government of Arequipa and entities in the private sector that led to the funding and construction of the Chilina Bridge, through the legal structure of taxes per work item. This has been the most important project of its kind in the country so far.
- Advises a variety of government institutions such as the Banking and Insurance Superintendence, the Judicial Branch, FONAFE - National State Fund for Financing of State Business Activities, among others.
- Advises a variety of private sector companies in relation to the administrative processes for obtaining licenses, permits, and authorizations from the state or government entities, as well as on defending their interests in case of disputes with administrative entities.

## Publications

- Author of various articles on Administrative, Constitutional, and Tax Law
- Speaker at various academic and professional events on the specialties of Administrative, Constitutional, and Tax Law

## Academic Experience

- Professor in the principal category in the School of Law of the Pontificia Universidad Católica del Perú; Professor of the Administrative Law course
- Professor of the Constitutional System and Economic Constitutional Law course in the Master's in Law program with honors in Constitutional Law of the Pontificia Universidad Católica del Perú
- Professor of the Economic Constitutional Law course in the Master's

in Taxation program in the Postgraduate School of the University of Lima

- Professor of Diploma in the Regulation of Utilities and Concessions in the Master's in Company Law program at the Pontificia Universidad Católica del Perú
- Professor of the Economic Constitutional Law course in the Master's in Tax Law program at the Pontificia Universidad Católica del Perú
- Professor of the Administrative Law course in the Law School of the Universidad del Pacífico