INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID

BEAR CREEK MINING CORPORATION

Claimant

v.

THE REPUBLIC OF PERU

Respondent

EXPERT REPORT

January 6, 2016

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I. SUMMARY OF CONCLUSIONS

1. This report is issued at the request of King & Spalding, in its capacity as attorneys representing Bear Creek Mining Corporation in the arbitral proceeding under way against the Republic of Peru. In particular, this report is in response to the report issued by Dr. Francisco Eguiguren supporting the Republic of Peru's position on the issues addressed in my first expert report.

2. This report should therefore be understood as complementary to my first report.

3. After completing my analysis, I have reached the following conclusions, which are fully consistent with the conclusions I had reached in my first report:

   a. BEAR CREEK MINING COMPANY SUCURSAL DEL PERÚ (hereinafter, BEAR CREEK) validly acquired property rights over mining concessions within 50 kilometers of the Bolivian border, because: (i) it obtained the declaration of public necessity from the Council of Ministers, authorizing it to own property, in compliance with all the requirements prescribed by Peruvian law; and (ii) it obtained property of the mining concessions through acquisition contracts which were based on valid option agreements.

   b. BEAR CREEK's property right is a fundamental right independent from the acts through which it was created, recognized in the Constitution as a subjective right protected through an institutional guarantee of constitutional nature which assures its inviolability, and which protects it from legislation acts or the acts of the public authorities in general.

c. The Peruvian State unlawfully impaired BEAR CREEK's property right by not complying with the revocation process or the expropriation process, wherefore it carried out an unlawful expropriation, which is nothing but a confiscation of property.

d. According to Peruvian law, the unlawful expropriation carried out by the Peruvian State was a direct one, because it deprived BEAR CREEK of all its property by eliminating the authorizations the company needed to be the owner pursuant to article 71 of the Constitution.

e. In the event, which we deny, that it is found that the State could impair BEAR CREEK's property through a derogation, the disappearance of that public necessity should have been achieved through a norm with legal rank, that is, considering that the declaration of public necessity rested on 2 measures of said status (Legislative Decree 757 and the Single Ordered Text of the General Mining Act). A supreme decree cannot repeal something that has been established by two measures with legal rank, nor may it impair a fundamental right.

f. Even under the assumption that the Council of Ministers has the power to declare the disappearance of a public necessity through a supreme decree, that authority must at least demonstrate that the provisions of Legislative Decree 757 and the provisions of the Single Ordered Text of the General Mining Act are no longer in force. However, Supreme Decree 032-2011-EM (hereinafter, DS 032) not only does not demonstrate that said provisions are not in force, but also it in no way identifies the "circumstances" which in the Council of Ministers' judgment resulted in the disappearance of the public necessity.

g. In any event, since the alleged disappearance of the public necessity implied depriving the owner of its property, according to Peruvian law, that necessarily means that the affected party must be compensated for the loss of its right.

h. In any case, since the Council of Ministers issued DS 032 without having assured BEAR CREEK's right of defense and without having duly justified that decision, it can be concluded that said decision was unlawful and arbitrary.

i. The State's unlawful expropriation and the position it has adopted to defend it not only impaired BEAR CREEK's property, but also infringed a basic principle of Peruvian law: legal security. This, as confiscating a private party's property under the State´s sole discretion puts an end to the predictability that private parties need regarding the *status quo* of their property in order to fully exercise their economic rights and their freedoms.

II. INTRODUCTION

4. In his expert's report, Dr. Eguiguren speaks at length about two topics: (i) the supposed discretion of the Peruvian State (hereinafter, the State) to grant the authorization regulated in article 71, and the supposed discretion to withdraw it;[1] and (ii) the existence of a supposed fraud or simulation which would void the authorization granted to BEAR CREEK through Supreme Decree 083-2007-EM (hereinafter, DS 083).[2]

[1] See EGUIGUREN, paragraphs 9 to 46 and 51 to 75.
[2] See EGUIGUREN, paragraphs 47 to 52.

5. However, it is striking that Dr. Eguiguren has ignored the two core issues of the argument between BEAR CREEK and the State: (i) the existence and impairment of the property right, and (ii) the infringement of legal security.

6. In this report we will explain that:

   a. BEAR CREEK validly acquired a property right over the mining concessions in two districts of Chucuito Province, in Puno Department, within 50 kilometers of the Bolivian border. Consequently, at the time DS 083 was rendered without effect, BEAR CREEK was already the owner of the mining concessions.

   b. Hence, the State unlawfully impaired BEAR CREEK's property right over the mining concessions when derogating DS 083.

   c. The State's behavior impaired not only BEAR CREEK's property right, but also the principle of legal security which radiates the entire legal system and enshrines a prohibition against arbitrariness.

III. BEAR CREEK VALIDLY ACQUIRED A PROPERTY RIGHT OVER THE MINING CONCESSIONS

7. The case between BEAR CREEK and the State rests on an undisputed fact: BEAR CREEK acquired the property right over the mining concessions in question with the State's authorization.

8. To have this right, it was required to:

a. Obtain a declaration of public necessity through a supreme decree which entitled BEAR CREEK, as a foreign entity, to acquire a mining concession within 50 kilometers of the border, on the basis of the exception provided for in article 71 of the Constitution.

b. Obtain ownership of the concession through acquisition contracts in the exercise of previous option agreements.

A. BEAR CREEK validly obtained the declaration of public necessity required by Art. 71 of the Constitution

9. As was discussed at length in my first report,[3] the first requirement for BEAR CREEK to become the owner of the mining concessions was to receive a declaration of public necessity from the Council of Ministers, authorizing it to have property within 50 kilometers of the border.

10. As I also explained in my first report[4], the declaration of public necessity (contained in an authoritative supreme decree) is a legal provision with specific and concrete character which purpose is to enable BEAR CREEK to acquire and possess mining rights in the zone of the border with Bolivia pursuant to Article 71 of the Constitution and Article 13 of Legislative Decree 757 (hereinafter Leg. D. 757). This authorization integrates itself as part of the property right so that the subsequently acquired property is an authentic property, with all the attributes [property] provides, equivalent to the property of any national. It is not, therefore, a second class property. The authorization act is, therefore, a specific act with

[3] See BULLARD 1, paragraphs 35 and 36.

[4] See BULLARD 1, paragraphs 165 and 166.

particular and specifically defined effects: it integrates the property as a component thereof.

11. According to Dr. Eguiguren, this declaration of public necessity arose from the Council of Ministers's discretion.[5] However, as I indicated in my first report,[6] Peruvian law does not grant that institution absolute freedom to decide whether or not to declare public necessity and thereby give rise to the authorization to obtain a property right. On the contrary, the law prescribes an administrative procedure, requirements, and parameters which must be followed in order to grant the authorization for a foreigner to acquire a property right or possession within 50 kilometers from the border.

(i) Requirements of the Single Text of Administrative Procedures (TUPA) of the Ministry of Energy and Mines (MEM)

12. Dr. Eguiguren asserts in his report[7] that the authorization for a foreigner to acquire rights of ownership within the border zone is a merely discretionary act, and that it is not an administrative act but a political one. Such assertions are totally inconsistent with the Peruvian legal framework.

13. According to Peruvian Administrative Law, to be binding, administrative procedures must be in conformity with the demands and requirements of the Single Text of Administrative Procedures (TUPA) of the agency in question. It is mandatory for every agency to have a TUPA and for it to include all the administrative procedures which are followed before that agency. A TUPA accordingly regulates: (1) administrative procedures; and (2) the requirements which the party subject to

5 See EGUIGUREN, paragraphs 23 and 24.

6 See BULLARD 1, paragraphs 147 to 171.

7 See EGUIGUREN, paragraphs 23 and 24.

administration must satisfy to obtain the result sought through the respective procedure.

14. On this score, article 36, section 1, of Law No. 27444, General Administrative Procedure Act ("LPAG") provides as follows:

> "*36.1. The administrative procedures, requirements, and costs are established exclusively through a supreme decree or a legal provision of higher rank, a provision adopted by the highest regional authority, a Municipal Ordinance, or a decision by the head of an autonomous agency pursuant to the Constitution, depending on their nature.* ***Said procedures must be compiled and systematized in the Single Text of Administrative Procedures*** *approved for each agency.*"[8] (Emphasis added)

15. Article 37 of the LPAG Act prescribes the mandatory content of every TUPA, which includes a list of all the administrative procedures carried out before the agency, a restrictive description of the requirements stipulated for each procedure, and other information related to the processing and procedural steps for each such procedure.[9] Article 38 of the LPAG Act, for its part, regulates the approval, publication, and amendment of the TUPAs.[10]

16. According to Morón Urbina, the TUPAs have the aim of simplifying the set of legal rules affording security to private investment[11] and giving the citizens information to

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8 LPAG, Article 36 (**BULLARD 005**).

9 LPAG, Article 37 (**BULLARD 005**).

10 LPAG, Article 38 (**BULLARD 005**).

11 MORÓN URBINA, Juan Carlos, *Comentarios a la Ley del Procedimiento Administrativo General (Commentary on the General Administrative Procedure Act)*, Gaceta Jurídica, Tenth Edition, lima, 2014, p. 266 (**BULLARD 033**).

facilitate the relations between parties subject to administration and the Public Administration, thus generating greater transparency and security.[12] The logic of these documents is to restrict the Administration's discretion. It is precisely for that reason that an agency cannot demand more requirements than those specified in the TUPA, even if they are prescribed in another provision, as has been repeatedly determined by INDECOPI's Commission on the Elimination of Bureaucratic Barriers. On this score, article 36, section 2, of the LPAG Act provides as follows:

> **"*Agencies shall demand of parties subject to administration only compliance with procedures, submission of documents, filing of information, or payment of filing fees, provided they are in compliance with the requirements prescribed in the preceding section. An authority that acts otherwise, imposing demands on parties subject to administration that go beyond those limits incurs liability.*"[13]**

17. In this respect, a procedure's incorporation into the TUPA means that this is an administrative procedure and the limits of the Administration's discretion prescribed in it are mandatory.

18. In accordance with the TUPA of the Ministry of Energy and Mines (MEM)[14], approval of investment for the acquisition of mining properties and investments by foreigners in border zones (Procedure 53[15]) requires the submission of an application with an annex containing information on the investor, the properties to be acquired, the project to be pursued, and the time spans for the investment, among other things.

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12 Ibid, p. 267 (**BULLARD 033**).

13 LPAG, Article 36.2 (**BULLARD 005**).

14 Note that even though it appears in the MEM's TUPA, the authority competent to decide on the application is the President of the Council of Ministers pursuant to the provisions of the same compilation. (**BULLARD 034**).

15 Single Text of Administrative Procedures of the Ministry of Energy and Mines (**BULLARD 034**).

19. With regard to Procedure 53, the TUPA provides as follows:

53	APPROVAL OF INVESTMENT FOR ACQUISITION OF MINING PROPERTIES AND INVESTMENTS BY FOREIGNERS IN BORDER ZONES LEGAL BASIS Political Constitution of Peru, Art. 71 12/30/03 Leg. D. No. 757 (Art. 13) (11/13/91) S.D. No. 162-92-EF (Arts. 32 & 33) (10/12/92)	a) APPLICATION ACCORDING TO FORMAT, FILING RUC No. b) ANNEX III OF S.D. No. 162-92-EF	(…)	30 days	Document Administration Office and Central Archive	President of the Republic and Council of Ministers Minister (By Supreme Decree)

[16]

20. In addition, pursuant to article 33 of Supreme Decree 162-92-EF,[17] any authorization application for acquisition of property or possession by foreigners in border areas must contain the information indicated in Annex III of the same supreme decree. The most important information required pursuant to that Annex III is the following:

> *"ANNEX III*
>
> *AUTHORIZATION APPLICATION FOR ACQUISITION OF PROPERTY OR POSSESSION BY FOREIGNERS IN BORDER AREAS*
>
> *A) DIRECT PARTICIPATION*
>
> *I. IDENTIFICATION OF THE INVESTOR:*
>
> *…*
>
> *2. Legal entities:*
>
> *2.1. Company name: ……..*

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[16] Procedure 53, contained in the Single Text of Administrative Procedures of the Ministry of Energy and Mines. Certain fragments have been omitted. (**BULLARD 0034**).

[17] Supreme Decree 162-92-EF.
Article 33**.** For purposes of obtaining the prior authorization referred to in the preceding article, foreign investors or the companies in which they participate must file an application with the Ministry responsible for the sector to which the economic activity in which they wish to engage corresponds. Said application must contain the information indicated in Annex III of this Supreme Decree, which is an integral part thereof.
Once the investment has been made, it must be registered in a freely convertible currency with the Competent National Agency, as the case may be.
(Emphasis added) (**BULLARD 023**).

2.2. Nationality:…….

(…)

2.7. The investor's legal representative (in Peru)

Name:……..

Address:……

Telephone:……

II. INFORMATION ON THE ASSETS TO BE ACQUIRED

1. Type of assets:……..

2. The right to be acquired over the assets:……

3. The total value of new investment: US$.....

4. The use to which the investment will be put:

4.1. Economic sector:……

4.2. Brief description of the project:……..

…

4.3. The company receiving the investment (if any):

(…)

5. The expected term for making the investment (in case of acquisition of the assets in installments):

(…)"[18]

21. The inclusion of the specific procedure that gave rise to DS 083 in the TUPA demonstrates that: (1) Dr. Eguiguren's assertion (which makes no reference to the existence of a TUPA and its consequences in the analysis) that the authorization for ownership of property by foreigners in border areas is not an administrative procedure runs counter to Peruvian law, since the fact that it is an administrative procedure renders the authority's final decision, expressed in the Supreme Decree,

[18] The full Annex III is part of Supreme Decree 162-92-EM (**BULLARD 023**).

an administrative act; and (2) his assertion that this is a political, and fully discretionary, act is likewise inconsistent with the legal framework.

(ii) Requirements of the Regulations of the Private Investment Guarantee Regimes

22. But the MEM's TUPA is not the only legal provision which regulates the granting of authorization for foreigners to acquire property in border areas. Articles 32 and 33 of Supreme Decree 162-92 EF, Regulations of the Private Investment Guarantee Regimes, provide that said authorization requires a favorable opinion by the Joint Command of the Armed Forces, for which national security considerations will be taken into account[19].

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[19] Supreme Decree 162-92-EF

Article 32. In conformity with the provisions of article 126 of the Constitution of 1979 and article 13 of Legislative Decree No. 757, for the exercise of property rights or possession of mines, lands, forests, waters, fuels, or energy sources by foreign investors, whether directly or indirectly, in areas located within fifty kilometers of the country's borders, it is necessary first to obtain the appropriate authorization, which is granted by a supreme resolution countersigned by the Minister who acts as chairman of the Council of Ministers and the Minister of the Sector in question. Said authorization must receive a favorable opinion by the Joint Command of the Armed Forces, for the reasons prescribed in the following paragraphs.
The Supreme Resolution to which reference is made in the preceding paragraph must establish the conditions or limitations for the exercise of the property rights or possession in question, which may be restricted only for reasons of national security.
Reasons of national security are understood as those required to assure the independence, sovereignty, or territorial integrity of the Republic, as well as internal order, pursuant to the provisions of article 275 of the Constitution of 1979.

Article 33. For purposes of obtaining the prior authorization prescribed in the preceding article, foreign investors or companies in which they participate must submit an application to the Ministry of the sector to which the economic activity in which they wish to engage pertains. Said application must contain the information specified in Annex III of this Supreme Decree, which is an integral part thereof.

Once the investment has been made, it must be registered in a freely convertible currency before the Competent National Authority, as appropriate.
(Emphasis added) **(BULLARD 023)**

23. According to Dr. Eguiguren, the national security aspects which the Joint Command must consider are not limited to the national defense against the risk of external aggression, but also encompass internal order. Paragraphs 37 and 40 of his report state the following:

> ***"Dr. Bullard (…) claims that the second paragraph of Article 71 exists solely because of a notion t of protecting national security from external aggressions. This assertion is incorrect, because it includes only one of the features involved in national security (national defense against the risk of external aggression), while leaving aside the undoubted impact of the internal situation sin the border areas (in terms of public order and freedom from social unrest),on the protection of national security which is now of a comprehensive nature."***
>
> ***(…)***
>
> ***"(…) Article 71 of the Constitution does not state that the ban on foreigners is based on preserving the national defense against an external threat or aggression. This is only one of the implicit grounds for the constitutional rule, but National Security, which is of an all-embracing nature, cannot be confused with National Defense, and even less can it be limited to external defense or protection from external aggression."***[20] (Emphasis added)

24. However, the Constitution itself distinguishes between the concepts of internal order and national security. Pursuant to articles 165 and 166, while internal order is the responsibility of the National Police of Peru (subordinate to the Ministry of the Interior), the Armed Forces (subordinate to the Ministry of Defense) guarantee the independence, sovereignty, and territorial integrity of the Republic (national

[20] EGUIGUREN paragraphs 37 and 40.

security). Only during states of exception do the Armed Forces assume control of internal order.[21]

25. If national security includes internal order, why are two different institutions responsible for each concept? Why do the Armed Forces not have full authority over internal order, except in states of exception (a state of emergency or a state of siege)? The answer is simple: because they are two different concepts.

26. Now then, Supreme Decree 162-92-EF only requires the opinion of the Joint Command of the Armed Forces to evaluate a declaration of public necessity.[22] If

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21 Political Constitution of Peru.

Article 165. The Armed Forces are comprised of the Army, the Navy, and the Air Force. Their fundamental purpose is to assure the independence, sovereignty, and territorial integrity of the Republic. They assume control over internal order in conformity with article 137 of the Constitution.

Article 166. The National Police have the fundamental purpose of assuring, maintaining, and restoring internal order. They provide protection and assistance to persons and the community. They assure compliance with the laws and the security of public and private wealth. They prevent, investigate, and combat crime. They supervise and control the borders.

Article 137. The President of the Republic, by resolution of the Council of Ministers, may decree, for a stipulated time span, in all the national territory or in a part thereof, and informing the Congress or the Standing Committee thereof, the states of exception provided for in this article:

1. State of emergency, in the event of a disturbance of the peace or of internal order, a disaster, or grave circumstances which impact the life of the Nation. In such cases, he may restrict or suspend the exercise of the constitutional rights of personal liberty and security, the inviolability of households, and freedom of assembly and transit in the territory encompassed by article 2, sections 9, 11, and 12, and section 24, part f, of the same article. Under no circumstances may any person be expelled from the country.

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

2. State of siege, in the event of an invasion, external war, civil war, or imminent danger of such circumstances' occurring, specifying the fundamental rights whose exercise is not restricted or suspended. The term may not exceed forty five days. When a state of siege is declared, the Congress meets as a matter of law. An extension requires Congressional approval. (**BULLARD 003**)

22 Supreme Decree 162-92-EF

Article 32. In conformity with the provisions of article 126 of the Constitution of 1979 and article 13 of Legislative Decree No. 757, for the exercise of property rights or possession of mines, lands, forests, waters, fuels, or energy sources by foreign investors, whether

this provision does not require the opinion of the National Police of Peru, it is because "internal order" is not a relevant issue for deciding whether or not to authorize a foreigner to acquire property in a border area. As I explained in my first report, any situation which affects internal order shall be relevant within this context only if it can weaken national defense from a foreign threat.[23]

27. In fact, if internal order were relevant, why is authorization required only within 50 kilometers of the border? Can there be no disturbances due to mines located in the rest of the territory of the Republic? How can one explain the fact that the "power to revoke" exists only for border areas if the purpose is internal order? Would it be legitimate to expropriate concessions granted anywhere in the territory by alleging the existence of disturbances inimical to internal order? These issues are not addressed by Dr. Eguiguren in his report.

28. Accordingly, the opinion issued by the Joint Command of the Armed Forces in the application of Supreme Decree 162-92-EF must be circumscribed to national security, understood as external defense.

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directly or indirectly, in areas located within fifty kilometers of the country's borders, it is necessary first to obtain the appropriate authorization, which is granted by a supreme resolution countersigned by the Minister who acts as chairman of the Council of Ministers and the Minister of the Sector in question. Said authorization must receive a favorable opinion by the Joint Command of the Armed Forces, for the reasons prescribed in the following paragraphs.

The Supreme Resolution to which reference is made in the preceding paragraph must establish the conditions or limitations for the exercise of the rights of ownership or possession in question, which may be restricted only for reasons of national security.

Reasons of national security are understood as those required to assure the independence, sovereignty, or territorial integrity of the Republic, as well as internal order, pursuant to the provisions of article 275 of the Constitution of 1979.

Article 33. For purposes of obtaining the prior authorization prescribed in the preceding article, foreign investors or companies in which they participate must submit an application to the Ministry of the sector to which the economic activity in which they wish to engage pertains. Said application must contain the information specified in Annex III of this Supreme Decree, which is an integral part thereof.

Once the investment has been made, it must be registered in a freely convertible currency before the Competent National Authority, as appropriate.
(Emphasis added) **(BULLARD 003)**

[23] See BULLARD 1, paragraphs 142-146.

29. Dr. Eguiguren also alleges an impact on national security arising from problems in trade with Bolivia,[24] such as, for example, the problems involving movement of merchandise due to the closure of the bridge between the two countries as a result of protest movements described in detail
by the State in its Counter-memorial.[25] That reflects a conceptual confusion between a national security problem and a problem of relations with another country.

30. The impact on trade or on the movement of persons or merchandise does not pose a threat to national security nor does it imply a risk of an armed conflict. An impact on relations with other countries cannot be viewed as a "national security" problem, because the latter concept involves the independence, sovereignty, and territorial integrity of the Republic, but not mere temporary trade problems, which furthermore are not attributable to BEAR CREEK's investment but to an absence of effective action by the authorities.

31. The above may clearly be seen in Note VRE-DGRB-UAM-011786/2011-8590 dated June 7, 2011 sent by the Bolivian Government to the Peruvian Embassy in Bolivia.[26] As we can see in the text of the aforementioned document, there is no allusion or reference to any term which indicates a possible military conflict that places national security at risk. It is clearly a trade/immigration problem, arising from the operational failings of a series of administrative offices. The Bolivian Government simply refers to the problem of the closure of the customs, immigration, and SENASA offices in Desaguadero, offices that remained closed due to the problems that existed with the population. In fact the Bolivian Government mentions "humanitarian reasons" created by the impossibility of

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24 See EGUIGUREN, paragraphs 71 and 72.

25 See the Counter-memorial, paragraph 103.

26 See the Counter-memorial, Annex **R-075**.

movement of persons and merchandise, which are creating economic problems for exports and transportation, and not due to issues of external security let alone armed conflict. It is clearly a trade/immigration problem, not a problem that places national security at risk. It should also be noted that the problem is created by the protesters and not due to the ownership of the mining concessions which, in addition, were in a different area.

32. Thus, even following the definition of "national security" used by Dr. Eguiguren, the trade and immigration problems with Bolivia are not national security problems. According to Dr. Eguiguren's own report, national security would involve the maintenance of peace and order both internally and vis-à-vis other countries.[27] However, there is no way to explain how trade or immigration disruptions in a border zone can escalate, in the absence of any significant reason or basis, to become national security problems.

33. In the worst case scenario, this kind of trade problem might have an impact on diplomatic relations with other countries, but that in no way implies an impact on national security. There is no risk involving a foreign force, and nothing in the facts of the case indicates that there has been.

34. In addition, as I already mentioned, the interpretation put forward by Dr. Eguiguren would lead to the conclusion that the constitutional regime gives an unjustified different treatment to foreign property owners vs. national owners. If the national security concept in force included internal order, there would be no reason as to why the property rights of foreigners could be restricted in the event of internal disturbances in border zones that threaten national security but not those of national owners. The distinction between foreigners and nationals cannot be explained by the risk of internal disturbances in zones near the border.

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[27] See EGUIGUREN, paragraphs 37, 40 and 46.

35. The Constitution in fact makes a distinction with foreign property within 50 kilometers of the border. This difference is based on the concurrence of two factors: (1) the foreign status of the owner and (2) the property being within the border region.

36. These factors are concurrent. There is no restriction on a foreigner having property rights within the rest of the national territory. There is also no restriction on a native having property rights in the border region. This demonstrates that the internal order is not relevant to the authorization.

37. The concurrence of these elements demonstrates that the concern being addressed is one of national security from a foreign threat. What the Constitution addresses is the risk that ownership by a foreigner may weaken security in a border area from an external attack. If it were a problem of internal order, the restriction should exist for the entire national territory of the Republic and would not be related to the nationality of the holder.

(iii) The declaration of public necessity which must be issued by the Council of Ministers

38. Pursuant to article 71 of the Constitution, the Council of Ministers must declare public necessity for purposes of the investment a foreigner will make within 50 kilometers of the border, for the latter to be validly entitled to acquire rights of ownership. Dr. Eguiguren's position is that this power is discretionary.[28]

[28] See EGUIGUREN, paragraphs 19 to 24.

39. However, the Council of Ministers does not have broad discretion to decide on the granting of this right. In the first place, the Council of Ministers is not at liberty to choose whether or not to make a decision on a request for a declaration of public necessity. As was shown above, there is a specific administrative procedure in the MEM's TUPA which limits the discretion of those who grant the authorization. Accordingly, there is no basis for concluding that this is a political act subject to unrestricted discretion as is argued by Dr. Eguiguren.[29]

40. In the second place, the Council of Ministers cannot request any information it sees fit, but is limited to demanding the documentation specified in the TUPA, pursuant to the provisions of article 36 of the LPAG Act[30]. Its powers are therefore far from discretionary; on the contrary, they are regulated by the aforementioned provisions. The demand for additional information may be understood as an unlawful bureaucratic barrier, and the official involved may even incur administrative liability[31]. That is a clear indicator of the fact that the alleged discretion does not exist.

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29 Ibid.

30 Pursuant to the provisions of article 36 of the LPAG Act, the TUPA stipulate the information that can be demanded by the administrative agencies:

LPAG Act, Article 36.

36.1. The procedures, requirements, and administrative costs are prescribed exclusively by a supreme decree or a legal provision of higher rank, a provision adopted by the highest regional authority, a Municipal Ordinance, or a decision by the head of an autonomous agency pursuant to the Constitution, depending on their nature. Said procedures must be compiled and systematized in the Single Text of Administrative Procedures approved for each agency. (**BULLARD 005**)

31 Article 38.
(…)
38.8. An official who does the following incurs administrative liability:

a) He/she requests or demands compliance with requirements not prescribed in the TUPA, or if they are prescribed in the TUPA, which have not been established by currently applicable provisions or have been repealed.
(…)
Without prejudice to the foregoing, the requirements prescribed in the preceding sections likewise constitute an unlawful bureaucratic barrier, rendering the penalties prescribed in

41. In the third place, the Council of Ministers cannot deny a declaration of public necessity on the basis of any argument; the sectorial provision (Supreme Decree 162-92-EF) makes this contingent exclusively on external defense risks: ***"The Supreme Resolution referred to in the preceding paragraph, must establish the conditions or limitations for exercising the corresponding property or possession rights, which may be restricted only for reasons of national security."***[32] (emphasis added)

42. Hence, the declaration of public necessity does not emanate from the mere discretion of the administration. On this score it is pertinent to consider the Sentence pronounced by the Constitutional Court in Case 0013-2003-CC/TC, cited by Dr. Eguiguren in paragraph 20 of his report, which states[33]:

> ***"[discretionary State power is] One in which the Constitution and other provisions in the constitutional corpus declare that a political faculty may be exercised, while leaving the operator or agent free to choose the manner of the State´s action; in this case, specific conditions, requirements, or procedures are not laid down in the constitutional framework, which only specifies that faculties are granted, thereby leaving the mode, timeless, advisability, or inadvisability of their exercise subject to the political judgment of whoever utilizes them."***

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article 26 BIS of Decree Law 25868, Organization and Functions of the National Institute of Defense of Competition and Protection of Industrial Property Act – INDECOPI, applicable. **(BULLARD 005)**

32 Supreme Decree 162-92-EF (**BULLARD 023**).

33 EGUIGUREN paragraph 20, and Annex R-095.

43. Accordingly, it is clear that BEAR CREEK validly obtained the authorization to be the owner, by obtaining the Council of Ministers' declaration of public necessity, which was issued after verification of compliance with the "specific conditions, documentation, or procedures" prescribed in the applicable legislation, that is, the requirements of the MEM's TUPA and the favorable opinion of the Joint Command of the Armed Forces, as required by the Regulations of the Private Investment Guarantee Regimes.

B. BEAR CREEK validly acquired ownership of the concessions through the exercise of the option agreements.

44. The second requirement for BEAR CREEK to validly acquire the mining concessions was, after having obtained the authorization, their transfer to its ownership.

45. In the case at hand, those concessions were already owned by a private party, Ms. Jenny Karina Villavicencio (hereinafter, Ms. Villavicencio), with whom BEAR CREEK had signed option agreements for their acquisition.

46. Once the declaration of public necessity had been obtained and it had been authorized to own property within 50 kilometers of the border, BEAR CREEK exercised its option right and signed agreements for the acquisition of the concessions, thereby becoming their owner.

47. However, the State has alleged that BEAR CREEK violated the Constitution by executing the Option Agreements over the concessions in question with Ms. Villavicencio. According to the State's position, through those agreements BEAR CREEK sought to evade the mandate prescribed in article 71 of the constitution, whereby:

"(…) within fifty kilometers of the borders, foreigners cannot acquire or hold, under any title whatsoever, mines, lands, forests, waters, fuels, or energy sources, either directly or indirectly, and whether individually or in partnership(…)"

48. According to the State, that would constitute an attempted fraud against the Constitution which would justify BEAR CREEK's forfeiture of the concessions. In his expert's report, Dr. Eguiguren coincides with this position, though without furnishing a detailed explanation, and he states the following in paragraph 50 of his report:

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

49. In this regard I maintain that the State's position, shared by Dr. Eguiguren in his report, is erroneous. BEAR CREEK acted with respect for the Constitution, in good faith, and with transparency vis-à-vis the State at all times.

50. In this chapter I will explain that:

a. The State was aware of the option agreements at all times, because BEAR CREEK was transparent in regard to them at all times.

b. The option agreements executed by BEAR CREEK and Ms. Villavicencio did not constitute, as is alleged by the State, a fraudulent scheme whose purpose was to evade constitutional provisions which prohibited it from owning property within 50 kilometers of the border. On the contrary, the option agreements had a legitimate purpose and constitute a valid exercise of rights under the existing legal framework.

c. Even in the event, which we deny, that the option agreements executed by BEAR CREEK were inconsistent with the Constitution, the State acquiesced in this allegedly improper situation by issuing the supreme decree of authorization.

d. It should likewise be noted that the time limits for voiding the supreme decree of authorization (which attested to BEAR CREEK's compliance with the requirements) have expired.

(i) The execution of the agreements was known by the State

51. The State has alleged in its answer to the complaint[34] that the signing of the option agreements constituted a fraudulent scheme to evade compliance with the requirements prescribed in article 71 of the Constitution.

52. This is incorrect, since the State knew of the option agreements' existence, and in spite of that knowledge it raised no objection to BEAR CREEK. Neither did it take any action aimed at voiding or reversing the effect of those agreements at the time.

[34] See counter-memorial, paragraphs 46 and 47.

53. On the contrary, in the knowledge of the option agreements the State granted the permits to acquire the concessions located in the restricted zone within 50 kilometers of the border. It was only some time later, when it needed to justify DS 032 (which had been arbitrarily issued) ex post, that the State argued that this expropriation was due to the allegedly fraudulent manner in which the concessions had been acquired.

54. As BEAR CREEK states in paragraph 39 of its memorial, when it applied to the MEM for permission to obtain the concessions, it attached copies of the option agreements to the application, together with the rest of the documentation pertinent to the application in question, which included the designation of Ms. Villavicencio as BEAR CREEK's legal representative with banking powers. Ms. Villavicencio's capacity as legal representative with banking powers was not only not a concealed act, but it was an act of which the State was informed.

55. This application was subsequently evaluated by the State. The outcome of that evaluation was the approval of the concessions' transfer. The State cannot, then, allege that it gave that approval without knowledge of the option agreements and Ms. Villavicencio's designation as BEAR CREEK's legal representative.

56. Thus, even assuming that the State had not been aware of the option agreements and Ms. Villavicencio's designation as BEAR CREEK's legal representative with banking powers, in spite of the fact that these documents had been directly submitted before it, this would be due to a negligent act on its part. If the State received BEAR CREEK's aforementioned application, which contained the option agreements and the registration entry evidencing Ms. Villavicencio's designation as BEAR CREEK's legal representative with banking powers, and approved it without reviewing its content, the Peruvian State cannot in good faith allege ignorance of the option agreements and Ms. Villavicencio's designation as BEAR CREEK's legal representative with banking powers, as well as their consequences.

Still less can it rely on its own inaction to justify the revocation of previously granted permits.

57 Finally, even without taking into consideration the fact that BEAR CREEK had informed the State about the option agreements and Ms. Villavicencio's designation as BEAR CREEK's legal representative with banking powers, the State cannot allege its ignorance thereof because BEAR CREEK made them public information by recording them in the Public Registries.

58. In fact, after the two agreements with Ms. Villavicencio were executed, they were recorded in the registry entries of the Mining Property Registry for Registry Zone No. 12, Arequipa Office[35]. Ms. Villavicencio's designation as BEAR CREEK's legal representative with banking powers was likewise registered in registration entry No. 11395167, at the Registrar's Office in Lima.[36] This means that the option agreements and Ms. Villavicencio's designation as BEAR CREEK's legal representative with banking powers, and any interested party, including the State, could access them. It is therefore inconsistent to allege that BEAR CREEK acted with subterfuge and in a fraudulent manner to defraud the Constitution.

59. Note in particular that, pursuant to article 2012 of the Civil Code, *"It is presumed, in the absence of evidence to the contrary, that every person has knowledge of the content of the registrations."*[37]

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35 Registration of the transfer option agreements. (**C-0020 and C-0021**).

36 Granting banking power of attorney. (**C-0017**)

37 (**BULLARD 069**).

60. In conclusion, the State did know of the option agreements executed by BEAR CREEK and Ms. Villavicencio, and the relationship between them. Even if it were unaware of them, that would have been due exclusively to its own negligence, and the State cannot invoke that omission to justify its expropriation of BEAR CREEK. The State cannot argue that BEAR CREEK intended to conceal said facts or to act in bad faith.

(ii) The execution of the option agreements was not a fraudulent or simulated act

61. The State has also alleged that, regardless of the option agreements' public character, they were part of a fraudulent scheme whose aim was to evade the constitutional restriction. According to the State, BEAR CREEK sought to use this scheme to effectively act as the owner of the concessions in spite of the constitutional limitation.[38]

62. In this regard, the State has described the option agreements between BEAR CREEK and Ms. Villavicencio as an "illegal scheme." That is not true. The option agreements which it executed constituted a valid arrangement which did not evade the constitutional restrictions and was carried out in good faith with a legitimate purpose.

63. In paragraph 42 of the counter-memorial, the State argues that the option agreements executed by BEAR CREEK had the aim of assuring that the company would have priority if Ms. Villavicencio tried to transfer the concessions to a third party, as well as to allow the company to effectively acquire the concessions when it obtained the declaration of public necessity from the State.

[38] See counter-memorial, paragraphs 35 and 45.

64. Furthermore, the State says the following in paragraphs 45 and 46 of the same answer:

> ***"It is self-evident that Ms. Villavicencio had no independent interest in the concessions and never intended to utilize or exploit the concessions herself, and Claimant has not even attempted to claim that. Bear Creek paid her for that service, and bore all expenses and undertook all work that would be required to develop the concession rights. In effect, it was Bear Creek, not Ms. Villavicencio, that acquired the Santa Ana mining concession rights at the moment that they were issued by MINEM in 2004".***
>
> ***"Option contracts do routinely serve as a mechanism to secure an interest in mining concessions, without yet purchasing them, while the buying company completes its research and makes a business decision. However, these were not ordinary arms-length option contracts with a third party. They were part of a self-dealing scheme to create the appearance of compliance with, while at the same time circumventing, Article 71 of the Constitution."***

65. We agree with the State that the option agreements' purpose was to assure priority over the concessions, and thereby obtain ownership once BEAR CREEK had obtained the necessary authorization from the State. That is the purpose of any option agreement. However, it does not mean that BEAR CREEK used this type of contract to evade the constitutional provisions in question and leave them devoid of practical effect.

66. The fact that there was a relationship of employment and representation between BEAR CREEK and Ms. Villavicencio does not imply that there was any fraudulent scheme behind the option agreements. There is no law prohibiting a contract of this type between a company and its employees or representatives. As long as fraudulent intent is not shown, i.e., the intention of violating the provisions of law, the existence of a fraud cannot be alleged.

67. As is well known, a fraud is the use of an apparently lawful scheme to intentionally obtain an unlawful end. Hence, the key to establishing the existence of a fraud is to demonstrate the existence of such an intention.

68. According to Lizardo Taboada, a renowned Peruvian legal scholar, *"the key to classifying a transaction as fraudulent or not lies in its end and not in its structure."*[39] Guillermo Lohmann likewise makes it clear that the transactions which defraud the law are those which, *"having the practical intention of a permitted type of transaction, or one not prohibited by the legislation, clandestinely achieve an improper outcome, violating the original law."*[40]

69. However, the explanation given by the claimant and its expert regarding what the fraudulent intent, or the unlawful outcome achieved, consisted of, and what the harm to the State was, is not clear. The unlawful end allegedly achieved by the fraudulent scheme was BEAR CREEK's unauthorized ownership. But it is clear that if that authorization had not been granted, the property would never have belonged to BEAR CREEK. That was a precondition duly stipulated in the option agreements.

70. The manner in which BEAR CREEK proceeded is totally legitimate. It seems clear that it did not generate any harm to the Peruvian State, whose right to preserve the national security was not impaired. It is equally clear that the manner in which BEAR CREEK proceeded to acquire ownership generated no problem, because the State itself, after evaluating the information it has requested, granted the authorization. There is no basis for understanding why the alleged fraud harmed the State subsequent to the authorization when the State itself, in granting it, saw no harm. I have not found any explanation of why this is a fraudulent act, and

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39 TABOADA, Lizardo. *Acto jurídico, negocio jurídico y contrato* (Legal Act, Legal Transaction, and Contract). Editorial Grijley, 2nd ed., Lima, 2013, p. 412. **(BULLARD 035)**

40 LOHMANN, Guillermo. *El negocio jurídico* (The Legal Transaction), 2nd ed., Lima, 1994, p. 398. **(BULLARD 036)**

above all, how the act, being fraudulent, harmed the State, in the entire position put forward by the respondent or by its expert Dr. Eguiguren.

71. To such an extent was BEAR CREEK not the owner of the concessions, that the option agreements themselves made the declaration of public necessity by the Council of Ministers a precondition for obtaining them. If this were denied for any reason, BEAR CREEK would have had to give up the opportunity to acquire the concessions and develop the project, the option agreements would have remained unexercised, and the company would have had to withdraw. There is no basis for identifying any harm to the State.

72. If the option agreements supposedly gave BEAR CREEK ownership of the mining concessions, why did it submit to a procedure to obtain the declaration of public necessity? BEAR CREEK clearly accepted the costs and risks of applying for a declaration of public necessity because it always recognized that the option agreements by themselves did not confer a property right. If it had already had indirect ownership, it would have made no sense for it to run the risk of a denial which would also alert the State to any unauthorized use that might have been made of the concessions.

73. In addition, as I explained in my first report, the purpose of article 71 of the Constitution is to limit foreigners' ownership of property near the border, so as to avoid threats to the integrity of the territory. The purpose is not to limit any contractual relationship between a foreigner and a national owning property in that area, and still less if that relationship is known to the State itself and has no impact on national security.

74. In conclusion, BEAR CREEK did not create any fraudulent scheme. It only sought to assure the possibility of subsequently acquiring those concessions, provided the respective permits were obtained. Finally, and as has been shown, BEAR CREEK acted in good faith and always with transparency, and it never tried to conceal the option agreements signed with Ms. Villavicencio.

75. Dr. Eguiguren has also described the option agreements executed by BEAR CREEK as a "simulation." However, that legal concept cannot be applied in the case at hand.

76. On this score, Mario Castillo Freyre and Rita Sabroso, two prestigious commentators on Peruvian Civil Law, define a simulation as *"an apparent act which does not reflect the true will of the parties."*[41] The same authors also add the following:

> **"(*…) simulation requires the presence of a simulated legal transaction and an agreement for simulation. The first is the one intended to create the situation of appearance. The second is the one which reflects the real will of the parties (not to be bound by any transaction whatsoever or to be bound by a transaction other than the one they appear to execute).*"[42]**

77. That is, simulation consists of two parties' *apparently* executing a certain contract, when in fact the effects desired by these parties and actually carried into practice are different. The parties may have executed the apparent act when, in fact, they

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41 CASTILLO FREYRE, Mario, and SABROSO, Rita. *La teoría de los actos propios y la nulidad, ¿regla o principio de derecho?* (The Theory of Own Acts and Nullity. A Rule or a Principle of Law?), p. 14. Available at:

http://www.castillofreyre.com/archivos/pdfs/articulos/128_La_Teoria_de_los_Actos_Propios.pdf. **(BULLARD 037)**

42 Ibid. **(BULLARD 037)**

did not wish to execute any act at all, in which case they are deemed to have performed an "absolute simulation." Alternatively, the parties may have executed an apparent act which conceals the fact that they really wanted to carry out a different and concealed act; this case is known as "relative simulation."

78. Simulation, as a legal institution, has been regulated only by the Civil Code and in regard to legal acts. This institution is defined in articles 190 and 191 for absolute and relative simulation, respectively:

> ***"Article 190. Absolute simulation gives the appearance of executing a legal act when there is no real will to do so.***
>
> ***Article 191. When the parties wish to conclude a legal act other than the apparent one, the concealed act has effects between them provided the requirements of substance and form are satisfied and there is no injury to a third party's rights."***[43]

79. The State has not alleged in this arbitral procedure that the option agreements executed by BEAR CREEK constitute a simulation in conformity with articles 190 or 191 of the Civil Code. However, Dr. Eguiguren has made reference to the legal institution of simulation in multiple parts of his Expert Report (for example, in paragraphs 51 and 90).

80. Though Dr. Eguiguren does not specify which type of simulation would be applicable to this case, the only one which could conceivably fit the facts would be relative simulation, since the State alleges that BEAR CREEK wished to conceal a "de facto ownership" over the concessions behind the option agreements.

81. However, BEAR CREEK did not wish to use the option agreements to obtain ownership of the concessions merely by their execution. As we have explained above, if that had been the case, BEAR CREEK would have had no need, and would not have incurred the costs and risks, to commence the procedure for obtaining the declaration of public necessity from the Council of Ministers.

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43 (**BULLARD 069**).

82. The option agreements allowed BEAR CREEK to acquire ownership of the concessions in the future (and only if it obtained the required authorization from the State). The declared will was quite clear and coincided with the real will. And there is no identification of what harm to a third party might justify a challenge to the alleged simulation, especially after the State itself authorized the transaction.

83. For these reasons, it cannot be argued that BEAR CREEK engaged in a simulation which might impair the validity or effectiveness of the option agreements.

84. All the foregoing shows that, contrary to what is argued by the State, the option agreements executed by BEAR CREEK were a valid arrangement to assure its interests in the concessions, and in no way whatsoever did they constitute a fraud against the Constitution or a simulation.

All this is without prejudice to what is most obvious: never, prior to the revocation of the authorization, did the State notify BEAR CREEK of the existence of an alleged fraud or simulation; never did it state in any internal report or document, and still less in the text of the revocation, that the alleged simulation or fraud was the reason for the decision to revoke, and never was BEAR CREEK given the opportunity to refute these fundamental allegations.

(iii) If there was an impropriety in the execution of the option agreements, it was accepted by the State with the issuance of the permit to acquire the concessions.

85. As I have explained in the preceding sections, the option agreements executed by BEAR CREEK and Ms. Villavicencio were public and their existence and content were known to the State. There was no intent to evade the constitutional restriction

of article 71, but only the aim of assuring that the company could acquire the concessions after it had obtained authorization from the State.

86. So clear was it that there was no violation of article 71 of the Constitution that the State, in the knowledge of the link between BEAR CREEK and Ms. Villavicencio, decided to grant it the authorization to be the owner. In this way, the State's own acts serve as a criterion of interpretation to show, once again, that BEAR CREEK validly obtained the property right over the concessions.

87. However, even if one were to accept that the contracting for option rights between BEAR CREEK and Ms. Villavicencio was improper because it established a form of indirect ownership in the absence of the declaration of public necessity, (which I do not), the fact is that this declaration was ultimately granted, and with it, any doubt was overcome: BEAR CREEK acquired the authorization required for it to be the legitimate owner of the concessions, even if it occurred at the wrong time. This means that the Peruvian State cannot revoke the authorization for the sake of it.

88. The Peruvian State has alleged in its counter-memorial that BEAR CREEK's breach of the mandate of article 71 of the Constitution justifies the Peruvian State's revocation of the previously granted declaration of public necessity. In the words of Dr. Eguiguren, carrying out that scheme with Ms. Villavicencio implies "an improper situation which would result in the forfeiture of those rights to the State."[44]

89. What this means is that BEAR CREEK would lose the right to acquire the concessions because it had previously had an "indirect ownership" over the

[44] See EGUIGUREN, paragraph 50.

concessions without having authorization, even though that authorization was subsequently granted.

90. This position is baseless. It would make no sense that, after having granted the requested authorization, the State revoked it on the grounds that the requesting company infringed constitutional limits before obtaining that authorization.

91. It should be noted that the authorization for a foreigner to obtain property within 50 kilometers of the border consists of a declaration of public necessity, which implies a high degree of public interest. Once that declaration is granted, all doubts about whether the project is actually one of public necessity and whether it is desirable to grant the permit are dispelled.

92. It is inconsistent to revoke the declaration of public necessity because the foreigner became an owner at some time without having that declaration. That would imply voiding the effects of the declaration of public necessity when the alleged violation was precisely that of not having this declaration. Accordingly, the fact that the declaration was effectively obtained cures the alleged prior status as an indirect and unauthorized owner.

93. It is also important to consider that the State's conduct led BEAR CREEK to be very confident that it was a legitimate owner and that any potential violation in the initial acquisition of the rights over the concession had been cured and was irrelevant to the authorities themselves.

94. Hence, in the application of the *Actos Propios* [45] Doctrine, under which nobody can breach the trust it generated in a counterparty by its prior conduct, and which rests on the good faith principle expressly recognized in article 1362 of the Civil Code[46], the State, by having approved the manner in which BEAR CREEK acquired the concessions, forfeited the possibility of subsequently challenging said acquisition. Accordingly, if it uses said challenge as a ground for its defense in this arbitration procedure, either in the jurisdictional phase, to attempt to evade the Tribunal's competence, or with respect to the merits, to attempt to evade its obligation to pay damages to BEAR CREEK for the unlawful expropriation it carried out, this should be rejected.

95. The foregoing is the case because this doctrine seeks to encourage people to be consistent in their daily activities by penalizing those who contradict themselves, denying them the possibility of claiming for rights they would have been in a position to assert at the outset.

96. In this case, as shown by the facts, the State has clearly not been consistent in its mode of action: it engaged in a clear conduct in BEAR CREEK's favor by recognizing the validity of the latter's acquisition of the rights of ownership over the concessions (with full knowledge of the relationship between BEAR CREEK and Ms. Villavicencio), and it subsequently engaged in a second conduct contradicting the former, when it questioned the validity of the acquisition of the property rights on the basis of facts already known when the acquisition was approved.

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[45] The *Actos Propios* [Own Acts] Doctrine is recognized in the Legal Dictionary of the Peruvian Judiciary **(BULLARD 038)** and has been applied by the Supreme Court of Peru in its Sentence of August 22, 2002, in Case 2849-2001 **(BULLARD 039)**, by a number of arbitration tribunals, and even by State agencies such as the Regulatory Agency for Private Investment in Telecommunications – OSIPTEL, in its Resolution No. 071-2004-OSIPTEL of September 3, 2004 **(BULLARD 040)**.

[46] Peruvian Civil Code, Art. 1362**.** Contracts must be negotiated, executed, and performed in accordance with the rules of good faith and common intent of the parties. **(BULLARD 069)**

97. Accordingly, there is no doubt that three requirements which must be satisfied for that doctrine to be applicable, according to recognized legal scholars specializing in the subject such as Augusto Morello[47], are present. Let us now examine each of them in greater detail:

a. An original conduct, which in view of its nature, circumstance, and characteristics generates a confidence in the other party which, under the good faith principle, clearly indicates that an obligation to continue behaving in the same fashion has been generated.

As is shown by the facts, both the MEM, the agency before which the procedure to obtain the authorization was originally filed, and the Council of Ministers, the State entity with the power to ultimately grant

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[47] Augusto Morello (in his book MORELLO, Augusto, *Dinámica del Contrato. Enfoques* (Dynamics of Contracts. Approaches), Buenos Aires, Librería Editorial Platense, 1985, p. 59) states that: *"The basis will be present because the previous conduct has generated – according to the objective meaning arising from it – confidence that the party that issued it will remain in it, since the opposite would constitute an inconsistency or contradiction of conducts by one and the same person, which unfairly impacts the sphere of interests of the person who believed himself to be protected, having placed his confidence in what he considered to be a completed behavior at his original address."* **(BULLARD 041)**

See also Emilio Betti (cited in DIEZ PICAZO, Luis, *La Doctrina de los Propios Actos. Un studio crítico sobre la jurisprudencia del Tribunal Supremo* (The Own Acts Doctrine: A Critical Study of the Supreme Court's Jurisprudence), Pamplona: Thomson Reuters (Legal) Limited Chapter 12, ¶ 2.), who writes that *"good faith, as we have said several times, implies a duty of consistency in behavior, which consists of the need to carry out in the future the conduct that the previous acts made predictable."* **(BULLARD 042)**

Lohmann (cited by DIEZ PICAZO, Luis, Ibid.) (**BULLARD 042**) likewise asserts that *"the need for consistency in behavior limits a person's subjective rights and powers, which can be exercised only insofar as said exercise is consistent or compatible with, and not in contradiction of, the previous behavior.*

In the same vein, Alsina Atienza (cited by BORDA, Alejandro, Teoría de los Actos Propios (The Own Acts Theory), Buenos Aires, Abeledo Perrot, p. 54-55) **(BULLARD 043)** posits that the doctrine *"is reduced to [the idea] that a person who, through a certain conduct, whether positive or negative, induces or creates in another person a well-founded confidence that the former will continue his behavior in the future, must effectively do so even though in his own mind he would actually have had a different purpose."*

that authorization pursuant to the Constitution and the MEM's TUPA, had at their disposal all the information needed to make their decisions, including the documents which evidenced the link between Ms. Villavicencio and BEAR CREEK.

However, even having that information, the MEM did not question the acquisition of ownership of the concessions or detect the existence of any impropriety stemming from the link between Ms. Villavicencio and BEAR CREEK at the outset or during the course of the procedure prescribed in the TUPA.

Similarly, the Council of Ministers, which had the same information, raised no question whatsoever, and even granted BEAR CREEK the authorization to own property within 50 kilometers of the border, without making any comments.

Hence, there is no doubt that there existed a repeated conduct which generated BEAR CREEK's confidence, under the good faith principle, that the State would recognize the validity of its acquisition of ownership of the concessions.

b. A subsequent conduct which contradicted the previous one.

As is also shown by the facts, after not having questioned the acquisition of ownership even in the knowledge of the signing of the option agreements and the link between BEAR CREEK and Ms. Villavicencio, and after having granted the authorization to acquire ownership, both the MEM and the Council of Ministers now behave in a contradictory fashion, questioning the validity of the manner in which BEAR CREEK became the owner of the concessions in several ways,

and even eliminating the authorization which had validly been granted to that company.

c. Both conducts have been engaged in by the same subject, the latter term being understood as the sphere of attribution of a binding nature of the conduct.

In this case, the conducts were carried out by the same subject, the State, through the organs with the power to grant the authorization: the MEM and the Council of Ministers.

At first, both of those organs were the ones which, being aware of the existence of the option agreements and the link between Ms. Villavicencio and BEAR CREEK, permitted the filing, continuation, and favorable conclusion of the procedure regulated in the MEM'S TUPA without raising any objection whatsoever to the manner in which BEAR CREEK was going to obtain ownership of the concessions, and ultimately granting the appropriate authorization.

But at a later time they were the same organs that, behaving in a contradictory fashion, surprisingly questioned, in a number of ways including this arbitration, the manner in which ownership of the concessions had been acquired, and went so far as to eliminate the authorization for being their owner, thereby expropriating BEAR CREEK.

98. For what reason, then, does the State allege a violation of article 71 of the Constitution and claim that this empowers the State to withdraw the declaration of public necessity? I consider that this position reflects the need to justify DS 032, which was promulgated without giving BEAR CREEK an opportunity to refute the

merits of the revocation and without expressing the concrete reasons for the decree's formulation.

99. In conclusion, I consider that, even if article 71 of the Constitution had been infringed in the execution of the option agreements prior to obtaining the declaration of public necessity, the fact is that this declaration was later obtained. Having that declaration, BEAR CREEK was authorized to make itself the owner of the concessions, and whereas said permit was justified on the basis of public necessity, this fact cures the failure to obtain it prior thereto.

(iv) If there had been any defect producing the invalidity of the concessions' acquisition, the time limits for demanding their nullification have expired

100. Without prejudice to the foregoing, even in the event it could be considered that BEAR CREEK carried out a fraudulent scheme to evade article 71 of the Constitution, or even if that fraud meant that the granting of the authorization to operate within 50 kilometers of the border was defective, in 2011 the State could not invoke that defect to deprive BEAR CREEK of the previously issued permit. The time limits for declaring that administrative act null and void had expired.

101. Pursuant to Article 202 of Law 27444 – General Administrative Procedure Act (hereinafter, LPAG), the power to declare the nullity of administrative acts on an *ex officio* basis expires one year from the date on which they become final.[48]

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48 *"Article 202 – Nullity ex officio.*

202.1. In any of the cases listed in Article 10, the nullity of administrative acts can be declared ex officio, even when they have become final, provided they injure the public interest."

102. Upon the expiration of that term, *"it is only possible to sue for nullification before the Judiciary in the administrative law procedure, provided the suit is filed within the two (2) years after the date on which the power to administratively declare nullity expired."*[49]

103. It is clear that, by 2011, and even more so at the present time, the legally prescribed time limit for demanding the nullification of the supreme decree of authority issued in 2007 had expired.

104. In conclusion, even in the event it could validly be argued that BEAR CREEK carried out a "fraudulent scheme," and even if the subsequent granting of the State's authorization had not cured that impropriety and the authorization were null and void for being in violation of the Constitution, the State had to invoke the administrative act's nullity within the term prescribed by the LPAG Act. Since it did not do so, it is no longer possible to question BEAR CREEK's acquisition of property.

C. BEAR CREEK became the holder of a property right independent from the acts which gave rise to it

105. Once the requirements specified above were satisfied, BEAR CREEK's property right validly came into being; it is a fundamental right, independent from those acts,

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202.2. Nullity can be declared ex officio only by the hierarchical superior of the official who issued the act which is voided. If it is an act issued by an authority not subject to hierarchical subordination, its nullity shall be declared by resolution of the same official.

"202.3. The power to declare the nullity of administrative acts on an ex officio basis expires one year from the date on which they become final." **(BULLARD 005)**

[49] **LPAG Act, Article 202. Nullification *ex officio*.**
(…)
202.4. If the term prescribed in the preceding section has expired, it is only valid to sue for nullification before the Judiciary through an administrative law action, provided the suit is filed within the two (2) years subsequent to the date on which the power to declare the nullification in the administrative sphere expired. **(BULLARD 005)**

recognized in the Constitution as a subjective right pursuant to article 2, parts 8) and 16), and protected through an institutional guarantee of a constitutional nature pursuant to article 70, whereby the State guarantees its inviolability, rendering it untouchable by legislation and the public authorities.[50]

106. As I explained at length in my first report, once the exception is granted, the Authoritative Decree is issued, and the property right is acquired, the foreigner is a full owner that enjoys all the constitutional protections for property enjoyed by nationals. **The foreigner "returns" to the general property regime with respect to what is within the scope of the authoritative supreme decree.[51]**

107. Hence, the loss of effectiveness of any of the acts described above not only impairs those acts themselves, but also has even greater consequences: it implies the deprivation of a previously acquired property right, and accordingly, the violation of a fundamental right and a constitutional guarantee.

108. That is why it is irrelevant for Dr. Eguiguren and the State to argue that the declaration by supreme decree is discretionary. What counts is that said declaration was validly issued, and as a result of its issuance BEAR CREEK became the full owner and its property right arose in full and with complete constitutional protection.

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50 Sentence of the Constitutional Court dated March 26, 2007, in Case No. 0005-2006-PI/TC. Ground 40. *"Constitutionally, the property right is recognized not only as a subjective right pursuant to article 2, parts 8) and 16), but also as an institutional guarantee pursuant to article 70," whereby the State guarantees its inviolability."* **(BULLARD 044)** See, also: Sentence of the Constitutional Court dated March 2, 2005, in Case No. 4232-2004-AA/TC: *"In this way, the effectiveness of the institutional guarantees in the cases where the Constitution establishes a linkage between them … and the fundamental rights …, is of vital importance, because they guarantee certain objective contents of the Constitution and keep them untouchable by legislation and the public authorities."* **(BULLARD 045)**

51 See BULLARD 1, paragraph 37

IV. THE STATE UNLAWFULLY IMPAIRED BEAR CREEK'S PROPERTY RIGHT

109. With ownership already existing and the institutional guarantee of a constitutional nature which protects that right activated, the debate on the discretion which the authoritative supreme decree might have had is rendered irrelevant.

110. The question of whether this is a regulated power or a broadly discretionary one has no bearing on this discussion. The fact is that the Council of Ministers evaluated BEAR CREEK's compliance with the legally prescribed requirements and issued the corresponding declaration, validly conferring on it an authorization to obtain a property right.

111. The important thing is that, from the time that BEAR CREEK owns the concessions, if the State wished to void the authoritative decree, it had to apply the legally prescribed arrangements for depriving a private party of his/its property right – validly granted -, which at the least include payment of a compensation and the right of defense.

112. However, note that the payment of an indemnification does not give the State *carte blanche* to carry out any kind of revocation or expropriation, either. **Only those which the Law expressly authorizes can be carried out, following the established procedure.**

113. Consequently, and as we shall see below, it is not correct to assert that, since the granting of the right was "discretionary," the State has the same discretion to withdraw it. A reasoning along these lines would result in the conclusion that, for example, a real property that the State could donate to a war hero (even through a

law) could be made to revert to the State at any time for reasons of merit or convenience, without the satisfaction of the legally prescribed requirements. Once property comes into being, a person can be deprived of it only through the constitutionally and legally prescribed arrangement.

A. The State impaired BEAR CREEK's property right without abiding by the legally prescribed procedures

114. Whether the supreme decree of authority is an administrative act or a provision of law, as will be demonstrated below, the deprivation of right granted through the DS 032 did not abide by Peruvian law.

(i) The State did not comply with the revocation process required to eliminate an administrative act which declares public necessity

115. As I stated in my first report, I consider that the declaration of public necessity is not a law provision because it does not have general effects. Even though that declaration is issued through a supreme decree, in material terms it is an administrative act because it has particular and specifically defined effects. That is confirmed, as already seen, with the inclusion of the administrative procedure to obtain said authoritative supreme decree in the MEM's TUPA. According to the study titled "Border Zone Supreme Decrees in Mining: Limited or Absolute Discretion," written by Cecilia Sancho, supreme decrees can be provisions of law or resolutions which do not have a place in the national legislative system because they contain mandates of an individual nature[52]:

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52 SANCHO ROJAS, Cecilia Elizabeth, *"Decretos Supremos de zona de frontera en minería: Discrecionalidad limitada o absoluta"* (Mining Supreme Decrees in Border Zones: Limited or Absolute Discretion), master's thesis in corporate law, PUCP, 2014. P. 32. **(BULLARD 046)** which, in turn, are based on RUBIO CORREA, Marcial, *The Legal System, Introduction to the Law*, 10th edition, PUCP Editorial Fund, Lima, 2013, p. 145 **(BULLARD 047)**.

> ***"Provisions of law encompass those of a general nature which affect the entire population or at least a major portion of it. In this case, supreme decrees, which contain mandates of this kind, must be considered as part of the legislation within the Peruvian legal system because they reflect the normative function of the executive branch of the State. <u>Adjudicative provisions, for their part, are comprised of those supreme decrees that refer to problems of an essentially individual or particular nature; they are not part of the national legislative system but are mandates of an individual nature."</u>*** (Emphasis added)

116. Along the same lines Bernales, referring to supreme decrees in border zones, writes that ***"the supreme decree is an administrative act. All activities performed by a sector of the State through a ministry are regulated through the administrative powers, the Constitution, and in this case Legislative Decree 757 and its regulations, which are in force, and which stipulate when, how, and in what mode the authorization is applied."***[53] (Emphasis added)

117. Furthermore, the fact that the authoritative supreme decree was issued by the Council of Ministers (a mainly political body according to Dr. Eguiguren) does not change its nature as an administrative act. In this respect Morón Urbina points out that *"an administrative act can be produced by autonomous organs, by regional and municipal authorities, and even by private parties when administrative functions have been conferred on them.*[54]

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53 Interview with Dr. Enrique Martín Bernales Ballesteros, a specialist in Constitutional Law, Human Rights, Political Science, and International Relations, on November 24, 2013. IN: SANCHO ROJAS, Cecilia Elizabeth, *"Decretos Supremos de zona de frontera en minería: Discrecionalidad limitada o absoluta"* (Mining Supreme Decrees in Border Zones: Limited or Absolute Discretion), master's thesis in corporate law, PUCP, 2014. **(BULLARD 046)**

54 MORÓN URBINA, Juan Carlos. *"Comentarios a la Ley del Procedimiento Administrativo General"* (Commentary on the Administrative Procedure Act), Gaceta Jurídica, eight edition, Lima, 2009, p. 120. **(BULLARD 033)**

118. Dromi similarly explains that *"[Decrees] are acts of authority whereby the Executive Branch's will is expressed within the legal sphere. It is the form of legal incarnation that is assumed by acts of the president. In view of the legal effects it produces, it may take the form of an administrative act (individual, direct, and immediate effects) or that of administrative regulations (general effects).*[55]

119. Below are some examples of supreme decrees that materially constitute administrative acts, because they create individual effects:

D.S. (Supreme Decree) No.	Purpose
064-99-EM	Approves the transfer of real properties owned by PETROPERÚ S.A. to the Peruvian Air Force.[56]
033-2004-3M	Approves the Hydrocarbon Extraction License Contract in Lot 56. [57]
060-2005-EM	Approves the modification and assignment of a contractual position in the Hydrocarbon Extraction License Contract in Lot 56.[58]
026-2015-EM	Approves the Hydrocarbon Exploration and Extraction License Contract in Lot XXIX.[59]
015-2002-PRES	Authorizes the Banco de Materials S.A.C. bank to carry out the process of restructuring of loans and transactions past due as of December 31, 2001.[60]

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55 DROMI, Roberto. *Derecho Administrativo* (Administrative Law). Vol. I, Editorial Gaceta Jurídica, first edition, Lima 2005, p. 288. **(BULLARD 048)**

56 **BULLARD 049**)

57 (**BULLARD 050**)

58 (**BULLARD 051**)

59 (**BULLARD 052**)

60 (**BULLARD 053**)

005-2012-MIDIS	Authorizes the PRONAA to provide food aid to the displaced population at the Kiteni Minor Town Center, Echarate District, during the term of the State of Emergency declared by D.S. No. 043-2012-PCM.[61]
023-2005-EF	Approves the contract for the loan from Banco de la Nación bank to the INDECI.[62]
044-2005-EF	Grants a guarantee by the Peruvian State to the Compañía Minera Miski Mayo S.A.C. company, the holder of the Bayóvar Project concession.[63]
007-2014-MINEDU	Authorizes the National Superintendency of State Properties to extinguish the in-use encumbrance granted by the State to the National Council of the Peruvian University, currently, the National Assembly of University Presidents, over 6,701.00 m2 of land at Calle Aldabas No. 337 in Santiago de Surco District, Province and Department of Lima.[64]
030-2015-EM	Approves the Assignment of a Contractual Position in the Hydrocarbon Exploration and Extraction License Contract in Lot XXI.[65]
029-2015-EM	Approves an amendment of the "Investment Agreement for the Installation, Operation, and Maintenance of a Natural Gas Processing Plant," signed with Perú LNG S.R.L.[66]
006-2009-EM	Supreme Decree which establishes the percentage of representation of the State-owned shares pertaining to the members of the General Meeting of Shareholders of the

61 (**BULLARD 054**)

62 (**BULLARD 055**)

63 (**BULLARD 056**)

64 (**BULLARD 057**)

65 (**BULLARD 058**)

66 (**BULLARD 059**)

	Empresa Petróleos del Perú S.A. PETROPERÚ S.A. company. [67]

120. The LPAG Act prescribes a framework of protection for administrative acts which confer rights or legitimate interests. Pursuant to article 203, ***"administrative acts which confer rights or legitimate interests cannot be revoked, modified, or replaced ex officio for reasons of timing, merit, or convenience."***[68] Nevertheless, if any ground for their revocation provided for in the provision arises[69], the Administration must follow the procedure established in articles 203 and 205 of the LPAG Act, i.e.: (1) pay an economic compensation for the economic injury sustained; (2) assure the right of defense; and (3) declare the revocation by the highest authority of the competent agency.[70]

121. A review of DS 032-EM shows that the right of defense was not assured, and still less was an economic compensation paid. It is also noted that the revocation was not justified by any of the grounds provided for in article 203 of the LPAG Act[71]. In

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67 (**BULLARD 060**)

68 LPAG, Article 203 (**BULLARD 005**).

69 (i) The existence of a provision of legal rank which expressly authorizes the revocation, provided the requirements prescribed in said provision are satisfied; (ii) the supervening disappearance of the conditions legally required for granting the title, whose permanent presence is indispensable for the existence of the created legal relationship; or (iii) when, identifying supervening criteria of judgment, the parties to whom/which the act is addressed are favored, provided no harm is done to third parties.
(BULLARD 005)

70 On this score, Section V of my first report (paragraphs 118 to 124) addresses this procedure in greater detail.

71 On this score, a more detailed explanation of why the revocation declared through DS 032 does not fit into any of the categories provided for in article 203 of the LPAG act is provided in paragraphs 176 to 195 of my first report.

other words, **the revocation carried out through DS 032- did not abide by the arrangement prescribed in articles 203 and 205 of the LPAG Act.**

(ii) The State did not comply with the necessary process for the expropriation of BEAR CREEK's property.

122. Without prejudice to the foregoing, even assuming, which we deny, that the authoritative supreme decree were deemed not to be an administrative act but a provision of law, the same conclusion is reached: the revocation carried out through DS 032 did not abide by Peruvian law.

123. In fact, assuming that DS 083 were a provision of law makes no change in the fact that it conferred a property right on BEAR CREEK.

124. Article 70 of the Constitution provides that ***"no one may be deprived of his property except exclusively for reasons of national security or public necessity declared by law, and upon payment in cash of a fair indemnification which includes compensation for potential damages."***[72]

125. Along the same lines, Law 27117, General Expropriations Act[73], provides that a mandatory transfer of the right of private ownership must: (i) be authorized exclusively by an express law of the Congress; (ii) grant a fair indemnification which includes compensation for the potential damage inflicted; and (iii) be grounded in a public necessity or national security.

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72 Political Constitution of Peru, Article 70.
The right to property is inviolable. The State guarantees it. It is exercised in harmony with the common good and within the limits of the law. No person may be deprived of his property exclusively for reasons of national security or public necessity declared by law and upon payment in cash of a fair indemnification which includes compensation for potential damages. Action may be taken before the Judiciary to contest the value of the property which the State has indicated in the expropriation procedure.**(BULLARD 003)**

73 Provision in force at the time of issuance of DS 032. **(BULLARD 061)**

126. However, in this case the State has not complied with any of the three stipulated requirements, as is shown below:

a. **The expropriation was not carried out through an express law of the Congress:** It was carried out through a supreme decree, a provision of lower rank, through which our law does not allow this kind of impairment of the right of private property to be carried out.

b. **No fair compensation for damages has been paid to BEAR CREEK.** The State has been very emphatic in stating that, since no expropriation is deemed to have taken place, it has no reason to pay BEAR CREEK any monetary compensation.

c. **There is no public necessity or national security in this case.** The State, relying on Dr. Eguiguren's opinion, has justified its actions by the existence of a climate of social conflict in Puno, which could only be overcome by impairing BEAR CREEK's property right. The problem is that this is not a circumstance which authorizes the State to infringe the inviolability of property rights.

What the State should have done to solve the social conflicts is to fulfill its role and impose order through the intercession of the National Police. However, the State decided to impair a fundamental right without compensating its holder. There is not a single provision in the entire legal framework which authorizes an expropriation to avoid social conflicts.

It is obvious that, if the legitimate property right held by a private party such as BEAR CREEK is a target of protests, the lawful solution, in compliance with the institutional guarantee required by the Constitution, is to impose order on the protests which are illegal (looting, burning of public facilities,

blockage of roads and highways, constraints on freedom of movement, injuries or even deprivation of life), and not to confiscate property.

It is as if the population had usurped someone's property, and to calm the disturbances the State deprived the owner of his property and turned it over to the usurpers to avoid further protest. This is not the way to act under a Constitutional Rule of Law. It is a constitutional duty of the State to restore order and not to deprive private parties of their rights in order to appease the actions of the rioters.[74]

The only circumstances in which private parties' rights and freedoms can be abridged in response to problems of internal order such as social conflicts are the State of Emergency and the State of Siege.

A State of Emergency occurs when peace or internal order is perturbed or catastrophes or serious situations occur that place the Nation at risk. It is declared by the President of the Republic and means suspending certain constitutional rights established in article 137 of the Constitution. It lasts for 60 days, which the President may extend.

State of Siege is also declared by the President in the event of invasion, foreign war, civil war, or imminent danger that they may occur. When it is declared, the basic rights that are not suspended must also be specified. It lasts for 45 days and may only be extended by the Congress of the Republic.

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[74] This duty is regulated in the following articles of the Constitution: (a) Article 44. *"It is a key duty of the State … to assure the full application of human rights, protect the population from threats against their safety, and foster the general well-being …,";* (b) Article 118. *"The President of the Republic is responsible for; 1. Complying with and enforcing the Constitution and the treaties, laws, and other legal provisions …";* (c) Article 163. *"The State guarantees the security of the Nation through the National Defense System";* and (d) Article 166. *"The National Police have the fundamental purpose of guaranteeing, maintaining, and restoring internal order."* **(BULLARD 003)**

However, for one of these circumstances to occur, it is necessary for the aforementioned conditions to arise and to follow the procedure prescribed in Art. 137 of the Constitution. Moreover, it is not permissible to expropriate private property in such cases because the State of Emergency and the State of Siege are by their nature transitory situations, while expropriation is by its nature permanent. It is therefore not possible to permanently deprive [a party] of property rights using a temporary situation as the pretext.

127. Accordingly, it is clear that DS 032 has deprived BEAR CREEK of its property right without having abided by Peruvian law, whether the supreme decree of authority (DS 083) is assumed to be an administrative act or a provision of law. This means that an illegitimate expropriation, i.e., a confiscation of property, occurred in this case.

(iii) Under Peruvian law, the illegitimate expropriation carried out by the State is a direct one.

128. Under Peruvian law, this illegitimate expropriation is clearly a direct expropriation. As shown above, through DS 032 the State issued a provision of a particular nature aimed at a single subject of administration: BEAR CREEK. This provision's purpose was to repeal DS 083, and accordingly, eliminate the administrative act

which had authorized BEAR CREEK to have property within 50 kilometers from the border.

129. In this respect, Francisco Eguiguren asserts the following in his Expert's Report:

> **"*Since Supreme Decree No. 032 is of a general not a specific nature, not only does it annul the authorization granted to Bear Creek by Supreme Decree No. 083, but it also contains measures to prevent illegal mining of ore and prohibits all mining activity in the area. Its issuance, which was in accordance with the exercise of a discretionary power by the Executive Branch, did not require the intervention of persons that may consider themselves interested parties or affected by its contents.*"[75]**

130. Dr. Eguiguren's assertion is misguided. The fact that this supreme decree also contains, in its article 2, a general provision in no way changes the nature of the administrative act contained in article 1. A provision of law such as a Supreme Decree may have general and particular effects at the same time. This means that the provision will have a general character in regard to its general effects, but will also have the nature of an administrative act in regard to its particular effects.

131. Being BEAR CREEK expressly without the required authorization, it was deprived from its entire property. This because, as article 71 itself provides, the consequence of a foreigner having property within 50 kilometers of the border without having the required authorization is not only the impossibility of engaging in mining activity but also the complete forfeiture of the right to the State. Hence, there is not even the possibility that BEAR CREEK could sell its property right to third parties, since its property is unauthorized and has been declared illegal by the State.

[75] See EGUIGUREN, paragraph 65.

132. Accordingly, the State's assertion in its answer is incorrect, according to Peruvian law. It states that, since BEAR CREEK still has the concession registered in its name, it still maintains ownership until such time as the process commenced by the MEM concludes, wherefore in any case the expropriation would be an indirect one.[76]

133. However, the decisive fact is not that registration, which has only declarative effects, but the required authorization, an administrative act which does have constitutive effects. In the absence of such authorization, which is a material requirement needed to create property, BEAR CREEK has completely lost its right. The fact that for the concessions to formally revert to the State, one must wait until the process commenced by the MEM concludes, in no way changes the fact that, without the authorization required by the Constitution, BEAR CREEK can no longer hold property over them.

134. For all the reasons set forth in this section, the argument put forward by Dr. Eguiguren that the discretion of the authoritative supreme decree authorizes a discretionary power to impair a previously granted right is groundless. Under that odd interpretation, an administrative act could be eliminated without following the revocation procedure and the legitimate owner could be deprived of his/its right without the need to carry out the expropriation process.

135. In the end, what Dr. Eguiguren and the State propose is that there is a second-class property right, of lower rank than that of other persons, which can be extinguished or impaired by a discretionary act of the State. That does not exist in Peruvian law.

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[76] The State says the following in paragraph 251 of the Counter-memorial: *"In fact, Claimant retains title to the Santa Ana Concessions today."*

B. Even the discretion in the "derogation" does not mean arbitrariness.

136. Dr. Eguiguren's posture supports the proposition that the authoritative decree (DS 083) can be rendered without effect through another supreme decree if, at the Council of Ministers' discretion, the public necessity has disappeared.

137. Without prejudice to what was stated in the preceding chapters, and even assuming that the property right conferred by the authoritative decree could be rendered without effect in a discretionary manner and without paying any compensation, it does not mean that a supreme decree lacking in motivation (explanation) is the appropriate method.

138. In a formal sense, since the declaration of public necessity rested on two provisions of legal rank (Legislative Decree 757 and the Single Ordered Text of the General Mining Act)[77], the disappearance of that public necessity should also have been declared through a provision of legal rank. A supreme decree cannot repeal something established by two provisions of legal rank.

139. This is especially clear with regard to property rights. Pursuant to article 72 of the Constitution (not analyzed in Dr. Eguiguren's report), a third party cannot be totally deprived of property with a simple allegation of national security. The provision in question states that: "The law can, solely for reasons of national security, establish

[77] On the one hand, section V of the Preliminary Title of the Single Ordered Text of the General Mining Act, approved by Supreme Decree 014-92-EM, which provides that the mining industry is one of public utility and the promotion of investment in mining activity is in the national interest, and on the other, article 13 of Legislative Decree 757 and its regulatory provisions, which declares national and foreign private investment in productive activities conducted or to be conducted in border zones of the country to be a national necessity. (**BULLARD 031**)

temporary restrictions and specific prohibitions on the acquisition, possession, operation, and transfer of certain assets."[78] If a law is required to establish temporary limitations on property, how could someone be totally and permanently deprived of his property by a supreme decree? This is a clearly arbitrary act.

140. Hence, the only two ways provided for limiting or depriving the owner of property for reasons of national security are: (1) by an expropriation in conformity with article 71 of the Constitution, which requires a law, a procedure with the right of defense, and payment of a compensation; or (2) the establishment of temporary limitations, by law in conformity with article 72 of the Constitution. In both cases, a law is required. A Supreme Decree is not enough.

141. Without prejudice thereto, assuming that the Council of Ministers would have the power to declare the disappearance of public necessity through a supreme decree, this authority must, at the least, demonstrate that the provisions of Legislative Decree 757 and the Single Ordered Text of the General Mining Act are no longer in force. That is, at the date of "derogation": (i) private foreign investment in productive activities conducted or to be conducted in the country's border zones is no longer a national necessity; and (2) the mining industry is no longer a public utility and the promotion of investment in mining activity is no longer in the national interest.

142. However, in this case DS 032 not only failed to demonstrate that the provisions of Legislative Decree 757 and the Single Ordered Text of the General Mining Act are not in force, but in addition, it did not identify the "circumstances" which at its discretion produced the disappearance of the public necessity. In fact, the whereas section of DS 032 only states that: "circumstances have become known which would imply the disappearance of the conditions legally required for the issuance

[78] Political Constitution of Peru, article 72. (**BULLARD 003**).

of said act (…) in that respect, and given the existence of these new circumstances, it has become necessary to issue the appropriate act."

143. As I indicated in my first report, even though DS 032 is not clear on the subject, it can be assumed on the basis of a review of its Preamble that the "new circumstances" are related to the discontent prevailing among a part of the Aymara ethnic population of Puno[79]. However, the Council of Ministers has not succeeded in demonstrating how a regional social conflict can prevail over a national necessity.

144. In this respect, there are multiple scholars who point out, in addressing the concept of public necessity in the context of expropriations, that public necessity is a concept linked to "the general interest of the nation,"[80] "society as a whole,"[81] or "a matter of general interest to the community."[82] Hence, in the potential scenario for "derogation" of the authoritative decree, public necessity must be viewed from a national perspective rather than a regional one, contrary to what has been done in this case.

145. Without prejudice to the territorial scope of the conflicts, it should be recalled that, as I stated above in this report, there is no special provision in Peruvian law that authorizes the revocation of a concession or depriving a person of his/its property as a consequence of social discontent among the population. To do so would imply

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79 See BULLARD 1, paragraphs 180 and 181.

80 See GARCIA TOMA, Victor. *Systematic Analysis of the Peruvian Constitution of 1993*, Vol. II, Editorial Development Fund, University of Lima, 1998, p. 134. In: SANCHO ROJAS, Cecilia Elizabeth, "*Supreme Decrees in mining border areas: Absolute or Limited Discretion*," Master's Degree thesis in corporate law, PUCP, 2014. (**BULLARD 046**).

81 BERNALES, Enrique, *The 1993 Constitution with Comments, Twenty years Later*, 6th edition, IDEMSA, 2012, p. 400 **(BULLARD 062)**

82 BARRON GONZALEZ, Gunther. *Property Rights and Expropriation, The Constitution with Comments*, Judicial Gazette, Lima, 2013, p. 233, which, in turn, is based on: AVENDANO VALDEZ, Jorge, *Comments on Article 923*. In: VV.AA. Civil Code with Comments, Vol. V, Judicial Gazette, Lima, 2003, p. 190 (**BULLARD 063**).

that discontent or protests constitute a ground for expropriation, which has no legal foundation in Peruvian law.

146. Furthermore, there is no indication that the State gave BEAR CREEK the possibility to defend itself in response to the alleged change of circumstances which presumably affected the requirements for the validity of its title of authorization prior to the revocation carried out through DS 032.

147. On this score, the Political Constitution of Peru enshrines due process as a principal and a right of private parties.[83] Though article 139 of the Constitution includes this guarantee in the judicial sphere, the Constitutional Court has repeatedly made it clear that due process is applicable to all public agencies, and even to private entities. This guarantee is not exclusive to the judicial sphere.

148. In a sentence pronounced in Case No. 02600-2008-AA,[84] the Constitutional Court analyzed an association's decision to expel one of its members without having informed him of the charges against him or having given him a term in which to submit arguments in his defense. In response, the court pointed out that due process had been infringed and that it is not exclusive to the judicial sphere but extends to all public agencies and even private entities:

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[83] Political Constitution of Peru. Article 139.
The following are judicial principles and rights:
(…)
3. The observance of due process and judicial protection of rights.
(…) **(BULLARD 003)**

[84] Sentence of the Constitutional Court of Peru, pronounced in Case No. 02600-2008-AA. See: http://www.tc.gob.pe/jurisprudencia/2008/02600-2008-AA.html. **(BULLARD 064)**

"(…) <u>the scope of application of due process is not exclusively circumscribed to the judicial sphere but projects to encompass every organ, whether public or private</u>, which performs formally or materially judicial functions. Hence, the fundamental right to due process is a right which must be observed in all types of processes and procedures, whatever their nature may be, insofar as <u>the principle of prohibition of arbitrariness is a principle inherent to the essential postulates of a democratic constitutional State, as well as to the values incorporated in the Constitution itself</u>." (Emphasis added)

149. In the sentence pronounced in Case No. 3361-2004-AA,"[85] the Constitutional Court stated that due process is applicable **<u>even in discretionary acts of the State</u>**. The court made it clear that motivation or explanation is an expression of due process, and must accordingly be present in the decisions adopted by the State, even in cases such as ratifications by the National Judiciary Council in which there is a certain room for discretion.

***"<u>Motivation or explanation is a requirement which, though it is a part of judicial resolutions, must be observed in all categories of procedures</u>, in light of article 139, section 5), of the Constitution, as a 'written motivation,' since as is prescribed in article 12 of the Organic PJ act, all resolutions, except for those involving mere procedures, are motivated or explained, under responsibility; i.e., they must include an expression of the reasoning on which they are based.*

In that sense, <u>every resolution must be consistent in order to calibrate the proper correlation between the facts presented and the legal basis</u> (it must abide by the in dubio pro reo principle, meaning that the legal provisions must be construed in the defendant's favor), on which the final decision and what it determines rests. And it is precisely <u>the motivation or explanation which makes it possible to measure the consistency of the measure adopted</u>, since it is an effective means of control

[85] Sentence of the Constitutional Court of Peru, pronounced in Case no. 3361-2004-AA. See: http://www.tc.gob.pe/jurisprudencia/2005/03361-2004-AA.html. **(BULLARD 065)**

over the judge's activity that permits a public verification of his final conviction.

The motivation or explanation is useful essentially for two reasons: for the effectiveness of ex-post judicial control and to underlie the judge's conviction regarding the propriety and fairness of the CNM's decision on his rights as a citizen. Accordingly, a consistent resolution, supported by the motivation or explanation, reveals its pedestal in its articulation with <u>the reasonability criterion, with a view to adequately regulating the "margin of appreciation" possessed by the council members to resolve in final fashion, despite the good sense and flexibility that have been imposed on them in the performance of their functions.</u>
(…)
Though it appears clear and interesting that there is a certain discretion in the council members' activity (as in that of any judge), that fact cannot serve as a basis for infringing the rights of judges and prosecutors; on the contrary, their resolutions must be subject to legal criteria which reflect the values, principles, and rights enshrined in the Constitution."(Emphasis added)

150. In this pronouncement, the Constitutional Court also stressed the private party's right to obtain the documentation on which the decision relies:

"Hence, <u>the right to information relevant to the procedure is the one whereby the person subject thereto is able to gain access to the documents that support a resolution, both to challenge its content and to assess the judge's reasoning in issuing his ruling</u>.
(…)
This generic argumentation shows that all judges subject to ratification are entitled to have access to: a) the copy of the personal interview, since the hearing is a public one, through the minutes of the public act that was conducted, and not only the videotape thereof; b) the copy of the part of the CNM Plenum's which contains the vote and the resolution to not ratify the judge under evaluation; and c) the copy of the Standing Evaluation and Ratification Committee's Report. This is similar to the criterion adopted by the new Evaluation and Ratification Regulations for Judges of the Judiciary and Prosecutors of the Attorney General's Office, which stipulates in its preamble and its third complementary and final provisions that judges may request

copies of the components of the record and of the final report."
(Emphasis added)

151. Consequently, the guarantee of due process, understood as private parties' right to put forward their arguments, offer and submit evidence, and obtain a reasoned (explained) decision grounded in law, must be strictly respected by all State agencies, even in regard to the adoption of discretionary decisions.

152. This guarantee also appears in the LPAG Act. Pursuant to Article IV of its Preliminary Title, due process is a principle that encompasses the right of persons subject to administration to **"put forward their arguments, offer and submit evidence, and obtain a reasoned (explained) decision grounded in law."**[86] This principle is not merely declaratory in nature; its application is a duty of the administrative authorities, as is literally prescribed in article 75.2 of the LPAG Act: ***"The following are duties of the authorities (…) perform their functions following the principles of administrative procedure prescribed in the Preliminary Title of this Act."***

153. In this respect, the right of due process establishes a number of guarantees for private parties, chief among which are the right of defense, which allows the private party to validly question the accusations made by the Administration, and the right to reasons (explanation), which requires the Administration to pronounce

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86 General Administrative Procedure Act. Article IV.
Principles of administrative procedure.
(…)
1.2. Principle of due process. Persons subject to administration enjoy all the rights and protections inherent in administrative due process, which encompasses the right to put forward their arguments, offer and submit evidence, and obtain a motivated (explained) decision grounded in law. The institution of administrative due process is governed by the principles of Administrative Law. The regulations of Civil Due Process is applicable only insofar as it is compatible with the administrative regime. **(BULLARD 005)**

totally and adequately on all the private party's arguments, thereby avoiding the issuance of arbitrary and/or insufficiently reasoned decisions.

154. Since in this case the Council of Ministers issued DS 032 without having assured BEAR CREEK's right of defense and without having properly reasoned (explained) its decision, it can be concluded that said decision is arbitrary.

155. For all the reasons set forth above, DS 083 did not arise from the Council of Ministers' mere discretion, since it has been demonstrated that BEAR CREEK's application was in compliance with the legally required conditions. Nevertheless, even assuming a high degree of discretion in DS 083, that does not mean that the State has the authority to render previously granted property rights without effect.

156. Whatever the nature of DS 083 may be (an administrative act or a provision of law), a deprivation of rights must be contingent on payment of a compensation and the application of due process, among other protections prescribed by the Constitution and the laws. That has not happened in this case.

157. Without prejudice thereto, even if it is assumed that DS 083 can be "repealed" without payment of an economic compensation, in such a scenario the authority has a duty to properly reason (explain) its decision and grant the right of defense to the injured parties; that has not happened in this case either.

[Short Signature]

V. THE STATE NOT ONLY IMPAIRED BEAR CREEK'S PROPERTY RIGHT BUT ALSO THE PRINCIPLE OF LEGAL SECURITY

158. The reason why there is no second-class property in Peru, which can be extinguished or impaired at the State's discretion, is that there is a close linkage between that right and the legal security principle.

159. This principle implies, as has been explained by the Spanish Constitutional Court, *"the citizen's reasonably grounded expectation regarding what the authority's action in the application of the Law will be."*[87] Hence, predictability in the State's conduct in terms of concepts previously established by law imbues all the law and consolidates the prohibition against arbitrariness. That is why, according to the Peruvian Constitutional Court, legal security *"pervades all the law, naturally including the Supreme Law which prevails over it. Its recognition is implicit in our Constitution."*[88]

160. In the specific case of property rights, legal security generates predictability in terms of the expectations that the owner and third parties may have towards one or more goods. In the words of Harold Demsetz, *"the right to property is an instrument created by society, and it draws its importance from that fact that it helps individuals generate the expectations they can reasonably maintain in their relations with third parties."*[89]

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87 Sentence 36/1991 of the Constitutional Court of Spain. See: http://hj.tribunalconstitucional.es/es/Resolucion/Show/1675. **(BULLARD 066)**

88 Sentence of the Constitutional Court of Peru, pronounced in Case No. 0016-2002-AI/TC. See: http://www.tc.gob.pe/jurisprudencia/2003/00016-2002-AI.html. **(BULLARD 067)**

89 DEMSETZ, Harold. *Toward a Theory of Property Rights*, in: *The American Economic Reviews*, Vol, 57, No. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association, May 1967, p. 347. **(BULLARD 068)**

161. This principle imposes a dual demand on the State in regard to property rights: (i) not to take actions which modify the status quo *"so that the individual is assured of the maintenance of his legal status insofar as the conditions prescribed by law for its transformation do not arise,"* and (ii) to intercede immediately in response to *"illegal disturbances of legal situations … whether to assure the permanence of the status quo … or when appropriate, to give rise to appropriate changes therein."*[90]

162. Assuring an individual the maintenance of his legal status is vital because it generates an institutional certainty which allows people to have sufficient initiative to give rise to wealth creation on the basis of their ownership of property rights.[91]

163. For all the reasons set forth above, the interpretation that foreigners' property rights within 50 kilometers of the border can be eliminated at the State's discretion means that foreign investors will never have enough institutional certainty to invest in that area.

164. What results is the subjection of foreign investment to a "Sword of Damocles," since property may be lost at any time due to the existence of facts created by third parties that lead the State, for reasons of political convenience, to eliminate previously adopted declarations of public necessity and thereby confiscate those investors' properties.

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90 Sentence of the Constitutional Court, pronounced in Case No. 0016-2002-AI/TC, Op. Cit. **(BULLARD 067)**

91 Ibid.

165. This is a clear attack on the legal security principle, especially since public necessity is an undetermined concept which lends itself for the State to change its content whenever it pleases.

VI. CONCLUSIONS

My conclusions are those indicated in the introduction to this opinion, to which I make reference.

I declare that those conclusions reflect my knowledge and understanding, and are based on my academic and professional experience and on a detailed and honest analysis of the information I have reviewed. In that sense, this report reflects my honest understanding and conviction of the issues submitted to me for the issuance of an opinion.

I present this report on January 6, 2016.

[signature]

Alfredo Bullard González

Lima, Peru

Annex I

List of Documents

BULLARD 033: MORÓN URBINA, Juan Carlos. *Comentarios a la Ley de Procedimiento Administrativo General*, Gaceta Jurídica, 10th ed., Lima, 2014. (Extracts)

BULLARD 034: Texto Único de Procedimientos Administrativos del Ministerio de Energía y Minas.

BULLARD 035: TABOADA, Lizardo. *Acto jurídico, negocio jurídico y contracto.* Editorial Grijley, 2nd ed., Lima, 2013. (Extracts)

BULLARD 036: LOHMANN, Guillermo. *El negocio jurídico.* Editorial Grijley, 2nd ed., Lima, 1994. (Extracts)

BULLARD 037: CASTILLO FREYRE, Mario and SABROSO, Rita. *La teoría de los actos propios y la nulidad. ¿regla o principio de derecho?.* (Extracts)

BULLARD 038: Legal Dictionary of the Peruvian Judiciary. (Extract)

BULLARD 039: Sentence of the Supreme Court of Peru, dated August 22, 2002, in Case 2849-2001.

BULLARD 040: Resolution of the Regulatory Agency for Private Investment in Telecommunications – OSIPTEL No. 071-2004-CD-OSIPTEL, dated September 3, 2004.

BULLARD 041: MORELLO, Augusto. Dinámica del Contrato. Enfoques. Buenos Aires: Librería Editorial Platense, 1985. (Extracts)

BULLARD 042: DIEZ PICAZO, Luis. La Doctrina de los Propios Actos. Un studio crítico sobre la jurisprudencia del Tribunal Supreme. Pamplona, Thomson Reuters (Legal) Limited. (Extracts)

BULLARD 043: BORDA, Alejandro. Teoría de los Actos Propios. Buenos Aires, Abeledo Perrot. (Extracts)

BULLARD 044: Sentence of the Constitutional Court, dated March 26, 2007, in Case No. 0005-2006-PI/TC.

BULLARD 045: Sentence of the Constitutional Court, dated March 2, 2005, in Case No. 4232-2004-AA/TC.

BULLARD 046: SANCHO ROJAS, Cecilia Elizabeth. *"Decretos Supremos de zona de frontera en minería. Discrecionalidad limitada o absoluta,"* Master's thesis in Law, in the PUCP company, 2014. (Extracts)

BULLARD 047: RUBIO CORREA, Marcial, *El Sistema Jurídico, Introducción al Derecho*, 10th edition, Fondo Editorial PUCP, Lima, 2013, p.145

BULLARD 048: DROMI, Roberto. *Derecho Administrativo.* Vol. I, Editorial Gaceta Jurídica, 1st ed., Lima, 2005. (Extracts)

BULLARD 049: Supreme Decree No. 064-99-EM

BULLARD 050: Supreme Decree No. 033-2004-EM

BULLARD 051: Supreme Decree No. 060-2005-EM

BULLARD 052: Supreme Decree No. 026-2015-EM

BULLARD 053: Supreme Decree No. 015-2002-PRES

BULLARD 054: Supreme Decree No. 005-2012-MIDIS

BULLARD 055: Supreme Decree No. 023-2005-EF

BULLARD 056: Supreme Decree No. 044-2005-EF

BULLARD 057: Supreme Decree No. 007-2014-MINEDU

BULLARD 058: Supreme Decree No. 030-2015-EM

BULLARD 059: Supreme Decree No. 029-2015-EM

BULLARD 060: Supreme Decree No. 006-2009-EM

BULLARD 061: General Expropriations Act – Law 27117.

BULLARD 062: BERNALES, Enrique *La Constitución Comentada de 1993. Veinte años después* 6th edition IDEMSA, 2012.

BULLARD 063: BARRÓN GONZALES, Gunther. *Derecho de Propiedad y expropiación. La Constitución Comentada*., Gaceta Jurídica, Lima, 2013.

BULLARD 064: Sentence of the Constitutional Court of Peru, dated November 18, 2008 in Case No. 02600-2008-AA.

BULLARD 065: Sentence of the Constitutional Court of Peru, dated August 12, 2005 in Case No. 3361-2004-AA.

BULLARD 066: Sentence 36/1991 of the Constitutional Court of Spain, dated February 14, 1991.

BULLARD 067: Sentence of the Constitutional Court of Peru, dated April 30, 2003 in Case No. 0016-AI/TC.

BULLARD 068: DEMSETZ, Harold. *Toward a theory of property rights, in The American Economic Review*, Vo. 57. No. 2, Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association, May 1967. (Extracts)

BULLARD 069: Peruvian Civil Code. Cited Articles.