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Second Expert Report of
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English Translation

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

Bear Creek Mining Corporation

Claimant

Vs.

Republic of Peru

Respondent

ICSID CASE No. ARB/14/21

SECOND EXPERT OPINION ON PERUVIAN CONSTITUTIONAL LAW

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I. INTRODUCTION

1. This report is a response to the legal opinions expressed by Bear Creek Mining Corporation (“Bear Creek” or “Claimant”) in its Reply submission on the Merits and Counter-Memorial on Jurisdiction, dated January 8, 2016,¹ and in the reply report of the expert Dr. Alfredo Bullard, presented by the Claimant, in response to the contents of my expert report on Peruvian constitutional law, dated October 6, 2015.² For this purpose, I shall both summarize and expand on, as the case may be, the opinions and arguments that I expressed in my first report on the topics covered by the analysis and the legal debate. I shall also respond to the opinions expressed by Dr. Bullard in his reply report, with particular regard to the new arguments or topics that my distinguished colleague introduces.

2. The main areas which will be addressed in this report are:

- a) The declaration of public necessity for a foreign company to be able to acquire and exploit mines and other natural resources located within 50 kilometers of the border zone, which is issued by a supreme decree approved by the Council of Ministers, constitutes an act of government [sovereign act], exceptional in nature and at the discretion of the State, and not an administrative act.
- b) This supreme decree does not grant the foreign investor ownership of the mining concessions requested, but it does authorize it to make the acquisition of those concessions.
- c) Bear Creek violated Article 71 of the Constitution by exercising early, covertly, indirect ownership of the requested mining concessions, before obtaining the declaration of public necessity and making the formal transfer for its acquisition. To do so, it acted through a third party, a Peruvian citizen with whom it had an employment relationship, who formally appeared as an applicant for the mining concession applications and the subsequent holder of the concessions.
- d) The issuance of the Supreme Decree No. 032-2011-EM (“S.D. No. 032-2011-EM”) conformed to the Constitution and the competencies and powers of the

¹ See Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, January 8, 2016 (“Claimant’s Reply”).

² See Second Expert Report of Alfredo Bullard González, January 6, 2016 (“Bullard Second Report”).

Executive Branch. Said legal norm does not contain or involve any expropriation of the ownership that Bear Creek held, and continues to hold, of mining concessions that it still owns. The legal norm merely repeals Supreme Decree No. 083-2007-EM (“S.D. No. 083-2007-EM”), which had declared as a public necessity the approval for the company Bear Creek to make the acquisition of certain mining concessions in the area of the border with Bolivia. As it is a standard that repealed the provisions of another supreme decree, which was an act of government, discretionary in nature and not an administrative act, the provisions governing the withdrawal or cancellation of administrative acts, the rights of defense, the motivation or statute of limitations are not applicable to it.

II. EXECUTIVE SUMMARY

3. The power granted by the Constitution to the Council of Ministers to declare as a public necessity the authorization for a foreign company to be able to acquire or possess mining rights or other natural resources located within 50 kilometers of a border zone, is a power that is discretionary in nature, that allows the Council to evaluate this request and determine whether or not it is in line with what the State considers to be a public necessity. Therefore, it will be the Council of Ministers who will analyze and determine whether the foreign investment project in the border zone is justified because it responds to a need for development of the region and the related population, as well as offering benefits for the country. Essentially, it is an assessment of the political and economic suitability and opportunity of such an acquisition or investment; of its compatibility with the development policies nationally and for the border areas adopted by the Executive Branch; as well as the impact or risk that the mining activity, under the responsibility of the foreign company, may involve for the preservation of national security, both at an external or international level (referring to the prevention of any aggression from a foreign state) and at a domestic level (referring to the preservation of social peace and public order within the national territory, especially in the most sensitive areas in terms of security, such as the border areas).

This political and economic nature itself, which involves the assessment of all these factors and criteria, places us clearly at a discretionary decision of the National Government.

4. For these reasons, I consider the assertions of the Claimant and the expert reports of Dr. Alfredo Bullard to be erroneous when they argue that the supreme decree issued by the Council of Ministers, which declares the public necessity and authorizes the acquisition of the mining concessions for the foreign company, is an administrative act. It is also not correct to state that this supreme decree should be issued necessarily and automatically, solely on the basis of the request made by the foreign company or because national law generally declares foreign investment in mining a priority. It may be the case that in a particular or specific case, which is what the Council of Ministers will decide upon, the foreign petitioner or its project does not meet the necessary requirements for the investment or development of mining activities in the border area to be declared a public necessity.

5. Considering the discretionary nature of this power of the Council of Ministers, it could be concluded that the foreign company has the right to request the authorization from the Council of Ministers and has the possibility of obtaining it, but only if the latter assesses the request and its link to a public necessity favorably. But the foreign company does not have the right to demand that this authorization necessarily be granted; much less so when it comes to the operation of mines and natural resources that, as expressly provided for in Article 66 of the Constitution, are the property of the Nation. Additionally, this constitutional standard requires, also explicitly, that it will be the State that decides through its own sovereignty the approval and the conditions for awarding resource use to individuals, whether they be domestic or foreign.

6. The S.D. No. 083-2007-EM is an act of government, which is discretionary in nature. The legal effects of the declaration of public necessity and the authorization granted in

favor of Bear Creek, by S.D. No. 083-2007-EM, approved by the Council of Ministers, cannot and must not be confused with the legal acts subsequently made by the said company to finalize the acquisition of the mining concessions, whether it is a case of a transfer agreement with a private party (which appears as owner of these concessions) or of administrative acts before the mining authorities for the registration of the concessions acquired.

7. In this case, Bear Creek acquired the ownership of the mining concessions not through the issuance of the supreme decree, but rather through the exercise of the right arising out of the transfer option contract which it had previously entered into with Ms. Jenny Villavicencio. There is a clear difference between the legal purposes and effects of the supreme decree, which granted the authorization for Bear Creek to be able to acquire mining concessions, and the act of the acquisition, in this case, the execution of the transfer agreement entered into between private parties. This distinction is so clear, that it could have occurred, for example, that, despite the issuance of the authoritative supreme decree in favor of Bear Creek, the acquisition of the mining concessions could have failed to materialize, either because the company withdrew from doing so (because of some sort of economic or opportunity considerations) or because Ms. Villavicencio did not keep the promise given.

8. The S.D. No. 032-2011-EM did not constitute an expropriation of the right of property of Bear Creek, as now alleged by the Claimant and the reply report of Dr. Bullard. This statement lacks practical and formal legal basis. It is enough to simply review the contents of said supreme decree to see that in no part of the text, whether in the whereas section or in its articles, is any reference made to a loss of ownership rights of Bear Creek, or there being any provision for their expropriation. This standard has neither provided for nor led to any forcible transfer of the ownership rights of Bear Creek in favor of the State.

9. Bear Creek remains the owner of the mining concessions, so it is not possible to argue that it has suffered loss of its property rights or that the State has to grant assessed compensation, in advance and in cash, to the company. Furthermore, no type of administrative expropriation proceedings have been initiated against it and it has not been stripped of the ownership or rights that it continues to hold on the mining concessions in question.³ As a consequence, there has been no expropriation of the property of Bear Creek under Supreme Decree No. 032-2011-EM.

10. The Claimant and Dr. Bullard were also wrong when they claim that the S.D. No. 032-2011-EM has repealed or affected the validity of any provision of the Legislative Decree No. 757, “Framework Law for Private Investment Growth,” or the Consolidated Amended Text (“TUO” for its Spanish-language initials) of the General Law on Mining. These legal standards, which establish a general framework of treatment for the promotion of private investment or the development of mining activities, respectively, preserve their validity and content. The issuance of S.D. No. 083-2007-EM, through which it declared as a public necessity the approval of the authorization for Bear Creek to be able to acquire mining concessions, had as its main direct source the express mandate contained in the second paragraph of Article 71 of the Constitution. The S.D. No. 032-2011-EM that repealed it finds a similar constitutional foundation, considering that the causes or reasons that led to the declaration as a public necessity the authorization for Bear Creek to be able to acquire certain mining concessions in a border zone had disappeared. Contrary to what the Claimant alleges, the declaration of public necessity is not derived from the general declaration of public need for investment in mining projects provided for in Legislative Decree No. 757 and the Consolidated Amended Text of the General Law on Mining. The repeal

³ I understand that after having issued the Supreme Decree No. 032, the Attorney’s office of MINEM initiated an inefficacy action against Bear Creek for the improper acquisition of the mining concessions.

of the declaration of public necessity of the mining project of Bear Creek, provided for by S.D. No. 032-2022-EM, annuls a given decision, without affecting the validity of the general standards relating to this matter.

11. Article 71 of the Constitution expressly provides for the prohibition on foreigners acquiring ownership or rights, not just directly, but also indirectly, before having obtained the declaration of public necessity and the authorization granted by the Council of Ministers. This article seeks to prevent the foreign company from using the participation of third persons of Peruvian nationality, who appear to act on their own behalf and economic interest, but who are in fact mere “proxies” or authorized representatives of the company, to circumvent the constitutional prohibition. That is to say, it aims to prevent such a company from exercising covertly and in advance, in practical terms, using the intervention of third parties, ownership of the said assets or the realization of economic activity, despite not having yet obtained the supreme decree authorizing the acquire this ownership or rights, or not having finalized their acquisition.

12. Even if it may be understandable that Bear Creek would adopt certain measures that would provide it with greater assurance that, once the supreme decree of authorization is issued, it could actually finalize the acquisition of the ownership of the mining concessions that interested it, it does not render any and all measures or agreements valid or acceptable, but rather exclusively those that were consistent with the Constitution and the law.

13. In this sense, Bear Creek could have resorted to two valid options in order to secure its interests, as long as its application was being processed and the issuance of the Supreme Decree to be approved by the Council of Ministers was obtained. In the event that the mining concessions had not yet been granted to any person, it could have applied directly to

INGEMMET, holding a priority or preference while obtaining the declaration of public necessity. And, in the event that the mining concessions already had an owner, it could have entered into a transfer option contract with the owner (person independent to Bear Creek) of the mining concessions that it wished to acquire. But the situation would be very different if the company chose to arrange with a person of Peruvian nationality, over whom it exercised some form of control, so that this person, pretending to act on her own behalf and in her own economic interest, sought and obtained ownership of certain mining concessions. Especially if both parties (the company and the person of Peruvian nationality) knew that this request was actually made for the foreign company and that the company would exercise, in fact, the attributes of owner or holder prior to the issuance of the Supreme Decree and would be the entity to whom the transfer would take place to acquire such ownership. This would clearly be invalid and fraudulent, as it entails having obtained and exercised indirect ownership of mining concessions, covertly and prematurely, which is expressly prohibited by the Constitution.

14. Concerning the information reviewed and analyzed in this reply report, I find it reasonable to consider that Bear Creek, in fact but covertly, exercised indirect ownership and beneficial ownership of the 7 mining concessions, acting through an intermediary (as a “proxy”), a Peruvian citizen with whom it also had an employment relationship, who appeared falsely as the formal holder.

15. If this irregular situation is proven, before the administrative or judicial authorities, the acquisition of the ownership of the mining concessions formally obtained by Bear Creek, by executing the transfer option contained in the contracts entered into with Jenny Villavicencio, would not be valid. In this case, there would have been a manifest violation of Article 71 of the Constitution. The foreign company would have indirectly acquired or owned

ownership of or rights over mining concessions, located within 50 kilometers of the border area, prior to not only the date of issuance of the Supreme Decree 083-2007-EM, which declared the public necessity and authorized the acquisition by Bear Creek of these concessions, but also prior to the time when the contract was entered into to formally transfer ownership of them.

16. Given the existence of this defect of invalidity in the acquisition of the ownership by Bear Creek, the Peruvian state would be enabled (as provided in the Constitution itself expressly) to declare the loss of ownership and mining rights acquired irregularly by the foreign company, which would revert to the State without payment or compensation having to be made, as it would not be considered an expropriation but rather an imposition of a sanction provided for by the Constitution, against the wrongdoing of this company.

17. The S.D. No. 083-2007-EM, approved by the Council of Ministers simply declared as a public necessity the mining investment of the company Bear Creek and authorized it to be able to acquire certain specific mining concessions within 50 kilometers of the border with Bolivia. This supreme decree did not uphold any defect or irregularity that may have existed prior to its issuance, as claimed by the Claimant and Dr. Bullard. The decree does not contain any reference to the link that existed between Jenny Villavicencio and Bear Creek or the option contract entered into between both parties, so there is no reason or evidence to assert or assume that the Council of Ministers had to have known of the existence of either of these situations.

18. Even if it could be proved that some officials of the Ministry of Energy and Mining knew that Jenny Villavicencio was representing the interests of Bear Creek, in spite of which they still allowed the processing of the mining requests that she had made in her name and the further issuance of the supreme decree of authorization, this in no way weakens the transgression in relation to Article 71 of the Constitution and the irregularities committed by this

simulation. In any case, the company cannot try to “validate” or make valid acts or conduct that are clearly unconstitutional, and it does not prevent the State from annulling them when it discovers them or it becomes aware of their existence.

19. The S.D. No. 032-2011-EM is a legal norm that is legitimate under the Constitution and the competencies and powers of the Executive Branch. It is general in nature as its content is not merely to repeal S.D. No. 083-2007-EM, which had declared as a public necessity the authorization for the company Bear Creek to be able to make the acquisition of certain mining concessions in the area of the border with Bolivia, but rather it also contains provisions to combat illegal mining and to suspend all mining activity in certain districts of the department of Puno. As it is a standard that repealed the provisions of another supreme decree, which was an act of government, discretionary in nature and not an administrative act, the provisions of the General Administrative Procedure that govern aspects such as revocation or cancellation of the administrative act, the right of defense, motivation or statute of limitations are not applicable, as unduly claimed by the Claimant and Dr. Bullard, in his Expert Report.

20. The S.D. No. 032-2011-EM cannot be described as arbitrary. In its whereas section, it sets out the reasons that support its issuance. The legal norm makes reference to the fact that circumstances have become known that made disappear the reasons that led to the declaration (in the S.D. No. 083-2007-EM) of a public necessity and the authorization for the company Bear Creek to be able to conduct mining activities in the border area with Bolivia and acquire certain concessions. These circumstances, while they do not appear explicitly or are broadly indicated, could involve both serious and violent social conflicts and protests of the population that happened in the area that called into question the continued development of mining activities on account of their negative impact on the conservation of the local

environment, and the State becoming aware of the existence of irregularities in the acquisition of the ownership of the concessions made by Bear Creek (the early and covert exercise of indirect ownership on the concessions, acts of simulation, etc.). I believe that the disappearance of the reasons that led to the declaration of public necessity, or the emergence of new circumstances that make its continuation unsuitable, enable the State to annul this declaration.

III. DEVELOPMENT OF THE RESPONSE REPORT

A. THE DECLARATION OF PUBLIC NECESSITY FOR THE AUTHORIZATION OF FOREIGN INVESTMENT, IN RELATION TO MINES, LAND, AND OTHER NATURAL RESOURCES LOCATED WITHIN 50 KILOMETERS OF THE BORDER ZONE, WHICH MUST BE APPROVED BY THE COUNCIL OF MINISTERS BY SUPREME DECREE, CONSTITUTES A GOVERNMENT ACT THAT IS DISCRETIONARY IN NATURE AND NOT AN ADMINISTRATIVE ACT

21. As I indicated in my first report, the standard contained in the second paragraph of Article 71 of the Peruvian Constitution of 1993 establishes an express exception to the constitutional rule on equality between nationals and foreigners in terms of rights of ownership (recorded in the first paragraph of Article 71 itself) and the equal treatment and applicable conditions for domestic and foreign investments (Article 63 of the Constitution).⁴ The second paragraph of Article 71 of the Constitution imposes a special restriction on foreigners (whether they be individuals, associates, or companies) that prevents them from acquiring or owning, under any circumstance whatsoever, whether directly or indirectly, the rights over mines, land, water, forests, fuel, or energy sources located within 50 kilometers of border areas.⁵ Nevertheless, this constitutional provision in turn includes an exception to this general prohibition, which is that the foreigner may acquire such rights over mining and natural resources as long as they first obtain special authorization from the State, issued by means of a

⁴ See Expert Report of Francisco Eguiguren Praeli, October 6, 2015 (“Eguiguren First Report”), at paras. 9-10, 12 [Exhibit REX-001].

⁵ See Constitution of Peru, December 29, 1993 (“Constitution of Peru 1993”), at Art. 71.2 [Exhibit R-001].

Supreme Decree approved by the Council of Ministers declaring as a public necessity the development of this activity and authorizing the foreign company to carry it out.⁶

22. As to the legal nature of the supreme decree that approves the government act, which declares as a public necessity the authorization for the foreigner to be able to acquire or possess mines and other natural resources located within 50 kilometers of the border area, we reiterate our disagreement with the legal interpretation and the conclusions made by the Claimant and Dr. Bullard.

23. For Dr. Bullard, as stated in his first report and reiterated in his reply, the authorization granted by supreme decree approved by the Council of Ministers, is an administrative act, i.e., a non-discretionary decision that is granted automatically by the government authority, on the request submitted by the foreign company, according to the procedure laid down in the TUPA of the Ministry of Energy and Mines.⁷ I believe that this statement is incorrect.

24. As I stated in my first report⁸ and I reiterate in this response, the decision taken by the President of the Republic and the Council of Ministers regarding the declaration of public necessity and whether or not to grant the authorization for a foreign investor to be able to acquire or possess mines or other natural resources in the area border, constitutes a discretionary government act [sovereign act], and not a mere administrative act.

25. For a better understanding of the difference between the two types of acts, it should be noted that the administrative acts, by definition, are declarations issued by state entities which, under the framework of public law standards, are designed to produce specific or

⁶ See Constitution of Peru 1993 at Art. 71.2 [Exhibit R-001].

⁷ See Expert Report of Alfredo Bullard González, May 29, 2015 (“Bullard First Report”), at paras. 12-13; Bullard Second Report at paras. 11, 38-43.

⁸ See Eguiguren First Report at paras. 29, 34-36. [Exhibit REX-001].

particular legal effects on the interests, rights, or obligations of the parties concerned.⁹ Meanwhile, government acts are political acts that, despite being issued by a body of the state administration, are exercised with discretionary power, and are not subject to judicial control. Therefore, while administrative acts can be later revoked or declared invalid, acts of government, embodied in supreme decrees, whether dealing with standards of a general nature or with particular content, can only be rescinded by their own repeal.

26. Thus, Dr. Bullard argues that the declaration of public necessity, approved by the supreme decree of the Council of Ministers, is an administrative act, because the process for obtaining it is covered by the Single Text of Administrative Procedures (“TUPA” for its Spanish-language initials) of the Ministry of Energy and Mines.¹⁰ I believe that this conclusion is wrong. The TUPA is a compilation of all procedures that can be pursued with a public entity, in this case the Ministry of Energy and Mines, the aim of which is to inform citizens about the standards that apply to a specific procedure and the requirements that the applicants must meet. Therefore, the fact that the TUPA of the Ministry of Energy and Mines governs (in procedure 53) the specific procedure that the foreigner shall have to adhere to in order to apply for the acquisition of mining rights within 50 kilometers of border areas, only implies the existence of a procedure that must be followed before the said Ministry in order to initiate and process the request. This is different from the nature of the final decision that is to be taken in a different government office, the Council of Ministers, in reference to the declaration of public necessity of the approval of the application, which will be the result of an assessment and discretionary determination as to whether to grant or reject such request.

⁹See Law of General Administrative Procedure, Law No. 27444, April 10, 2001, at Art. 1.1 [Exhibit R-104]

¹⁰ See Bullard Second Report at paras. 13-21.

27. The Council of Ministers must assess and consider a number of factors and criteria when determining whether a foreign investment project in a border area meets the criteria of public necessity. Economic, political, and security factors must ensure and underpin such a declaration. This is why it is wrong to argue that the supreme decree that can be approved by the Council of Ministers is a matter of mere administrative formality or that it is issued automatically by the simple merit of the request of the foreign company. If it was an automatic declaration, it would not make any sense that the process requires the declaration to be issued by the highest authority of the national government.

28. When I argue that the issuance of the supreme decree, which declares the public necessity to authorize the acquisition of mining concessions by the foreign company, constitutes an act of government, which is discretionary in nature and not a common administrative act, I am not at all considering that this makes such a decision an act that is arbitrary or devoid of certain limits and parameters. With this, I only say that as a discretionary act, as defined by administrative doctrine and as stated by the Constitutional Court, the government authority has margins of policy freedom to choose whether or not to grant the authorization requested.¹¹ The authority is not obliged to grant this authorization, and its decision should follow the assessment criteria on the considerations of opportunity, convenience, necessity, or usefulness of the investment. This assessment also takes into account issues such as the solvency and trajectory of the applicant foreign investor, the importance and benefit of the investment or activity for the development of the country or region, the technical support that is attributed to the project and whether this activity does not jeopardize national security. Therefore, it is an act of government

¹¹ See Decision of the Constitutional Tribunal, EXP. N.º 0013-2003-CC/TC, December 29, 2003 (“Judgment of the Constitutional Court 2003”), at p. 7-8 [Exhibit R-095]; Decision of the Constitutional Tribunal EXP. N.º 0090-2004-CC/TC, July 5, 2004 (“Judgment of the Constitutional Court 2004”), at p. 4-6 [Exhibit R-096];

where the Council of Ministers assesses, on a discretionary and sovereign basis, the desirability of the presence and operation of a foreign company in the border area, basing its decision on the interests of the State and public welfare.

29. I have to reiterate what is stated in my first report, specifically that it is not treated as a mere administrative act, for mandatory and automatic issuance by the Council of Ministers, but rather a government act of a discretionary nature, on the following grounds:¹²

- a) The restriction imposed by the second paragraph of Article 71 of the Constitution on the ownership of foreigners in relation to the acquisition of rights over mining and other natural resources located within fifty kilometers of the border area, is an exceptional legal norm contained in the Constitution itself (the highest legal norm in the country) and not in a law or simple supreme decree. The only way that the Constitution provides to overcome this prohibition is through the approval of a supreme decree by the Council of Ministers that grants authorization for reasons it considers to be a public necessity. Therefore, it is an exceptional procedure, different to any administrative procedure, that emanates from the highest norm of the national legal system and requires the approval of the highest political authority of the National Government (the President of the Republic and the Council of Ministers), as well as the favorable opinion of the Joint Command of the Armed Forces. It deals with exceptional requirements that are not present in the administrative procedures.

Therefore, it would have made no logical, legal, and political sense, for an exceptional procedure such as this one to be considered comparable to the administrative procedures.

- b) Although S.D. No. 083-2007-EM that approved the declaration of public necessity for Bear Creek to be able to acquire mining concessions, has a particular and specific character (and not a general content, as the rule in the case of the ordinary supreme decrees tends to be) that does not mean that such a supreme decree can be equated to an administrative act, which always has particular or individual content. Moreover, administrative acts are not approved by supreme decree or the Council of Ministers.
- c) The Council of Ministers, the entity that is able to determine the existence of public necessity and the approval of the supreme decree that authorizes the foreign company to acquire mines or other natural resources in the border area, is a political body and not an administrative one. Its competence relates

¹² See Eguiguren First Report at paras. 25-31 [Exhibit REX-001].

to the adoption of acts of government, policy decisions, and approval of the regulations of the laws.

- d) It would be wholly unreasonable for the Constitution to provide for an express legal norm, which involves the intervention of the highest instance of the Executive Branch of Government to issue a decision or act that is administrative in nature, much less to affirm that such a decision is approved and issued by the Council of Ministers automatically on the simple administrative request made by a foreign company. Rather, this requirement is explained by the discretionary nature of the decision, where the President of the Republic and the Council of Ministers make an assessment of the benefits, effects, and risks for the development of the country or region or national security, which may lead to the approval or rejection of the authorization requested by a specific foreign company or person, which involves criteria on the political and economic expediency, timeliness, and usefulness of the measure, on the basis of which the decision on whether or not the approval is granted will be adopted in the exercise of the sovereign power of the State. This is a situation that is somewhat similar to the freedom of choice (discretion) held by the Executive Branch, regarding the suitability of approving the signing or accession to an international treaty, to declare a state of emergency in the national territory, or to grant the extradition of a person sought by a foreign state.

30. For these reasons, I can conclude by reiterating that the power granted by the Constitution to the Council of Ministers to declare a public necessity the grant of authorization to a foreign company to be able to acquire or possess mining rights or other natural resources located within 50 kilometers of a border zone is a power that confers a discretionary power, to evaluate this request and determine whether or not it is in line with a public necessity . Therefore, it will be the Council of Ministers that will analyze and determine whether the foreign investment project or request in the border zone is justified to respond to a request for national or regional development and the development of the related population, as well as to offer benefits for the country. Essentially, it is an assessment on the political and economic suitability and opportunity of such an acquisition or investment; of its compatibility with national development policies in border areas adopted by the Executive Branch; as well as the impact or risk that such activity can lead to in terms of national security.

31. As I explained in my first report, national security is an integral dimension, which is not limited to the traditional view that confined it to the prevention of risk arising from a possible aggression by another State. In reality, national security involves both the external and international environment, demanding prevention and protection against external threats; as well as the domestic environment, linked to the preservation of social peace and public order within the national territory, especially in strategic areas of particular sensitivity and control, such as the border areas. The restriction imposed by Article 71 of the Constitution on the acquisition of ownership or rights by foreigners within 50 kilometers of the border area reflects the pursuit of conservation of national security in this integral dimension.

32. The assessment by the Council of Ministers of the request made by the foreign company necessarily requires it to have the freedom to analyze and decide whether or not to approve the requested authorization, depending on whether or not there is a situation that qualifies as a public necessity. The political and economic nature itself of this assessment places us clearly within a discretionary decision of the National Government.

33. The discretionary nature of this power of the Council of Ministers determines that the foreign company has the right to have the possibility of requesting authorization and of obtaining it, only if the Executive Power assesses that the request is related to a public necessity. But the foreign company does not gain a constitutionally recognized right to demand that this authorization necessarily be granted; much less when it comes to the operation of mines and natural resources that, as expressly provided for in Article 66 of the Constitution, belong to the Nation. Additionally, the said constitutional standard requires that it will be the State that will decide in its sovereign capacity on its use and the conditions for awarding its use to individuals, whether they be domestic or foreign.

B. THE DECLARATION OF PUBLIC NECESSITY, GRANTED BY SUPREME DECREE NO. 083-2007-EM APPROVED BY THE COUNCIL OF MINISTERS, DID NOT GRANT RIGHT OF PROPERTY TO BEAR CREEK FOR THE REQUESTED MINING CONCESSIONS, BUT RATHER AUTHORIZED THAT IT COULD ACQUIRE THEM. SIMILARLY, THE SUPREME DECREE NO. 032-2011-EM, WHICH REPEALED SUPREME DECREE NO. 083-2007-EM, DOES NOT CONTAIN ANY PROVISION REGARDING THE RIGHT OF PROPERTY OF BEAR CREEK OVER SUCH MINING CONCESSIONS

34. In my first report, I noted that, although, as a rule, the granting of mining concessions or rights to a private party is made through an administrative act, the situation is different in the case of acquisition by a foreigner in relation to the mineral resources located within fifty kilometers of the border.¹³ Such an acquisition can only be made, once the foreign company has obtained the authorization granted by the Council of Ministers. This authorization is granted through a supreme decree and not an administrative act, as discussed in the previous section. Only after the issuance of this supreme decree, legal acts designed to define and formalize the acquisition of the mining rights on such concessions can be performed.

35. It is for this reason that one cannot and should not confuse the legal effects of the declaration of public necessity and the authorization granted in favor of Bear Creek, by S.D. No. 083-2007-EM approved by the Council of Ministers, which constitutes a discretionary act of government, with the later concrete acts that were enacted to give effect to the grant of ownership of the respective seven mining concessions, which occurred through the exercise of the option contract about the transfer of mining rights previously entered into by Ms. Jenny Villavicencio and the company Bear Creek, as well as the registration of such acquisition by the administrative mining authority.

36. The S.D. No. 083-2007-EM does not grant rights of property to Bear Creek. From the review of the text of the S.D. No. 083-2007-EM, it can be seen that Article 1 declares the

¹³ See Eguiguren First Report at paras. 27-30 [Exhibit REX-001].

mining investment a public necessity so that the company Bear Creek is able to acquire the mining rights for seven specific concessions, located in the department of Puno, within 50 kilometers of the border with Bolivia. In Article 2 of the decree, each one of these concessions is identified. On the other hand, in Article 3, the mining authorities are ordered to issue the respective administrative acts in relation to these concessions to Bear Creek, but only once the company has complied with the legally required requirements and obligations. This corroborates our claim that the S.D. 083-2007-EM is not an administrative act and merely declares that the public necessity to authorize the acquisition of rights on mining concessions by Bear Creek. But it is worth pointing out that the acquisition of property or ownership by Bear Creek over mining concessions originated from the subsequent verification of the specific concrete acts.

37. From a formal point of view, the moment that Bear Creek acquired the right of property over the mining concessions was when the transfer option contract was exercised, which it had previously entered into with Ms. Jenny Villavicencio in relation to them. This means that it was only after the execution of this private contract that it acquired rights of property over such concessions and not by virtue of S.D. No. 083-2007-EM, which merely authorized the foreign company to be able to acquire those rights. So clear is the legal difference between the nature and effects of the supreme decree, which granted authorization for Bear Creek to be able to acquire mining concessions, and the very act of the acquisition (the execution of the transfer contract) that it could eventually have occurred that, despite the issuance of the authoritative supreme decree in favor of Bear Creek, the acquisition of the mining concessions ultimately did not materialize, either because the company withdraws from doing so (on account of some type of economic considerations or opportunity) or because Ms. Villavicencio did not keep the promise she had given.

38. For this reason, the Supreme Decree No. 032-2011-EM neither makes any reference whatsoever to the ownership acquired by Bear Creek over the mining concessions, and even less does it contain a provision on the loss of this right or its expropriation, as erroneously claimed by the Claimant and Dr. Bullard, an issue that we will analyze later in Section F of this report. Supreme Decree No. 032-2011-EM is a legal norm that is general in nature, which provides for, in Article 1, the repeal of S.D. No. 083-2007-EM, and that in its following provisions authorizes the enactment of legal norms designed to prohibit the development of mining activities in two districts of the province of Chucuito, Department of Puno.

C. BEAR CREEK EXERCISED THE INDIRECT OWNERSHIP OF THE MINING CONCESSIONS COVERTLY, BEFORE ITS FORMAL ACQUISITION HAD OCCURRED, AND COMMITTED A VIOLATION OF THE CONSTITUTION

39. The prohibition set out by Article 71 of the Constitution is quite clear and definitive: foreigners, whether individuals or companies, cannot acquire or possess, under any consideration whatsoever, whether directly or indirectly, mines, land, and other natural resources located within 50 kilometers of the border area.¹⁴ This prohibition can only be overcome by the foreigner obtaining an authorization in advance, granted by supreme decree approved by the Council of Ministers that declares such acquisition a public necessity. The constitutional provision itself states that the breach or violation of this prohibition will lead to the loss of ownership or rights acquired by the foreigner, which will revert to the State.¹⁵

40. In his reply, Dr. Bullard reiterates his opinion that Bear Creek validly acquired ownership of seven mining concessions, located in the department of Puno, within 50 kilometers of the border with Bolivia. This validity would be based on: 1) having obtained the authorization of the Council of Ministers, approved by Supreme Decree No. 083-2007-EM, which declared

¹⁴ See Constitution of Peru 1993 at Art. 71 [Exhibit R-001].

¹⁵ See Constitution of Peru 1993 at Art. 71 [Exhibit R-001].

such acquisition a public necessity; and 2) having entered into a transfer option contract with the holder of these concessions, Ms. Jenny Karina Villavicencio, which was exercised after the supreme decree of authorization was issued.¹⁶ The Claimant also alleges that an indirect ownership never existed and was never exercised, given the fact that any act performed by the company in the Santa Ana project, before obtaining the declaration of public necessity, was reportedly “on behalf” of Ms. Villavicencio.¹⁷

41. Dr. Bullard added that even “in the denied assumption” that the option contract concluded between Bear Creek and Jenny Villavicencio contravened the Constitution, any irregularity in this regard would have been validated by the State when the authorization was granted by the S.D. No. 083-2007-EM.¹⁸ Such a statement is not correct, as will be analyzed later.

42. It is necessary to clarify the meaning and scope of the express provision made in Article 71 of the Constitution regarding the prohibition on foreigners acquiring or possessing, whether directly or indirectly, ownership or rights over mines or natural resources in border areas, prior to the granting of the authorization by the Council of Ministers. The purpose of Article 71 of the Constitution, as I explained in my first report, is to ensure the preliminary assessment and the discretionary decision of the State (exercised by the President of the Republic and the Council of Ministers) *before* the foreign company can acquire ownership or rights to exploit mines, land, and other natural resources located in border areas. This requirement seeks to provide adequate protection for national security (internally and externally) and ensure that the

¹⁶ See Bullard Second Report at para. 8, conclusion a.

¹⁷ See for example Claimant’s Reply at para. 29.

¹⁸ Bullard Second Report at para. 50(c).

activities that the foreign investors seek to carry out are consistent with the strategic development in these regions.

43. When Article 71 of the Constitution expressly provides for the prohibition on foreigners acquiring ownership or rights, not only directly, but also indirectly, before they have obtained the declaration of public necessity and the authorization granted by the Council of Ministers, it seeks to prevent or avoid the foreign company making use, for example, of the participation of third persons of Peruvian nationality, who appear to act on their own behalf and economic interest but actually are mere “proxies” or agents of the foreign company, to circumvent the constitutional prohibition allowing such company to exercise prematurely and covertly the ownership of the said assets or the conduct of economic activity, despite not having yet obtained the supreme decree of authorization for the acquisition of this ownership or rights. When Article 71 of the Constitution makes reference to indirect ownership, it is understood that it does not only involve ownership exercised in corporate terms, but rather also exercised by a person or company acting as a proxy.

44. As pointed out by Bear Creek and Dr. Bullard, it may be understandable that the foreign company, taking into account the uncertain time that could pass from the time the declaration of public necessity and the authorization to acquire mining concessions is requested, and the later time when the respective supreme decree is eventually issued, would take steps to have some greater assurance that it can effectively acquire the mining concessions that are of interest to it, when it has the relevant governmental authorization, as long as its application goes through the process whereby the authorization is approved that grants the supreme decree that must be approved by the Council of Ministers. This could be done, as the case may be, by directly bringing a request before the mining authorities, if the concessions have not been

claimed, or by entering into a transfer option contract with the holder of such concessions, as long as the person is not subject to a relationship of dependence or subordination with the company.

45. However, the situation would be very different if the foreign company decides to enter into an agreement with a person of Peruvian nationality so that the said person, by pretending to act on their own behalf and economic interest, can request and obtain the ownership of certain mining concessions, while both parties know that this request is really being made for the foreign company and under its direction. We believe that this situation would be a clear breach of the constitutional standard and either a fraud or simulation, as the foreign company would be exercising covert and advance indirect ownership over mining concessions, which is expressly prohibited by the Constitution.

46. In this case, considering the very statements of Bear Creek and the Peruvian State, in the claim, response, and reply, respectively, as well as in documents that they have provided us with, verification of the following facts can be observed:

- According to the submissions of the Claimant, in early May 2004, César Rios (a geologist employed by Bear Creek) contacted Jenny Karina Villavicencio, a Peruvian citizen, so that she would acquire the concessions of the Santa Ana Project, with the goal to enter into a transfer option contract with Bear Creek transfer.¹⁹
- Jenny Karina Villavicencio, being employed and a representative (“proxy”) of Bear Creek, presented, in her own name, the request for mining concession applications before the National Institute of Concessions and Mining Cadastre, on May 26, 2004 (concessions Karina 9A, Karina 1, Karina 2, and Karina 3), and November 29, 2006 (concessions Karina 5, Karina 6, and Karina 7).²⁰
- Jenny Karina Villavicencio signed transfer option contracts with Bear Creek, on November 17, 2004 (concessions Karina 9A, Karina 1, Karina

¹⁹ See Claimant’s Memorial on the Merits, May 29, 2015 (“Claimant’s Memorial”), at para. 25.

²⁰ See Claimant’s Memorial at para. 26.

2, and Karina 3) and December 5, 2004 (concessions Karina 5, Karina 6, and Karina 7). At that time, she had not yet obtained ownership from the State over these mining concessions, so she was not the owner of them.

- According to the contract, Jenny Villavicencio committed to retaining ownership of the concessions until Bear Creek obtained the government decree of authorization. The contract would have a term of 60 months; if after that term has expired Bear Creek had not obtained authorization for the acquisition, Ms. Villavicencio was free to decide whether to sell the concessions to third parties or embark on their exploitation.²¹
- Bear Creek, for the purposes of maintaining its existing option contract in effect, agreed to assume all costs associated with the requests for mining concession applications, as well as maintaining them.²²
- At the time Bear Creek exercised the transfer option, it had to pay Ms. Villavicencio USD 14,000.²³
- Jenny Karina Villavicencio obtained and formally registered in her name before the National Institute of Concessions and Mining Cadastre titles on the concessions on July 5, 2006 (Karina 2 and Karina 3), on August 8, 2006 (Karina 1), September 26, 2006 (Karina 9A), and February 28, 2008 (Karina 5, Karina 6, and Karina 7).²⁴
- Bear Creek filed the application for a declaration of public necessity on December 5, 2006. It enclosed, as a part of its request, the option contracts entered into with Ms. Villavicencio.
- Supreme Decree No. 083-2007-EM, issued on November 28, 2007, and published in the Official Journal on the 29th of that same month, declared the investment of Bear Creek a public necessity and authorized the company to obtain mining concessions Karina 9A, Karina 1, Karina 2, Karina 3, Karina 5, Karina 6, and Karina 7.²⁵
- Bear Creek acquired the mining concessions Karina 9A, 1, 2, and 3 on December 3, 2007, executing the transfer option contract of ownership entered into with Ms. Jenny Villavicencio.²⁶ Regarding the transfer of the

²¹ See Claimant's Memorial at para. 31.

²² See Claimant's Memorial at para. 31.

²³ See Claimant's Memorial at para. 32.

²⁴ See Claimant's Memorial at para. 27.

²⁵ See Claimant's Memorial at para. 42; *see also* Supreme Decree No. 083-2007-EM, November 29, 2007 [Exhibit C-0004].

²⁶ See Claimant's Memorial at para. 43.

concessions Karina 5, 6, and 7, in the same paragraph of the claim, it is stated that they were recorded in SUNARP [*Superintendencia Nacional de los Registros Públicos* (National Superintendency of Public Registries)] on February 28, 2008, but does not specify whether they had been included in the transfer made by the contract on December 3, 2007 or in a later specific contract.

47. Taking into account this information on the timeline of events and acts, and the content of the S.D. No. 083-2007-EM, published on November 29, 2007, it can be seen that this decree authorized Bear Creek to be able to acquire mining concessions: Karina 9A, 1, 2, 3, 5, 6, and 7. The company exercised the right arising from the transfer option contract signed with Jenny Villavicencio, by acquiring the ownership of the concessions on December 3, 2007. Nevertheless, it should be noted that, according to the information already mentioned, Ms. Villavicencio obtained from the State the ownership of the mining concessions Karina 5, 6, and 7 only on February 28, 2008, so they could not be transferred by her to Bear Creek before that date, or with the contract of December 3, 2007, because then she was not the owner of them. In the event that it had done so, such a transfer and the acquisition of ownership by the company would not be valid with respect to those specific mining concessions.

48. In relation to this point, there would be no problem or legal objection with the S.D. No. 083-2007-EM having recorded seven mining concessions, since this legal norm only authorized Bear Creek to be able to acquire them later, but it did not grant it the ownership or title to them. But it would have to be verified and clarified, for the purposes of the validity of the acquisition by Bear Creek from Ms. Villavicencio in relation to mining concessions Karina 5, 6, and 7, whether they were included in the contract of December 3, 2007, which would not be valid because by then Ms. Villavicencio was not the owner of them; or if the transfer was made through a separate contract (whose existence is unknown) when the woman in question was already owner of such concessions (2-28-2008), which would be valid. This clarification is

relevant to determine the time from which the company was authorized to acquire and exercise the attributes as the holder of these concessions and Ms. Villavicencio to transfer them. Therefore, if the transfer of the concessions Karina 5, 6, and 7 are included in the contract executed by the parties on December 3, 2007, Bear Creek would have exercised, early, the indirect ownership over these concessions, which would be a violation of the prohibition established by Article 71 of the Constitution.

49. Notwithstanding this necessary clarification, it could be noted that, from a formal point of view, there would be an apparent logical and valid sequence between the dates on which the facts and events already mentioned occurred, such as: a) [*sic*] conclusion of the option contract between Ms. Villavicencio and Bear Creek (November 17, 2004), acquisition of Jenny Villavicencio of the ownership over mining concessions (July, August, and September 2006 and February 2008, respectively, according to each concession), application of Bear Creek for a declaration of public necessity (December 5, 2006), issuance of the supreme decree of authorization (November 28, 2007), and acquisition contract by transfer of the mining concessions from Jenny Villavicencio to Bear Creek (December 3, 2007).

50. However, some other aspects can be observed that deserve to be analyzed, since they can give rise to justified suspicions with respect to the time at which Bear Creek began to exercise ownership (direct or indirect) of the mining concessions. We see:

- The claimant has acknowledged that, at the start of May 2004, a person linked to Bear Creek (Mr. Rios) coordinated with the Peruvian national Jenny Villavicencio (who was its representative or employee) for her to make applications (formally on her own name) aimed at acquiring ownership of various mining concessions, in order to then enter into a transfer option contract for them with the said foreign company, once Bear Creek had obtained the supreme decree of authorization to acquire them.
- It is also recognized by the parties that Jenny Villavicencio presented the applications to acquire the mining concessions on May 26, 2004

(concessions Karina 9A, 1, 2, and 3) and November 29, 2006 (concessions Karina 5, Karina 6, and Karina 7). Similarly, Jenny Villavicencio and Bear Creek entered into the transfer option contracts on the concessions, on November 17, 2004, and December 5, 2004, respectively, when she still did not have any title over such concessions.

- From these facts, it can be inferred that both the application for the mining concessions made by Jenny Villavicencio in her name a few days after her contact and coordination with representatives of Bear Creek, and the option contracts that she later entered into with the company, had as its origin and resulted from a prior agreement finalized by both parties. Such agreement took place when Jenny Villavicencio had not even applied for or was owner of the mining concessions, ownership of which she received from the State more than 2 years later. There is also no information stating that Jenny Villavicencio was a person dedicated to mining activities, which would have explained her request for concessions.

51. However, the fundamental objection that, in the light of these facts, could be raised is: Was Jenny Villavicencio, when she made the mining concession applications in her own name and entered into the transfer option contracts for the concessions with Bear Creek, really acting on her own behalf and in her own interests or was it done, in a covert and simulated fashion, on behalf of Bear Creek? This [the former] seems unlikely, since, as has been argued, Ms. Villavicencio was the proxy or employee of Bear Creek, calling her autonomy and independence from the company into question.

52. Even more, in addition to the fact that the application and option contracts that Jenny Villavicencio entered into originated in the prior consultation made with representatives of Bear Creek, there are several clauses in the transfer option contracts of mining rights that generate reasonable doubts as to whether Jenny Villanueva really acted in her own interest when she requested and acquired them, or if it was merely on behalf of Bear Creek. In the latter scenario, the company would have covertly exercised indirect ownership prior to the moment of formal acquisition of the concessions.

53. To explain these questions, it is necessary to analyze the content and scope of certain clauses of the transfer option contracts of mining rights. For the purposes of this analysis, we refer to the express provisions of the option contract signed on November 17, 2004, given that the language and content of the two contracts is virtually identical.²⁷ Some of the clauses which can be mentioned are the following:

- In the First Clause of the contract, “Background” 1.1, it is stated that Jenny Karina Villavicencio is OWNER of the mineral rights on “Karina,” “Karina 1,” “Karina 2,” and “Karina 3,” an assertion that proved to be false, as at that time she had only formulated mining concession applications that were initially rejected by the administrative mining authority and that were only granted two years after the signing of the option contract.
- In the Second Clause, “Transfer Option”, 2.1, it is clearly stated that the exclusive option granted to Bear Creek is irrevocable in nature during the agreed term of 60 months, with the company being able to acquire for itself or for a third party 100% of the ownership.
- In that same clause, in point 2.2, it is stated that the only price to be paid by Bear Creek for the 4 mining concessions would be USD \$7,000; to which it would be necessary to add another USD \$7,000 for the concessions “Karina 5,” “Karina 6,” and “Karina 7,” contained in the other contract. That means, that for the transfer of seven mining concessions, exploitation of which would then be declared as a public necessity, Bear Creek would pay Ms. Villavicencio the paltry sum of USD \$14,000 in total, as a lump sum.
- Clause 2.2.3 establishes that for the transfer option to remain in force, Bear Creek shall provide the (non-refundable) funds needed to cover the maintenance costs of the mining ownership, including the payment for the operational rights that corresponds to each concession, costs of publication of notices and registration. That means, that since the signing of the option contract, Bear Creek, despite not being the owner, would assume all expenses, on a non-reimbursable basis, incurred by Ms. Villavicencio to acquire and maintain the ownership of the mining concessions.

²⁷ See Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Peru Branch, November 17, 2004 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Peru Branch, September 5, 2006 [Exhibit R-007].

54. In view of the provisions stipulated by the parties themselves in the cited clauses of the option contract, it can be concluded that:

- a) The statement of the Claimant that Jenny Villavicencio had full freedom to sell the concessions is not true. The contract expressly provided for the irrevocable nature of the option granted to the company during its term of 60 months. Instead, Bear Creek itself could unilaterally renounce the option, choose to exercise it in its favor or in favor of a third party that it freely decided. Under the contract, Jenny Villavicencio could only be able to dispose of the concessions after the validity period of the option has expired, without Bear Creek having exercised its right of option.
- b) The amount of the total price agreed in the contracts for the transfer of 7 concessions was USD \$14,000, a tiny figure that makes one doubt that it could actually correspond to the payment of the acquisition values of the ownership over such concessions by the company Bear Creek. Instead, it can lead to the suggestion that it corresponds to a sort of compensation for Jenny Villavicencio for having formally appeared as an the applicant for the mining concession application and “owner” of the concessions, without actually being the owner in reality.
- c) That Bear Creek has taken on an obligation in the contract, in order for the transfer option to subsist, the commitment to provide the necessary funds for the acquisition, maintenance, and conservation of the ownership of the concessions, on a non-reimbursable basis (which implies losing them if the transfer of the concessions is in the end not made in its favor), seems to clearly correspond to the exercise of a obligation characterized by one who is the owner and beneficial owner of them, releasing the party who was formally listed as its owner from this expense.

55. In light of the above, I consider that there is sufficient evidence to assume that Bear Creek, in fact but covertly, exercised indirect ownership and beneficial ownership of the 7 mining concessions, acting through an intermediary (as a “proxy”), a Peruvian citizen with whom it also had an employment relationship, who appeared as the formal owner.

56. Upon judging this situation as irregular, whether by the administrative or judicial authorities, the ownership of the mining concessions formally obtained by Bear Creek, by executing the transfer option contained in the contracts entered into with Jenny Villavicencio, would not be valid. There would have been a manifest violation of Article 71 of the Constitution,

given that the foreign company would have indirectly acquired or owned ownership of or rights over mining concessions, located within 50 kilometers of the border area, prior to not only the issuance of the Supreme Decree 083-2007-EM, which declared the public necessity and authorized the acquisition by Bear Creek of the mineral concessions indicated in the decree, but also prior to the time when the contract was entered into to formally transfer ownership of them.

57. Given the existence of this defect of invalidity in the acquisition of the ownership by Bear Creek, the Peruvian State would be enabled (as provided in the Constitution itself expressly) to declare the loss of ownership and mining rights acquired irregularly by the foreign company, which would revert to the State without payment or compensation having to be made. Now, as we have been informed, the Ministry of Energy and Mines has initiated inefficacy procedures against Bear Creek, due to the irregularities that have been found in the acquisition of the mining concessions (simulation in the mining concession applications, actual and advance exercise of indirect ownership of them). It should be noted that, if there is a favorable decision for MINEM in these proceedings, the loss of ownership that Bear Creek would suffer in favor of the State would not come by means of an expropriation, but rather it would be a consequence of the penalty provided for in the Constitution as a result of the improper and unconstitutional conduct of the company.

58. Surely with a view to anticipate or avoid the consequences that could result from the situation outlined above, the Claimant and Dr. Bullard reject the claim made by the State, in its answer to the complaint, concerning the existence of indirect and irregular ownership exercised by Bear Creek.²⁸ For this, they argue that even if there had been any irregularities in the applications for mining concession applications made by Ms. Villavicencio or in the transfer

²⁸ See Bullard Second Report at paras. 57-99.

option contracts entered into with the company, it must be considered that all this would have been validated because the State was aware of the relationship that existed between Jenny Villavicencio and Bear Creek, by the handing down of the S.D. No. 083-2007-EM.²⁹

59. In order to try to substantiate this claim, which is unquestionably wrong, the Claimant and Dr. Bullard invoke the application of the so-called “estoppel” doctrine, according to which the State, after having granted the authorization, cannot allege the existence of defects or irregularities to repudiate it, if it has participated in them.³⁰ I believe that these allegations have no legal basis.

60. To begin, it is necessary to explain, in summary form, the content or implications of the “estoppel” doctrine. It is based on the general principle of good faith and posits the prohibition on a contractual person or party making two linked contradictory acts, where the former has generated a certainty, expectation, or belief in its counterpart and the second impairs it. In the field of administrative law, the Peruvian legal system has adopted this doctrine through the Principle of Procedural Conduct, as stated in Article IV of the Preliminary Title of the General Administrative Procedure Law—Law No. 27444—which establishes the following: “The administrative authority, the parties concerned, their representatives or lawyers, and, in general, all participants in the proceedings, shall perform their respective procedural acts, guided by mutual respect, cooperation, and good faith. No regulation of the administrative procedure can be interpreted in such a way that protects any conduct that goes against procedural good faith.”

61. In this case, S.D. No. 083-2007-EM, approved by the Council of Ministers, simply declared the public necessity of the mining investment and the authorization for the

²⁹ See Bullard Second Report at paras. 86-87.

³⁰ See Bullard Second Report at paras. 94-96.

company Bear Creek to be able to acquire certain specific mining concessions within 50 kilometers of the border with Bolivia. This supreme decree does not contain any reference in the whereas section or in the regulatory articles to the transfer option contract entered into by the company and Jenny Villavicencio, or to the mining concession applications made by her, as they are matters that have no relation to the purpose and scope of the said supreme decree. There is no basis to argue that, with the issuance of the S.D. No. 083-2007-EM, the State had “validated” any defect or irregularity in these existing contracts, or that the Council of Ministers must have known of their existence or of the employment relationship or personal links that were in existence between Bear Creek and Ms. Jenny Villavicencio.

62. Even if some Ministry officials or entities in the State sector of Energy and Mines had had some knowledge of the agreement and simulation established between Bear Creek and Ms. Jenny Villavicencio in making the mining concession applications, as argued by the Claimant and Dr. Bullard, it would result in the administrative and individual criminal responsibility for such erroneously acting officials, but it does not validate an illegal act or impact the decision taken by a different state body, such as the Council of Ministers, which approved the respective supreme decree without participating in these simulated acts. It would also not prevent the State, through the Council of Ministers, when they become aware of the irregularities committed by lower ranking officials, from proceeding to repeal the supreme decree, since an act of willful misconduct of these officials cannot be regarded as “estoppel” acts attributable to the State. Moreover, if the principle underlying the “estoppel” doctrine is precisely to preserve the good faith in the conduct or actions of the Public Administration and of the parties concerned, preventing the party performing the contradictory acts from benefiting from this improper procedure, it is evident that the lack of this good faith is clearly on the part of the

party that, on the one hand, coordinated and simulated acts for the purpose of unduly obtaining indirect ownership of certain mining concessions, using the intervention of a “proxy” and on the other hand, making the formal acquisition of the said ownership appear at a much later time.

63. Consequently, even if it could be proved that some officials of the Ministry of Energy and Mining had known that Jenny Villavicencio was the employee or representative of the interests of Bear Creek, in spite of which they still allowed the processing of the mining requests that she had made, supposedly in her name, and the issuance of the supreme decree of authorization, this in no way weakens the transgression in relation to Article 71 of the Constitution and the irregularities committed by this simulation. In any case, possible knowledge of these facts by certain government officials cannot serve as a basis for trying to make valid the acts or conduct that were manifestly unconstitutional, and it also does not prevent the State from annulling them when it came to know of their existence. Less still can it invoke this assumption and a non-existent validation of exactly those who designed and carried out such a simulation, attempted threat against the Constitution and the interests of the State.

D. SUPREME DECREE NO. 032-2011-EM IS A LEGAL NORM THROUGH WHICH AN ACT OF GOVERNMENT IS ISSUED THAT REPEALED THE PROVISIONS OF ANOTHER SUPREME DECREE, SUPREME DECREE NO. 083-2007-EM, SO IT IS LEGITIMATE UNDER PERUVIAN CONSTITUTIONAL LAW AND CANNOT BE CLASSIFIED AS ARBITRARY

64. Dr. Bullard argues that, although the state had the power to repeal the S.D. No. 083-2007-EM, (a statement that is patently obvious) S.D. No. 032-2011-EM, through which it was repealed, was issued arbitrarily.³¹ I believe that this statement is not correct. As already stated in my first report, the Supreme Decree No. 032-2011-EM, in its whereas section, said the reasons and basis that supported its issuance and the repeal set out in Supreme Decree No. 083-

³¹ See Bullard Second Report at paras. 136-157.

2007-EM.³² While the reasons that led to its issuance were not spelled out comprehensively, that does not mean that the issuance of this legal norm can be considered as arbitrary or lacking motivation. Moreover, as I have already pointed out, in contrast to judicial decisions or administrative acts, for which the Constitution and the law require proper motivation as a requirement for their validity, with its lack or deficiency of cause sufficient to demand its annulment, for supreme decrees insufficient substantiation in its explanatory preamble or in its whereas section does not affect the validity or enforceability of the decree.³³

65. As we know, the S.D. No. 083-2007-EM declared the public necessity to authorize the investment of the company Bear Creek in mining concessions located within 50 kilometers of the border with Bolivia, as well as the acquisition of them by the said company. This decision, approved by the Council of Ministers, was a discretionary act adopted from an assessment of the expediency and benefits of the project, both for the development of the country and for the preservation of national security, in its internal and external dimensions. It is evident that if a substantive change in this situation occurs in the future, due to the verification of new circumstances that make disappear the reasons that served as support for the declaration of public necessity for this foreign investment in the border area, there would be every constitutional and legal reason to annul this declaration and authorization. Since it was granted by a supreme decree, the ideal way to do so was to issue another Supreme Decree (S.D. No. 032-2011-EM) that repealed it, which is exactly what took place. It was not applicable to resort to the revocation or declaration of invalidity, as it was not an administrative act, but rather a supreme decree.

66. In the whereas section of the S.D. No. 032-2011-EM, which serves as motivation for the issuance of the said standard, it expressly states the following:

³² See Eguiguren First Report at para. 56 [Exhibit REX-001].

³³ See Eguiguren First Report at para. 68 [Exhibit REX-001].

“That, it has become aware of the circumstances that result in the disappearance of the legally required conditions for the issuance of that act;

That, it is the duty of the State to ensure that the rights to sustainable use of natural resources are granted in harmony with the interests of the Nation, the common good, and within the limits and principles set out by law and the regulatory standards on the matter;

That, in this regard, given the existence of these new circumstances, it is necessary to issue the corresponding act;”

67. The invocation of these *circumstances* that make disappear the reasons that motivated the declaration of public necessity and the authorization to acquire the mining concessions in border areas by Bear Creek, without having been sufficiently made explicit, could entail both the emergence of serious and violent social conflicts and protests from the local population against the development of the mining activities in the area due to its negative impact on the conservation of the environment, as well as the State becoming aware of the irregularities in the acquisition process of the mining concessions by Bear Creek (prior existence of a covert indirect ownership and acts of simulation, for example).

68. The allegation of Dr. Bullard, invoking the provisions of Article 202 of Law No. 27444, the General Administrative Procedure Law regarding the time period for the declaration of invalidity of the public necessity that had already lapsed when the S.D. No. 032-2011-EM was issued, is not worthy of consideration.³⁴ As we have already repeatedly pointed out, this supreme decree was not an administrative act, so that the provisions on invalidity or any other aspect of such acts are not applicable.

³⁴ See Bullard Second Report at paras. 100-104.

E. THE RULING OF THE COURT SPECIALIZING IN CONSTITUTIONAL MATTERS, WHICH DECLARED THE AMPARO ACTION FILED BY BEAR CREEK, LACKS LEGAL EFFECT BECAUSE THE STATUS OF *RES JUDICATA* WAS NOT ACQUIRED. IT IS ONLY A RESOLUTION, FROM A LOWER COURT OF THE JUDICIAL BRANCH, WHICH WAS NOT FINAL BECAUSE, WHEN IT WAS ON APPEAL, THE CLAIMANT, BY ITS OWN CHOICE, WITHDREW FROM THIS PROCESS

69. As I set out in my first report, on May 12, 2014 Bear Creek obtained a favorable ruling from the First Court Specializing in Constitutional Matters in Lima, regarding the application for amparo filed against the Presidency of the Council of Ministers, the Ministries of Energy and Mines and the Ministry of Defense. In the said ruling, Article 1 of Supreme Decree No. 032-2011-EM, was declared not applicable to the Claimant, recognizing the mining rights conferred by Supreme Decree No. 083-200/-EM to the company and the exercise of the said rights. However, it is important to keep in mind that the said ruling, issued by the First Instance of the judicial system, lacked legal effect and is no more than a mere referential fact, since it was never final as it was subject to appeal by the State bodies. When the process was under review before the Second Judicial instance, the company itself determined, through its decision and sole responsibility, to withdraw from the action and abandon the process, opting to resort to arbitration before ICSID.³⁵ With this decision, Bear Creek caused there to be no firm and final decision before the national court.

70. However, in its response memorial, Bear Creek again sought to claim that the said ruling of the Court is defining proof of the unconstitutionality of the Supreme Decree No. 032-2011-EM. This statement is false, because there was not a resolution that was final in nature, which has acquired the status of *res judicata*. It is that, as I stated in my previous report, I consider that the State had sufficient legal grounds for the court of review of the appeal could decide to revoke such a judgment in its favor. This is because the main claim of the application

³⁵ See Claimant's Memorial at paras. 85-86, 88.

for amparo was that Article 1 of Supreme Decree 032-2011-EM, did not apply to the company Bear Creek, as it considered it to be unconstitutional and a violation of its rights. Nevertheless, the accreditation of this situation was not possible to verify without having to resort to an examination of the evidence to prove or disprove the existence and magnitude of the facts that justified the issuance of the aforementioned Supreme decree, such as the acute and violent social conflict in the area, due to the rejection of the population of the development of mining activities, the nature of the new circumstances that came to light that made the reasons for the declaration of public necessity disappear, etc.

71. This evidentiary examination and debate about the existence and accreditation of facts, does not merit, and cannot, be carried out in an amparo, because this is a process that does not have an evidentiary stage. In that regard, Article 5.2 of the Constitutional Procedural Code states that the amparo will not be admissible when there are other procedural avenues that are equally satisfactory for the protection of the right.³⁶ Therefore, it is very likely that the court ruling of the higher court could have been able to better analyze and assess the merits of the said procedural situation and declare the amparo inadmissible, providing that the Claimant necessarily had to resort to the courts that was suited for this case.

72. On the other hand, there is no doubt that the ruling of the First Court Specializing in Constitutional Matters in Lima, being a court ruling of first instance against which an appeal was filed, never acquired the status of *res judicata* and was not final, therefore it was not a final decision on the merits of the process.³⁷ For these reasons, the provisions of that court ruling is a

³⁶ Constitutional Procedural Code, December 1, 2004 (“Constitutional Procedural Code”), at Art. 5 [Exhibit R-106] “Grounds for inadmissibility: Constitutional proceedings are not admissible when: (...) 5.2 There are specific procedural routes, which are equally satisfactory, for the protection of the threatened or violated constitutional right, except in the case of *habeas corpus*.”

³⁷ Constitutional Procedural Code at Art. 6 [Exhibit R-106] “Res Judicata: In constitutional process, only the final decision that is made on the merits acquires the status of *res judicata*.”

merely referential fact, which is not effective or enforceable against the Peruvian State. The responsibility for this lies fully with the claimant company, which decided to withdraw from the proceedings of its own free will.

F. THE PERUVIAN STATE HAS NOT EXPROPRIATED A RIGHT OF PROPERTY OF BEAR CREEK IN RELATION TO THE MINING CONCESSIONS THAT IT ACQUIRED, OWNERSHIP OF WHICH THE COMPANY STILL HOLDS AND EXERCISES TODAY

73. In his reply report, Dr. Bullard introduced a new approach, which was neither alleged in his first report nor addressed by me, both because I was not consulted about the issue and because I did not consider it relevant. So now it is argued that the Peruvian State has performed an illegal expropriation of the right of property of Bear Creek over the mining concessions that it has acquired.³⁸ In this sense, it says that the issuance of S.D. No. 032-2011-EM, which repealed the S.D. No. 083-2007-EM and annulled the declaration of public necessity that authorized Bear Creek to acquire seven mining concessions, has arbitrarily deprived the company of its right of property over them, meaning an illegal expropriation for not have being made following the provisions of the Constitution. That is to say: to be approved by law and not by a supreme decree; to pay compensation to the affected company in cash as assessed compensation for the deprivation of its ownership.³⁹

74. I consider this statement by Dr. Bullard to lack legal or factual basis, since it is not true that the Peruvian State has issued any legal norm providing for the expropriation or performed administrative acts aimed at the expropriation of the right of property of Bear Creek over the mining concessions it owns. Furthermore, to date Bear Creek is still owner and holder of these concessions, as it remains registered in the respective mining register.

³⁸ See Bullard Second Report at para. 3, conclusions c and d.

³⁹ See Bullard Second Report at conclusion e, f, g.

75. The Peruvian Constitution of 1993, in Article 70 guarantees the inviolability of the right of property and regulates expropriation as a constitutional mechanism providing for the forced deprivation of the property of an individual in favor of the State, with the consequent obligation to grant it compensatory payment. The said provision states:

“Article 70. - The right to property is inviolable. The State guarantees it. It is exercised in harmony with the common interest and within the limits of the law. No one can be deprived of their property, except, exclusively, by reason of national security or public necessity declared by law, and upon payment in cash of assessed compensation that includes compensation for any damages. Action can be taken before the Judicial Branch to challenge the value of the property that the State has indicated in the expropriation proceedings.”⁴⁰

76. From this constitutional norm it is understood, with total clarity, that, for the expropriation to validly constitute the forced deprivation of the property of an individual in favor of the State, the following requirements must be met:

- a) the expropriation only proceeds on grounds of national security or public necessity;
- b) these grounds must be declared by law;
- c) the private owner affected shall receive prior payment for assessed compensation in cash from the State, for the value of the asset;
- d) compensation shall include additional compensation for any possible damages;
- e) the owner may pursue before the Judicial Branch the issue of the value of the asset set by the State in the administrative expropriation procedure.

77. In a similar vein, Article 2 of the Law No. 27117, General Expropriation Law defines the concept of expropriation as “... *the forcible transfer of the private property right, authorized only by explicit law of Congress in favor of the State, on the initiative of the Executive*

⁴⁰ See Constitution of Peru 1993 at Art. 70 [Exhibit R-001].

Branch, Regional or Local Governments and upon payment in cash of assessed compensation including compensation for any damages.”⁴¹

78. The first objection against the claim of Dr. Bullard, about Bear Creek having suffered the expropriation of its ownership rights over mining concessions that it owns, which supposedly would have occurred with the issuance of S.D. No. 032-2011-EM, is that in no part of the text, whether in the whereas section or in its articles, is any reference made to a loss of ownership rights of Bear Creek, or there being any expropriation. Furthermore, this legal norm has not provided for or led to any forcible transfer of the ownership rights of Bear Creek in favor of the State, or ordered the initiation of an administrative expropriation procedure.

79. Only if the cited Supreme Decree had provided for such expropriation, which it has not, in fact such a legal norm would have been manifestly unconstitutional as an expropriation only could have been ordered by an act of Congress, as expressly stated by the Constitution and the General Expropriation Law. But, as we have indicated, what this supreme decree actually provided for was to repeal S.D. No. 083-2007-EM and, therefore, the declaration of public necessity that was authorized to Bear Creek to make the acquisition of seven specific mining concessions; it never supposes nor tries to produce the forced loss of ownership of the company and its transfer to the State.

80. This erroneous classification on the content and alleged expropriatory scope of S.D. No. 032-2011-EM, leads Dr. Bullard to arrive at other assertions and conclusions that were equally inaccurate or wrong, such as: a) The State violated the Constitution and the General Expropriation Law, by “having expropriated” Bear Creek through a supreme decree and not a

⁴¹ See General Expropriation Law, Act No. 27117, May 15, 1999, at Art. 2 [Bullard-061]

law, despite the fact that this “expropriation” was never provided for and never occurred;⁴² b) The Supreme Decree No. 032-2011-EM has repealed or rescinded specific legal standards contained in Legislative Decree No. 757 and the TUO of the General Mining Law, standards under which the authorization to Bear Creek would have been issued, granted by S.D. No. 083-2007-EM;⁴³ and, c) That the ownership of Bear Creek was expropriated without the payment for compensation laid down by Article 70 of the Constitution.⁴⁴

81. But as the alleged expropriation, supposedly handed down by the S.D. No. 032-2011-EM, never existed, and there has no forcible deprivation or transfer of ownership of Bear Creek in favor of the State, being the case that the said company continues to hold ownership over the mining concessions, it could not be argued or substantiated that the State is required to pay advance assessed compensation in cash to the said company, because it has neither initiated any administrative expropriation proceedings against it, nor has it been dispossessed of ownership or ownership as it still holds the cited mining concessions.

82. The assertion that an expropriation has taken place lacks legal basis, when the supposedly affected owner company retains ownership of its right of property of the mining concessions acquired. For this reason, no type of financial compensation payment for expropriation applies, when such expropriation never took place and when Bear Creek has not lost ownership over its mining concessions.

83. It is also not true that the S.D. No. 032-2011-EM has affected or less still repealed the validity of any standard of the Legislative Decree No. 757, “Framework Law for Private Investment Growth” or the TUO of the General Law on Mining. These norms, which have legal

⁴² See Bullard Second Report at para. 3 conclusions e and f.

⁴³ See Bullard Second Report at para. 3 conclusions e and f.

⁴⁴ See Bullard Second Report at para. 3 conclusion g.

status and, therefore, are subordinate to the provisions of the Constitution, establish the general framework for the promotion of private investment in economic activities and the regime applicable to mining activity, respectively. Their legal principles have not at all been modified or annulled by the issuance of that supreme decree, through which they retain their validity and content.

84. It must not be forgotten that the main basis for the issuance of the S.D. No. 083-2007-EM, which declared the public necessity to approve the authorization for Bear Creek to be able to acquire mining concessions, has as its direct source the express mandate contained in Article 71 of the Constitution, which establishes a restriction and a special procedure exclusively applicable to the acquisition of ownership or rights over mines and other natural resources by foreign persons within 50 kilometers of the border areas. The S.D. No. 032-2011-EM, which repealed the S.D. No. 083-2007-EM on the grounds that the causes or reasons that formed the basis for declaring the public necessity for Bear Creek to be authorized to make the acquisition of the mining concessions had disappeared. Therefore, neither of these two supreme decrees, handed down under a mandate and a special regime provided for in the Constitution itself, assumed the involvement or repeal of the general framework provided for in the laws for the promotion and growth of private investment (legislative decree No. 757) or the development of mining activities.

This Opinion is based on my professional experience and I certify that its content is in line with my knowledge and understanding.

\signature\

Francisco José Eguiguren Praeli

Date: March 31, 2016