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August 18, 2016

Ms. Mercedes Cordido-Freytes de Kurowski  
Secretary of the Tribunal  
International Centre for Settlement of  
Investment Disputes  
1818 H Street, NW  
Washington, DC 20433

Re: *Bear Creek Mining Corporation v. Republic of Perú (ICSID Case No. ARB/14/21) – Respondent’s Comments to the Non-Disputing Party Submission from the Government of Canada*

Dear Ms. Kurowski:

Pursuant to the procedural schedule annexed to Procedural Order No. 1 dated January 27, 2015, Respondent hereby submits its comments on the Government of Canada’s non-disputing party submission of June 9, 2016 (“Canada’s Submission”).<sup>1</sup> Respondent welcomes this submission from its fellow Contracting Party to the Canada-Perú Free Trade Agreement (the “FTA” or “Treaty”), and trusts that it will resolve any lingering questions regarding the issues of treaty interpretation that Canada has addressed.

Canada’s Submission explains: (i) the scope of the protection against expropriation under Article 812 of the FTA, and in particular, what acts qualify as an indirect expropriation under that provision;<sup>2</sup> and (ii) the scope of protection afforded by Article 805 of the FTA, which relates to the minimum standard of treatment under customary international law.<sup>3</sup> As set out below, Perú agrees with Canada—its counterparty to the FTA—on the proper interpretation of Articles 812 and 805 of that Treaty.

The Tribunal cannot disregard this agreement between the Contracting Parties. As recognized in Article 31(3)(a) of the Vienna Convention on the Law of Treaties, any agreement

<sup>1</sup> Canada made its submission pursuant to Article 832 of the Canada-Perú Free Trade Agreement, which stipulates that “[o]n written notice to the disputing parties, the non-disputing Party may make submissions to a Tribunal on a question of interpretation of this Agreement.” Canada-Perú Free Trade Agreement at Art. 832 [Exhibit C-001].

<sup>2</sup> Canada’s Submission, June 9, 2016, at paras. 3-6.

<sup>3</sup> Canada’s Submission, June 9, 2016, at paras. 7-12.

between contracting parties on the proper interpretation of a treaty “shall be taken into account.”<sup>4</sup> As explained below, both Canada and Perú have now opined and agreed upon the scope of Articles 812 and 805 of the FTA. The Contracting Parties’ common interpretation of their Treaty should be considered definitive.

A. Indirect Expropriation Under Article 812 of the FTA

Canada’s Submission makes two important points regarding Article 812, the Treaty’s provision on expropriation. First, Canada notes that Annex 812.1 of the FTA (to which Article 812 refers) “provides guidance on how to distinguish between [] an indirect expropriation and *bona fide* regulation that does not amount to an expropriation.”<sup>5</sup> Claimant and Respondent both agree with Canada on the relevance of Annex 812.1.<sup>6</sup>

Second, Canada states that under Annex 812.1, “[a] non-discriminatory measure that is designed to protect legitimate public welfare objectives does not constitute indirect expropriation except in rare circumstances where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.”<sup>7</sup>

Respondent agrees. As noted in its Counter-Memorial, Respondent’s position is that under Annex 812.1:

Claimant’s indirect expropriation claim will fail unless Claimant can prove that the enactment of Supreme Decree No. 032: (i) represents a “rare circumstance;” (ii) is discriminatory; or (iii) was not designed to protect public safety.<sup>8</sup>

Claimant, it appears, also agrees with Canada that it must prove “rare circumstances” to succeed in its indirect expropriation claim.<sup>9</sup> Instead of arguing that it need not show “rare

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<sup>4</sup> See Vienna Convention on the Law of Treaties, January 27, 1980, at Art. 31(3)(a) (“There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions . . . .”) (emphasis added) [Exhibit CL-0039]. See also *Renco Group Inc. v. Republic of Perú*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 15, 2016, at paras. 134, 156 (holding that, in reference to non-disputing party submissions from the United States Government, “the Tribunal must ‘take into account’ any subsequent agreement between the State Parties pursuant to Article 31(3)(a) of the [Vienna Convention on the Law of Treaties]”) [Exhibit RLA-097].

<sup>5</sup> Canada’s Submission, June 9, 2016, at para. 4.

<sup>6</sup> Respondent’s Counter-Memorial, October 6, 2015, at para. 253; Claimant’s Reply, January 8, 2016, at paras. 246-47.

<sup>7</sup> Canada’s Submission, June 9, 2016, at para. 6.

<sup>8</sup> Respondent’s Counter-Memorial, October 6, 2015, at para. 254.

<sup>9</sup> Claimant’s Reply, January 8, 2016, at paras. 256 *et seq.*

circumstances,” Claimant tries to redefine the word “rare,” declaring that the term does not create an elevated burden.<sup>10</sup> Claimant then goes further, adopting the bizarre position that the “rare circumstances” language is actually helpful to would-be claimants, because “[i]t does not say ‘extremely uncommon’ or ‘very unlikely,’ but simply ‘rare.’”<sup>11</sup>

Canada’s Submission does not opine on the definition of “rare.” As such, the Tribunal will need to rely on the Parties’ submissions—and its own common sense—to determine whether Claimant’s position is credible (let alone persuasive). Respondent maintains that it is not.

**B. The Minimum Standard of Treatment Under Article 805 of the FTA**

Canada’s Submission also makes four important points regarding the scope of Article 805, which guarantees investors treatment in accordance with the minimum standard under customary international law. First, Canada clarifies that Article 805 “does not require treatment in addition to or beyond [the minimum] standard,”<sup>12</sup> a proposition with which both Claimant and Respondent agree.<sup>13</sup>

Second, Canada’s Submission states that “[t]o establish the content of the minimum standard of treatment requires turning to customary international law,”<sup>14</sup> and, in turn, that “[t]o establish a customary norm, a claimant must prove that a specific rule regarding the treatment of the investor or its investment has crystallized into widespread and consistent State practice flowing from a sense of legal obligation (*opinio juris*).”<sup>15</sup> In other words, vague allusions to the minimum standard are insufficient—a claimant must identify and substantiate the existence (via State practice) of a “specific” rule under customary international law, and then prove that the State violated that rule.

As explained in its pleadings, Respondent agrees entirely with Canada’s position.<sup>16</sup>

Claimant’s interpretation, on the other hand, diverges from the common understanding of Canada and Perú. Claimant believes that identification and substantiation of a specific rule of customary international law is unnecessary.<sup>17</sup> Respondent noted in its briefs, however, that

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<sup>10</sup> Claimant’s Reply, January 8, 2016, at paras. 256 *et seq.*

<sup>11</sup> Claimant’s Reply, January 8, 2016, at para. 258 (quoting Anthony B. Sanders, *Of All Things Made in America Why Are We Exporting the Penn Central Test*, 30 NW. J. INT’L L. & BUS. 339, 363-64 (2010) [Exhibit CL-0178]).

<sup>12</sup> Canada’s Submission, June 9, 2016, at para. 7.

<sup>13</sup> Claimant’s Reply, January 8, 2016, at para. 329.

<sup>14</sup> Canada’s Submission, June 9, 2016, at para. 8 (emphasis added).

<sup>15</sup> Canada’s Submission, June 9, 2016, at para. 9 (emphasis added).

<sup>16</sup> Respondent’s Counter-Memorial, October 6, 2015, at paras. 279-80; Respondent’s Rejoinder, April 13, 2016, at paras. 521 *et seq.*

<sup>17</sup> *See* Claimant’s Reply, January 8, 2016, at 187 n.931.

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Claimant’s position conflicts with international law jurisprudence.<sup>18</sup> We now know that Claimant’s position also is at odds with the views of both of the Contracting Parties to the FTA.

Third, Canada’s Submission clarifies that “[t]he decisions and awards of international courts and tribunals do not constitute instances of State practice for the purpose of proving the existence of a customary norm . . . .”<sup>19</sup> Respondent, once again, agrees with Canada.<sup>20</sup> Claimant, however, apparently believes otherwise. It relies entirely on “[t]he decisions and awards of international courts and tribunals” in arguing its case on the international minimum standard.<sup>21</sup> This reliance—as confirmed by Canada, Perú, and international law precedent—is misplaced.

Fourth, and finally, Canada explains that customary international law does not require a State to protect an investor’s legitimate expectations.<sup>22</sup> Claimant argues otherwise, but its analysis—once again—is based solely on arbitral case law.<sup>23</sup> As discussed, however, arbitration decisions cannot establish customary international law norms.

C. Conclusion

As explained above, Canada, Perú, and Claimant agree on several of the issues addressed in Canada’s Submission. With respect to the points on which Claimant disagrees with Canada and Perú, Respondent submits that the common understandings of the Contracting Parties to the Treaty—backed as they are by international law precedent—must prevail.

Sincerely,



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Marinn Carlson  
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<sup>18</sup> Respondent’s Rejoinder, April 13, 2016, para. 522 (citing *S.S. Lotus (Fr. v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 [Exhibit RLA-057] (rejecting any implied “[r]estrictions upon the independence of States,” and noting that States enjoy “a wide measure of discretion which is only limited in certain cases by prohibitive rules”)).

<sup>19</sup> Canada’s Submission, June 9, 2016, at para. 10.

<sup>20</sup> Respondent’s Rejoinder, April 13, 2016, at paras. 525-26.

<sup>21</sup> See Claimant’s Memorial, May 29, 2015, at paras. 146-53 (describing the “content” of the fair and equitable treatment standard under customary international law by referencing arbitral awards); Claimant’s Reply, January 8, 2016, at paras. 329-55 (again describing the content of the fair and equitable treatment standard under customary international law by referencing arbitral awards).

<sup>22</sup> Canada’s Submission, June 9, 2016, at para. 12.

<sup>23</sup> See Claimant’s Memorial, May 29, 2015, at paras. 151-53; Claimant’s Reply, January 8, 2016, at para. 353.