BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES AND UNDER THE CANADA-PERU FREE TRADE AGREEMENT

BEAR CREEK MINING CORPORATION

Claimant

AND

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/14/21

SUBMISSION OF CANADA PURSUANT TO ARTICLE 832 OF THE CANADA-PERU FREE TRADE AGREEMENT

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I. INTRODUCTION

1. Canada makes this submission pursuant to Article 832 of the *Peru-Canada Free Trade Agreement* ("the FTA") and section 17 of Procedural Order No. 1. Through this submission, Canada provides its views on certain questions of interpretation of the FTA, but does not provide any views on issues of fact or on the application of these submissions to the facts of this dispute.

2. No inference should be drawn from Canada's silence in relation to issues not addressed.

II. EXPROPRIATION

3. Article 812 provides that no Party may nationalize or expropriate an investment, directly or indirectly, except for a public purpose, in accordance with due process of law, in a non-discriminatory manner and on prompt, adequate and effective compensation. An analysis of breach of Article 812 requires as a first step the identification of the investment alleged to have been expropriated. For there to be an expropriation, there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.[1]

4. In the case of an alleged indirect expropriation, Annex 812.1 provides guidance on how to distinguish between whether an indirect expropriation and *bona fide* regulation that does not amount to an expropriation. Whether a measure constitutes a non-discriminatory, regulatory measure designed to protect public welfare – as opposed to an indirect expropriation – requires a case-by-case, fact based inquiry that considers various factors. The Parties have articulated certain of these factors in Annex 812.1 to guide the Tribunal, including the economic impact of the measure or series of measures, the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations, and the character of the measure or series of measures (for example if the measure is general in nature as opposed to targeting a particular

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[1] *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 102; *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 148; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 357.

investment). None of these factors will be determinative on its own. Together, they must be weighed along with any other relevant factors.

5. A State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives. As the tribunal in *Suez InterAgua v. Argentina* stated, "in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation."[2]

6. 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.

III. MINIMUM STANDARD OF TREATMENT

7. Article 805 guarantees investors the customary international law minimum standard of treatment, and does not require treatment in addition to or beyond that standard. It provides a minimum level of protection under which the treatment of investors must not fall.

8. To establish the content of the minimum standard of treatment requires turning to customary international law.

9. The burden of proving a rule of customary international law under Article 805 rests with the party invoking the provision. To establish a customary norm, a claimant must prove that a specific rule regarding the treatment of the investor or its investment has

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[2] *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, 30 July 2010, ¶ 128.

crystallized into widespread and consistent State practice flowing from a sense of legal obligation *(opinio juris)*.[3]

10. The 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 and are only relevant to the extent that they include an examination of State practice and *opinio juris.* In the words of the tribunal in *Cargill v. Mexico,* awards "do not create customary international law but rather, at most, reflect customary international law."[4]

11. Decisions interpreting an autonomous fair and equitable treatment standard, in other words, one that is not qualified by customary international law, do not create or reflect customary international law. As the tribunal in *Glamis Gold v. United States* held, arbitral tribunals applying "autonomous standard[s] provide[ ] no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom."[5] Such awards are therefore not relevant to ascertaining the content of the customary international law minimum standard of treatment for the purposes of Article 805 of the FTA because they apply a different standard based on the treaty practice of States that have extended investor protection beyond what is required by customary international law.

12. While certain awards interpreting provisions based on an unqualified or autonomous standard of fair and equitable treatment have found that it protects an investor's legitimate expectations, customary international law does not contain such an

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[3] See *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, 1952 ICJ 176, p. 200 (Judgement of 27 August 1952); *Asylum Case (Colombia v. Peru),* 1950 ICJ 266, p. 276 (Judgement of 20 November 1950); *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands/Denmark)*, 1969 ICJ 3, ¶ 74 (Judgement of 20 February 1969).

[4] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 277.

[5] *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 608.

obligation.[6] Nor does customary international law contain a general duty of transparency,[7] or a prohibition against nationality-based discrimination.[8]

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Respectfully submitted on behalf of Canada,

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[6] All three NAFTA Parties agree on this point. See, for example, *Windstream Energy, LLC v. Canada* (UNCITRAL) Canada's Reply to the 1128 Submissions of the United States and Mexico, 29 January 2016, ¶¶ 33-36.

[7] See for example *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, ¶ 294*; Merrill & Ring Forestry L.P. v. Government of Canada* (UNTIRAL) Award*,* 31 March 2010, ¶ 231.

[8] See for example *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter C, ¶¶ 14-16.