

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/14/21

In the Matter of

BEAR CREEK MINING CORPORATION

Claimant

v.

REPUBLIC OF PERU

Respondent

**CLAIMANT'S COMMENTS ON CANADA'S NON-DISPUTING PARTY
SUBMISSION PURSUANT TO ARTICLE 832 OF THE CANADA-PERU FREE
TRADE AGREEMENT**

August 18, 2016

KING & SPALDING LLP

Henry G. Burnett

Caline Mouawad

Aloysius P. Llamzon

Cedric Soule

Fernando Rodriguez-Cortina

Luis Alonso Navarro

Jessica Beess und Chrostin

MIRANDA & AMADO ABOGADOS

Luis G. Miranda

Cristina Ferraro

On behalf of Claimant Bear Creek Mining Company

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	EXPROPRIATION.....	1
III.	MINIMUM STANDARD OF TREATMENT	5

I. INTRODUCTION

1. On June 9, 2016, Canada made a non-disputing party submission pursuant to Article 832 of the Canada-Peru FTA and section 17 of Procedural Order No. 1 (“Canada’s Submission”). Through this submission, Canada “provide[d] its views on certain questions of interpretation of the FTA, but [did] not provide any views on issues of fact or on the application of these submissions to the facts of this dispute.”¹ As detailed below, Canada’s views on the interpretation of the FTA and its legal standards largely coincide with the positions advanced by Claimant in this arbitration.²

II. EXPROPRIATION

2. In its Submission, Canada sets forth its understanding of the relevant test and factors that an arbitral tribunal adjudicating a claim of expropriation under the Canada-Peru FTA must apply.³ Claimant adopted and applied the same test and factors in its Memorial on the Merits and Reply Memorial, and has shown that Bear Creek’s claims against Peru meet these criteria.⁴ By contrast, Peru has advocated a more restrictive reading of the Canada-Peru FTA, and, in any event, has failed to address several of the factors that Canada and Claimant agree apply under the FTA.

3. *First*, the starting point for Canada’s analysis is the text of Article 812, which provides that “[n]either Party [to the FTA] may nationalize or expropriate a covered investment either 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.”⁵ This is also the starting point for Claimant’s analysis, and Claimant has shown that Peru’s

¹ Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement, June 9, 2016, ¶ 1, (“Canada’s Submission”).

² Since Canada’s Submission is limited to questions of interpretation of the Canada-Peru FTA, Claimant’s response to Canada’s Submission similarly will focus on such questions. Claimant respectfully refers the Tribunal to its prior briefings for the application of the FTA standards of protection to the facts of this case.

³ Canada’s Submission, ¶¶ 3-6.

⁴ Claimant’s Memorial on the Merits, May 29, 2015, Section IV.A, (“Claimant’s Memorial on the Merits”); Claimant’s Reply on the Merits and Counter-Memorial on Jurisdiction, Section IV, Jan. 8, 2016, (“Claimant’s Reply Memorial”).

⁵ **Exhibit C-0001**, Chapter Eight of the Free Trade Agreement between Canada and the Republic of Peru, signed on May 29, 2008 and entered into force on Aug. 1, 2009, Art. 812.1, (“Canada-Peru FTA”); Canada’s Submission, ¶ 4.

expropriation of Claimant’s investment does not meet these criteria.⁶ Peru, on the other hand, has not addressed any of these components of the expropriation analysis under Article 812.⁷

4. *Second*, according to Canada, an analysis of breach of Article 812 of the Canada-Peru FTA requires “the identification of the investment alleged to have been expropriated”⁸ and a “taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.”⁹ Claimant agrees and has shown that Bear Creek is the rightful owner of the Santa Ana Concessions, and that it was deprived of its fundamental ownership rights in these Concessions by, *inter alia*, Peru’s enactment of Supreme Decree 032.¹⁰

5. *Third*, Canada further explains that, in the case of an alleged indirect expropriation, Annex 812.1(b) of the Canada-Peru FTA requires a “case-by-case, fact based inquiry that considers various factors[,] ... 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.”¹¹ Notably, Canada highlights that the analysis of the character of the measure at issue under the FTA includes scrutiny of whether said measure is “**general in nature as opposed to targeting a particular investment**[.]”¹²

6. Claimant agrees and has demonstrated how Peru’s expropriation of Bear Creek’s investment meets each of these factors:¹³ (i) Supreme Decree 032 rendered Bear Creek’s investment in Santa Ana worthless and resulted in a significant reduction in value of the Corani

⁶ Claimant’s Memorial on the Merits, ¶¶ 120-44.

⁷ Respondent’s Counter-Memorial on the Merits and Memorial on Jurisdiction, Oct. 6, 2015, Section IV.A, (“Respondent’s Counter-Memorial”); Respondent’s Rejoinder on the Merits and Reply on Jurisdiction, Apr. 13, 2016, Section IV.A, (“Respondent’s Rejoinder”).

⁸ Canada’s Submission, ¶ 3.

⁹ *Id.*

¹⁰ Claimant’s Memorial on the Merits, Sections II-III, IV.A; Claimant’s Reply Memorial, Sections II.B, II.E, III.B-C, IV.

¹¹ Canada’s Submission, ¶ 4.

¹² *Id.* (emphasis added).

¹³ Claimant’s Reply Memorial, ¶¶ 248-253.

Project;¹⁴ (ii) Bear Creek acquired ownership over the mining concessions at Santa Ana in reliance on Peru’s grant of a declaration of public necessity (in the form of Supreme Decree 083) and continued to develop the Project in reliance on a plethora of representations various Peruvian officials made to Bear Creek, expressing the Government’s support for the Santa Ana Project;¹⁵ and (iii) the character of the expropriatory measure—Supreme Decree 032—was not general or regulatory in nature, but rather targeted only Bear Creek and its investment for illegitimate and political reasons.¹⁶ Peru, on the other hand, altogether failed to address any of the elements set forth in Annex 812.1(b).¹⁷

7. *Fourth*, Canada stresses that the aforementioned factors listed in Annex 812.1(b) of the Canada-Peru FTA “must be weighed along with any other relevant factors.”¹⁸ Claimant agrees and highlighted in its pleadings the “other relevant factors” that inform the character of the measure at issue, including Peru’s unwarranted and arbitrary suspension of Bear Creek’s ESIA process,¹⁹ Peru’s overnight revocation of Supreme Decree 083 without notice or due process,²⁰ Peru’s knowledge at the time that revoking Supreme Decree 083 would be unlawful and in violation of Bear Creek’s rights,²¹ and the Lima First Constitutional Court’s confirmation

¹⁴ *Id.* at ¶ 250.

¹⁵ *Id.* at ¶ 252; Claimant’s Rejoinder on Jurisdiction, May 26, 2016, ¶¶ 65-71, 142.

¹⁶ Claimant’s Reply Memorial, ¶ 253; **Exhibit C-0005**, Supreme Decree 032-2011-EM, June 25, 2011.

¹⁷ Respondent’s Rejoinder, ¶ 477 (“Without conceding in any way that Claimant can meet the Annex 812.1(b) test, our analysis below focuses on the “rare circumstances” test in Annex 812.1(c).”).

¹⁸ Canada’s Submission, ¶ 4.

¹⁹ Claimant’s Reply Memorial, ¶¶ 106-31.

²⁰ *Id.* at ¶¶ 132-46.

²¹ **Exhibit C-0095**, *Diálogo no prosperó en Puno debido a intransigencia de los dirigentes*, MINISTRO DE ENERGÍA Y MINAS, May 26, 2011 (Vice-Minister of Energy and Mines Fernando Gala explained that the cancellation of the mining concessions and the revocation of Supreme Decree 083 were “completely illegal demands” and that canceling the mining concessions was not feasible because it would affect legal security in the country); **Exhibit C-0096**, *MEM: Ejecutivo sigue abierto al diálogo con población de Puno*, RPP NOTICIAS, May 27, 2011 (Minister of Energy and Mines Pedro Sánchez indicated that the demand to cancel mining concessions was unconstitutional, excessive, and impossible to implement); **Exhibit C-0097**, Interview of Prime Minister Rosario Fernández, *Mira Quien Habla*, Willax TV, May 31, 2011 (Prime Minister Rosario Fernández rejected demands to cancel oil and mining concessions, noting that “legal security comes first, and without that, there is nothing”); **Exhibit C-0236**, *El diálogo primará en Puno*, EL PERUANO, May 27, 2011 (discussing President Alan García’s statement that demands to cancel the mining concessions were “irrational requests” motivated by “electoral interests”).

that the Government's actions were arbitrary and in violation of Bear Creek's right to legal security and due process.²²

8. *Finally*, Canada maintains that a “non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives” does not constitute a compensable expropriation,²³ 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.”²⁴ Claimant agrees and has shown that Peru's expropriation of Bear Creek's investment was discriminatory and designed to placate illegitimate political demands rather than protect legitimate public welfare objectives.²⁵ Claimant also agrees with Canada that even a “non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives” may constitute a compensable expropriation if the impact of the measure is disproportionate to its purpose (*i.e.*, “so severe in light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith”).²⁶ Claimant has demonstrated that, even if Supreme Decree 032 could be deemed non-discriminatory and designed and applied to protect legitimate public welfare objectives (it cannot), the impact of Supreme Decree 032 was disproportionate to its alleged purpose.²⁷ Peru had other courses of conduct at its disposal that would have achieved the same alleged public welfare objectives short of expropriating Bear Creek's investment in Santa Ana (and significantly impacting the value of the Corani Project) in gross violation of Bear Creek's due process and property rights.²⁸ But Peru consciously chose to violate Bear Creek's rights by adopting the most extreme and harmful course of action, without

²² **Exhibit C-0006**, Amparo Decision No. 28 rendered by the Lima First Constitutional Court, May 12, 2014 at 20-21 (holding that the issuance of Supreme Decree 032 “is an action by the State that is not found within the margins of reasonability and proportionality, required not to violate the principle of legal security[.]” “it can be verified that the cited supreme decree [032] violates the principle of the prohibition of arbitrariness[.]” and “[t]he only certainty is that neither the violent demonstrations of the anti-mining movement and its illicit attacks on public and private property, nor much less the Government's decision to refrain from coping with such demonstrations, legally justified the adoption of the decision set forth in Article 1 of Supreme Decree No. 032-2011-EM and, in deciding as such, the principle of legal security was gravely affected[.]”).

²³ Canada's Submission, ¶ 5.

²⁴ *Id.* at ¶ 6.

²⁵ Claimant's Reply Memorial, ¶¶ 264-66.

²⁶ Canada's Submission, ¶ 6; Claimant's Reply Memorial, ¶¶ 260-63. Peru, on the other hand, wholly ignores this proportionality component.

²⁷ Claimant's Reply Memorial, ¶¶ 260-63.

²⁸ *Id.* at ¶ 262.

consulting Bear Creek, putting it on notice, or affording it an opportunity to be heard. Supreme Decree 032 was grossly disproportionate to its alleged public welfare objectives and constitutes a compensable taking.

9. In sum, Canada and Claimant are in agreement on the appropriate test and factors relevant to the consideration of Bear Creek's expropriation claim, and Claimant has shown how each of these tests and factors is met in the present case. By contrast, Peru has advocated a more restrictive reading of the FTA, which the text of the FTA simply does not support.

III. MINIMUM STANDARD OF TREATMENT

10. Canada's position on the interpretation of Article 805 of the Canada-Peru FTA is largely consistent with Claimant's. *First*, Canada and Claimant agree that Article 805 "guarantees investors the customary international law minimum standard of treatment."²⁹ *Second*, Canada and Claimant agree that the content of the minimum standard of treatment ("MST") requires reference to customary international law.³⁰ *Third*, Canada and Claimant agree that awards applying the autonomous standard of fair and equitable treatment "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."³¹ In its analysis of MST, Claimant has not relied on any arbitral decisions applying the autonomous fair and equitable treatment standard.³²

11. *Fourth*, Canada aligns itself with the position of the *Cargill v. Mexico* tribunal, which held that arbitral awards "do not create customary international law but rather, at most, reflect customary international law."³³ Consistent with Canada's view that arbitral awards may reflect customary international law, Claimant has relied on awards that have analyzed the content

²⁹ Canada's Submission, ¶ 7; Claimant's Reply Memorial, ¶ 329. Claimant also maintains that it is entitled to import broader standards of treatment (such as the autonomous fair and equitable treatment standard) from other treaties to which Peru is a party by operation of the most-favored-nation treatment clause contained in Article 804 of the FTA. See Claimant's Reply Memorial, Section V.B.

³⁰ Canada's Submission, ¶ 8; Claimant's Reply Memorial, ¶ 329.

³¹ Canada's Submission, ¶ 11; Claimant's Reply Memorial, ¶¶ 332-56.

³² Claimant's Reply Memorial, ¶¶ 332-75.

³³ **RLA-053**, *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, Sept. 18, 2009, ¶ 277; Canada's Submission, ¶ 10.

of MST to inform its discussion thereof.³⁴ In particular, Claimant relies on the articulation of MST put forth by the *Waste Management II* tribunal, which conducted a detailed and thorough analysis of arbitral jurisprudence to determine the content of MST,³⁵ and the holding of which “reflect[s] customary international law[.]” The *Mesa* tribunal recently stated that “the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment[.]”³⁶ Indeed, arbitral awards and commentators overwhelmingly agree that the *Waste Management II* tribunal accurately stated the contemporary content of MST.³⁷

12. Regarding the content of MST, Canada submits that customary international law does not recognize a general duty of transparency or an obligation to protect the investor’s legitimate expectations.³⁸ In other arbitrations, Canada has clarified its position, stating that transparency and legitimate expectations are not standalone rights entitled to protection, but may be considered in the overall analysis of alleged MST breaches.³⁹ In contrast to Canada’s position, Peru maintains that legitimate expectations and transparency are entirely irrelevant to the MST analysis.⁴⁰ As Claimant previously briefed, and as the *Waste Management II* tribunal explained, MST protects against a complete lack of transparency, and an investor’s legitimate

³⁴ By contrast, Respondent argues that the decisions and awards of arbitral tribunals are entirely irrelevant to the analysis of the content of MST. Respondent’s Rejoinder, ¶¶ 525-26.

³⁵ **CL-0069**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, Apr. 30, 2004, ¶¶ 89-99, (“*Waste Management II* Award”).

³⁶ **CL-0236**, *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, Mar. 24, 2016, ¶ 501.

³⁷ **CL-0190**, *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, Mar. 17, 2015, ¶ 427, (“*Bilcon* Award on Jurisdiction and Liability”) (“The Tribunal in the present case is guided by these earlier cases, particularly the formulation of the international minimum standard by the *Waste Management* Tribunal.”); **CL-0070**, *Teco v. Guatemala*, ICSID Case No. ARB/10/17, Award, Dec. 19, 2013, ¶¶ 454-55; **CL-0034**, *GAMI Investments, Inc. v. Government of United Mexican States*, NAFTA UNCITRAL, Final Award, Nov. 15, 2004, ¶ 101.

³⁸ Canada’s Submission, ¶ 12. Canada also submits that customary international law does not contain a prohibition against nationality-based discrimination (*id.*), but as Claimant has not alleged that Peru violated the MST through nationality-based discrimination, Claimant does not take a position on this point.

³⁹ **CL-0190**, *Bilcon* Award on Jurisdiction and Liability, ¶ 401 (“The Respondent [Canada] also argues that NAFTA Article 1105(1) does not include a stand-alone obligation protecting legitimate expectations, although legitimate expectations may be relevant to determining whether a measure amounts to the type of egregious conduct that would breach Article 1105(1).”); **CL-0188**, *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA UNCITRAL, Award, ¶ 171, Mar. 31, 2010 (summarizing Canada’s position that transparency is not a standalone right, but may be considered “as part of denial of justice and due process”).

⁴⁰ Respondent’s Rejoinder, ¶ 528.

expectations are relevant to assess a breach of MST.⁴¹ In this case, Peru has violated MST on both grounds, in breach of the Canada-Peru FTA.⁴²

* * * * *

13. As set forth herein, Claimant and Canada are largely in agreement regarding the proper interpretation of the Canada-Peru FTA, whereas Peru adopts a more restrictive reading.

August 18, 2016

Respectfully submitted,



KING & SPALDING LLP

Henry G. Burnett
Caline Mouawad
Aloysius P. Llamzon
Cedric Soule
Fernando Rodriguez-Cortina
Luis Alonso Navarro
Jessica Beess und Chrostin

MIRANDA & AMADO ABOGADOS

Luis G. Miranda
Cristina Ferraro

⁴¹ **CL-0069**, *Waste Management II* Award, ¶ 98; Claimant's Reply Memorial, Section V.A.

⁴² Claimant's Reply Memorial, Section V.A.