

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation,
Claimant,

v.

Republic of Peru,
Respondent

(ICSID Case No. ARB/14/21)

SUBMISSION AS AN "OTHER PERSON" PURSUANT TO
ARTICLE 836 AND ANNEX 836.1 OF THE PERU-CANADA FTA

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June 9, 2016

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TABLE OF CONTENTS

I. INTRODUCTION	1
A. Overview of legal arguments	1
B. International human rights law, particularly regarding the rights of indigenous peoples, is relevant to the dispute at hand, as is the broader context of social conflict around extractive investments in Peru.	1
II. ARGUMENTS GOING TO JURISDICTION: EXISTENCE OF A COVERED INVESTMENT	
A. Recognizing a right to exploit mineral resources in the Santa Ana concessions is inconsistent with the definition of an “investment” under the Peru-Canada FTA.	5
B. Interpreting Claimant’s “investment” as including a right to exploit mineral resources would run counter to national law and international human rights law.	7
1. <i>Claimant has not met environmental, social, and other requirements established by Peruvian domestic law that are necessary for mineral exploitation.</i>	7
2. <i>Claimant has not demonstrated compliance with its human rights responsibilities regarding consultation and free, prior and informed consent, which is critical before commencing mineral exploitation.</i>	8
C. Interpreting Claimant’s “investment” as including a right to exploit mineral resources would frustrate the rights of non-parties and be inconsistent with the objectives of the Peru-Canada FTA.	9
III. ARGUMENTS GOING TO THE MERITS: FAIR AND EQUITABLE TREATMENT	
A. The Peru-Canada FTA’s FET obligation, which is tethered to the MST, does not protect investors’ legitimate expectations.	10
B. Interpreting the FET obligation as protecting investors’ “legitimate expectations” generates negative policy outcomes and does not reflect the purpose of the Peru-Canada FTA.	11
C. Should the Tribunal proceed to an assessment of expectations, Claimant did not possess relevant legitimate expectations.	13
1. <i>Peru’s long-standing obligations under human rights law requiring the protection of indigenous peoples’ rights are relevant for the determination of whether Claimant’s expectations can be considered legitimate and reasonable.</i>	13
2. <i>The social context in which Claimant sought to establish its investment is also relevant for the determination of whether its expectations were legitimate and reasonable.</i>	14
IV. ARGUMENTS FALLING UNDER ARTICLE 2201.3(B) OF THE PERU-CANADA FTA	
A. “Laws and regulations” under Article 2201.3(b) include international human rights laws, in addition to Peruvian national law that incorporates Peru’s obligations under international human rights laws.	16
B. International human rights laws are not inconsistent with the Peru-Canada FTA and require Peru to respect and protect the rights of indigenous peoples.	16
C. Peru’s promulgation of Supreme Decree No. 032 was a necessary measure to ensure compliance with laws obligating it to respect and protect indigenous peoples’ rights to consultation and FPIC.	17
D. Supreme Decree No. 032 is not a disguised restriction on international investment, nor does it amount to “arbitrary or unjustifiable discrimination” between investments or between investors.	19
V. CONCLUSION	19

I. INTRODUCTION

Investment in the extractive sector raises complex issues of significant public concern, both globally and in Peru. The promise of such investment can be immense for resource-rich countries. Yet the challenges should not be underestimated, with some extractive projects resulting in grievous consequences for host states and their citizens. The legal and regulatory framework governing the extractive sector therefore plays a crucial role. A carefully calibrated framework enables host states to foster investment that contributes to sustainable development objectives while also maintaining the safeguards necessary to avoid severe environmental harms and to respect, protect, and fulfill the rights of third parties.

This submission asserts that acceptance of certain interpretations of the Peru-Canada Free Trade Agreement that are advanced by Claimant would undermine efforts to ensure extractive industry projects are governed by—and only proceed in accordance with—applicable legal frameworks. Indeed, acceptance of such interpretations would significantly frustrate both Peruvian domestic law and international human rights law.

This introductory section provides a brief overview of legal arguments contained in the submission, before turning to the broader legal and socio-political context that is relevant for assessing the issues in dispute. Subsequent sections focus on arguments going to the jurisdiction, those going to the merits, and those falling under one of the exception provisions.

A. Overview of legal arguments

The present submission makes the following arguments. First, recognizing a right to exploit mineral resources as part of Claimant’s “investment” is inconsistent with the definition of an investment under the Peru-Canada FTA, and would run counter to norms of both domestic and international law designed to protect the public interest and the rights and interests of non-parties to the arbitration. Second, the fair and equitable treatment standard contained in the Peru-Canada FTA has not been shown to protect legitimate expectations and, even if such expectations were capable of being protected by the Treaty, Claimant has failed to demonstrate that it held legitimate expectations of a right to exploit mineral resources in the Santa Ana concessions. Both of these arguments contest the premise that the Treaty permits claimants to obtain compensation for rights they do not possess under applicable domestic law. Finally, the series of measures adopted by Peru in 2011, which include Supreme Decree No. 032, fall under the general exception described in Article 2201.3(b) of the Peru-Canada FTA. These arguments have serious public interest implications, although they do not cover all issues of public interest arising in this dispute.

B. International human rights law, particularly regarding the rights of indigenous peoples, is relevant to the dispute at hand, as is the broader context of social conflict around extractive investments in Peru.

International law protects a host of human rights that can be affected by mining projects.¹ Peru has ratified, and is thus bound by, human rights treaties that obligate it to uphold certain freedoms and basic

¹ This submission focuses primarily on the rights of indigenous peoples to prior consultation and to provide or withhold their free, prior and informed consent, which are most relevant to the underlying actions and dispute. However, mining projects frequently affect or implicate numerous other protected human rights, ranging from economic and social rights, such as the rights to water, housing, food, health, and culture, to civil and political rights, such as rights to life, liberty, and security. See James Anaya (U.N. Special Rapporteur on the rights of indigenous peoples), *Extractive Industries Operating*

protections, including in the context of investment in the extractive sector. Among Peru's established obligations under international human rights law is the obligation to respect and protect the rights of indigenous peoples to prior consultation and to give or withhold their free, prior and informed consent (FPIC). These obligations stem from a range of treaties ratified by Peru.² Taken together, and applied specifically in the context of international investment, these treaties impose a duty on states to, *inter alia*:

1. At a minimum, consult indigenous peoples, with the objective of achieving agreement or consent, where consideration is being given to measures or programs that may affect such peoples.³ These consultations must: (a) be in good faith, in accordance with the communities' customs, and with the aim of reaching agreement; (b) take place during the early stages of an investment or development plan; and (c) fully inform the communities of the possible risks associated with the project.⁴
2. Where indigenous peoples may be relocated,⁵ or (most notably in the present arbitration) where their enjoyment of their rights may be affected by a large-scale development or investment plan,⁶ their FPIC must be obtained.⁷ The Inter-American Court has defined "development or

Within or Near Indigenous Territories, paras. 30-35, U.N. Doc. A/HRC/18/35 (July 11, 2011) (summarizing human rights violations caused by extractive operations globally).

² ILO 169, which came into effect for Peru in 1995, was the first legally binding treaty to explicitly codify the right to FPIC; see Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO 169]. However, preceding core human rights treaties have been authoritatively interpreted to protect the right. For example, Article 27 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Peru in 1978 and noted by the tribunal in *Al Warraq v. Indonesia* to be "part of general international law," has been interpreted by the U.N. Human Rights Committee (HRC) to require "not mere consultation but the free, prior and informed consent of the members of the [affected] community"; see Hesham T.M. Al Warraq v. Republic of Indonesia, UNCITRAL Arb., Award, para. 558 (Dec. 15, 2014) (citation omitted); Human Rights Comm., *Ángela Poma Poma v. Peru*, para. 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (Mar. 27, 2009). The HRC has also affirmed that its interpretation of Article 27 applies specifically to the Aymara people in Peru, the same group affected by the subject matter of the present dispute. *Poma Poma v. Peru*, para. 7.3. Similarly, the Committee on Economic, Social and Cultural Rights (CESCR) has affirmed that indigenous peoples' FPIC is required under Articles 1 and 15 of the International Covenant on Economic, Social and Cultural Rights; see CESCR, *General Comment No. 21*, U.N. Doc. E/C.12/GC/21, paras. 2, 36, 37 (Dec. 21, 2009). Likewise, the Committee on the Elimination of Racial Discrimination (CERD) has affirmed that the principle of non-discrimination implies that indigenous peoples' FPIC must be obtained when their property and cultural rights are impacted by State or private sector actors; see CERD, *General Recommendation XXIII Indigenous Peoples* (1997). In addition, authoritative human rights bodies have also clarified that the U.N. Declaration on the Rights of Indigenous Peoples, which affirms the right to self-determination and FPIC, should serve as an interpretative guide for international treaties in the context of indigenous peoples' rights; see e.g., *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 185, para. 18 (Aug. 12, 2008).

³ ILO 169, arts. 6, 15.2.

⁴ *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 172, paras. 133-134 (Nov. 28, 2007); *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 245, paras. 165-167, 171, 177-178 (June 27, 2012). See also ILO 169, arts. 6, 15.

⁵ Relocation should only be considered as an exceptional measure. ILO 169, art. 16.2.

⁶ *Saramaka v. Suriname* (ser. C) No. 172, paras. 129, 133-137 (Nov. 28, 2007); *Kichwa v. Ecuador* (ser. C) No. 245, paras. 157, 177-178, 180, 205, 208 (June 27, 2012).

⁷ *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R., (ser. C) No. 172, paras. 133-134 (Nov. 28, 2007); *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 245, paras. 165-167, 171, 177-178 (June 27, 2012). This obligation to obtain FPIC is further reinforced by the recognition of indigenous peoples' right to self-determination and by the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), which requires FPIC, and which some experts have argued constitutes a codification of customary international law. See e.g. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007), <http://jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php>. See in particular UNDRIP articles 19 and 32.2, which require, respectively, that FPIC be obtained regarding legislative or administrative measures that may affect

investment plan” as “any proposed activity that may affect the integrity of the lands and natural resources within the territory” of indigenous peoples, “*particularly any proposal to grant logging or mining concessions.*”⁸

The relevant international human rights instruments and jurisprudence clarify that consultations to obtain FPIC must be broad based and include all concerned indigenous peoples; in addition, FPIC must be obtained through indigenous peoples’ own representative institutions in accordance with their customs and traditions, as determined by the concerned peoples themselves.⁹ With respect to extractives projects, the UN Special Rapporteur on the rights of indigenous peoples has clarified that, as a general rule, “consent is required for extractive projects within indigenous territories.”¹⁰

Peru’s obligations under international human rights law are particularly relevant in analyzing the issues raised in the present arbitration, given the constitutional rank afforded to human rights treaties under Peruvian domestic law.¹¹ By virtue of Article 55 of the Peruvian Constitution, and the Peruvian Constitutional Tribunal’s interpretation and application thereof, international treaties ratified by Peru: are directly incorporated into domestic law;¹² influence the interpretation of other human rights norms in Peru;¹³ constitute the parameter for the constitutionality of rights and liberties recognized in the Constitution;¹⁴ and directly inform all public activity.¹⁵ Furthermore, Peruvian law provides that the judgments of the Inter-American Court of Human Rights are binding and effective at the domestic level, and must be executed without further validation or examination.¹⁶

While states are the primary duty-bearers under international human rights law, companies also have responsibilities to respect human rights, as affirmed under the UN Guiding Principles on Business and Human Rights.¹⁷ In relation to the exercise of extractive industry companies’ responsibility to respect

indigenous peoples as well as “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

⁸ *Saramaka v. Suriname* (ser. C) No. 172, paras. 129, note 127 (emphasis added).

⁹ See sources cited *supra*, notes 2-8. See also *Saramaka v. Suriname* (ser. C) No. 185, para. 18.

¹⁰ U.N. Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, A/HRC/24/41 (July 1, 2013), paras. 27-30.

¹¹ El Tribunal Constitucional [Const. Court] June 19, 2007, Demanda de inconstitucionalidad interpuesta por el Colegio de Abogados del Callao contra el artículo único de la Ley No. 28642, Expediente No. 00007-2007-PI/TC, para. 13 (Peru) (citing Caso José Claver Nina-Quispe Hernández, en representación del Gobierno Regional de San Martín, Expediente N.º 0047-2004-AI/TC); see also ANNELEN MICUS, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AS A SAFEGUARD FOR JUSTICE IN NATIONAL TRANSITIONS 195-198 (2015).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ El Tribunal Constitucional [Const. Court] Dec. 9, 2004, Case of Gabriel Orlando Vera Navarrete, Expediente No. 2798-04-HC/TC, para. 8 (Peru).

¹⁶ MICUS, *supra* note 11, at 198 nn. 54-57.

¹⁷ This includes a responsibility to avoid causing or contributing to infringement of the human rights of others, and to carry out human rights due diligence; see U.N. Guiding Principles on Business and Human Rights [hereinafter UNGPs]. Princs. 11, 13, 15. Note that the responsibility to respect has been incorporated into the OECD Guidelines for Multinational Enterprises, which applies to companies operating from Canada, Claimant’s home state; see Org. for Econ. Cooperation & Dev., OECD Guidelines for Multinational Enterprises, paras. 1-2, 5, at 31 (2008) [hereinafter OECD Guidelines]. Note that the UNGPs were endorsed by the Human Rights Council in 2011 (Resolution 17/4 of June 16, 2011) after lengthy and extensive consultations. As a soft law instrument, the principles do not create new law, but rather help interpret how the human rights framework applies to business enterprises and their activities. While their adoption occurred around the same time of the events underlying this dispute, their content was thus not a new development at the time but rather a codification of a broad consensus on respective roles and responsibilities regarding human rights. A previous draft of the UNGPs was presented in the 2008 Report of the Special Representative of the Secretary-General on the issue of human

indigenous peoples' rights, the UN Special Rapporteur on the rights of indigenous peoples has clarified that "[t]he principle of due diligence also requires that companies recognize the duty of States to consult indigenous peoples (and, in some cases, to obtain their consent) prior to the adoption of measures that may affect them directly, and in particular in relation to projects that affect their traditional territories."¹⁸ The Special Rapporteur has further clarified that companies "should conduct due diligence before proceeding, or committing themselves to proceed, with extractive operations ... If they would not be in compliance [with international standards, including in relation to consultation and consent], the extractive operations should not be implemented, regardless of any authorization by the State to do so."¹⁹

Despite these well-established human rights obligations and responsibilities, indigenous peoples (and other citizens) in Peru have been severely and detrimentally affected by decades of extractive activities,²⁰ including by the environmental impacts caused by extractive projects.²¹ This has resulted in calls, both from the international community and within Peru, for the government to address existing abuses and protect indigenous peoples from future infringements on their rights.²² Social conflict that has emerged around extractive projects in Peru²³ has underscored the urgent need for the government to do so. Indeed, among three notable examples of social conflict highlighted by the UN Special Rapporteur on the rights of indigenous peoples following his official visit to Peru in 2013 was the opposition by the Aymara people to the proposed project at Santa Ana.²⁴

In recent years, Peru has taken steps to comply with its obligations by adopting a series of measures aimed at better protecting the rights of indigenous peoples from the consequences of extractive and other large-scale projects.²⁵ These measures include Law No. 29785, which was adopted in 2011 shortly after

rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

¹⁸ U.N. Human Rights Council, Report of the Special Rapporteur on the situation of rights and fundamental freedoms of indigenous people, James Anaya, U.N. Doc. A/HRC/15/37 para 87 (July 19 2010).

¹⁹ U.N. Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, A/HRC/24/41 (July 1, 2013), para. 40.

²⁰ See e.g., Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples' rights in Peru with regard to the extractive industries, A/HRC/27/52/Add.3, paras. 7, 18-23 (Jul. 3, 2014) [hereinafter A/HRC/27/52/Add.3] (estimating that 88% of hydrocarbon concessions currently under exploration or exploitation are located on indigenous lands); Inter-American Comm'n on Human Rights, *Indigenous Peoples, Afro-Descendant Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, para. 276 (2015) [hereinafter IACmHR Report 2015]; International Commission of Jurists, *Industrias Extractivas, Derechos Humanos y Conflictos Sociales en Perú* (2016).

²¹ See e.g., David Hill, *Pioneer gas project in Latin America fails indigenous peoples*, The Guardian, June 2, 2016; David Hill, *What is Peru's biggest environmental conflict right now?* The Guardian, June 8, 2015; Ben Hallman and Roxana Olivera, *Gold Rush: How the World Bank is Financing Environmental Destruction*, Huffington Post, Apr. 15, 2015. See also International Commission of Jurists, *Industrias Extractivas, Derechos Humanos y Conflictos Sociales en Perú* (2016).

²² See e.g., Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, CERD/C/PER/CO/14-17, Sept. 3, 2009, Part C, at 2; Defensoría del Pueblo, Informe N° 011-2009-DP/AMASPP/PP.

²³ A/HRC/27/52/Add.3, *supra* note 20, at paras. 27, 62, 71; IACmHR Report 2015, *supra* note 20, at paras. 71, 289, 301; Shannon K. O'Neil, *Peru's Balancing Act: Indigenous Rights and Economic Development*, Foreign Rels., Oct. 3, 2011; *Honeymoon over: Ollanta Humala struggles to contain opposition to mining projects*, The Economist, Nov. 19, 2011. See also Defensoría del Pueblo, Reportes Mensuales de Conflictos Sociales, <http://www.defensoria.gob.pe/temas.php?des=3#r>.

²⁴ A/HRC/27/52/Add.3, *supra* note 20, at para. 25.

²⁵ Supreme Resolution No. 131-2011-PCM, May 22, 2011 (creating the Multi-Sectoral Commission of the Central Government); Supreme Decree No. 008-2011-MINAM, May 28, 2011 (prohibiting mining concessions in Khapia Hill, which the decree considers a landscape reserve); Decree Suspending the Admissions of New Mining Requests in the Provinces of Chucuito, El Collao, Puno and Yunguyo in the Puno Department, Supreme Decree No. 026-2011-EM, May 29, 2011 (suspending the admission of Mining Concession Applications in the territory of the provinces of Chucuito, el

the issuance of Supreme Decree No. 032 and the height of social unrest around the proposed project at Santa Ana, and which seeks to operationalize Peru's obligations under ILO 169.²⁶ The steps taken by Peru have been welcomed by *inter alia* the UN Special Rapporteur on the rights of indigenous peoples and the UN Committee on the Elimination of Racial Discrimination (CERD).²⁷ It is in the context of these measures, which aimed to increase protections of recognized rights, that Peru's actions at the center of the present case were taken.

II. ARGUMENTS GOING TO JURISDICTION: EXISTENCE OF A COVERED INVESTMENT

The meaning of the term "investment" in investment treaties is a key factor influencing the scope of state obligations under those agreements and potential impacts that the treaties have on government policy space to protect human rights and advance other important public interest objectives. Consequently, as is shown in the Peru-Canada FTA, a number of states have been increasingly careful in expressly defining what is, and what is not, covered under that term. As is explained in this section, accepting the interpretation advanced by Claimant would require the Tribunal to gloss over crucial nuance in the Treaty regarding the scope of protections it offers. Moreover, if Claimant's interpretation were accepted, it would give rise to two related and problematic policy implications. First, it would enable Claimant to obtain something the company did not yet have: namely, a right to exploit minerals in the Santa Ana concessions (or, more specifically, compensation as if it had secured that right). Such an outcome would override limits on those rights found in otherwise applicable domestic and international legal norms. Second, it would enable Claimant to disregard the rights and interests of non-parties to the arbitral dispute, including, but not limited to, the rights of indigenous peoples.

A. Recognizing a right to exploit mineral resources in the Santa Ana concessions is inconsistent with the definition of an "investment" under the Peru-Canada FTA.

The Peru-Canada FTA is one of a relative minority of treaties that protects both established investments and, in certain contexts, the establishment of investments. In so doing, it carefully identifies and differentiates between, on the one hand, the different types of assets and interests that constitute protected

Collao, Puno, and Yunguyo of Puno department, for a period of twelve months); Decree that Complements Emergency Decree No. 028-2011, June 17, 2011; Supreme Decree No. 032-2011-EM, June 25, 2011 (repealing Supreme Decree No. 083-2007-EM, which declared the Santa Ana Mining Project to be of public necessity, authorizing its concessions to Claimant, and includes provisions aimed at prohibiting mining activities in Huacullani and Kelluyo, Chucuito province, Puno department); Decree that Supplements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 (adopting remediation rules in the basin of the rivers Ramis and Suches); Law No. 29785, Sept. 7, 2011 [hereinafter 2011 Consultation Act] (required authorities and investors to conduct prior consultation processes with certain indigenous peoples).

²⁶ While Law No. 29785 was enacted in 2011, it had been under development for several years prior to its enactment. In 2008, the Peruvian Human Rights Ombudsman was requested to issue an opinion on a draft of the law. The Ombudsman issued its opinion the following year, and several of its recommendations were subsequently incorporated into the final law as enacted in 2011. See Peru Human Rights Ombudsman, *El Derecho a la Consulta de Los Pueblos Indígenas: Opinión de la Defensoría del Pueblo sobre Dictamen recaído en los proyectos de Ley No 413/2006-CR, 427/2006-CR Y 2016/2007-CR* [The Right to Consultation of Indigenous Peoples: Opinion of the Ombudsman on Opinion fallen in draft Law No 413/2006-CR, 427/2006-CR and 2016/2007-CR], Opinion No 011-2009-DP/AMASPPI.PPI, at 1 (May 2009).

²⁷ See e.g., Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, CERD/C/PER/CO/14-17, Sept. 3, 2009, at para. 9; A/HRC/27/52/Add.3, *supra* note 20, at 44; Informe del Relator Especial sobre los derechos de los pueblos indígenas, James Anaya, Adición: La situación de los derechos de los pueblos indígenas en Perú, en relación con las industrias extractivas, U.N. Doc. A/HRC/27/52/Add.3, Ma 7, 2014, para. 33, at 11.

investments and the protections available for those investments; and, on the other, the types of pre-establishment interests and activities that can be covered under the Treaty and the protections available to investors for their pre-establishment efforts. The argument advanced by Claimant that its investment included a right to mine the Santa Ana concessions²⁸ would, if accepted, blur the Treaty's important distinctions between pre- and post-establishment coverage.

With respect to the difference between established investments and pre-establishment activities and interests, the Treaty specifies that the former are certain assets identified in an exhaustive list. As Claimant has stated,²⁹ these include locally established enterprises (art. 847(a)); tangible and intangible property rights owned by the investor (art. 847(g)); and interests arising under concession contracts (art. 847(h)).³⁰ In contrast, the Treaty indicates that the latter includes such interests as those arising from an investor's still un-granted "application for a permit or license" authorizing intended operations.³¹

The distinction between the two categories matters: depending upon whether there is either an established investment or pre-establishment interests or activities, the scope of protections available under the Treaty will differ. In particular, while the fair and equitable treatment (FET) and expropriation obligations only protect *established* investments, not investors seeking to establish those investments or activities at the pre-establishment phase,³² the Treaty's articles on national treatment, most-favored nation treatment, and prohibitions on performance requirements expressly extend investor protections to the pre-establishment phase.³³

This clear and careful differentiation reflects an approach whereby the Treaty, with respect to the establishment phase, prohibits discrimination in permitting or licensing decisions and prevents host states from conditioning permits or licenses on investors' compliance with certain performance requirements. Then, *once relevant permits or licenses have been granted* and an investment has thereby been established, the Treaty's articles on FET and expropriation restrict host states' freedom to take or interfere with that investment.³⁴ By adopting this approach, the Parties to the Treaty ensure that the agreement does not require compensation relating to or for the granting of permits, licenses, or other approvals that have not yet been conferred under domestic law. Consistent with the general principle that internal law,

²⁸ Claimant's Memorial, paras. 103-111.

²⁹ *Id.*

³⁰ Peru-Canada FTA, art. 847.

³¹ Peru-Canada FTA, nn. 6-7. The Trans-Pacific Partnership Agreement (TPP), which both Canada and Peru have negotiated, reflects a similar approach whereby permits and licenses are only protected investments *if* "conferred pursuant to" and only to the extent valid under the host state's domestic law. TPP, art. 9-1(g) and n. 4.

³² Peru-Canada FTA, arts. 805 and 812 (specifying that obligations apply to "investments," not "investors").

³³ Peru-Canada FTA, arts. 803, 804, 807. *See also* Apotex Holdings Inc. & Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Rejoinder on Merits and Reply on Objections to Jurisdiction of the United States, paras. 284, 288-289 (Sept. 27, 2013).

³⁴ If there were an established investment such as a local subsidiary that sought unsuccessfully to acquire a permit, the investment could potentially have a claim for a breach of the FET obligation. In this case, however, Claimant brought its claims under Article 819 of the Treaty as an investor, not under Article 820 for harms to locally established enterprises. Claimant is therefore limited to claims alleging harms suffered by it as an investor. *See e.g., GAMI Investments, Inc. v. Government of United Mexican States*, Submission of the United States of America, paras. 1-18 (June 30, 2003). For more on the distinction that corporate law regimes typically draw between the nature of harms suffered by investors and harms suffered by the companies in which they hold shares, *see* David Gaukrodger, *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice* (OECD Working Papers on International Investment, 2014/03); David Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law* (OECD Working Papers on International Investment, 2014/2); David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency* (OECD Working Papers on International Investment, 2013/3). *See also infra*, Section III.C (discussing Claimant's FET claims).

not international law, creates and defines the contours of property rights,³⁵ the Peru-Canada FTA focuses on protecting extant property rights; it does not create new ones. The host states retain significant policy space to make what are often complex and fact-intensive administrative determinations regarding whether (and on what terms) to allow different regulated activities.

In the present case, the disputing parties agree that Claimant had not yet secured all government approvals necessary for mineral extraction. Its extractive project was therefore at the pre-establishment, permit-seeking phase. Based on the Treaty's definition of an investment, and its treatment of permit applications as being an example of pre-establishment activities, the Tribunal should therefore reject Claimant's claims that its investment included the right to exploit mineral resources in the Santa Ana concessions. To conclude otherwise would be to broadly and unreasonably expand the Treaty's reach, contrary to its terms.

B. Interpreting Claimant's "investment" as including a right to exploit mineral resources would run counter to national law and international human rights law.

In addition to being inconsistent with the language of the Peru-Canada FTA, determining that Claimant's "investment" effectively includes a right to exploit mineral resources would have troubling legal and policy implications. Such a determination would allow investors to use investment protection instruments to benefit from rights they were not entitled to enjoy under applicable law. Additionally, this would undermine the important roles of domestic and international law in safeguarding and advancing environmental and human rights objectives.

1. Claimant has not met environmental, social, and other requirements established by Peruvian domestic law that are necessary for mineral exploitation.

Peruvian law, in order to protect the environment and its citizens, establishes multiple requirements that must be met before a mining project can proceed. One key requirement is the environmental impact assessment (EIA), which in Peru includes social elements such as a citizen participation plan, and which must be submitted by the company and approved by the government. EIAs are vitally important and complex processes that allow for careful assessments of a project's permissibility and desirability in light of potential environmental and social concerns; they enable meaningful consideration of alternatives and mitigation strategies. Peruvian law also allows citizens to seek the revocation of a decision to approve an EIA.³⁶

By the time the government adopted Supreme Decree N. 032, which is at the heart of the dispute at hand, Claimant had no right to undertake any exploitation of mining resources.³⁷ Such a right could only be established once Claimant met all necessary requirements and obtained all necessary authorizations,³⁸ including both an approved EIA as well as at least 40 other permits required to construct and operate a mine that Claimant had not yet obtained.³⁹

³⁵ MONIQUE SASSON, *SUBSTANTIVE LAW IN INVESTMENT TREATY ARBITRATION: THE UNSETTLED RELATIONSHIP BETWEEN INTERNATIONAL AND MUNICIPAL LAW*. KLUWER LAW INTERNATIONAL 65-96 (2010).

³⁶ Second Expert Report of Luis Rodríguez-Mariátegui Canny, para. 101 (Mar. 31, 2016) [hereinafter Second Canny Report].

³⁷ Respondent's Counter-Memorial, paras. 166, 176 (Oct. 6, 2015).

³⁸ See Expert Report of Luis Rodríguez-Mariátegui Canny, para. 34 (Oct. 6, 2015) [hereinafter First Canny Report].

³⁹ See *id.*, Section III(D), at 60. See also Second Expert Report of Antonio Alfonso Peña Jumpa, para. 18 (Apr. 4, 2016); Second Canny Report, para. 20 (Mar. 31, 2016).

Other relevant domestic legal requirements relate to indigenous lands.⁴⁰ For example, the Land Act requires that investors obtain prior agreement from the owners of indigenous lands before using such lands for extractive activities,⁴¹ and both the current and previous Constitutions have established protections for indigenous lands.⁴²

At the time Supreme Decree 032 was adopted, Claimant had not yet reached an agreement with indigenous communities regarding land use rights in the area surrounding the project.⁴³ Components of the proposed project at Santa Ana are located on land that is partially owned by indigenous peoples, organized into *Comunidades Campesinas*, and partially privately owned by 94 indigenous community members.⁴⁴ To successfully claim that it had a right to own and operate a mine on this land, Claimant would have had to negotiate the acquisition of the land with the relevant communities as well as with the 94 community members. The absence of these land use rights further demonstrates that Claimant had not yet complied with the legal prerequisites necessary to obtain a right to mine the Santa Ana concessions.

2. *Claimant has not demonstrated compliance with its human rights responsibilities regarding consultation and free, prior and informed consent, which is critical before commencing mineral exploitation.*

As noted above in Section I.B, investors have a responsibility to respect human rights.⁴⁵ In the context of extractive industry projects, the UN Special Rapporteur on the rights of indigenous peoples has explained that companies should not proceed with operations if they would not be in compliance with international standards related to consultation and consent.⁴⁶ Engaging in consultation and obtaining consent is thus a critical prerequisite before engaging in mining exploitation. Failure to do so undermines claims that an investor has a right to exploit resources.

Claimant has not shown that it met its responsibilities under international human rights law in the context of its interactions with the Aymara people, in particular the right of the Aymara people to be consulted according to the established standard, and to give or withhold their FPIC.⁴⁷ There is no evidence that Claimant *meaningfully consulted* communities regarding its proposed project at Santa Ana; rather, it appears that Claimant assumed it would suffice to *tell* the Aymara people that the company would be engaging in mining activities, presenting the project as a *fait accompli* rather than as a proposed project for which the views and consent of the Aymara would be necessary for establishment. For example,

⁴⁰ “Indigenous lands” used here to refer collectively to the native lands and the lands of *Comunidades Campesinas*, which include the Aymara people.

⁴¹ Law on the Private Investment for the Development of Economic Activities Within the National Territory and Native Communities Lands, Law No. 26505, art. 7, July 14, 1995 [hereinafter “Land Act”]. *See also* First Canny Report, para. 66.

⁴² The current Peruvian Constitution establishes that indigenous peoples have free disposition over their lands, and the 1979 Constitution established that the lands of *Comunidades Campesinas* are inalienable, unless approval for any transfer of such lands is obtained from at least two-thirds of “qualified members” of the relevant community. *See* Const. art. 89 (Peru) (with amendments through 2009); Const. art. 163 (Peru) (with amendments through 2009); *see also* First Canny Report, para. 31 (noting that the rights recognized in the 1979 Constitution remain in effect, per the Civil Code of Peru, article 136).

⁴³ Second Canny Report, para. 2(c); Respondent’s Rejoinder, paras. 330-331.

⁴⁴ First Canny Report, para. 67 (Oct. 6, 2015).

⁴⁵ *See* sources cited *supra* note 17.

⁴⁶ U.N. Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, A/HRC/24/41 (July 1, 2013), para. 40.

⁴⁷ *See* discussion and references *supra* Section I.B.

Claimant notes that the public hearing held in February 2011 provided an opportunity for the company to “present” the proposed project to communities,⁴⁸ rather than to consult with them. Claimant acknowledges that no less than 103 questions concerning the proposed project were raised during the February 2011 hearing alone, yet it frames these questions as mere evidence that those who attended the hearing “were curious and engaged in the process,” rather than focusing on the substantive content of the questions themselves.⁴⁹ It appears that there was little or no room for intervention from community members who attended the hearing, and that failure to address their concerns resulted in the first public demonstrations against the proposed project at Santa Ana, which took place directly after the February 2011 hearing and directly outside the hearing’s location.⁵⁰ Furthermore, in its letters to shareholders, Claimant describes its “workshops to *educate*” the indigenous communities about its activity in the area of Santa Ana.⁵¹ It does not appear that Claimant made any attempts, or even considered making an attempt, to obtain consent from affected communities for its proposed project.⁵²

Claimant’s failure to demonstrate that it had adequately consulted the Aymara people and received their informed consent undermines any argument that the company had a right to exploit minerals in the Santa Ana concession. Just as Claimant had not yet obtained all necessary permits and approvals from the government, as described in the sub-section above, so too the company had not yet secured the consent of potentially affected indigenous peoples. Respecting the Aymara people’s right to FPIC was Claimant’s responsibility under international human rights law, and securing their consent was an additional critical component of its efforts to gain a right to exploit minerals.

C. Interpreting Claimant’s “investment” as including a right to exploit mineral resources would frustrate the rights of non-parties and be inconsistent with the objectives of the Peru-Canada FTA.

Claimant faced many hurdles to overcome before it could obtain exploitation rights over the minerals in the proposed Santa Ana project area. Without fulfilling its duty of establishing that relevant prerequisites have been satisfied, Claimant cannot claim to possess exploitation rights protected as investments under the Treaty. To hold otherwise would enable Claimant to obtain compensation for a fully permitted extractives project without having to satisfy all necessary conditions and without having to bear the risk that necessary legal authorizations could be denied.

The relief that Claimant seeks, therefore, requires a *de facto* waiver of Peru’s environmental requirements, and of requirements and responsibilities established to protect the rights of indigenous peoples. Moreover, granting Claimant its requested relief would mute the voices of other stakeholders in Peru. For example, if the Tribunal were to find that Claimant had exploitation rights constituting a protected investment, thereby effectively deeming the EIA approved and valid under Peruvian law, it would be ignoring the rights of domestic citizens to challenge EIAs. As citizen challenges can result in the government’s revocation of an EIA, citizens have important power over the viability of projects. A holding that the investor had (or should be compensated for) a right to mine irrespective of the possibility for citizen suits would disregard the roles and rights of those potential litigants. Similarly, such a finding would effectively constitute a determination that the company had secured the prior consent—a protected

⁴⁸ Claimant’s Reply, para. 90.

⁴⁹ Claimant’s Reply, para. 90 (Jan. 8, 2016).

⁵⁰ Expert Report of Antonio Alfonso Peña Jumba paras. 77, 98 (Oct. 6, 2015). Interviews with Derechos Humanos y Medio Ambiente, Mar. 30, 2016 and May 26, 2016.

⁵¹ Bear Creek April 2011 Letter to Shareholders, at 4, www.sedar.com; Bear Creek April 2010 Letter to Shareholders, at 3 (emphasis added), www.sedar.com.

⁵² See discussion and references *supra* Section I.B.

right—of the Aymara people, notwithstanding the significant disputes of fact and law evidenced in the disputing parties’ submissions, as well as in Aymara representatives’ own strong contestation of Claimant’s perspective.⁵³ These potential implications are particularly significant given the reality that no Aymara representatives are party to or can fully participate in these arbitration proceedings.

Not only do these outcomes frustrate Peruvian domestic law and international human rights law, but they also contravene the environmental and social policy choices reflected in the Peru-Canada FTA. The Treaty reflects a commitment by its Parties to strictly comply with and not waive or derogate from environmental laws in order to attract or keep investments,⁵⁴ and to abide by high standards of corporate social responsibility.⁵⁵ A decision deeming a right to mine to be part of Claimant’s investment would be inconsistent with the objectives of both of those promises.

III. ARGUMENTS GOING TO THE MERITS: FAIR AND EQUITABLE TREATMENT

Claimant argues that, even if it did not have a right to mine,⁵⁶ it had legitimate expectations that it would be able to develop its mining project, and that those expectations are protected under the Treaty.⁵⁷ As this section explains, there are at least three different grounds on which those arguments should be rejected. First, Claimant has not provided adequate proof that the customary international law (CIL) minimum standard of treatment (MST), to which the Treaty’s FET obligation is tethered,⁵⁸ protects investors’ legitimate expectations.⁵⁹ Second, the doctrine of legitimate expectations is fundamentally flawed on legal and policy grounds, and does not reflect the purpose of the Peru-Canada FTA. Third, even if investors’ legitimate expectations were protected under the Treaty, Claimant could not demonstrate it held legitimate expectations of a right to exploit mineral resources in the Santa Ana concessions.

A. The Peru-Canada FTA’s FET obligation, which is tethered to the MST, does not protect investors’ legitimate expectations.

The Treaty expressly states that the FET obligation incorporates, but does not go beyond, obligations owed by states under the CIL MST.⁶⁰ Establishing the content of those obligations requires proof of *opinio juris* and state practice,⁶¹ and the burden is on the investor to provide that proof.⁶² In this case,

⁵³ Interviews with Derechos Humanos y Medio Ambiente, Mar. 30, 2016 and May 26, 2016.

⁵⁴ Peru-Canada FTA, art. 809.

⁵⁵ Peru-Canada FTA, art. 810.

⁵⁶ Claimant’s Reply, paras. 234-39 (Jan. 8, 2016).

⁵⁷ Claimant’s Reply, paras. 353, 356, 359 (Jan. 8, 2016).

⁵⁸ Peru-Canada FTA, art. 805(1)-(2).

⁵⁹ Claimant also alleges that the MST under CIL requires host states to treat foreign investors transparently, which, in turn, includes a requirement on governments to provide advance notice of regulatory decisions. (Claimant’s Memorial, paras. 167-69). As with the doctrine of legitimate expectations, however, Claimant has not provided proof of state practice and *opinio juris* sufficient to demonstrate that transparency and advance notice in this context are mandated under CIL. (See, e.g., *Apotex Holdings*, Award, paras. 9.15-9.27, 9.40). (August 25, 2014)). Moreover, assuming there were such a rule and that it was breached, Claimant does not establish nor even allege how any lack of transparency or notice caused the investor harm. As such, these FET claims should be dismissed as they do not meet the Treaty’s requirement that, in order for claims to be presented before a tribunal, they must allege “loss or damage” caused by a treaty breach. (Peru-Canada FTA, art. 819).

⁶⁰ Peru-Canada FTA, art. 805 (1)-(2).

⁶¹ Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, T.S. No. 933 (1945); *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*) (Merits), 1986 I.C.J. 14, para. 207 (June 27, 1986).

⁶² See, e.g., *Apotex Holdings v. United States*, ICSID Case No. ARB(AF)/12/1, para. 9.40 (August 25, 2014); *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, para. 273. *Windstream Energy LLC v. Canada*, Canada’s Counter-

however, not only did the investor fail to cite any *opinio juris* or state practice evidencing that CIL requires protection of investors' legitimate expectations,⁶³ it rejected the notion that such proof was required⁶⁴ and relied instead on arbitral jurisprudence for its arguments regarding protection of investors' expectations. As the tribunal in *Apotex Holdings v. United States* recently affirmed, such an approach is inadequate, and cannot support Claimant's contention that CIL protects its alleged "legitimate expectations."⁶⁵

Moreover, state practice reflected in government submissions to tribunals in investor-state disputes—which include submissions by states as respondents and as non-disputing parties—shows states expressly disagreeing with the contention that CIL prevents states from interfering with investors' legitimate expectations. In disputes arising under treaties that, similar to the Peru-Canada FTA, bind the FET obligation to the MST under CIL, states such as Mexico,⁶⁶ the United States,⁶⁷ El Salvador,⁶⁸ and Claimant's home state of Canada⁶⁹ routinely dispute the relevance of investors' expectations to the FET standard.⁷⁰ Indeed, as Canada recently stated in a NAFTA dispute, "There is simply no evidence of ... practice of any of ... the 193 members of the United Nations, sufficient to show that the protection of legitimate expectations has become a rule of customary international law."⁷¹

These submissions are crucial evidence of both state practice and the treaty parties' shared understanding of the instruments they have negotiated as both home and host states. As such, the force of these government submissions overpowers the vague and unsubstantiated contention that CIL requires protection of investors' mere expectations regarding their economic interests.

B. Interpreting the FET obligation as protecting investors' "legitimate expectations" generates negative policy outcomes and does not reflect the purpose of the Peru-Canada FTA.

In addition to lacking proof of state practice and *opinio juris*, protection of investors' expectations regarding development of their economic plans appears inconsistent with the content and objectives of modern investment protection treaties. For one, an investor cannot succeed on its expropriation claims unless it first establishes that it possessed a valid property right with which the government subsequently interfered.⁷² Interpreting the FET obligation as requiring states to provide compensation for interference

Memorial, para. 370 (Jan. 20, 2015). In the TPP, Peru and Canada have *also* clarified TPP, art. 9.23(7) (clarifying that the burden is on the investor to prove the elements of its CIL claims).

⁶³ See generally Claimant's Memorial (containing no references to *opinio juris* or state practice) and Claimant's Reply (containing no discussion of how state practice and *opinio juris* establish a rule requiring states to protect investors' "legitimate expectations").

⁶⁴ Claimant's Reply, n.931 at 187.

⁶⁵ *Apotex Holdings*, Award, para. 9.17.

⁶⁶ See, e.g., *Eli Lilly v. Canada*, Case No. UNCT/14/2, Submission of Mexico Pursuant to NAFTA Article 1128, para. 15 (Mar. 18, 2016).

⁶⁷ See, e.g., *Eli Lilly v. Canada*, Case No. UNCT/14/2, Submission of the United States of America, para. 13 (Mar. 18, 2016).

⁶⁸ See, e.g., *Spence International Investments v. Costa Rica*, ICSID Case No. UNCT/13/2, Non-Disputing Party Submission of the Republic of El Salvador, paras. 8-12 (Apr. 17, 2015).

⁶⁹ See, e.g., *Eli Lilly v. Canada*, Case No. UNCT/14/2, Government of Canada Rejoinder Memorial, para. 264 (Dec. 8, 2015).

⁷⁰ See Lise Johnson, *Ripe for Refinement: The State's Role in Interpretation of FET, MFN, and Shareholder Rights* (GEG Working Paper 2015/101), 15-17.

⁷¹ *Windstream Energy LLC v. Canada*, Canada's Counter-Memorial, para. 405 (January 20, 2015).

⁷² See, e.g., *Emmis Int'l Holding, B.V. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, paras. 158-177 (Apr. 16, 2014); *Merrill & Ring Forestry v. Canada*, Award, para. 142 (Mar. 31, 2010).

with investor expectations—irrespective of whether these expectations constitute valid, vested rights—would enable claimants to merely reframe their expropriation claims as breaches of the FET obligation, and render the limits on the expropriation obligation meaningless contrary to the principle of effectiveness in treaty interpretation.

Additionally, to the extent that investors’ “legitimate expectations” can be based on assurances, representations, or other actions by government officials that are insufficient to give rise to valid legal rights under applicable domestic law, protection of those expectations risks undermining domestic legal and policy frameworks and upsetting checks and balances duly placed on the different spheres of authority within a state.⁷³ A mining project, for example, may require separate approvals from officials in environmental, mining, and other agencies; it may also require approvals from both federal/central and local officials or entities. Furthermore, the authority of one branch (such as an administrative branch) to approve or govern a project may be subject to the scrutiny of, and revocation by, another branch (such as the judicial branch). These structures distribute power and can be critical for effectively protecting different and potentially competing interests. The doctrine of protection of legitimate expectations, however, threatens to frustrate this system by effectively binding the state to representations made by certain officials or entities, even if those representations were outside the scope of the speaker’s authority or would otherwise not have been binding under domestic law.⁷⁴

For example, a project may be sought or encouraged by investment promotion officials, mining agencies, and other federal/central-level officials eager to increase tax revenue and foreign investment; environmental officials and local communities, however, may adopt a more negative or cautious view of the project and seek to withhold or delay approval. As Claimant’s claims suggest, if an investor were required under internal law of the host state to obtain approvals from all of those players, and succeeded in obtaining approvals and encouragement from some, but not all, of them, the investor could potentially invoke the approvals and encouragement that it had received in order to argue it had had legitimate expectations that the project would be able to proceed, and could then seek compensation for frustration of those expectations if the project were ultimately unable to overcome all legal hurdles.

Allowing project proponents to secure compensation for their reliance on certain approvals and encouragements is particularly problematic in the context of investments in the extractive industries when benefits may be felt at the national level, but costs concentrated at the local level and, commonly, among indigenous or marginalized communities. Those who benefit from and support the project may knowingly or negligently give representations that arguably generate investor expectations; if environmental officials, local communities, or others later withhold their approval of the investor’s project, they may face pressure and arguments that stopping or otherwise interfering with the project would be inconsistent with the treaty and would require the government (and taxpayers) to pay the investor compensation.⁷⁵

⁷³ For this reason, some domestic jurisdictions do not protect investors’ reliance on government statements or representations that would otherwise be nonbinding under domestic law. *See, e.g.,* Alan I. Saltman, *The Government’s Liability for Actions of its Agents that are Not Specifically Authorized: The Continuing Influence of Merrill and Richmond*, 32 PUBLIC CONTRACT L.J. 775, 796 (2003).

⁷⁴ *See, e.g.,* *Micula v. Romania*, ICSID Case No. ARB/05/20, Award, paras. 675-677 (December 11, 2013); *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, para. 547 (April 8, 2013); *MTD Equity v. Chile*, ICSID Case No. ARB 01/7, Award, paras. 164-166 (May 25, 2004).

⁷⁵ *See, e.g.,* Claimant’s Memorial, paras. 98-99 (citing statements by Peruvian officials).

While an award of compensation would provide broad protections for investors' reliance interests, it would undermine the rule of law and risk nullifying the voice and legal authority of those who may be concerned about or opposed to proposed projects. Moreover, contrary to the Treaty's objectives of encouraging corporate social responsibility⁷⁶ and ensuring adherence to environmental and social norms,⁷⁷ protecting investors' reliance interests would reduce the need and incentive for investors to do robust due diligence to understand all issues and fully comply with all legal prerequisites.

Interpreting the FET obligation as protecting legitimate expectations would thus run counter to the text, object, and purpose of the Peru-Canada FTA (which explicitly ties FET to MST); render the expropriation clause meaningless by allowing the investor to obtain a remedy without having to establish any actual property rights; and permit the investor to avoid risks of challenges and opposition to the project by those with the legal rights to object.

C. Should the Tribunal proceed to an assessment of expectations, Claimant did not possess relevant legitimate expectations.

The preceding sections have argued that the Tribunal should not engage in an analysis of Claimant's expectations, as these expectations are not protected by the FET standard contained in the Peru-Canada FTA, and protection of such expectations generates negative policy outcomes and does not reflect the object and purpose of the Treaty. However, should the Tribunal choose to reject these arguments and proceed to an assessment of Claimant's purported expectations, the following section argues that, in order to be considered legitimate, Claimant's expectations should have been contextualized by: (1) Peru's obligations under international human rights law, which form part of the regulatory framework applicable to the extractive sector in Peru; and (2) the well-known and widespread opposition to extractive projects by indigenous peoples in Peru, coupled with correlated tendency toward social conflict in regions targeted for such investment. Claimant should have expected that Peru might take steps to comply with its obligations under international human rights law, and that the government would be required to address any social conflict that might emerge with respect to proposed activities at Santa Ana.

- 1. Peru's long-standing obligations under human rights law requiring the protection of indigenous peoples' rights are relevant for the determination of whether Claimant's expectations can be considered legitimate and reasonable.*

As outlined in Section I.B, Peru has obligations under international human rights law, including obligations with respect to the rights of indigenous peoples. Peru's obligations were already well established by the time the Peru-Canada FTA was signed, and also existed well before the time that Claimant purportedly formed its expectations with respect to the proposed project at Santa Ana.⁷⁸

Peru's obligations under international human rights law, also incorporated into domestic law, form part of the legal and regulatory framework applicable to extractive and other large-scale projects in Peru.⁷⁹ Such obligations are thus relevant in considering any expectations claimed by Claimant. An investor must have

⁷⁶ Peru-Canada FTA, pmb1.

⁷⁷ Peru-Canada FTA, art. 809.

⁷⁸ Peru ratified ILO 169 in 1994, the ICCPR in 1978, and the ACHR in 1978. It also endorsed UNDRIP in 2007. See citations and discussion *supra* Section I.B.

⁷⁹ See discussion and references *supra* Section I.B.

a general awareness of the regulatory environment in which it seeks to operate,⁸⁰ and cannot claim its legitimate expectations to have been frustrated by the enforcement or application of the regulatory framework already in force at the time of making its investment.⁸¹ Furthermore, as noted by the tribunal in *Parkerings v. Lithuania*, host states have a “right to enact, modify or cancel” laws at their own discretion, and there is nothing objectionable about amending a regulatory framework that existed at the time an investor made its investment.⁸² In this context, investors cannot claim to have expectations that are legitimate if such expectations fail to be informed by the possibility of regulatory change,⁸³ and an assessment of whether frustration of expectations was justified and reasonable must take into consideration “the host State’s legitimate right subsequently to regulate domestic matters in the public interest.”⁸⁴

Claimant’s own statements concerning its activities in Peru indicate that it was aware of the relevance of human rights law to the regulatory framework applicable to its purported investment. For example, in 2004, Claimant noted that the Constitutional Tribunal’s role in interpreting basic rights and the creation of a human rights Ombudsman’s Office in Peru were two factors relevant to and informing its investment decisions.⁸⁵ In 2010 and 2011 letters to shareholders, Claimant represented that its management was “strongly committed towards responsible project development consistent with World Bank standards, including informed consent practices.”⁸⁶

Supreme Decree No. 032 was one of a series of measures adopted in 2011 that sought to amend the existing regulatory framework applicable to extractive (and other large-scale) projects to improve Peru’s compliance with its obligations under international human rights law with respect to indigenous peoples.⁸⁷ Claimant should not have assumed that the establishment of any exploitation rights would be immune to such changes in the existing regulatory framework that fall within the host state’s legitimate right to regulate in the public interest,⁸⁸ particularly when those changes are required of the state to comply with its own legal obligations.

2. *The social context in which Claimant sought to establish its investment is also relevant for the determination of whether its expectations were legitimate and reasonable.*

In the context of assessing the legitimacy and reasonableness of expectations, tribunals have recognized that any such assessment “must take into account *all circumstances*, including not only the facts

⁸⁰ See e.g. *Methanex Corp. v. United States of America*, Final Award, Part IV, Chapter D, para. 10 (Aug. 3, 2005). Investors must also take into account the level of development of the host state in shaping their expectations. See also *Genin, Eastern Credit Ltd. v. The Republic of Estonia*, ICSID Case No. ARB/99/2, para. 348 (Jun. 25, 2001); *Parkerings-Compagniet A.S. v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, paras. 335-336 (Sept. 11, 2007).

⁸¹ See e.g., *The Oscar Chinn Case*, PCIJ Series A/B No. 63, pp. 19-23, at 23 (1964); see also Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept* 2013 ICSID REV. 1; Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT’L LAWYER 87, 102-103 (2005); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 134-135 (2008).

⁸² *Parkerings-Compagniet v. Lithuania*, ICSID Case No. ARB/05/8, para. 332.

⁸³ *Id.*, paras. 334-338.

⁸⁴ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Arb., Partial Award, para. 305 (Mar. 17, 2006)

⁸⁵ See, e.g., *Bear Creek Annual Information Form for 2005*, at 4 (Apr. 28, 2006); *Bear Creek Annual Information Form for the Year Ended December 2013*, at 12 (Apr. 3, 2014); *Bear Creek Letter to shareholders 2010*, at 3; *Bear Creek Letter to Shareholders 2011*, at 4.

⁸⁶ *Bear Creek Letter to shareholders 2010*, at 3; *Bear Creek Letter to Shareholders 2011*, at 4 (emphasis added).

⁸⁷ See sources cited *supra* note 25.

⁸⁸ See e.g., *Saluka v. Czech Republic*, Partial Award, para. 305.

surrounding the investment, but also the political, *socioeconomic*, *cultural* and historical conditions prevailing in the host State.”⁸⁹

Thus, in order to be legitimate and reasonable, Claimant’s expectations should also be assessed against the prevalence of social conflict around extractive projects in Peru. At the time that Claimant sought to establish its investment, significant opposition to extractive projects in Peru had been widely reported; indeed, this opposition was a well-known feature of the investment climate.⁹⁰ Indeed, opposition to extractive projects, and the correlated tendency toward social conflict, had been well documented by national and international human rights experts, including the Peruvian Human Rights Ombudsman and the UN Special Rapporteur on the rights of indigenous peoples.⁹¹ This situation was even acknowledged by Claimant in its disclosures to shareholders.⁹²

In this context, Claimant knew or should have known about the tendency for social conflict to arise in response to extractive projects, and its expectations should have been contextualized on the basis of these circumstances.

IV. ARGUMENTS FALLING UNDER ARTICLE 2201.3(B) OF THE PERU-CANADA FTA

In addition to not constituting a breach of the Peru-Canada FTA, the series of measures related to extractive projects and the rights of indigenous peoples that Peru adopted in 2011,⁹³ which include Supreme Decree No. 032, fall under the general exception described in Article 2201.3(b) of the Peru-Canada FTA, which covers measures necessary to ensure compliance with laws not inconsistent with the Treaty so long as the measures are not arbitrary, unjustifiably discriminatory, or a disguised restriction on trade or investment. Under this exception, “laws” can include international human rights laws, which are codified in treaties ratified by Peru, incorporated into Peruvian national law via the Constitution, and not inconsistent with the Peru-Canada FTA. International human rights laws obligate Peru to respect and protect indigenous peoples’ collective rights, including their right to FPIC. Peru’s measures in 2011, including Supreme Decree No. 032, were necessary to ensure compliance with such obligations, with the decree creating the conditions necessary for Peru to immediately and effectively restore the Aymara people’s right to FPIC. Supreme Decree No. 032 is not a disguised restriction on international investment,

⁸⁹ Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, para. 340 (Aug. 12, 2008) (emphasis added); *See also* Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Award, para. 195 (Aug. 27, 2009); Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, Award, para. 245 (May 24-30, 2012); Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award, para. 348 (June 25, 2001); Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award paras. 335-336 (Sept. 11, 2007); Methanex Corporation v. United States of America, UNCITRAL Arb., Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005).

⁹⁰ *See e.g.* Shannon K. O’Neil, *Peru’s Balancing Act: Indigenous Rights and Economic Development*, FOREIGN RELS., Oct. 3, 2011; *Honeymoon over: Ollanta Humala struggles to contain opposition to mining projects*, THE ECONOMIST, Nov. 19, 2011; Inter-American Comm’n on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities* (2015).

⁹¹ *See e.g.* Defensoria del Pueblo, Reportes Mensuales de Conflictos Sociales, <http://www.defensoria.gob.pe/temas.php?des=3#r>. Note that the conflict concerning the proposed project at Santa Ana is referred to in numerous reports from 2008-2011. U.N. Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, *Extractive Industries Operating Within or Near Indigenous Territories*, U.N. Doc. A/HRC/18/35 (July 11, 2011); U.N. Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples’ rights in Peru with regard to the extractive industries, A/HRC/27/52/Add.3 (Jul. 3, 2014).

⁹² Bear Creek Annual Information Form 2013, at 12 (Apr. 3, 2014).

⁹³ *See sources cited supra* note 25.

nor does it amount to “arbitrary or unjustifiable discrimination” between investments or investors. Peru’s issuance of Supreme Decree No. 032 thus satisfies the components of Article 2201.3(b).

Although Peru has not specifically argued that these measures fall within the scope of Article 2201.3(b), Peru has justified the series of measures adopted in 2011 by underscoring its obligations with respect to the Aymara people under international and domestic law.⁹⁴ In the context of a more in-depth examination of Peru’s obligations under international and domestic law, the justifications Peru has offered create sufficient scope for invoking Article 2201.3(b). This section of the submission thus provides a new perspective on issues already raised by Peru.

A. “Laws and regulations” under Article 2201.3(b) include international human rights laws, in addition to Peruvian national law that incorporates Peru’s obligations under international human rights laws.

As international laws, human rights treaties (and the obligations they create) fall within the scope of “laws and regulations” under Article 2201.3(b) of the Peru-Canada FTA. Furthermore, as described in Section I.B above, Peru’s Constitution incorporates international human rights treaties into national law directly,⁹⁵ which again comes within the scope of “laws and regulations” for the purposes of Article 2201.3(b). Apart from establishing that the relevant laws and regulations must not be inconsistent with the Peru-Canada FTA, the wording of Article 2201.3(b) does not exclude specific types of laws and regulations from coming within the scope of the provision.

B. International human rights laws are not inconsistent with the Peru-Canada FTA and require Peru to respect and protect the rights of indigenous peoples.

International human rights laws are compatible and consistent with the Peru-Canada FTA, as demonstrated by at least three features of the Treaty itself. First, the Preamble affirms the Parties’ “commitment to the ... promotion and protection of human rights and fundamental freedoms,” referring in particular to the UDHR.⁹⁶ The Preamble also explicitly states that the Parties “preserve their flexibility to safeguard public welfare,” which is inherently linked to the protection of human rights.⁹⁷ These references highlight that the object and purpose of the Peru-Canada FTA should not be construed as unidimensional, and that provisions should be interpreted in light of these explicit commitments to the protection and promotion of human rights and to the safeguarding of public welfare.

Second, the Peru-Canada FTA actively encourages enterprises in Canada and Peru to incorporate standards for corporate social responsibility, including principles of human rights and community relations, into their internal policies, and reminds investors “of the importance of incorporating” such

⁹⁴ Respondent’s Counter-Memorial, para. 135 n.236-237; Respondent’s Rejoinder, paras. 135 n.222, 265.

⁹⁵ Articles 55 and 56 of Peru’s Constitution incorporate treaties into national law. The Constitution additionally highlights the importance of human rights in Article 44, which states that the “fundamental duties of the State” are to “defend the national sovereignty, to guarantee full enjoyment of human rights, to protect the population from threats to their security, and to promote the general welfare based on justice and the comprehensive and balanced development of the nation.” CONST. art. 44 (Peru) (with amendments through 2009), the Constitution Project, <http://constitutionproject.org>.

⁹⁶ Peru-Canada FTA, PmbI.

⁹⁷ The UDHR links respect for rights of others with the public order and general welfare, explaining that any limitations on rights and freedoms should be “solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” UDHR art. 29.

standards.⁹⁸ If human rights laws were inconsistent with the Peru-Canada FTA, the agreement would not instruct the parties to encourage human rights compliance.

Third, the Peru-Canada FTA provides that the Tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”⁹⁹ This wording allows the Tribunal to rely on other rules of international law,¹⁰⁰ including those arising from human rights treaties, in interpreting and applying provisions and in deciding the issues in dispute. Investment tribunals have relied on human rights law in interpreting and applying provisions of investment treaties, and have refrained from holding that measures taken to comply with human rights obligations are inherently inconsistent with investment protection.¹⁰¹ It is also expected that states comply with such obligations. As the tribunal in *Al Warraq v. Indonesia* explained with respect to human rights treaties, “[w]hen ratifying a treaty the State undertakes to honour its obligations under that treaty.”¹⁰²

As noted in Section I.B, these international human rights laws require Peru to respect and protect the rights of indigenous peoples, including their rights to consultation and FPIC. Claimant should have expected that Peru would take steps to honor its human rights obligations, including the obligation to respect and protect the right of the Aymara people to be effectively consulted and to give (or not give) their FPIC with respect to the proposed project at Santa Ana.

C. Peru’s promulgation of Supreme Decree No. 032 was a necessary measure to ensure compliance with laws obligating it to respect and protect indigenous peoples’ rights to consultation and FPIC.

The “measures necessary” language in article 2201.3(b) mirrors the language in the general exception provisions found in the General Agreement on Trade in Services (GATS)¹⁰³ and the General Agreement on Tariffs and Trade (GATT).¹⁰⁴ In *Continental Casualty Co. v. Argentina*,¹⁰⁵ an arbitral tribunal

⁹⁸ Peru-Canada FTA, art. 810. In addition, the Preamble “ENCOURAGE[s] enterprises operating within their territory or subject to their jurisdiction, to respect internationally recognized corporate social responsibility standards and principles and pursue best practices”. *Id.* pmb1.

⁹⁹ Peru-Canada FTA, art. 837. *See also* Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* 82, 84-85 (2009) (“Numerous BITs contain composite choice of law clauses, typically including treaty rules, host state law, and customary international law. Under these provisions, human rights, as a component of international law, are part of the applicable law.”).

¹⁰⁰ Pursuant to article 38(1) of the Statute of the ICJ, these rules are understood to include (a) international treaties; (b) customary international law; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and teachings of the most highly qualified publicists. Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 933. Note that the language in art. 837.1 (Governing Law) of the Peru-Canada FTA is broader than other applicable law provisions, providing: “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and *applicable rules of international law*,” and does not include any restrictions on the applicable rules. Peru-Canada FTA, art. 837.1 (emphasis added).

¹⁰¹ *See e.g.* Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL Arb., Final Award, paras. 556-61 (Dec. 15, 2014). *See generally* Lorenzo Cotula, *Human Rights and Investor Obligations in Investor-State Arbitration*, 17 J. W. INV. & TRADE 17 (2016) 148. Cotula provides examples of instances where tribunals have relied on international human rights law at nn 9 and 10, including: Ronald S. Lauder v. Czech Republic, UNCITRAL, Award, para. 200 (Sep. 3, 2001); Tecmed v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, para. 122 (May 23, 2003); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, paras. 311-312 (July 14, 2006). *See also* Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, (Sept. 11, 2009);

¹⁰² *Al Warraq v. Indonesia*, Final Award, para. 561 (citing 2 OPPENHEIM’S INTERNATIONAL LAW 1226-1229, 1234 (Longman ed., 9th ed. 1992)).

¹⁰³ *See* GATS art. XIV (c).

¹⁰⁴ *See* GATT art. XX (d).

¹⁰⁵ *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, paras. 193-195 (Sept. 5, 2008).

borrowed from GATT jurisprudence¹⁰⁶ and concluded that “necessary” measures were those that “contributed materially” and that were “apt to and did make such a material or decisive contribution to” the end sought.¹⁰⁷ Under a similar interpretation, the measures adopted by Peru must make a material contribution to the end sought in order to come within the scope of Article 2201.3(b), but they need not be the sole available means of meeting their objective.

In this context, the promulgation of Supreme Decree No. 032 was a necessary measure that made a material contribution toward fulfilling Peru’s obligation to respect and protect the right of the Aymara people to FPIC. Widespread concern among the local Aymara people regarding potential social and environmental impacts of the Santa Ana project had developed prior to the adoption of Supreme Decree No. 032. This concern manifested in protests that grew in intensity, illustrating (at the very least) that not all of the Aymara people concerned about the potential impacts of proposed activities had been adequately consulted and had assented to the proposed project.¹⁰⁸ Supreme Decree No. 032 subsequently established the conditions necessary to ensure that mining activity at Santa Ana would proceed only once community support was secured and consent obtained.¹⁰⁹ There was therefore an integral connection between the decree and the State’s legitimate objective of complying with its obligation to respect and protect the right to FPIC of the Aymara people.

Furthermore, Supreme Decree No. 032 was but one of a series of measures adopted by Peru in 2011,¹¹⁰ and must be considered in that context. The need for the adoption of such measures, which sought to protect the rights of indigenous peoples in Peru, had been underscored by several human rights experts and treaty bodies prior to 2011. For example, in 2009, the UN Special Rapporteur on the rights of indigenous peoples observed the pressing need for Peru to take steps to fulfill its obligations, including with regard to indigenous peoples’ right to FPIC, and to effectively implement an appropriate consultation procedure that is compatible with relevant international standards.¹¹¹ In 2010, the UN Committee on the Elimination of Racial Discrimination (CERD) reiterated its concerns regarding “the tensions caused by the exploitation of the subsoil resources of territories of indigenous peoples,”¹¹² noting the conflict between the Peruvian government and indigenous peoples that had emerged in several contexts, and indicating that numerous concessions had been approved without the FPIC of indigenous peoples.¹¹³

Finally, with respect to the wording of Article 2201.3(b), it is important to note that the term “ensure” in the phrase “necessary to ensure compliance” indicates that the measure promulgated by the State may be

¹⁰⁶ Concerning GATT art. XX (d).

¹⁰⁷ Continental, Award, para. 196. For further commentary on this point, see Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements* (Second Biennial Global Conference, July 8-10, 2010, at the University of Barcelona and its IELPO Programme, Working Paper No. 2010/13) June 29, 2010.

¹⁰⁸ See e.g., Respondent’s Counter-Memorial, paras. 115-116, 128-129; Claimant’s Reply, para. 273; Respondent’s Rejoinder, paras. 198-201; Expert Report of Antonio Alfonso Peña Jumba, paras. 99-100.

¹⁰⁹ A/HRC/27/52/Add.3, supra note 20, at 25; Respondent’s Rejoinder, Part II(F)(2), at 151; Respondent’s Counter-Memorial paras. 72-75.

¹¹⁰ See sources cited supra note 25.

¹¹¹ Human Rights Council Working Group on the Universal Periodic Review, Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, A/HRC/WG.6/14/PER/2, Aug. 13, 2012, at para. 78 (citing Human Rights Council, Report of the Special Rapporteur on the situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, A/HRC/12/34/Add.8, Aug. 18, 2009, para. 38, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/150/32/PDF/G0915032.pdf>).

¹¹² *Id.*, para. 77 (citing CERD/C/PER/CO/14-17, para. 14).

¹¹³ *Id.*, paras. 74-83.

an assertive act that is highly likely to result in compliance with the relevant law/regulation. Supreme Decree No. 032, once in effect, created the conditions necessary for Peru to immediately and effectively restore the Aymara people's right to FPIC: in combination with other measures adopted by Peru in 2011, the decree effectively required that Claimant and the national government engage in prior consultations with all of the Aymara people potentially affected by the project, if they wished to move forward with the proposed project at Santa Ana. In this context, it is clear that Supreme Decree No. 032 made a material contribution toward compliance with Peru's human rights obligations.

D. Supreme Decree No. 032 is not a disguised restriction on international investment, nor does it amount to “arbitrary or unjustifiable discrimination” between investments or between investors.

There is no evidence that Peru's Supreme Decree No. 032 was a disguised restriction on investment or a discriminatory measure between investments or investors. Rather, Peru has set out in its briefs valid motivations for the series of measures adopted in 2011, along with evidence showing that Supreme Decree No. 032 was necessitated by social unrest in the region, adopted to comply with its legal obligations, and that it did not unfairly target Claimant.¹¹⁴ The burden rests on Claimant to show that the impugned act was not a measure necessary for compliance with human rights law, as there exists an assumption that states adopt measures to comply with their human rights obligations in good faith.¹¹⁵

V. CONCLUSION

Mining projects in Peru do not occur in a vacuum, but in a context fraught with increasing social conflict around extractive operations and their impacts. In a similar vein, international investment law is not the only applicable legal framework that governs investment or imposes binding legal obligations on governments. The issues raised in the present dispute have profound public policy implications. Their determination holds the potential to shape understandings, on the part of both host governments and investors, regarding the regulation of an industry that is critical to many resource-rich countries, as well as the interaction between investment law and other bodies of applicable law, including international human rights and domestic environmental law. Most critically, the resolution of issues raised in this arbitration will have significant and lasting impacts on the lives of community members who, despite their legally protected rights that stand to be affected by the decision, are precluded from participating fully in this arbitration.

A dismissal of the claims would send a clear signal that the broader legal and socio-political context in which investors seek to operate cannot be rendered meaningless. Yet the Tribunal need not make determinations with the desire to send such a signal. A close reading of the Peru-Canada FTA, coupled with a strong understanding of relevant domestic and international legal frameworks, demonstrates that Claimant's claims presupposing a right to exploit mineral resources, as well as those that would allow investors to penalize governments for taking steps to protect human rights, can be rejected. It is respectfully requested that the Tribunal thus reject such claims.

¹¹⁴ Respondent's Rejoinder, Part II(F)(2), at 151.

¹¹⁵ See e.g., *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL Arb., Award, paras. 582-584, (Feb. 14, 2012).

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