

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation

v.

Republic of Peru

(ICSID Case No. ARB/14/21)

Procedural Order No. 6

Regarding the Application by the Columbia Center on Sustainable Investment (“CCSI”) to File a Written Submission

Date of this Order: July 21, 2016

Members of the Tribunal

Prof. Karl-Heinz Böckstiegel, President of the Tribunal

Dr. Michael Pryles, Arbitrator

Prof. Philippe Sands QC, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

Assistant to the Tribunal

Dr. Katherine Simpson

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GLOSSARY OF DEFINED TERMS

Abbreviation	Full Term
CCSI	Columbia Center on Sustainable Investment
CCSI Application	Application to File a Written Submission as an 'Other Person' Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA
CCSI Submission	CCSI's Memorial, attached to the CCSI Application
FTA	Free Trade Agreement between Canada and the Republic of Peru
PO-1	Procedural Order No. 1 (January 27, 2015)

I. INTRODUCTION

1. The Tribunal has considered the arguments presented by the Parties and by the Columbia Center on Sustainable Investment (hereinafter “CCSI” or “Applicant”) in respect of CCSI’s Application to File a Written Submission as an ‘Other Person’ Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (“CCSI Application”). The Tribunal’s use of one entity’s terms as opposed to another’s is not to be taken as a reflection of the Tribunal’s legal interpretation of an issue – rather, effort has been made to use consistent terminology throughout this Procedural Order to facilitate understanding.
2. The Applicant is a joint center of Columbia Law School and the Earth Institute. It describes itself as follows:

CCSI [...] is the only university-based applied research center and forum dedicated to the study, discussion, and practice of sustainable international investment. CCSI recognizes that foreign direct investment plays an important role in providing revenue, technology transfer, and other benefits that can be crucial for sustainable development. CCSI also recognizes that the extent to which positive effects of international investments are realized, and negative effects avoided, in host countries depends on the policies and practices of governments and investors, as well as on the institutions available to find satisfactory outcomes. Against this background, CCSI works to provide the interdisciplinary research, tools, and support necessary for governments, investors, communities, and other stakeholders to maximize the impact of international investment for sustainable development.

Two of CCSI’s core focus areas are: (1) Investment Law and Policy and (2) Investment in Extractive Industries. [...]

3. The Applicant states that it has no affiliation with either of the Parties and that it has received no financial or other assistance from any government, person, or organization for the purpose of preparing the Application or the submission attached thereto.

II. PROCEDURAL HISTORY RELATED TO CCSI’S APPLICATION

4. During the first session of the Arbitral Tribunal on January 12, 2015, the Parties and the Tribunal discussed the matter of non-disputing parties’ participation in these proceedings. The Parties’ and the Tribunal’s agreement in this respect was memorialized in section 17 of PO-1, provided below for convenience:

17. *Non-Disputing Party Submissions and Amicus Curiae*
Articles 832 and 836 of the Canada-Peru FTA

17.1. *The Tribunal shall, in consultation with the Parties, establish all necessary procedures and schedules in the event that Canada files, or*

any person other than the Parties seeks leave to file, a written submission pursuant to Articles 832 and 836, respectively, of the Canada-Peru FTA.

17.2. The Parties agree that any written submissions by Canada or any person other than the Parties will take place during a dedicated procedural phase following the exchange of written submissions by the Parties and prior to the hearing, as set forth in Annex A to this Procedural Order No. 1.

5. In Annex 1 to PO-1, the Parties and the Tribunal set June 9, 2016 as the deadline for receipt of any petition to submit a submission by non-disputing party.
6. On June 9, 2016, CCSI submitted the “CCSI Application”, together with its “other persons” submission (“CCSI Submission”) to the Tribunal.
7. On June 14, 2016, the Tribunal informed the Parties that it was in receipt of the CCSI Application and granted the Parties until July 7, 2016 to respond thereto.
8. On July 7, 2016, each Party responded to the CCSI Application, by separate letters.

III. THE RELEVANT LEGAL PROVISIONS

9. The procedure for the admission of submissions by non-disputing Parties is governed by Rule 37.2 of the ICSID Arbitration Rules, provided below:

***Rule 37
Visits and Inquiries;
Submissions of Non-disputing Parties***

[...]

- (2) *After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:*
 - (a) *the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
 - (b) *the non-disputing party submission would address a matter within the scope of the dispute;*
 - (c) *the non-disputing party has a significant interest in the proceeding.*

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

10. The procedure for the admission of submissions by non-disputing parties, called “Other Persons”, is governed by Art. 836 and Annex 836.1 of the FTA, provided below:

Article 836: Submissions by Other Persons

1. *Any person, other than a disputing party, that wishes to file a written submission with a Tribunal (the “applicant”) shall apply for leave from the Tribunal to file such a submission, in accordance with Annex 836.1. The applicant shall attach the submission to the application.*
2. *The applicant shall serve its application for leave to file a submission, as well as its submission, on all disputing parties and the Tribunal.*
3. *The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave.*
4. *In determining whether to grant the leave the Tribunal shall consider, among other things, the extent to which:*
 - (a) *the applicant’s submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
 - (b) *the applicant’s submission would address a matter within the scope of the dispute;*
 - (c) *the applicant has a significant interest in the arbitration; and*
 - (d) *there is a public interest in the subject-matter of the arbitration.*
5. *The Tribunal shall ensure that:*
 - (a) *any applicant’s submission does not disrupt the proceedings; and*
 - (b) *neither disputing party is unduly burdened or unfairly prejudiced by such submissions.*
6. *The Tribunal shall decide whether to grant leave to an applicant to file a submission. If the Tribunal grants leave, it shall set an appropriate date for the disputing parties to respond in writing to the submission. By that date, the non-disputing Party may, pursuant to Article 832, address any issues of interpretation of this Agreement presented in the submission.*
7. *The Tribunal that grants leave to file a submission to an applicant is not required to address the submission at any point in the arbitration, nor is the*

person that files the submission entitled to make further submissions in the arbitration.

8. *Access to hearings and documents by persons that file applications under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under Article 835.*

Annex 836.1
Submissions by Other Persons

1. *Applications for leave to file submissions by other persons shall:*
 - (a) *be made in writing, dated and signed by the applicant, and include the applicant's address and other contact details;*
 - (b) *be no longer than five typed pages;*
 - (c) *describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);*
 - (d) *disclose whether the applicant has any affiliation, direct or indirect, with any disputing party;*
 - (e) *identify any government, person or organization that has provided any financial or other assistance in preparing the submission;*
 - (f) *specify the nature of the interest that the applicant has in the arbitration;*
 - (g) *identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;*
 - (h) *explain, by reference to the factors specified in paragraph 4 of Article 836, why the Tribunal should accept the submission; and*
 - (i) *be made in a language of the arbitration.*
2. *Submissions filed by other persons shall:*
 - (a) *be dated and signed by the person filing the submission;*
 - (b) *be concise, and in no case longer than 20 typed pages, including any appendices;*
 - (c) *set out a precise statement supporting the person's position on the issues; and*

(d) *only address matters within the scope of the dispute.*¹

IV. CCSI'S APPLICATION TO PARTICIPATE AS AN "OTHER PERSON" (SUMMARIES)

A. THE ARGUMENTS OF CCSI

11. Article 836 and Annex 831.1 of the FTA require purported "*other persons*" to explain why the Tribunal should accept written submissions, by reference to four specific, though non-exhaustive factors. CCSI argues that it has met each of these factors.
12. First, the CCSI Submission will assist the Tribunal in the determination of a factual or legal issue related to the arbitration, by bringing a perspective, particular knowledge, or insight that is different from that of the disputing Parties. The CCSI Submission is broader and more holistic than the submissions put forward by the Parties and the CCSI Submission reflects other international law and public policy considerations that are relevant to extractive industry investments. CCSI's particular expertise in the legal frameworks governing international investment in the extractive sector, as well as its active engagement in the analysis of the public policy implications of such investment and of investor-state arbitration more broadly support CCSI's Submission. The CCSI Submission contextualizes the issues in dispute and provides reference to source material and background information that will assist the Tribunal in assessing the circumstances of Respondent's adoption Supreme Decree No. 032 and other measures regarding the regulation of the extractive sector.
13. Second, the CCSI Submission addresses the following matters that are within the scope of the dispute:
 - i. *The scope of Claimant's rights protected under the Peru-Canada FTA, and the relationship between these rights and other bodies of applicable domestic and international law;*
 - ii. *The nature and scope of the fair and equitable treatment standard included in the Peru-Canada FTA, and the relevance of specific legal and contextual factors to assessments of the legitimacy and reasonableness of expectations on the part of the investor;*
 - iii. *The legal and socio-political context in which the conduct in dispute took place, and the relevance of this context to the interpretation of claims and defenses under the Peru-Canada FTA.*

¹ Chapter Eight of the Free Trade Agreement between Canada and the Republic of Perú signed May 29, 2008 and entered into force on August 1, 2009 [C-0001].

14. The Tribunal has discretion to grant leave to CCSI to file the submission, while disregarding specific issues that the Tribunal determines are not relevant.
15. Third, CCSI has a significant interest in the arbitration. CCSI's interest is best taken from its own words (footnotes omitted):

[...] The Applicant has a demonstrated and specific interest in the interpretation of key aspects of international investment law, in particular their implications for the host state's regulatory space and their interface with human rights law. The consequences of such interpretations can profoundly shape the sustainable development outcomes of international investment, the topic that animates the Applicant's work. The Applicant thus has a significant interest in the legal issues in dispute, and in the interpretation and application of treaty standards in the present arbitration, which are highly relevant to the Applicant's mission and work.
16. Fourth, there is a public interest in the subject-matter of the arbitration. The subject matter of this arbitration concerns matters of significant public importance that extend beyond the commercial sphere and will be of significant interest to policy makers in other national and global contexts. Interests and rights of third parties in Respondent-state stand to be affected by the Tribunal's determinations. Individuals and communities living in the area within which Claimant is seeking to operate have raised significant concerns regarding the potential impact of extractive activities.
17. Finally, the dispute raises complex international legal considerations due to the human rights issues at stake. In this arbitration, acceptance of some Treaty interpretations could frustrate Peruvian law and international human rights law. Aside from threatening the rule of law in Respondent-state, such an outcome could affect the balance of incentives for Respondent to comply with its international human rights law obligations, and for investors to comply with their responsibility to respect the rights of third parties who stand to be affected by their activities.

B. THE CLAIMANT'S POSITION

18. Claimant argues that the Tribunal should reject the CCSI Application. The Tribunal must reject applications that do not satisfy the specific requirements contained in the FTA. The CCSI Submission fails to meet at least four of the criteria of Art. 836.4 and Annex 836.1 of the FTA. It will not assist the Tribunal in determining any issues related to the arbitration by bringing a different perspective from either Party. Rather, when CCSI is not attempting to inject new legal issues into the dispute, CCSI merely echoes and amplifies the Respondent's position.
19. First, CCSI has no significant interest in the present arbitration, as required by the FTA, and its Application should be denied. CCSI is unable to demonstrate anything beyond a general,

academic interest animated by a policy agenda of reforming the investor-State arbitration system as a whole. Article 836.4 and Annex 836.1 of the FTA, however, require that the interests of the Applicant be tied to the specific arbitration at issue – not the general subject matter or the legal issues involved. Allowing such participation would lead to the absurd result that any institution with a general academic interest in investment law would have the right to intervene in virtually any investment treaty arbitration. Furthermore, political and systemic reform goals cannot constitute a significant interest in the specific arbitration between the Parties. This arbitration is not the appropriate forum for CCSI to further its agenda for systemic reform and should not serve as a platform for the advancement of a particular political or academic viewpoint.

20. Second, the CCSI Submission would not assist the Tribunal in determining the factual or legal issues by offering a perspective that is different from the Parties. The Tribunal, as in the words of the *Methanex* tribunal, should proceed on the assumption that “*the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute.*” Thus, *amicus* petitions should only be granted where the Tribunal determines that the Parties have failed to provide the Tribunal the assistance and materials it needs to resolve the dispute. CCSI, however, has not sustained this burden. Furthermore, the CCSI Submission cannot assist the Tribunal in the determination of any of the factual issues. CCSI – having no relationship to the region – must rely on the Parties pleadings and other secondary sources. It would be inappropriate for the Tribunal to accept CCSI’s analysis of explanations and motivations for Respondent’s actions against Claimant, as CCSI was not proxy to Respondent’s internal decision-making in connection with this dispute.
21. With respect to CCSI’s desire to assist the Tribunal in determination of purely legal issues, those issues have already been briefed by Respondent, Claimant, and Canada. This Tribunal is more than qualified to interpret the FTA and, in any event, CCSI’s proposed interpretation does not offer a different perspective or insight than that of Respondent. To the extent that CCSI has attempted to address matters of Peruvian law, CCSI has provided no explanation of its qualifications in that field and, absent such, its submission must be rejected.
22. Third, the CCSI Submission addresses matters that are beyond the scope of the arbitration. This case does not relate to the rights of the Aymara communities. Neither side has put at issue the rights of the Aymara communities and neither side has disputed the existence of or alleged the violation of international human rights law. Rather, this dispute concerns the enactment of Supreme Decree 032. This arbitration is an inappropriate forum for the interpretation and application of international human rights treaties, which is beyond the Tribunal’s jurisdiction.

23. Fourth, CCSI has not complied with the requirements listed in Annex 836.1 of the FTA. CCSI has failed to make the disclosures necessary to enable the Tribunal to properly assess CCSI's independence. CCSI did not disclose its membership or its ties to Respondent. It did not disclose that Peruvian officials are frequent speakers at events organized by CCSI. Indeed, CCSI's ties to Respondent are exceptionally strong. In March 2014, Claimant's CEO met with Mr. Valderamma, then-President of the Commission on Investment Disputes against the Peruvian State. Mr. Valderamma proposed enlisting CCSI to help with the negotiation process between Claimant and Respondent. This raises questions regarding the nature and extent of ties between CCSI and Respondent that the CCSI Submission fails to address.
24. Finally, the Applicant's request is inappropriate and burdensome and would unfairly prejudice Claimant. Accepting the *amicus* submission would impose on both Parties the additional burden of preparing responsive briefings, would require additional time and resources – especially given that the *amicus* submission raises matters outside the scope of the arbitration. This burden would be disproportionately heavy for Claimant. The Applicant has expressed anti-mining and/or anti-ISDS views and has aligned with or echoed the views of Respondent. It would unfairly prejudice Claimant to be required to prepare responses in the few weeks before the hearing, to purported *amicus* submissions from *amici* whose independence and expertise cannot be confirmed, who parrot Respondent's position, and who raise matters outside the scope of the dispute. Accordingly, this Tribunal should reject the CCSI Application.

C. THE RESPONDENT'S POSITION

25. Respondent argued that the Tribunal should admit the CCSI Submission. Two of CCSI's core areas of focus – international investment law and policy and foreign investment in extractive industries – are central to this case. Given its expertise, CCSI is qualified to comment on these topics.
26. Investment tribunals, in light of what the *Glamis Gold* tribunal described as the “*public and remedial purposes of non-disputing submissions*”, accept most *amicus* applications.
27. Application of each of the four factors for admission under Art. 836 of the FTA weighs in favor of admitting the CCSI Submission. First, the CCSI Submission will assist the Tribunal in determining factual and legal issues by bringing a perspective, particular knowledge, or insight that is different from – and broader and more holistic than – that of the disputing Parties. CCSI focuses on the promotion of sustainable investment, human rights, and rational public policy. With such relevant expertise, it can help the tribunal by providing the kind of broad perspective

that has been found helpful by other tribunals.

28. Second, as enumerated above, the CCSI Submission addresses jurisdictional and merits-related issues of clear import to matters that are in dispute in this arbitration.
29. Third, CCSI has a clear interest in these proceedings, as CCSI's participation in this arbitration aligns with CCSI's organizational mission.
30. Fourth, there is a public interest in the subject matter of this arbitration. The public's interest involves not only the State's sovereign rights, but also the public's interest in the procedural approach adopted by the Tribunal. The public benefits from the open, transparent, and participatory resolution of investor-State disputes. The Tribunal's blanket refusal to receive amicus submissions could do positive harm.

V. THE TRIBUNAL'S CONSIDERATIONS

31. The Tribunal has given careful consideration to the extensive factual and legal arguments presented by CCSI and the Parties in their submissions. In this Order, the Tribunal addresses the arguments of CCSI and the Parties it considers most relevant for its decisions. The Tribunal's reasoning, without repeating all the arguments advanced, addresses what the Tribunal itself considers to be the determinative factors required to decide on the disputed issues.
32. The Parties have made extensive reference to decisions of other tribunals, whilst recognizing that decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for the decision in the present case, and the approach that might be taken.
33. Further, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the FTA as far as necessary in order to decide on the Application. No less, but also no more. This is of particular relevance in the present context, because the FTA contains detailed provisions regarding the submissions by other persons.
34. The Tribunal recalls the criteria provided by Art. 836 of the FTA:
 4. *In determining whether to grant the leave the Tribunal shall consider, among other things, the extent to which:*

- (a) *the applicant's submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
- (b) *the applicant's submission would address a matter within the scope of the dispute;*
- (c) *the applicant has a significant interest in the arbitration; and*
- (d) *there is a public interest in the subject-matter of the arbitration.*

5. *The Tribunal shall ensure that:*

- (a) *any applicant's submission does not disrupt the proceedings; and*
- (b) *neither disputing party is unduly burdened or unfairly prejudiced by such submissions.*

35. From the language of Art. 836.4 of the FTA, it is made explicit that these are only “criteria” and not conditions, and also that they are to be considered non-exhaustive. The Tribunal has discretion as to which of these criteria and which “other things” it takes into account for its decision. The Tribunal will use this discretion with a particular view to the specific factual and legal circumstances of the present case.
36. In the view of the Tribunal, the most important criteria is the first mentioned and quoted above in subsection 4(a), namely whether *the applicant's submission would assist the Tribunal*. This is also inherent in the term “amicus curiae”, used to describe such submissions and also used by the Parties in this case.
37. In this context, the Tribunal notes that in the present proceeding both Parties are represented by distinguished international law firms with extensive experience in international investment arbitration. The Parties have filed lengthy and detailed submissions and evidence regarding every aspect of the case.
38. Having examined the respective arguments of the Parties and CCSI, the Tribunal finds that, while CCSI may have a wide experience in the field of sustainable investment, beyond the above mentioned extensive submissions by the Parties, it has not sufficiently been shown that CCSI would be able to contribute any further information or arguments that would assist the Tribunal *in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.*

39. Since CCSI's application does not fulfill this first and most important threshold of Art. 836.4(a) of the FTA, it is sufficient for the Tribunal to add that the arguments submitted regarding the further criteria in subsections (b) to (d) do not provide any reason in the present case to nevertheless conclude that an acceptance of the application is appropriate.

VI. DISPOSITIF

The Application by the Columbia Center on Sustainable Investment ("CCSI") is denied.

On behalf of the Tribunal

[Signed]

Prof. Dr. Karl-Heinz Böckstiegel
President of the Tribunal
Date: July 21, 2016