



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

August 3, 2016

Prof. Dr. Karl-Heinz Böckstiegel
Dr. Michael Pryles
Prof. Philippe Sands QC
c/o Ms. Mercedes Cordido-F. de Kurowski
ICSID
MSN J2-200
1818 H Street, N.W.
Washington, D.C. 20433
Email: mkurowski@worldbank.org

Re: Response to Procedural Order No. 6 Regarding the Application by the Columbia Center on Sustainable Investment (“CCSI”) to File a Written Submission in the matter of Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)

Dear Members of the Tribunal,

We write in response to the denial of CCSI’s application as an “other person,” submitted pursuant to Article 836 and Annex 836.1 of the Peru-Canada Free Trade Agreement,¹ as elaborated in Procedural Order No. 6 (dated July 21, 2016).² While we respect the Tribunal’s discretion to reject such applications, we wish to raise two concerns regarding PO-6.

1. The reasoning summarized in PO-6 does not clearly explain the denial of CCSI’s Application.

As noted in PO-6,³ Article 836.4(a) of the Peru-Canada FTA directs the Tribunal to consider whether the 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.” In concluding that CCSI failed to sufficiently show that it “would be able to contribute any further information or arguments that would assist the Tribunal” in this manner,⁴ the Tribunal appears to rely heavily on two factors. First, that both disputing Parties “are represented by distinguished international law firms with extensive experience in international investment arbitration.”⁵ Second, that “[t]he Parties have filed lengthy and detailed submissions and evidence regarding every aspect of the case.”⁶

The Tribunal’s reference to these factors could be made with respect to most applications to participate as *amicus curiae* in proceedings brought under an investment treaty. More importantly, neither the fact that the disputing Parties are represented by distinguished international law firms, nor that they have addressed “every aspect of the case,” says anything conclusive about whether all relevant perspectives, including those on crucial questions of treaty interpretation, have been covered in the submissions filed by the disputing Parties.

¹ Hereinafter referred to as the Peru-Canada FTA.

² Hereinafter referred to as PO-6.

³ PO-6, paras. 10, 34.

⁴ PO-6, para. 38.

⁵ PO-6, para. 37.

⁶ *Id.*

Indeed, the legal representatives of the disputing Parties have a vested interest in presenting the perspectives of the Parties themselves, which likely do not cover the full breadth of perspectives regarding the facts or legal issues in dispute. In this case, CCSI's Submission, while closely grounded in the legal and factual issues raised by the disputing Parties,⁷ went beyond the Parties' analysis and sought to assist the Tribunal by providing a more holistic view of certain matters in dispute, along with the policy implications of these matters. For example, CCSI's Submission argued that the interpretation of treaty standards at issue in the present dispute must pay particular attention to human rights, corporate social responsibility, and upholding environmental standards. This perspective is consistent with the FTA,⁸ but not fully covered by the disputing Parties' submissions.⁹ We are thus concerned by the limited rationale in PO-6, which appears to rely primarily on the Parties' representation and submissions in rejecting CCSI's Application.

2. The Tribunal's approach appears to discount the relevance of submissions addressing legal issues.

Article 836.4(a) of the Peru-Canada FTA does not require that submissions from "other persons" address both legal and factual issues. Rather, the provision allows for submissions to address *either* a factual *or* a legal issue. Nonetheless, in comparing PO-6 with Procedural Order No. 5, issued by the Tribunal with respect to the Application submitted by DHUMA and Dr. Carlos López,¹⁰ it appears that the Tribunal's decision to accept the latter Application turned in large part on DHUMA's "local knowledge of the facts," which, when combined with Dr. López's legal expertise, was considered to "add a new perspective that differs from that of the Parties."¹¹

The Tribunal's emphasis on local factual knowledge as a distinguishing factor in PO-5, along with its limited reasoning in PO-6, suggests that applications from "other persons" addressing legal issues may be less likely to be accepted than those addressing factual issues. Applying Article 836 in this manner would be unduly narrow, and risks discouraging future submissions on relevant legal issues of significant public interest.

3. Conclusion

For the reasons outlined in this letter, we respectfully submit that we are troubled by, and disagree with, the approach adopted by the Tribunal in its rejection of CCSI's Application. CCSI is, however, pleased that the Tribunal has accepted DHUMA and Dr. López's Application, and we look forward to the Tribunal's due consideration of our colleagues' Submission.

Thank you for your consideration of these comments.

Sincerely,



Lise Johnson
Head: Investment Law and Policy
lj2107@columbia.edu



Kaitlin Cordes
Head: Land, Agriculture, and Human Rights
kaitlin.cordes@law.columbia.edu



Jesse Coleman
Legal Researcher
jcoleman@law.columbia.edu

⁷ As required by art. 836.4(a) and (b) of the Peru-Canada FTA.

⁸ See e.g., Peru-Canada FTA, pmbl. and arts. 809, 810.

⁹ CCSI's Submission also: (i) added context regarding relevant human rights obligations that bind Peru at the domestic, regional, and international levels, and that apply to the establishment of extractive sector investments in Peru; (ii) articulated the systemic implications of certain interpretations of the fair and equitable treatment (FET) standard contained in the Peru-Canada FTA; and (iii) elaborated the connections between Peru's obligations under international law, the social unrest caused or exacerbated by the proposed project at Santa Ana, and measures challenged by the Claimant in the present dispute.

¹⁰ Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5 Regarding the Association of Human Rights and Environment of Puno, Peru ("DHUMA"), and Dr. Carlos López PhD, Senior Legal Adviser to the International Commission of Jurists, Application to File a Written Submission (July 21, 2016) [hereinafter PO-5].

¹¹ PO-5, para. 40.