

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Bear Creek Mining Corporation,**  
*Claimant,*

v.

**Republic of Peru,**  
*Respondent*

(ICSID Case No. ARB/14/21)

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

The Columbia Center on Sustainable Investment (CCSI)

June 9, 2016

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## INTRODUCTION

By the present Application, the Columbia Center on Sustainable Investment (the “Applicant”) seeks leave from the Tribunal to file a written submission in the present arbitration, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21.

This application is made pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA,<sup>1</sup> which establish the rules applicable to written submissions filed by “[a]ny person, other than a disputing party,” also referred to as “other persons” within the text of the Treaty.<sup>2</sup> It is within the discretion of the Tribunal to grant leave to “other persons” to file such submissions.<sup>3</sup> A grant of leave would fall within the now firmly established practice of accepting amicus submissions in arbitration proceedings.<sup>4</sup>

## DESCRIPTION OF THE APPLICANT

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute, 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. CCSI’s Investment Law and Policy workstream explores elements and effects of the legal frameworks governing international investment, including the roles and implications of investment treaties.<sup>5</sup> CCSI’s Extractive Industries workstream focuses on the transformative potential of the sector for resource-rich economies, and strives to promote solutions that address the myriad opportunities and challenges posed by the extractive industries for sustainable development.<sup>6</sup>

CCSI is an independent, non-profit, academic center based at Columbia University. The Center is proud to maintain academic integrity as a neutral platform for advanced research.

## AFFILIATION

The Applicant has no affiliation, direct or indirect, with either party to the present dispute.

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<sup>1</sup> Peru-Canada Free Trade Agreement [hereinafter Peru-Canada FTA or Treaty].

<sup>2</sup> See e.g. the headings of art. 836 and annex 836.1, which refer to “Other Persons.” See also Procedural Order No. 1 (Jan 27, 2015), para. 17, which refers to “any person other than the Parties.”

<sup>3</sup> Peru-Canada FTA, art. 836.6. The Tribunal may grant leave at its own discretion, without approval from either of the disputing Parties.

<sup>4</sup> For tribunal decisions permitting third party amicus briefs, see e.g., *Methanex Corp. v. United States of America*, UNCITRAL Arb., Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” (Jan. 15, 2001); *Aguas Argentinas, S.A v. The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005); *United Parcel Services of America Inc. v. Government of Canada*, UNCITRAL Arb., Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae (Oct. 17, 2001); *Glamis Gold v. The United States of America*, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005); *Biwater Gauf v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 (Feb. 2, 2007); *Piero Foresti v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Letter from Eloise M. Obadia, Secretary of the Tribunal, to Non-Disputing Parties (Oct. 5, 2009); *Pac Rim Cayman v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8 (Mar. 23 2011); *Philip Morris Brand v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3 (Feb. 17, 2015).

<sup>5</sup> Further information about this work can be found at: <http://ccsi.columbia.edu/our-focus/investment-in-law-and-policy/>.

<sup>6</sup> Further information about this work can be found at: <http://ccsi.columbia.edu/our-focus/investments-in-extractive-industries/>.

## FINANCIAL OR OTHER ASSISTANCE

The Applicant has not received financial assistance from any government, person, or organization for the purposes of preparing this application or the attached submission. While CCSI receives funding from a variety of public and private sources for other projects, it has assumed the entirety of its costs related to this application and the attached submission. In addition, no funding has been solicited or received on the basis of this application or the attached submission.

In preparing this application and submission, the Applicant has benefited from research assistance, technical support, and peer reviews,<sup>7</sup> but has retained full control over the content.

## TEST TO APPLY TO WRITTEN SUBMISSIONS BY “OTHER PERSONS”

Pursuant to the instructions of the Tribunal in Procedural Order No. 1, the ICSID Rules apply to the present arbitration except where modified by Chapter Eight of the Peru-Canada FTA.<sup>8</sup> The specific rules established by Chapter Eight with respect to submissions by other persons thus apply to this Application and the attached submission. Article 836 and Annex 836.1 of the Peru-Canada FTA set out the test for the Tribunal to apply in exercising its discretion on whether to accept an application to file a written submission from “[a]ny person, other than a disputing party”, also referred to as “other persons”<sup>9</sup> within the text of the Treaty. In combination, these provisions require “other persons” to explain why the Tribunal should accept such written submissions by reference to four specific (though non-exhaustive) factors. These factors are addressed in turn below.

- 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.*

The perspective provided through the attached submission is both broader and more holistic than that put forward by the disputing parties, reflecting other international law and public policy considerations that are relevant to extractive industry investments. The Applicant has particular expertise in the legal frameworks governing international investment in the extractive sector, and is actively engaged in analyzing the public policy implications of such investment, as well as of investor-state arbitration more broadly.<sup>10</sup> As a result, the

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<sup>7</sup> CCSI is grateful for the contributions provided by the Sciences Po Law School Clinic and the Environmental Law Clinic at Columbia Law School in the preparation of this application and the attached submission, and is particularly grateful for the assistance provided by Joseph Saei, team leader for the Sciences Po Law School Clinic. The attached submission also benefitted from review by: Lorenzo Cotula, Brooke Güven, Ben Hoffman, Jeremy Perelman, Andrea Shemberg, and Horatia Muir Watt. CCSI expresses its thanks for the technical support received from Geneviève Paul, Maria Isabel Cubides, and Cathal Doyle. In preparing the attached submission, CCSI carried out two phone interviews with Derechos Humanos y Medio Ambiente (Peru), and are grateful for the insights that they shared.

<sup>8</sup> Procedural Order No. 1 (Jan. 27, 2015), para. 17.

<sup>9</sup> See e.g. the headings of art. 836 and annex 836.1, which refer to “Other Persons.” See also Procedural Order No. 1 (Jan 27, 2015), para. 17, which refers to “any person other than the Parties.” While there are several similarities between the Peru-Canada FTA’s requirements under Article 836 and Annex 836.1 and those established by rule 37(2) of the ICSID Rules of Procedure for Arbitration Proceedings (Apr. 10, 2006) with respect to amicus curiae, one important difference is that the former refer exclusively to submissions by “other persons” or “[a]ny person, other than a disputing party,” while the latter refers to submissions by “non-disputing parties.” Thus, despite the clear similarities between rule 37.2, Article 836, and Annex 836.1, the Parties to the Peru-Canada FTA chose to establish the requirements for amicus submissions by “other persons” without limiting the relevant requirements by the defined term “non-disputing party.” The term chosen by the Parties is not defined in the Peru-Canada FTA, and its plain language meaning does not imply the applicability of any requirements relating to the defined term “non-disputing parties.”

<sup>10</sup> See e.g. the following recent publications from CCSI: ANA TERESA TAVARES-LEHMANN, PERRINE TOLEDANO, LISE JOHNSON, AND LISA SACHS, RETHINKING INVESTMENT INCENTIVES: TRENDS AND POLICY OPTIONS (Columbia University Press, forthcoming July 2016); Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, *Land Deal Dilemmas: Grievances, Human Rights and Investor Protections* (March 2016); Lise Johnson, *Investment Treaties and Industrial Policy: Select Case Studies on State Liability for Efforts to Encourage, Shape and Regulate Economic Activities in Extractive Industries and Infrastructure* (Jan. 2016); Lise Johnson and Jesse Coleman, *International Investment Law and the Extractive Industries Sector* (CCSI Briefing Note, Jan. 2016); Lise Johnson, *Ripe for Refinement: The State’s Role in Interpretation of FET, MFN, and Shareholder Rights* (University of Oxford GEG Working Paper 2015/101, Apr. 2015); Lise

attached submission is grounded both in the Applicant's insight into the extractive sector as well as in considerations of the public policy implications that would attach to the Tribunal's determinations. In assessing these implications, the submission examines the underlying issues not only in the context of international investment law, but also in the contexts of applicable domestic and international human rights law and of protection of the rights of third parties: a relevant perspective that has not been fully fleshed out by the disputing parties.

The Applicant's submission also provides new knowledge and insights by contextualizing the issues in dispute through relevant legal and socio-political factors that are not elaborated by the disputing parties.<sup>11</sup> The attached submission includes extensive reference to source material and background information that would assist the Tribunal in assessing, *inter alia*, the circumstances underlying Peru's adoption in 2011 of new measures regarding regulation of the extractive sector, including Supreme Decree No. 032.

*b) The Applicant's submission would address a matter within the scope of the dispute.*

The Applicant addresses the following matters in the attached submission, all of which are disputed by the Parties and thus within the scope of the present 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;<sup>12</sup>
- ii. The nature and scope of the fair and equitable treatment standard included in the Peru-Canada FTA,<sup>13</sup> and the relevance of specific legal and contextual factors to assessments of the legitimacy and reasonableness of expectations on the part of the investor;<sup>14</sup>
- 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.<sup>15</sup>

While it is hoped that the Tribunal will consider all of the issues addressed in the attached submission, the Applicant notes the discretion available to the Tribunal to grant leave to the Applicant to file the attached submission while disregarding specific issues that the Tribunal determines are not relevant.<sup>16</sup>

*c) The Applicant has a significant interest in the arbitration.*

This arbitration has important public interest and public policy implications that are directly relevant to the Applicant's mission of supporting stakeholders in maximizing the benefits of international investment for sustainable development,<sup>17</sup> including in the context of extractive industry investments. The Applicant has a demonstrated and specific interest in the interpretation of key aspects of international investment law, in

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Johnson, *State Control over Interpretation of Investment Treaties* (CCSI Policy Paper, Apr. 2014). CCSI also coordinates publication with Oxford University Press of the *Yearbook on International Investment Law & Policy*, an annual publication that monitors current developments and trends in foreign direct investment, international investment agreements, and investment disputes. All publications are available at: <http://ccsi.columbia.edu/publications/>.

<sup>11</sup> In *Methanex*, the Tribunal noted its "appreciation of the scholarship and industry which counsel for the Disputing Parties, Mexico and Canada as NAFTA Parties and the amici have deployed..." see *Methanex Corp. v. United States of America*, UNCITRAL Arb., Final Award of the Tribunal on Jurisdiction and Merits, part I-preface-page 6 (Aug. 3, 2005).

<sup>12</sup> See, e.g., Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, paras. 164-171 (Oct. 6, 2015); Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, para. 237 (Jan. 8, 2016).

<sup>13</sup> See, e.g., Claimant's Memorial on the Merits, Section VI(B), at 79 (May 29, 2015).

<sup>14</sup> See, e.g., Claimant's Memorial on the Merits, Section VI(B)(3), at 95 (May 29, 2015).

<sup>15</sup> Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, Section II(D) (3), at 50-77 (Oct. 6, 2015); Claimant's Reply on the Merits and Counter-Reply on Jurisdiction, Section II(D)-(E), at 57-76 (Jan. 8, 2016).

<sup>16</sup> See Peru-Canada FTA, art. 836(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...").

<sup>17</sup> CCSI's mission statement is available at: <http://ccsi.columbia.edu/about-us/>.

particular their implications for the host state's regulatory space and their interface with human rights law.<sup>18</sup> 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.

d) *There is a public interest in the subject-matter of the arbitration.*

Past Tribunals have noted that a public interest in the subject matter of a particular arbitration may arise where: the "substantive issues extend far beyond those raised by the usual transitional arbitration between commercial parties;"<sup>19</sup> the dispute concerns "the legality under international law, not domestic private law, of various actions and measures taken by governments" and thus raises "a variety of complex public and international law questions, including human rights considerations,"<sup>20</sup> or a Tribunal's decision has the potential to impact wider interests,<sup>21</sup> individuals, or entities beyond the dispute.<sup>22</sup> The subject matter of the present arbitration, and the consequences that may arise from the Tribunal's determinations, fulfill these characteristics.

First, the subject matter of the arbitration concerns matters of significant public importance that extend beyond the commercial sphere. The dispute concerns investment in a sector with particular import in Peru: while the extractive sector generates a majority of the country's exports<sup>23</sup> and has the potential to provide significant benefits, extractive projects in the country have led to environmental harms, human rights abuses, and correlated social conflict.<sup>24</sup> Indigenous peoples have been seriously affected by decades of extractive activities.<sup>25</sup> Moreover, these challenges and impacts, while deeply felt in Peru, are not exclusive to that country; they are also common in other resource-rich countries.<sup>26</sup> The present arbitration, and the Tribunal's determinations, will thus be of significant interest to policymakers in other national and global contexts.

Second, the wider interests and rights of third parties in Peru stand to be affected by the determinations of the Tribunal. Individuals and communities living in the area within which Claimant is seeking to operate have

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<sup>18</sup> See sources cited *supra* in note 10.

<sup>19</sup> *Methanex Corp. v. United States of America*, UNCITRAL Arb., Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amicus Curiae," para. 49 (Jan. 15, 2001).

<sup>20</sup> *Suez Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, paras. 19-21 (May 19, 2005).

<sup>21</sup> *Biwater Gauff v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, para. 53 (Feb. 2, 2007).

<sup>22</sup> *Apotex Holdings, Inc. v. The United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, para. 35 (Mar. 4, 2013).

<sup>23</sup> 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, para. 6 (Jul. 3, 2014) (estimating that more than half of exports consist of mineral and hydrocarbon products).

<sup>24</sup> The Inter-American Commission on Human Rights recently reported that it has received information pointing to "8,616 instances of environmental damage caused by mining activities in Peru, distributed in 21 regions of the country, as a consequence of irresponsible mining devoid of appropriate closure and remediation activities," and that, of these cases, 2,546 identified instances of environmental damage are considered to be of "very high risk." 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*, para 276 (2015) (citing Office of Ombudsperson Report No. 171, Lima (2015)); see also 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; *Mining conflicts in Peru: Condition critical*, Oxfam, March 2009, <https://www.oxfamamerica.org/static/oa3/files/mining-conflicts-in-peru-condition-critical.pdf>.

<sup>25</sup> See e.g., 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).

<sup>26</sup> See e.g., 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); 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*, paras. 30-35, U.N. Doc. A/HRC/18/35 (July 11, 2011) (summarizing human rights violations caused by extractive operations globally); European Parliament Directorate General for External Policies, *Indigenous Peoples Extractive Industries and Human Rights*, EXPO/B/DROI/2013/23 (Sept. 2014).

raised significant concerns regarding the potential impacts of extractive activities.<sup>27</sup> The Tribunal's decision may profoundly affect their rights, including those protected under international and domestic laws.

Third, the underlying dispute raises complex international law considerations, particularly due to the human rights issues at play. A more holistic assessment of these considerations would be especially timely in light of the rising recognition of the potential importance of human rights norms in investor-state arbitration,<sup>28</sup> as well as the increasing calls by UN experts for greater harmonization of international investment law with other international legal obligations.<sup>29</sup> In this specific arbitration, acceptance of some Treaty interpretations put before the Tribunal could frustrate both Peruvian law and international human rights law. Aside from threatening the rule of law in Peru, such an outcome could affect the balance of incentives for Peru to comply with its obligations under international human rights law, and for investors to comply with their responsibility to respect the rights of third parties who stand to be affected by their activities.<sup>30</sup> These potential impacts suggest a particularly strong public interest at stake in this arbitration.

## ORDERS SOUGHT

For the reasons stated herein, the Applicant requests that the Tribunal: (a) grant leave to the Applicant to file a written submission as "other persons" pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA; and (b) consider the submission attached to this Application.

Respectfully submitted,



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<sup>27</sup> See e.g., United Nations 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, para. 25 (Jul. 3, 2014) (mentioning Aymara opposition to concessions granted to Claimant at the Santa Ana site); Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, para. 68, 244 (Oct. 6, 2015); *Peru: Indigenous protests erupt in city of Puno*, BBC, May 28, 2011, <http://www.bbc.com/news/world-latin-america-13582707>.

<sup>28</sup> See e.g. James D. Fry, International Human Rights Law in Investment Law: Evidence of International Law's Unity, 18 DUKE J. OF INT'L & COMP. L (2007); Clara Reiner & Christoph Schreuer, *Human Rights and International Investment Arbitration*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 82, 84-85 (2009); PIERRE-MARIE DUPUY ET AL (EDS.), HUMAN RIGHTS IN INTERNATIONAL INVESTMENT ARBITRATION (2009); Luke Eric Peterson, "Human Rights and Bilateral Investment Treaties: Mapping the role of human rights law within investor-state arbitration," *Rights & Democracy* (2009); Bruno Simma & Theodore Kill, "Harmonizing Investment Protection and Human Rights: First Steps Towards a Methodology" in C. BINDER ET AL., (EDS.), INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2009); Ursula Kriebaum, *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 J. WORLD INV. & TRADE (2009); Lorenzo Cotula, Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law, 11 Int'l J. L. in Context 113 (2015).

<sup>29</sup> Various UN experts have commented on the need for harmonization of international investment law with other obligations, including those under international human rights law. See e.g., U.N. Office of the High Commissioner for Human Rights, *Statement by the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, on the upcoming signing the Trans-Pacific Partnership*, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17005&LangID=E>; U.N. Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, U.N. Doc. A/70/301 (Aug. 7, 2015); Report of the High Commissioner for Human Rights: Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9 (2 July 2003).

<sup>30</sup> U.N. Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).