

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**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**

**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

---

**TABLE OF CONTENTS**

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
<b>II.</b>	<b>PROCEDURAL HISTORY RELATED TO DHUMA’S AND DR. LÓPEZ’S APPLICATION .....</b>	<b>1</b>
<b>III.</b>	<b>THE RELEVANT LEGAL PROVISIONS .....</b>	<b>2</b>
<b>IV.</b>	<b>DHUMA’S AND DR. CARLOS LÓPEZ’S APPLICATION TO PARTICIPATE AS “OTHER PERSONS” (SUMMARIES).....</b>	<b>5</b>
	<b>A. THE ARGUMENTS OF DHUMA AND DR. CARLOS LÓPEZ.....</b>	<b>5</b>
	<b>B. THE CLAIMANT’S POSITION .....</b>	<b>6</b>
	<b>C. THE RESPONDENT’S POSITION .....</b>	<b>8</b>
<b>V.</b>	<b>THE TRIBUNAL’S CONSIDERATIONS .....</b>	<b>9</b>
<b>VI.</b>	<b>DISPOSITIF .....</b>	<b>16</b>

## GLOSSARY OF DEFINED TERMS

<b>Abbreviation</b>	<b>Full Term</b>
DHUMA	Association of Human Rights and Environment of Puno, Peru
Dr. López	Dr. Carlos López-Hurtado PhD, Senior legal Adviser to the International Commission of Jurists in Geneva, Switzerland
DHUMA and Dr. Carlos López Application	Request for leave to file a brief of Amicus Curiae as a Third Non-Disputing Party
DHUMA and Dr. Carlos López Submission	DHUMA's and Dr. Carlos López's Amicus Curiae Brief, attached to their 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 Association of Human Rights and Environment of Puno, Peru (hereinafter “DHUMA” or “First Applicant”) and Dr. Carlos López-Hurtado PhD, Senior Legal Adviser to the International Commission of Jurists in Geneva, Switzerland (hereinafter “Dr. López” or “Second Applicant”) (“DHUMA” and “Dr. López” together hereinafter the “Applicants”) in respect of a Request for leave to file a brief of *Amicus Curiae* as a Third Non-Disputing Party pursuant to Articles 832, 835, and 836 and Annex 836.1 of the Peru-Canada FTA (“DHUMA and Dr. López 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. DHUMA, the First Applicant, is described as a “*private non-profit organization established under Peruvian law*” that “*promote[s] the defense of life, based on respect for human dignity and the common good*”, whose mission “*is the promotion and protection of human rights and the environment of rural communities (indigenous peoples) Aymara and Quechua in the region of Puno.*” Dr. López, the Second Applicant, describes himself as “*a Peruvian lawyer who works in the non-governmental organization International Commission of Jurists, coordinating the program on business*”, who holds “*the degree of Doctor in Public International Law from the University of Geneva (Graduate Institute of International Studies) hav[ing] extensive knowledge and experience on international standards on social responsibility of business and human rights and its application to specific cases.*”
3. The Applicants state that they are totally independent from the Parties and that they have received no financial or other support from the Parties or other person related to them. The Applicants assert that DHUMA is “*funded by contributions and donations from organizations of the Catholic Church, and independent foundations for the promotion of development, human rights and environmental protection*”, and that Dr. López is “*part of the staff of the International Commission of Jurists.*”

## **II. PROCEDURAL HISTORY RELATED TO DHUMA’S AND DR. LÓPEZ’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, DHUMA and Dr. López submitted the “DHUMA and Dr. López Application”, together with their submission (“DHUMA and Dr. Carlos López Submission”) to the Tribunal.
7. On June 10, 2016, the Applicants requested an extension for filing the English translations of their Application and Submission, until June 17, 2016.
8. On June 14, 2016, the Tribunal informed the Parties that it was in receipt of the DHUMA and Dr. López Application and granted the Parties until July 7, 2016 to respond thereto.
9. On June 17, 2016, the Applicants submitted their translations to the Tribunal.
10. On July 7, 2016, each Party responded to the DHUMA and Dr. López Application, by separate letters.

### **III. THE RELEVANT LEGAL PROVISIONS**

11. 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.*

12. 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.*<sup>1</sup>

#### **IV. DHUMA'S AND DR. CARLOS LÓPEZ'S APPLICATION TO PARTICIPATE AS "OTHER PERSONS" (SUMMARIES)**

##### **A. THE ARGUMENTS OF DHUMA AND DR. CARLOS LÓPEZ**

13. The Applicants argue that their Application meets the requirements of Article 836.4 of the FTA.
14. First, the DHUMA and Dr. Carlos López Submission will assist the Tribunal in its understanding and evaluation of the disputing Parties' conduct and in its final decision, by providing the views, information, and analysis from organizations with long experience in the Puno region that have a close and direct knowledge of the events that took place between the Aymara communities and Claimant. The Applicants' Submission would bring a unique vision and information on the events in Puno, which is the result of their experience, extensive work in the region of Puno and with peasant communities, knowledge of the Aymara culture, and their participation in some events involving the mining company and the communities around the Santa Ana mining project. The Applicants further submit that they have a deep and close knowledge of international human rights standards and their application to business.
15. Second, the Applicants' Submission will address issues of fact and law that are within the Parties' dispute. The Applicants will present a detailed account of the social protest movements in 2011 and will refer, among other issues, to the existence or absence of consent and social support from the communities near to the Santa Ana Project. The Applicants will also detail the conduct and practices of Claimant with regard to the communities. The Submission will address the relationship between international standards of human rights and due diligence applicable to business and investors. The Submission will refer to the relationship between the need for the

---

<sup>1</sup> 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].

investor to obtain a "*social license to operate*" and the relevance of all this in relation to Article 810 on "*social responsibility of business*" and other standards of the FTA, as well as the relevance of international standards on free, prior and informed consent of the indigenous peoples of southern Puno who are Aymara.

16. Third, the Applicants have a significant interest in the arbitration, with long experience in the Puno region, and have a particular interest to convey to the Tribunal different, reliable, and direct information from people close to the facts and the region.
17. Fourth, there is a public interest in the subject-matter of the arbitration. The decision on the dispute between the Parties will have natural implications for the people and communities of the region of Puno and for the respect for the rights of peasant communities to their land and natural resources, as well as the right to be informed and consulted on the use of these resources.

#### **B. THE CLAIMANT'S POSITION**

18. Claimant argues that the Tribunal should reject the DHUMA and Dr. Carlos López Application. The Tribunal must reject applications that do not satisfy the specific requirements contained in the FTA. The DHUMA and Dr. Carlos López Application does not satisfy the criteria for third-party submissions under Art. 836.4 and Annex 836.1 of the FTA. Because DHUMA and Dr. López seek leave to file a *joint* submission, both must meet all of the criteria for *amici* set forth in the FTA. If either one fails to meet any of the criteria in the FTA, their joint Application should be denied. The joint Application will not assist the Tribunal and seeks to address matters outside the scope of this arbitration. Their Application also does not satisfy the disclosure requirements of Annex 836.1 of the FTA.
19. First, neither Dr. Carlos López nor DHUMA has a specific interest in the present arbitration, as Art. 836.4(c) of the FTA requires. Their Application should be rejected on that basis. Beyond being a Peruvian national and working in the field of business and human rights, Dr. López has not articulated a significant interest in this arbitration. A general interest in the subject-matter of the dispute or the international legal issues is insufficient to constitute a "*significant interest*" that may justify a tribunal's exercise of its discretion to permit an amicus submission. DHUMA claims that "[t]he interest of the amici in this arbitration process flows from the eminent public interest of the dispute over the facts and decisions that took place in Puno in 2011 and before[.]" and deems it sufficient to self-proclaim as a civil association whose mission is the promotion and protection of human rights and the environment of rural communities (indigenous peoples) Aymara and Quechua in the region of Puno. However, DHUMA has not made specific showings,

as required by the *Aguas Provinciales* tribunal, of its background, experience, expertise, or special perspectives that will assist the Tribunal. DHUMA does not explain what the natural implications of this case are for (1) the people and communities of the region of Puno, (2) the respect for their rights to land and water, or (3) for the right to be informed and consulted on the use of these resources. DHUMA also fails to explain how the outcome of this arbitration might affect DHUMA or its work. DHUMA's mission statement is not sufficient evidence of the mandate that DHUMA claims it has from the Aymara communities and cannot, without further substantiation, constitute a "*significant interest*" in this arbitration. In any event, the rights of the Aymara communities are not at issue in this dispute.

20. Second, the DHUMA and Dr. Carlos López Application would not assist the Tribunal and it seeks to address matters outside the scope of this arbitration. Dr. López's expertise is in business and human rights and he has no apparent first-hand knowledge of the facts underlying this dispute. DHUMA's allegedly "*unique vision*" of the facts will not assist the Tribunal but rather seeks, in part, to address matters outside the scope of this arbitration.
21. The Tribunal, as in *Methanex*, when considering the *amicus* application should proceed on the assumption that the Parties have adequately briefed the issues in dispute. Given the Parties' extensive briefing in the present case, neither Dr. López's position on the law applicable to the present dispute, nor DHUMA's perspective on the facts will assist the Tribunal. Dr. López's perspective and position are not new or different, and the Applicants' position that they have a deep and close knowledge of international human rights standards and their application to business is irrelevant, as neither Party is alleging a breach of human rights law.
22. DHUMA's alleged "*unique vision*" of the facts will not assist the Tribunal either as it is not unique or new. DHUMA's unsupported claim that it represents the facts viewed by the Aymara communities is belied by evidence that is already before the Tribunal. DHUMA's version of the facts echoes Respondent's, and Respondent has briefed these facts at length. Indeed, Respondent's expert, Mr. Peña Jumpa, addresses exactly the same facts on which DHUMA wishes to comment, and appears to have consulted and relied on DHUMA in the preparation of his expert report.
23. Third, the DHUMA and Dr. Carlos López Application has not complied with the disclosure requirements of Annex 836.1 of the FTA. DHUMA has not disclosed its membership and it is therefore impossible to assess its independence and expertise, which are key attributes of an *amicus curiae*. Similarly, Dr. López, apart from disclosing that he is a Peruvian lawyer who is part of the staff of the International Commission of Jurists, has neither provided further

information on his ties to Respondent, nor his *curriculum vitae*. Further, DHUMA and Dr. López have not “*specified*” the nature of their interest. Their disclosure is, therefore, insufficient to satisfy the requirements of Annex 836.1 of the FTA.

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 DHUMA and Dr. Carlos López Application.

#### **C. THE RESPONDENT’S POSITION**

25. Respondent argued that the Tribunal should admit the DHUMA and Dr. Carlos López Submission.
26. The DHUMA and Dr. Carlos López Submission presents a unique perspective, distinct from the view presented by the Parties – the perspective of the indigenous Aymara communities that would have been directly affected by the Santa Ana Project and that participated in the protests against it. That perspective will assist the Tribunal in analyzing Claimant’s failure to obtain the support of the local communities in Puno, as well as Claimant’s international law obligations to earn that support before proceeding with the Santa Ana Mining Project.
27. Application of each of the four factors for admission under Art. 836 of the FTA weighs in favor of admitting the DHUMA and Dr. Carlos López Submission. First, the DHUMA and Dr. Carlos López Submission will assist the Tribunal in determining factual and legal issues by bringing a perspective, particular knowledge, or insight that is different from that of the disputing Parties – the direct views of the *comunidades campesinas* that interacted with Claimant, participated in the Puno protests, and opposed the Santa Ana Project.
28. Second, their Submission will address a matter within the scope of the dispute. The Submission will address the social protests of 2011 and the relationship between Claimant and the local communities before and during those protests. The Submission also addresses Claimant’s

(non)compliance with its international social responsibility and international legal obligations to engage with the *comunidades campesinas*.

29. Third, the Applicants have a significant interest in this arbitration. Participation in this arbitration is consistent with DHUMA's mission. Given the stark consequences of this arbitration for the *comunidades campesinas* that DHUMA serves, it is clear that DHUMA has an interest in making sure that those community voices are heard in this arbitration.
30. Fourth, this arbitration has a public interest – namely, the State's right to regulate the ownership of natural resources on lands in its border area. These issues are addressed in the DHUMA Submission. In addition, the public has an interest in the transparent resolution of investor-state disputes and, as confirmed in the *Methanex* and *Glamis Gold* cases, amicus should be permitted to participate. It would greatly benefit the Tribunal to uphold the transparency and inclusiveness of this proceeding by allowing DHUMA, as a representative of the *comunidades campesinas* to address the Tribunal in its own voice.

## V. THE TRIBUNAL'S CONSIDERATIONS

31. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Applicants and the Parties in their submissions. In this Order, the Tribunal discusses the arguments of the Applicants 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, as quoted above.
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. The Tribunal agrees with Claimant that Dr. López's expertise seems to be primarily in business and human rights and he has no apparent first-hand knowledge of the facts underlying this dispute, and that DHUMA's version of the facts seems to be similar to what Respondent has briefed. And indeed, Respondent's expert, Mr. Peña Jumpa, addresses facts on which DHUMA wishes to comment, and appears to have consulted and relied on DHUMA in the preparation of his expert report.

39. But, in the view of the Tribunal, that does not mean that the Applicants may not “bring[] a perspective, particular knowledge or insight that is different from that of the disputing parties”, as provided by Art. 836.4(a) of the FTA.
40. Without prejudice as to whether the submissions of the Applicants will finally be considered relevant for the Tribunal in drawing its conclusions in this case, it appears to the Tribunal that the combination of Dr. López’s legal expertise and DHUMA’s local knowledge of the facts may add a new perspective that differs from that of the Parties. This is so, irrespective of whether DHUMA speaks for the Aymara communities, or whether its interests may be synonymous with the communities’ interests.
41. Claimant objects because DHUMA has provided no information on its membership, its composition, the precise work it does with the local communities, whether it consults with all communities or just a subset of them, with which communities it works, whether it has the widespread support of these communities, and whether the communities have authorized DHUMA to be their advocate.
42. Respondent makes the following submission:

*DHUMA has extensive experience working with the people of Puno, specifically the comunidades campesinas that would have been directly and indirectly affected by the Santa Ana project, and the organization also has specific experience addressing the community concerns related to the Santa Ana project. DHUMA representatives, including the authors of the DHUMA Submission, were actively involved in maintaining calm and order during the tumultuous 2011 time period as the communities expressed their opposition to Claimant’s operations in Puno. They sought to understand and constructively solve the complaints of the communities. The DHUMA Submission will therefore provide the most accurate and nuanced description of what motivated the 2011 protests, what community concerns were prevalent, and the ways in which Claimant responded to those concerns. DHUMA’s intimate knowledge of Aymara culture and its specific experience working with the local Aymara people imbues DHUMA with a unique perspective that would benefit the Tribunal.*

43. In their Application dated June 9, 2016, the Applicants made the following submission:

*Amici will provide, if the Tribunal allows, a unique vision and information on the events in Puno. This unique contribution is the result of our experience, extensive work in the region of Puno and with peasant communities, knowledge of the Aymara culture and our participation in some events involving the mining company and the communities around the mining project Santa Ana. DHUMA participated in the committee for Dignity and Social Peace, formed by various private, public and church institutions in the region in order to seek peaceful solutions to the socio-environmental conflict between communities and the Peruvian government. Amici also have a deep and close knowledge of international human rights standards and their application to business. Amici considers it important that the Arbitral Tribunal has the views, information and*

*analysis from organizations with long experience in the Puno region, and have a close and direct knowledge of the events that took place between the Aymara communities and Bear Creek Mining Company.*

44. Irrespective of the lack of information mentioned by Claimant, the information supplied by Respondent and the Applicants is sufficient to show that DHUMA has information and experience specific to the background and development of the Santa Ana Project which may contribute a new perspective as contemplated by Art. 836.4(a) FTA.
45. Regarding the further criteria (b) to (d) contained in Art. 836.4 FTA, the Tribunal does not agree with Claimant that “[b]ecause DHUMA and Dr. López-Hurtado seek leave to file a joint submission, both must meet all of the criteria for amici set forth in the Canada-Peru FTA. If either one fails to meet any of these criteria, their Joint Amicus Petition should be denied.” As already concluded above by the Tribunal, from this wording of the introductory sentence of Art. 836.4 of the FTA, it is clear that these are only “*criteria*” and not conditions, and also that they are not exhaustive. The Tribunal has discretion as to which of these criteria and which “*other things*” it takes into account for its decision its case.
46. Therefore, these other criteria need only be examined to establish whether the Tribunal considers them to be relevant, beyond the criteria of subsection (a). In the present case, the Parties have argued on all of these further criteria and come to different conclusions. In this context, the Tribunal has carefully examined whether the arguments put forward by Claimant in its Memorial of July 7, 2016 offer a reason to deny the admissibility of the Applicants’ Submission, notwithstanding the Tribunal’s conclusion above. The Tribunal finds that Claimant’s arguments do not provide a reason to depart from the Tribunal’s conclusion based on subsection (a).
47. Further to Art. 836, **Annex 836.1 of the FTA** provides conditions on the form and content of Applications. The Tribunal recalls the text quoted above in section III of this Order:

***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.<sup>2</sup>

48. Contrary to the criteria of Art. 836.4 discussed above, the introductory term “shall” indicates that these terms are mandatory.

49. Claimant has made the following submission:

*First, that DHUMA has not disclosed its membership, as required under Article 1(c) of Annex 836.1. Absent information on DHUMA's membership, it is impossible to assess its independence and expertise, which are key attributes of an amicus curiae. [...]*

*Similarly, Dr. López-Hurtado only discloses that he is a Peruvian lawyer who “is part of the staff of the International Commission of Jurists[,]” but provides no further information on his ties to Peru and does not attach a curriculum vitae to the Joint Amicus Petition. [...]*

*Second, DHUMA and Dr. López-Hurtado have not “specified” the nature of their interest in the arbitration. [...] DHUMA and Dr. López-Hurtado have not provided any*

---

<sup>22</sup> 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].

*information on how the outcome of this arbitration will affect their work and have not specified what their alleged interest in this arbitration is beyond asserting an “eminent public interest” and “natural implications[.]” This is insufficient to satisfy the requirements of Annex 836.1, Article 1(f).*

50. Regarding the condition in **Article 1(c) of Annex 836.1**, the Tribunal notes that the information is only required “where relevant.”
51. The Applicants have provided the following information:

*[...] DHUMA is duly registered with Partida Registration No. 11063494 in the Register of Legal Persons Puno, Peru.*

*DHUMA was born in 1988 as a Vicariate of Solidarity of the Prelature of Juli, starting its activities since 1989. On June 20, 2007 it becomes the "Association for Human Rights and the Environment"; a non-profit organization in order to promote the defense of life, based on respect for human dignity and the common good. DHUMA's mission is the promotion and protection of human rights and the environment of rural communities (indigenous peoples) Aymara and Quechua in the region of Puno. Dr. Carlos Lopez-Hurtado is a Peruvian lawyer who works in the non-governmental organization International Commission of Jurists, coordinating the program on business and human rights. Dr. López-Hurtado holds the degree of Doctor in Public International Law from the University of Geneva (Graduate Institute of International Studies) has extensive knowledge and experience on international standards on social responsibility of business and human rights and its application to specific cases.*

52. Having regard to the terms of Article 1(c) of Annex 836.1 of the FTA, the Tribunal considers this to be sufficient relevant information.
53. **For the condition in Annex 836.1, Article 1(f) of the FTA**, the Applicants have submitted the following:

*The interest of the amici in this arbitration process flows from the eminent public interest of the dispute over the facts and decisions that took place in Puno in 2011 and before. The decision on the dispute between Bear Creek and the Republic of Peru will have natural implications for the people and communities of the region of Puno, and for the respect for their rights to land, water and to be informed and consulted on the use of these resources. Amici have a particular interest to convey to the Tribunal different, reliable and direct information from people close to the facts and the region.*

54. In this context, the Tribunal further recalls its examination above regarding Art. 836.4(a) of the FTA where the information provided was considered sufficient to show that DHUMA has information and experience specific to the background and development of the Santa Ana Project which may contribute a new perspective as contemplated by Art. 836.4(a) of the FTA. That information, together with the information quoted above, in the view of the Tribunal sufficiently fulfills the requirement of Annex 836.1, Art. 1(f) of the FTA.

55. The Tribunal considers that all other conditions in Annex 836.1 of the FTA have been plainly complied with.
56. The further conditions set out in **subsection 2 of Annex 836.1 of the FTA**, are also plainly complied with, having regard to the text of the submission annexed by the Applicants with their Application.
57. Finally, **Art. 836.5 of the FTA** provides:
- 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.*
58. Contrary to the submission by Claimant in this regard, the Tribunal does not consider these provisions to be a problem in the present case. From the very beginning of these proceedings the timetable annexed to Procedural Order No. 1 has provided for the various procedural steps regarding the submissions of non-disputing parties. The Tribunal considers that the Applicants' submission does not disrupt the proceedings. Further, the Tribunal considers that the Parties are not *unduly burdened or unfairly prejudiced* by the Applicants' Submission. They are aware of the Submission as its text was enclosed with the Application dated June 9, 2016. The English version was received shortly thereafter, and it is only 17 pages long and thus below the limit of 20 pages set by Annex 836.1 subsection 2(b). According to the agreed timetable the Parties have until August 18, 2016, to comment on it.
59. In view of all the above considerations, the Tribunal admits the submission.

## **VI. DISPOSITIF**

- 1. The Tribunal hereby admits the Submission of the Applicants, Association of Human Rights and Environment of Puno, Peru (“DHUMA”) and Dr. Carlos López PhD, as Other Persons according to Art. 836 FTA.**
- 2. According to the agreed Timetable attached to Procedural Order No. 1, the Parties are invited to submit comments on that submission by August 18, 2016.**

On behalf of the Tribunal

*[Signed]*

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