

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation

v.

Republic of Peru

(ICSID Case No. ARB/14/21)

PROCEDURAL ORDER NO. 8 (PO-8)

Regarding Details of the Hearing

Date of the Order: August 4, 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

I. Introduction

1. On June 30, 2016, the Tribunal communicated a draft of Procedural Order No. 7 *Regarding Details of the Hearing* (“PO-7”) to the Parties. The Parties submitted their comments on July 19, 2016. Taking into account the comments received from the Parties, the Tribunal issued PO-7 on July 25, 2016 (“PO-7”).
2. By letter of July 26, 2016, Claimant requested the Tribunal to reconsider certain aspects of PO-7, including the Hearing schedule and the order of expert testimony. Claimant requested that the Tribunal hear the experts by subject-matter, with the legal experts first, followed by the damages experts.
3. Claimant also requested the Tribunal to reconsider the time allocation for closing statements and, instead of closing statements, to provide for two rounds of simultaneous post-hearing submissions.
4. By letter of August 1, 2016, Respondent provided its comments on Claimant’s letter of July 26, 2016. In Respondent’s view, there is no need or grounds for the Tribunal to revisit the Hearing procedures set out in PO-7. Respondent further requested the Tribunal to reject Claimant’s attempt to re-open issues the Tribunal has already decided, and instead reaffirm the Hearing schedule set out in PO-7.

II. The Tribunal’s Considerations

5. The Tribunal has taken note of Claimant’s letter dated July 26, 2016, and of Respondent’s letter dated August 1, 2016. In view of the different preferences of the Parties regarding their use of their time slots at the Hearing, the Tribunal has concluded that it should provide the Parties a greater flexibility for the presentation of their case.
6. The Tribunal recalls that the Parties had suggested, and PO-7 had provided, that each Party may use time not used for its Opening Statement (up to 3.5 hours) for its examination of witnesses and experts.
7. In view of the above considerations regarding flexibility, the Tribunal considers that each Party should also be given the choice of whether it prefers to present oral Closing Statements at the end of the Hearing for up to two hours or prefers to shorten or waive such Closing Statements and use the unused time for its earlier examination of witnesses and experts.
8. Further, the Tribunal considers that, for its own purposes, the Opinions of the Legal Experts speak for themselves and do not require oral cross examination. However, it should be left to each Party whether it wishes to use some of its time-slot for such cross examination during the hearing or prefers to provide any further comments regarding the Experts’ Opinions only in the Post-Hearing Brief.
9. In view of the above considerations, the Tribunal has decided to amend certain details of the Hearing that were originally contemplated in its PO-7. As a result, the Tribunal’s PO-7 of July 25, 2016 is hereby repealed and substituted by this Procedural Order No. 8 (“PO-8”) of today’s date.

III. Earlier Rulings

10. The Tribunal recalls the following sections of **Procedural Order No. 1 (PO-1)**. They shall remain valid unless they are changed or amended by later sections of this PO-8.

19. Examination of Witnesses and Experts
Arbitration Rules 35 and 36

[...]

19.4. *The procedure for examining witnesses and experts at the hearing shall be the following:*

19.4.1. *Before giving evidence, witnesses shall make the declaration in ICSID Arbitration Rule 35(2), and experts shall make the declaration in ICSID Arbitration Rule 35(3).*

19.4.2. *The witness statement of each witness and expert report of each expert shall stand in lieu of the examination by the party producing the witness and expert (“direct examination”), subject to the provisions below and any agreement of the Parties or direction of the Tribunal.*

19.4.3. *Witnesses giving oral testimony may first be examined in direct examination for no longer than 15 minutes. Direct examination of witnesses shall be conducted only if and as necessary to introduce the witness, confirm the accuracy of and completeness of the witness’s written statement(s), offer any corrections or clarifications that may be necessary to prevent a misunderstanding of that witness’s written direct testimony, to highlight briefly the key points of his or her witness statement, and to address any relevant development that occurred after the witness signed the witness statement. Direct examination of experts shall either follow the same format as for witnesses, or the expert may provide a brief presentation of the key points of his or her report of no longer than 30 minutes, except for experts on quantum who may take up to 45 minutes.*

19.4.4. *The direct examination of a witness or expert is followed by examination by the other party (“cross-examination”), and subsequently by the party producing the witness (“redirect examination”).*

19.4.5. *The redirect examination shall be limited to matters raised in cross-examination.*

19.4.6. *The Tribunal may interject questions to the witnesses and experts at any time.*

19.5. *Unless the Parties and the Tribunal agree otherwise, experts (but not witnesses) shall be allowed in the hearing room before giving their testimony and shall be permitted to read the transcript of the hearing before testifying. As a general rule and subject to their availability, if either Party’s party representatives are called upon to be examined, they shall be heard first.*

19.6. *The party whose witness or expert has been called for cross-examination must make the witness or expert available for the hearing. In the event of a failure to do so without good cause, the Tribunal shall disregard the statement, report or opinion of the relevant witness or expert. In any case, the Tribunal shall assess the probative value of such statement, report or opinion taking into account the record and all relevant circumstances, including the fact that the*

statement was not confirmed orally and that the witness and/or expert was not examined.

19.7. *Examination by video-conference may be permitted for justified reasons at the discretion of the Tribunal.*

19.8. *A party's waiver to cross-examine a witness or expert at the hearing shall not be deemed to be an acceptance of the witness' or expert's written testimony.*

19.9. *The Tribunal shall determine the order in which the witnesses and experts will be called after consultation with the Parties during the pre-hearing organizational meeting in §20 below.*

20. *Pre-Hearing Organizational Meetings*
Arbitration Rule 13

20.1 *A pre-hearing organizational meeting shall be held by telephone between the Tribunal, or its President, and the Parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing.*

21. *Hearings*
Arbitration Rules 20(1)(e) and 32

21.1. *The oral procedure shall consist of a hearing for the examination of witnesses and experts, if any, and for oral arguments.*

21.2. *The hearing shall be held at a place to be determined in accordance with § 10 above.*

21.3. *It was agreed that the Parties and the Tribunal shall reserve from Thursday, September 8, 2016 through Friday, September 16, 2016, with September 15th and 16th to be kept in reserve, as well as Saturday, September 10, 2016.*

21.4. *The Members of the Tribunal shall reserve at least one day after the hearing to determine the next steps and to hold deliberations.*

21.5. *The allocation of time for the hearing shall be decided by the Tribunal after consultation with the Parties. Without prejudice to any subsequent developments, the Parties currently estimate that at least five working days will be required for a hearing on the merits of the case, with two working days also being held in reserve.*

21.6. *In accordance with Article 835(1) of the Canada-Peru FTA, Hearings shall be open to the public. To the extent necessary to ensure protection of confidential information, the Tribunal may hold portions of hearings in camera.*

21.7. *Also in accordance with Article 835(2) of the Canada-Peru FTA, the Tribunal shall establish procedures for the protection of confidential information and appropriate logistical arrangements for an open hearing, in consultation with the Parties.*

22. *Records of Hearings and Sessions*
Arbitration Rules 13 and 20(1)(g)

22.1. *Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the Parties and the Tribunal Members.*

22.2. *The Tribunal Secretary may prepare summary minutes of hearings and sessions upon request.*

22.3. *Verbatim transcript(s) in the procedural language(s) shall be made of any hearing and session other than sessions on procedural issues. Unless*

otherwise agreed by the Parties or ordered by the Tribunal, the verbatim transcripts shall be available in real-time using Live Note or similar software and electronic transcripts shall be provided to the Parties and the Tribunal on a same-day basis.

22.4. The Parties shall agree on any corrections to the transcripts within 20 business days of the later of the dates of the receipt of the sound recordings and transcripts. At the request of either Party, the agreed corrections shall be entered by the court reporter in the transcripts (“revised transcripts”). The Tribunal shall decide upon any disagreement between the Parties and any correction adopted by the Tribunal shall be entered by the court reporter in the revised transcripts.

23. Post-Hearing Memorials and Statements of Costs
Convention Article 44; Arbitration Rule 28(2)

23.1. At the hearing, after consulting with the Parties and taking into account their views (particularly in respect of any cost implications), the Tribunal shall decide whether it believes it to be necessary for the Parties to file Post-Hearing Memorials.

23.2. Each party will submit its Statement of Costs within 4 weeks after the hearing or the final exchange of Post-Hearing Memorials (if any).

ANNEX A. TO THE PROCEDURAL ORDER NO. 1
PROCEDURAL SCHEDULE

<i>Procedural Steps</i>	<i>Time Periods (days)</i>	<i>Dates (mm/dd/yyyy)</i>
[...]	[...]	[...]
Hearing (five full days with three additional days being held in reserve)	28	09/8/2016 – 09/14/2016 with 09/15/2016 and 09/16/2016 held in reserve, as well as 09/10/2016

IV. Duration, Date and Location of the Hearing

11. As agreed by the Parties, the Hearing shall be held in Washington, D.C.
12. The Hearing shall begin on Wednesday, September 7, 2016 (at 9:30 am) and continue till and including Saturday, September 10, 2016.
13. The Hearing shall continue from Monday, September 12, 2016 till and including September 14, 2016. With adjustments as appropriate to the circumstances, the Hearings shall typically extend for 8.5 hours each day.

V. Notification of Witnesses and Experts

14. The Parties have consulted and agreed that the following witnesses and experts are being called to appear at the Hearing. The sequence below shall apply for the examination of

the witnesses and of the experts respectively in accordance with the Agenda below, unless the Parties agree otherwise

- Claimant's experts and witnesses:
 - Andrew Swarthout
 - Elsiario Antunez de Mayolo
 - Catherine McLeod-Seltzer
 - Hans Flury
 - Alfredo Bullard
 - RPA Inc.
 - FTI Consulting

- Respondent's experts and witnesses:
 - Fernando Gala
 - César Zegarra
 - Felipe Ramírez
 - Jorge Danos
 - Francisco Eguiguren
 - Luis Rodríguez-Mariategui
 - Antonio Peña Jumpa
 - SRK Consulting
 - The Brattle Group

15. Notwithstanding the above, if, in view of the Tribunal's considerations under paras. 5-9 *supra*, and the amended details of the Hearing as reflected in this PO-8, a Party wishes to reconsider and change its notifications of the witnesses and experts it intends to examine at the Hearing, the Party may do so and submit a new list by **August 18, 2016**.

16. The Parties are to notify the Secretary of the Tribunal as soon as possible whether any of its witness and/or experts will require Certificates of Travel for the Hearing.

VI. A consolidated USB drive with the Parties' submissions

17. Each of the Parties will prepare a consolidated USB drive that contains all of its pleadings to date, including the witness statements, expert reports, exhibits and legal authorities it has submitted, with hyperlinked indexes, and provide 10 (ten) units to the Secretary of the Tribunal by **August 22, 2016**, for further distribution to the Tribunal

Members, the Tribunal Secretary, the Tribunal Assistant, the court reporters and the interpreters, as well as for the case file.

VII. Documentation for and at the Hearing

18. **New documents** that do not form part of the record in this arbitration may not be presented at the Hearing unless agreed by the Parties or authorized by the Tribunal.
19. However, a Party may use **Demonstrative Exhibits or PowerPoint presentations** at the Hearing, provided that it indicates on each page the submission or exhibit in the file from which it originates.
20. Demonstrative Exhibits and PowerPoint presentations used during opening and closing statements shall be provided in hard copy at the beginning of the respective statement; all other Demonstrative Exhibits and PowerPoint presentations shall be provided immediately before the testimony to which they relate. Each Party will provide 12 (twelve) hard copies of such Demonstrative Exhibits and Power Point Presentations (one Hearing Binder for each Tribunal member, the Tribunal Secretary, and the Tribunal Assistant, two Hearing Binders for the opposing Party, two for the court reporters, two for the interpreters and one for the file), with an electronic copy to follow at the end of the same day to be sent to the Tribunal Secretary, with copy to opposing counsel, for further distribution to the Tribunal members and the Tribunal Assistant.
21. The Parties shall use **separate document bundles for the examination of witnesses or experts**, which are to be handed to the witness or expert at the beginning of his or her examination. One copy shall be provided to each member of the Tribunal, the Tribunal Secretary, and the Tribunal Assistant, two copies to the opposing Party, two copies for the court reporters and two copies for the interpreters. Bundles for direct examination need only be provided if new developments have occurred after the witness' or expert's last written statement, which the Party presenting the witness wishes to introduce on the basis of documents.

VIII. Agenda of the Hearing

22. The Tribunal may address questions to the Parties at any time.
23. The following Agenda is established for the Hearing (the "**Agenda**"):
 1. Introduction by the President of the Tribunal.
 2. Opening Statements of not more than 3.5 hours each for:
 - a. The Claimant; and
 - b. The Respondent.
 - c. Any time not used by a Party for its Opening Statement will be available for that Party's use for the examination of witnesses and experts.
 3. Examination of each of the Claimant's witnesses. Each witness shall be examined in the sequence as detailed above in section V, as revised in accordance with paragraph 15 *supra*, in the following manner:
 - a. Affirmation of witness as to the truth of his or her evidence;
 - b. Short introduction by the Claimant of not more than 15 minutes (this

may include short direct examination on new developments after the last written statement of the witness);

- c. Cross-examination by the Respondent;
 - d. Re-direct examination by the Claimant, but only on issues raised in cross-examination;
 - e. Re-cross examination by the Respondent will be permitted only by leave of the Tribunal, and only on issues raised in re-direct examination;
 - f. Remaining questions by Members of the Tribunal.
4. Examination of each of the Respondent's witnesses. Each witness shall be examined in the same manner and sequence as detailed in Section 3 of the Agenda.
 5. Order of expert testimony: insofar as a Party chooses to cross examine Legal Experts, and so notifies the Tribunal by **August 18, 2016**, such examination should be conducted before the start of the examination of the Experts for damages from both sides. Accordingly, legal experts shall be examined first (Claimant's, then Respondent's), followed by the damages experts (Claimant's, then Respondent's).
 6. With the exception of the order of experts testimony provided under section 5 of the Agenda, the examination of each of the Claimant's experts shall be conducted in the same manner and sequence as detailed in section 3 of the Agenda. Similarly, the examination of each of the Respondent's experts shall be conducted in the same manner and sequence as detailed in section 3 of the Agenda.
 7. With respect to testimony from experts listed in paragraph [6] who have submitted expert reports with multiple authors (*i.e.* RPA, FTI and The Brattle Group), the following shall apply:
 - a. Each Party will decide which of the author(s) of its expert reports will be examined, except that:
 - i. No more than two authors may be selected; and
 - ii. The author(s) who appear to testify must be able to answer questions related to the full report (whether in its entirety or in portions, so long as the full report is covered between them).
 - b. If two experts testify regarding the same expert report:
 - i. The experts will testify at the same time;
 - ii. Counsel will designate one of its two experts as the "point person" to initially receive all questions and then decide which of the two testifying experts will answer; and
 - iii. Only one expert may answer each question posed.
 8. After consultation with the Parties, the Tribunal may decide to hear certain witnesses and experts by conferencing.
 9. Closing Statements of not more than 2 hours each for:
 - a. The Claimant; and

- b. The Respondent.
- c. Each Party will have the choice of whether it prefers to present an oral Closing Statement at the end of the Hearing for up to two hours or prefers to shorten or waive such Closing Statement and use the unused time for its earlier examination of witnesses and experts.

10. Remaining questions by the Tribunal, if any.

11. Discussion of post-hearing submissions (if any) and other procedural issues.

IX. Allocation of Time

24. The principle of equal time as between the Parties shall be observed in the conduct of the Hearing.

25. Taking into account the examination of witnesses and experts announced by the Parties, and also taking into account the total time reserved for the Hearing, the Tribunal has determined the maximum time periods which the Parties shall have available for their presentations and examination and cross-examination of all witnesses and experts. On the basis of the Calculation of Hearing Time attached to this Order, the total maximum time available to the Parties (excluding their Opening and Closing Statements) for examination of witnesses and experts shall be as follows:

16.75 hours for the Claimant

16.75 hours for the Respondent

26. As noted in paragraphs 23.2(c) and 23.9(c) above, however, if either Party does not use its full allocation of time for its Opening Statement and Closing Statement, it may allocate the remaining time to the examination of witnesses and experts.

27. It is left to each Party to determine how much of its total allotted time it wishes to spend on the items in Sections 3 to 6 of the Agenda, so long as the Party does not exceed the total time allotted to it.

28. Time spent on direct or re-direct examination shall be counted toward the time account of the Party presenting the witness or expert, whereas time spent on cross-examination shall be counted toward the opposing Party's time account. Time spent on witness or expert conferencing shall be counted in half toward both Parties' time accounts. Time spent on housekeeping matters shall not be counted toward either Party's time account.

29. Taking into account the notification by the Parties of the names of witnesses and experts that will be examined during the Hearing (listed in paragraph [6] above), the Parties are requested to consult with each other with a view to establishing a scheduling proposal indicating the order of appearance of witnesses and experts and the likely date on which each witness or expert may be presented. The Parties are requested to submit such proposal to the Tribunal, together with an updated list of the witnesses and experts that will be examined during the Hearing in accordance with paragraph 15 *supra*, **by August 18, 2016.**

X. Examination of Witnesses and Experts

30. Section 19 of PO-1 shall apply subject to the following:

31. If a Party declines to call a witness or expert of the other side for cross-examination, this shall not be deemed as acceptance of that witness's testimony or that expert's report.

XI. Hearing Open to the Public – Modality

XII. As already indicated under Sections 21-6 and 21-7 of PO-1, in accordance with Article 835(1) and (2) of the Canada-Peru FTA, the Hearing is going to be open to the public. To enable the Tribunal to establish procedures for the protection of confidential information and appropriate logistical arrangements for an open hearing, the Parties have provided proposals to the Tribunal **on August 3, 2016**. Since the Parties' proposals differ considerably and need to be deliberated by the Tribunal, in order not to delay issuing this PO-8, the Tribunal intends to issue a separate Order regarding the modalities of the access to the public at a later stage.

XIII. Records of Hearings

32. Section 22 of PO-1 shall apply.

XIV. Interpretation Services

33. In accordance with Section 11.1 of PO-1, English and Spanish are the procedural languages of the arbitration. In light of this, the Secretariat has made arrangements for English/Spanish simultaneous interpretation services to be provided during the whole duration of the Hearing.

XV. Other Matters

34. The Tribunal may change any of the rulings in this Order, after consultation with the Parties, if considered appropriate under the circumstances.

On behalf of the Tribunal

[signed]

Karl-Heinz Böckstiegel

President of Tribunal

Date: August 4, 2016

See Annex hereafter.

Annex to Procedural Order No. 8

Calculation of Hearing Time

Hours

Time available (section 21.5 of PO-1): 7 days of 8.5 hours 59.5

Time needed

Lunch breaks: 7 x 60 minutes	7.0
Coffee breaks: 14 x 15 minutes	3.5
Procedural discussions (estimated total)	1.0
Introduction by Tribunal President	0.5
Additional questions by Members of Tribunal	3.0

Total time for other purposes	15.0

That leaves for the Parties a total of 44.5

Total time available for each side
22.25

Total time for Opening Statements and Closing Statements for each Party	5.5
Total time available for each Party for witness and expert examination	16.75