INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport-McMoran Inc. on its own behalf
and on behalf of Sociedad Minera Cerro Verde S.A.A.

v.

Republic of Peru

(ICSID Case No. ARB/20/08)

AWARD

Members of the Tribunal
Dr. Inka Hanefeld, President of the Tribunal
Prof. Dr. Guido Santiago Tawil, Arbitrator
Prof. Dr. Bernardo Cremades, Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Assistant to the Tribunal
Ms. Charlotte Matthews

17 May 2024

THE PARTIES' REPRESENTATIVES

Representing the Claimant

Dietmar W. Prager
Laura Sinisterra
Nawi Ukabiala
Julianne J. Marley

Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, NY 10001
United States of America

Luis Carlos Rodrigo Prado
Francisco Cárdenas Pantoja
Lourdes Castillo Crisóstomo

Rodrigo, Elías & Medrano
Av. Pardo y Aliaga 652 piso 8
San Isidro
Lima 15073
Republic of Peru

Representing the Respondent

Vanessa Rivas Plata Saldarriaga
Mijail Feliciano Cienfuegos Falcón
Comisión Especial que representa al Estado en Controversias Internacionales de Inversión
Ministerio de Economía y Finanzas
Jr. Junín No. 319
Cercado de Lima Lima
Republic of Peru

Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC
1501 K Street, N.W. Suite C-072
Washington, DC 20005
United States of America

Jennifer Haworth McCandless
María Carolina Durán
Baker Botts LLP
700 K Street, NW,
Washington, DC 20001
United States of America

Alejandro A. Escobar
Baker Botts LLP
Level 30, 20 Fenchurch Street,
London EC3M 3BY
United Kingdom

Marinn Carlson (until 31 July 2023)
Sidley Austin LLP*
1501 K Street, N.W.
Washington D.C. 20005
United States of America
**Sidley Austin LLP no longer represents the Republic of Peru in this arbitration.*

Ricardo Puccio
Oswaldo Lozano
Estudio Navarro & Pazos Abogados
Av. Del Parque 195
San Isidro, Lima
Republic of Peru

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

1996 Feasibility Study	Revised version of the 1995 Fluor Canada Ltd. feasibility study for the improvements, upgrades, and further development of the existing leaching facility and infrastructure
1996 Mill Feasibility Study	Feasibility Study Analysis conducted by ICF Kaiser Engineers Inc., for the Cerro Verde Project from 1996
1998 Mill Feasibility Study	Feasibility Study Analysis conducted by Bateman Engineering Inc. Engineers Inc., for the Cerro Verde Project from 1998
1994 Stability Agreement	Stability Agreement signed between SMCV and the Respondent on 26 May 1994
1998 Stability Agreement	Stability Agreement signed between SMCV and the Respondent on 26 February 1998
2002 Pre-Feasibility Study	2002 Pre-Feasibility Study conducted by SMCV dated December 2002
2002 SUNAT Report	Report No. 263-2002-SUNAT/K00000 issued by SUNAT dated 23 September 2002
2004 Feasibility Study	Feasibility Study conducted by Fluor Canada Ltd., for the Cerro Verde Primary Sulfide Project dated May 2004
2006-2007 Royalty Assessments	Assessments issued by SUNAT on 17 August 2009 against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007
2008 Royalty Assessments	Additional royalty assessments issued by SUNAT on 1 June 2010 against SMCV for minerals processed in the Concentrator from January 2008 to December 2008
2009 Royalty Assessments	Royalty assessments issued by SUNAT on 27 June 2011 against SMCV for the minerals processed in the Concentrator from January 2009 to December 2009
2010-2011 Royalty Assessments	Royalty assessments issued by SUNAT on 13 April 2016 against SMCV for the minerals processed in the Concentrator in 2010 and the first three quarters of 2011

2012 Royalty Assessment	Royalty assessments issued by SUNAT on 28 March 2018 against SMCV for the minerals processed in the Concentrator in 2012
2013 Royalty Assessment	Royalty assessments issued by SUNAT on 28 September 2018 against SMCV for the minerals processed in the Concentrator in 2013
2012 Stability Agreement	Stability Agreement signed between SMCV and the Respondent on 17 July 2012
AIT	Additional Income Tax
Anaconda	Anaconda Copper Mining
APOYO	Apoyo Consultoría
April 2005 Report	Report No. 153-2005-MEM/OGAJ issued by MINEM dated 14 April 2005
Aquiño I	First Witness Statement of Ramiro Aquiño dated 19 October 2021
Aquiño II	Second Witness Statement of Ramiro Aquiño dated 13 September 2022
Bedoya I	First Witness Statement of Claudia Gabriela Bedoya Arbañil dated 18 April 2022
Bedoya II	Second Witness Statement of Claudia Gabriela Bedoya Arbañil dated 3 November 2022
Bravo-Picón I	First Expert Report of Jorge Bravo and Jorge Picón dated 4 May 2022
Bravo-Picón II	Second Expert Report of Jorge Bravo and Jorge Picón dated 3 November 2022
Bullard I	First Expert Report of Alfredo Bullard dated 19 October 2021
Bullard II	Second Expert Report of Alfredo Bullard dated 13 September 2022
Bullard III	Third Expert Report of Alfredo Bullard dated 16 December 2022

Camacho I	First Witness Statement of Marco Antonio Camacho Sandoval dated 18 April 2022
Camacho II	Second Witness Statement of Marco Antonio Camacho Sandoval dated 3 November 2022
Castagnola	Witness Statement of Gianfranco Castagnola dated 19 October 2021
Chappuis I	First Witness Statement of María Chappuis Cardich dated 19 October 2021
Chappuis II	Second Witness Statement of María Chappuis Cardich dated 13 September 2022
Choque I	First Witness Statement of Pedro Choque Ticona dated 19 October 2021
Choque II	Second Witness Statement of Pedro Choque Ticona dated 13 September 2022
CEPRI	Special Committee to Promote Private Investment in Production Units
Claimant or Freeport	Freeport-McMoran Inc., an entity incorporated in the State of Delaware in the United States of America
Claimant's Memorial	Claimant's Memorial dated 19 October 2021
Claimant's Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 13 September 2022
Claimant's Post-Hearing Brief	Claimant's Post-Hearing Brief dated 14 July 2023
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction dated 16 December 2022
Concentrator, Concentrator Project, Concentrator Plant	The mining project set out in the 2004 Feasibility Study and its update destined to treat primary sulfide ore at Cerro Verde
COPRI	Commission to Promote Private Investment
CMPF	Complementary Mining Pension Fund
Cruz I	First Witness Statement of Colón Haraldo Cruz Negrón dated 18 April 2022

Cruz II	Second Witness Statement of Colón Haraldo Cruz Negrón dated 3 November 2022
Cyprus	Cyprus Minerals Company
Davenport I	First Witness Statement of Randy L. Davenport dated 19 October 2021
Davenport II	Second Witness Statement of Randy L. Davenport dated 13 September 2022
DGM	Directorate General of Mining
EGASA	*Empresa de Generación de Arequipa S.A.*
Eguiguren I	First Expert Report of Francisco Eguiguren Praeli dated 4 May 2022
Eguiguren II	Second Expert Report of Francisco Eguiguren Praeli dated 3 November 2022
Estrada I	First Witness Statement of Leonel Estrada Gonzales dated 19 October 2021
Estrada II	Second Witness Statement of Leonel Estrada Gonzales dated 13 September 2022
FET	Fair and equitable treatment
Flury I	First Witness Statement of Hans Flury dated 19 October 2021
Flury II	Second Witness Statement of Hans Flury dated 13 September 2022
GEM	Special Mining Contribution (*Gravamen Especial a la Minería*)
GEM Agreement	Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 dated 28 February 2012
GST	General Sales Tax
Hernández I	First Expert Report of Luis Hernández Berenguel dated 19 October 2021
Hernández II	Second Expert Report of Luis Hernández Berenguel dated 13 September 2022

Hernández III	Third Expert Report of Luis Hernández Berenguel dated 16 December 2022
Herrera I	First Witness Statement of Carlos Alberto Herrera Perret dated 13 September 2022
Herrera II	Second Witness Statement of Carlos Alberto Herrera Perret dated 16 December 2022
ICJ	International Court of Justice
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Arbitration Rules, entered in force as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
ILC Articles	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
Isasi I	First Witness Statement of Juan Felipe Guillermo Isasi Cayo dated 18 April 2022
Isasi II	Second Witness Statement of Juan Felipe Guillermo Isasi Cayo dated 3 November 2022
June 2006 Report	Report No. 156-2006-MEM/OGJ issued by MINEM dated 16 June 2006
Kunsman I	First Expert Report of Isabel Santos Kunsman, dated 4 May 2022
Kunsman II	Second Expert Report of Isabel Santos Kunsman, dated 8 November 2022
L.D. 109	General Mining Law, Legislative Decree No. 109 dated 12 June 1981
L.D. 662	Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 dated 29 August 1991

L.D. 708	Law for the Promotion of Investment in the Mining Sector, Legislative Decree No. 708 dated 6 November 1991
L.D. 757	Framework Law for Private Investment Growth, Legislative Decree No. 757 dated 13 November 1991
Leaching Project	The mining project set out in the 1996 Feasibility Study destined to produce 105 million pounds of cathode copper from the heap leaching of copper ore at Cerro Verde
MAG	Minerals Advisory Group
Master Participation Agreement	Master Participation Agreement entered into by SMCV with interested lenders to finance the Concentrator dated 30 September 2005
MEF	Ministry of Economy and Finance
MINEM	Ministry of Energy and Mines
Minero Perú	Empresa Minera del Perú
Mining Law	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) dated 3 June 1992
Mining Regulations	Mining Regulations, Supreme Decree No. 024-93-EM dated 7 June 1993
Morales I	First Expert Report of Rómulo Morales Hervias dated 4 May 2022
Morales II	Second Expert Report of Rómulo Morales Hervias dated 3 November 2022
Morán I	First Witness Statement of Cristián Morán dated 19 October 2021
Morán II	Second Witness Statement of Cristián Morán dated 13 September 2022
MST	Minimum standard of treatment
Non-disputing Party or NDP	The United States of America

Notice of Arbitration	Notice of Arbitration filed on 28 February 2020 by the Claimant against Peru
November 2005 Letter	Letter from the Minister of Energy and Mines to Diez Canseco dated 8 November 2005
October 2005 Letter	Letter from the Minister of Energy and Mines to Congressman Oré dated 3 October 2005, forwarding Mr. Isasi's September 2005 report
Olano I	First Witness Statement of Zoraida Alicia Olano Silva dated 18 April 2022
Olano II	Second Witness Statement of Zoraida Alicia Olano Silva dated 3 November 2022
Otto I	First Expert Report of James M. Otto dated 19 October 2021
Otto II	Second Expert Report of James M. Otto dated 13 September 2022
Participation Agreement	Participation agreement for the purpose of obtaining financing for the Concentrator, entered into by Sumitomo Metal Mining, Sumitomo Corporation, Buenaventura, Phelps Dodge, SMCV, and others on 16 March 2005
Phelps Dodge	Phelps Dodge Corporation
Polo I	First Witness Statement of César Augusto Polo Robilliard dated 18 April 2022
Polo II	Second Witness Statement of César Augusto Polo Robilliard dated 3 November 2022
PTU	Employee Profit-Sharing Obligation
Q4 2011 Royalty Assessment	Royalty assessments issued by SUNAT on 29 December 2017 against SMCV for the minerals processed in the Concentrator for the fourth quarter of 2011
Ralbovksy I	First Expert Report of Stephen F. Ralbovksy dated 4 May 2022
Ralbovksy II	Second Expert Report of Stephen F. Ralbovksy dated 3 November 2022

Respondent or Peru	Republic of Peru
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 4 May 2022
Respondent's Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 8 November 2022
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief dated 14 July 2023
Roundtable Discussions	Roundtable discussions involving SMCV, MEF, and MINEM commenced on 23 June 2006
Roundtable Discussion Agreement	Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV dated 2 August 2006
Royalty Law	Royalty Law No. 28258 dated 24 June 2004
Sampliner I	First Expert Report of Gary Sampliner dated 13 September 2022
Sampliner II	Second Expert Report of Gary Sampliner dated 16 December 2022
Santa María I	First Witness Statement of Hugo Santa María dated 19 October 2021
Santa María II	Second Witness Statement of Hugo Santa María dated 13 September 2022
Sarmiento	Witness Statement of Jorge Orlando Sarmiento Díaz dated 26 October 2022
September 2005 Report	Report No. 385-2005-MEM/OGJ issued by MINEM dated 22 September 2005
Settlement Agreement	Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. dated 30 March 2001
Share Purchase Agreement	Share Purchase Agreement executed by Minero Peru and a subsidiary of Cyprus dated 17 March 1994
Silva	Witness Statement of Milagros Silva-Santiseban Concha dated 19 October 2021

SMM Cerro Verde Arbitration	*SMM Cerro Verde Netherlands B.V. v. Republic of Peru* (ICSID Case ARB/20/14)
SMCV	Sociedad Minera Cerro Verde S.A.A., a company constituted under the laws of Peru
SMM Cerro Verde	SMM Cerro Verde Netherlands B.V.
SMT or IEM	Special Mining Tax
Spiller-Chavich I	First Expert Report of Pablo T. Spiller and Carla Chavich dated 19 October 2021
Spiller-Chavich II	Second Expert Report of Pablo T. Spiller and Carla Chavich dated 13 September 2022
SUNAT	National Superintendence of Customs and Tax Administration
SX/EW	Solvent Extraction/Electrowinning facilities
Torreblanca I	First Witness Statement of Julia Torreblanca dated 19 October 2021
Torreblanca II	Second Witness Statement of Julia Torreblanca dated 13 September 2022
Tovar I	First Witness Statement of Oswaldo Tovar Jumpa dated 18 April 2022
Tovar II	Second Witness Statement of Oswaldo Tovar Jumpa dated 3 November 2022
TPA or the Treaty	United States-Peru Trade Promotion Agreement, entered into force on 1 February 2009
TTNA	Temporary Tax on Net Assets
TUO or *Texto Único Ordenado*	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM dated 3 June 1992
VCLT	Vienna Convention on the Law of Treaties
Vega I	First Expert Report of María del Carmen Vega dated 19 October 2021
Vega II	Second Expert Report of María del Carmen Vega dated 13 September 2022

Voluntary Contribution Agreement	Voluntary Contribution Agreement executed between SMCV and Peru dated 10 August 2007
Voluntary Contribution Program	Voluntary Contribution Program, Supreme Decree No. 071-2006-EM dated 21 December 2006

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (**ICSID** or the **Centre**) pursuant to the United States-Peru Trade Promotion Agreement (the **TPA** or the **Treaty**),[1] which was signed on 12 April 2006 and entered into force on 1 February 2009, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 and became binding on the Republic of Peru on 8 September 1993 and on the United States of America on 14 October 1966 (the **ICSID Convention**).

A. The Parties and their Representatives

2. The Claimant is Freeport-McMoran Inc. (the **Claimant** or **Freeport**), an entity incorporated in the State of Delaware in the United States of America.[2] The Claimant also brings its claim on behalf of Sociedad Minera Cerro Verde S.A.A. (**SMCV**), a company constituted under the laws of Peru.[3] Freeport indirectly owns 53.56% of the shares of SMCV and indirectly controls the company.[4]

3. The Respondent is the Republic of Peru (the **Respondent** or **Peru**).

4. The Claimant and the Respondent are collectively referred to as the **Parties**.

B. The Dispute

5. The dispute concerns the imposition of certain royalties and taxes on SMCV by the Respondent.

6. The Claimant submits that the Respondent breached the stability agreement signed between SMCV and the Respondent on 26 February 1998 (the **1998 Stability Agreement**) every time the Respondent denied SMCV the stability guarantees of the 1998 Stability Agreement and unlawfully imposed royalties and taxes on SMCV. The Claimant also submits that the Respondent breached the minimum standard of treatment (**MST**) contained in Article 10.5 of the TPA (i) each time the disputed royalty

[1] United States-Peru Trade Promotion Agreement (**TPA**) (**CA-10**).
[2] Certificate of Good Standing Freeport dated 18 February 2020 (**CE-263**).
[3] Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart dated 21 February 2020 (**CE-265**); SMCV, Certificate of Transition to Open Public Limited Company dated 11 January 2000 (**CE-366**).
[4] Share Purchase Agreement dated 17 March 1994 (**CE-4**); Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart dated 21 February 2020 (**CE-265**).

assessments became enforceable against SMCV, (ii) each time the Respondent failed to waive the assessments of penalties and interest against SMCV, and (iii) each time the Respondent failed to reimburse SMCV for certain overpayments of mining contributions.

7. As a result of these alleged breaches, the Claimant claims that it is entitled to at least USD 942.2 million in damages plus interest, or, alternatively, to at least USD 719.9 million plus interest.

8. The Respondent disputes the Tribunal's jurisdiction over certain of the Claimant's claims on various accounts.

9. On the merits, the Respondent argues that it did not breach the 1998 Stability Agreement or its obligations under Article 10.5 of the TPA.

10. In the event that the Tribunal should nevertheless conclude that the Respondent has violated any such obligations, the Respondent argues that the Claimant's alleged damages are grossly inflated.

C. Requests for Relief

11. In its Memorial, the Claimant requested the following relief:

> *A. Declaring that Peru breached the Stability Agreement;*
>
> *B. Declaring that Peru breached Article 10.5 of the TPA;*
>
> *C. Ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's illegal acts, valued at US$909 million as of 19 October 2021, and subject to updating closer to the date of the Award (the "Main Claim").*
>
> *D. In the alternative to C, ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's arbitrary failure to waive penalties and interest in breach of Article 10.5 of the TPA; arbitrary refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM payments in breach [of] Article 10.5 of the TPA; and arbitrary failure to apply the non-stabilized regime to assets and activities that enjoyed stability even under Peru's own flawed interpretation of the Stability Agreement, valued at US$682.1 million as of 19 October 2021, and subject to updating closer to the date of the Award (the "Alternative Claim").*

E. Ordering Peru to pay annually compounding post-award interest on Freeport's and SMCV's damages and losses at a rate equal to SMCV's cost of equity running from the date of the Award to the date full payment of those amounts is made;

F. Ordering Peru to pay all the costs of the arbitration, as well as Freeport's and SMCV's attorneys' fees and expenses in an amount to be determined by such means as the Tribunal may direct;

G. Declaring that all amounts paid by Peru are net of any Peruvian taxes or other fiscal obligations and ordering Peru to indemnify Freeport and SMCV with respect to any Peruvian tax imposed on such amounts; and

H. Ordering any other such relief as the Tribunal may deem just and appropriate in the circumstances.[5]

12. In addition, the Claimant "*reserve[d] its rights to amend or supplement [its] Memorial, including the requested relief and the amounts claimed, and to seek further relief for additional breaches arising from Peru's past, present, or future conduct*."[6]

13. In its Reply on the Merits and Counter-Memorial on Jurisdiction, the Claimant requested the following relief:

A. Dismissing Peru's objections to jurisdiction and declaring that it has jurisdiction over Freeport's claims;

B. Declaring that Peru breached the Stability Agreement;

C. Declaring that Peru breached Article 10.5 of the TPA;

D. Ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's illegal acts, valued at US$942.4 million as of 13 September 2022, and subject to updating closer to the date of the Award (the "Main Claim").

E. In the alternative to D, ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's arbitrary failure to waive penalties and interest in breach of Article 10.5 of the TPA; arbitrary refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM payments in breach Article 10.5 of the TPA; and arbitrary application of the non-stabilized

[5] Claimant's Memorial dated 19 October 2021 (**Claimant's Memorial**), ¶ 464.
[6] Claimant's Memorial, ¶ 465.

regime to assets and activities that enjoyed stability even under Peru's own flawed interpretation of the Stability Agreement, valued at US$719.9 million as of 13 September 2022, and subject to updating closer to the date of the Award (the "Alternative Claim").

F. Ordering Peru to pay annually compounding post-award interest on Freeport's and SMCV's damages and losses at a rate equal to SMCV's cost of equity running from the date of the Award to the date full payment of those amounts is made;

G. Ordering Peru to pay all the costs of the arbitration, as well as Freeport's and SMCV's attorneys' fees and expenses in an amount to be determined by such means as the Tribunal may direct;

H. Declaring that all amounts paid by Peru are net of any Peruvian taxes or other fiscal obligations and ordering Peru to indemnify Freeport and SMCV with respect to any Peruvian tax imposed on such amounts; and

I. Ordering any other such relief as the Tribunal may deem just and appropriate in the circumstances.[7]

14. In addition, the Claimant also "*reserve[d] its rights to amend or supplement this Reply and Counter-Memorial on Jurisdiction, including the requested relief and the amounts claimed, and to seek further relief for additional breaches arising from Peru's past, present, or future conduct*."[8]

15. In its Rejoinder on Jurisdiction, the Claimant requested the following relief:

> *Freeport respectfully requests the Tribunal [to] dismiss Peru's objections to jurisdiction and declare that it has jurisdiction over Freeport's claims.*[9]

16. In its Post-Hearing Brief, the Claimant "*respectfully reiterate[d] its Request for Relief set forth in Section V of its Reply*."[10]

17. The Respondent requested in its Counter-Memorial on the Merits and Memorial on Jurisdiction as well as in its Rejoinder on the Merits and Reply on Jurisdiction and in its Post-Hearing Brief the following relief:

---

[7] Claimant's Reply and Counter-Memorial on Jurisdiction dated 13 September 2022 (**Claimant's Reply**), ¶ 319; see also Claimant's Post-Hearing Brief dated 14 July 2023 (**Claimant's Post-Hearing Brief**), ¶ 133.
[8] Claimant's Reply, ¶ 320.
[9] Claimant's Rejoinder on Jurisdiction dated 16 December 2022 (**Claimant's Rejoinder**), ¶ 103.
[10] Claimant's Post-Hearing Brief, ¶ 133.

For the foregoing reasons, Respondent respectfully requests that the Tribunal find that it does not have jurisdiction over Claimant's claims or, in the alternative, that Claimant's claims have no merit, and award Respondent the costs and fees, including attorneys' fees, it has incurred in this arbitration.[11]

D. The Tribunal

18. The Tribunal consisting of Prof. Dr. Guido Santiago Tawil, Prof. Dr. Bernardo Cremades and Dr. Inka Hanefeld was constituted on 31 March 2021, in accordance with the ICSID Convention and the ICSID Arbitration Rules in force as of 10 April 2006 (the **ICSID Arbitration Rules**).

19. Prof. Dr. Tawil accepted his appointment as Arbitrator appointed by the Claimant on 9 June 2020.

20. Prof. Dr. Cremades accepted his appointment as Arbitrator appointed by the Respondent also on 9 June 2020.

21. Dr. Hanefeld accepted her appointment as President of the Tribunal by agreement of the Parties on 31 March 2021.

22. As recorded in paragraph 2.1 of Procedural Order No. 1, the Parties confirmed that the Tribunal was properly constituted and that no Party had any objection to the appointment of any Member of the Tribunal at such point in time.[12]

23. As recorded in paragraph 7.1 of Procedural Order No. 1, Ms. Marisa Planells-Valero is the Secretary of the Tribunal.

24. As recorded in paragraph 8.3 of Procedural Order No. 1, the Parties agreed to the appointment of Ms. Charlotte Matthews as Assistant to the Tribunal.

E. The languages of the proceedings

25. As set out in paragraph 12.1 of Procedural Order No. 1, the procedural languages of the arbitration are English and Spanish.

---

[11] Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 4 May 2022 (**Respondent's Counter-Memorial**), ¶ 823; Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 8 November 2022 (**Respondent's Rejoinder**), ¶ 1108; Respondent's Post-Hearing Brief dated 14 July 2023 (**Respondent's Post-Hearing Brief**), ¶ 310.
[12] Procedural Order No. 1, ¶ 2.1.

26. As set out in paragraph 12.13 of Procedural Order No. 1, the present Award is rendered in English and Spanish simultaneously, both language versions being equally authentic.

F. The place of the proceedings

27. Pursuant to Articles 62 and 63 of the ICSID Convention, the place of the proceedings is Washington, D.C.

G. The scope of this Award

28. The present Award addresses both the Tribunal's decision on jurisdiction and the merits.

29. To the extent that certain facts, allegations, or arguments are not expressly or comprehensively referred to in the below summaries of the Parties' positions or in other parts of the Award, this does not imply that the Tribunal has not taken them into consideration. Rather, the Tribunal has taken note of and carefully considered all submissions and evidence on the record.

II. PROCEDURAL HISTORY

30. On 28 February 2020, the Claimant filed a Notice of Arbitration under the ICSID Convention against Peru, with exhibits CE-1 to CE-275 and legal authorities CA-1 through CA-19 (the **Notice of Arbitration**). In its Notice of Arbitration, the Claimant appointed Prof. Dr. Tawil, a national of Argentina and Portugal, as arbitrator in the case.

31. On 16 March 2020, the Secretary-General of ICSID issued a Notice of Registration pursuant to Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institution Rules. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible pursuant to Articles 37 to 40 of the ICSID Convention.

32. On 3 June 2020, the Respondent appointed Prof. Dr. Cremades, a national of Spain, as arbitrator in the case.

33. On 10 June 2020, the Secretary of the Tribunal advised the Parties that Prof. Dr. Tawil and Prof. Dr. Cremades had accepted their appointments as arbitrators in the case.

34. On 3 November 2020, the Secretary of the Tribunal advised that if no steps were taken before 3 December 2020, the Secretary-General would, after giving notice to the Parties, discontinue the proceeding.

35. On 3 December 2020, the Parties indicated that they agreed to extend the time period under ICSID Arbitration Rule 45 by one month.

36. On 4 December 2020, the Secretary-General of ICSID confirmed that the six-month period under ICSID Arbitration Rule 45 had been extended by one month, *i.e.,* until 4 January 2021.

37. On 23 December 2020, the Parties to the case as well as the parties to the ICSID *SMM Cerro Verde Netherlands B.V. v. Republic of Peru* case (the ***SMM Cerro Verde* Arbitration**) requested the Centre's assistance in appointing the presiding arbitrators in both cases through the Parties' agreed protocol for appointing the presidents of the tribunals.

38. On 11 February 2021, the Secretary-General of ICSID circulated a list of candidates for the Parties to consider.

39. On 26 March 2021, the Parties communicated their respective rankings of candidates in this case and in the *SMM Cerro Verde* Arbitration.

40. On 29 March 2021, the Secretary-General of ICSID advised the Parties that they had agreed to appoint Dr. Inka Hanefeld as the presiding arbitrator in this case.

41. On 31 March 2021, Dr. Inka Hanefeld accepted her appointment as President in this case.

42. On the same day, the Tribunal was deemed to have been constituted.

43. On 15 April 2021, the Tribunal proposed to the Parties that Ms. Charlotte Matthews, a lawyer from the President's firm, be appointed as Assistant to the Tribunal.

44. On 22 April 2021, the Parties confirmed that they had no objections to the appointment of Ms. Charlotte Matthews as Assistant to the Tribunal.

45. On 11 May 2021, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties by videoconference.

46. On 17 June 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of the proceeding would be Washington, D.C.

47. On 2 July 2021, the Claimant filed a Notice of Additional Claims, with exhibits CE-276 to CE-284, and legal authorities CA-20 to CA-25.

48. On 12 July 2021, the Tribunal invited the Respondent to file its observations to the Claimant's Additional Claims in its Counter-Memorial.

49. On 20 October 2021, the Claimant submitted its Memorial, with exhibits CE-285 to CE-906 and legal authorities CA-26 to CA-292 (the **Claimant's Memorial**). The pleading was also accompanied by eleven witness statements and five expert reports, as follows: (i) Witness Statement of Ramiro Aquiño, dated 19 October 2021; (ii) Witness Statement of Gianfranco Castagnola, dated 19 October 2021; (iii) Witness Statement of María Chappuis Cardich, dated 19 October 2021; (iv) Witness Statement of Pedro Choque Ticona, dated 19 October 2021; (v) Witness Statement of Randy L. Davenport, dated 19 October 2021; (vi) Witness Statement of Leonel Estrada Gonzales, dated 19 October 2021; (vii) Witness Statement of Hans Flury, dated 19 October 2021; (viii) Witness Statement of Cristián Morán, dated 19 October 2021; (ix) Witness Statement of Hugo Santa María, dated 19 October 2021; (x) Witness Statement of Milagros Silva-Santisteban Concha, dated 19 October 2021; (xi) Witness Statement of Julia Torreblanca, dated 19 October 2021; (xii) Expert Report of Pablo T. Spiller and Carla Chavich, dated 19 October 2021; (xiii) Expert Report of Alfredo Bullard, dated 19 October 2021; (xiv) Expert Report of Luis Hernández Berenguel, dated 19 October 2021; (xv) Expert Report of James M. Otto, dated 19 October 2021; and (xvi) Expert Report of María del Carmen Vega, dated 19 October 2021.

50. On 16 April 2022, the Parties requested the Tribunal to extend a number of deadlines for the Parties' upcoming submissions and other procedural steps.

51. On 21 April 2022, the Tribunal issued a revised Annex A to Procedural Order No. 1 incorporating into the procedural timetable the modification of the deadlines as agreed by the Parties on 16 April 2022.

52. On 5 May 2022, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction dated 4 May 2022, with exhibits RE-1 to RE-174 and legal authorities RA-1 to RA-90 (the **Respondent's Counter-Memorial**). The pleading was also accompanied by seven witness statements and five expert reports, as follows: (i) Witness Statement of César Augusto Polo Robilliard, dated 18 April 2022; (ii) Witness Statement of Juan Felipe Guillermo Isasi Cayo, dated 18 April 2022; (iii)

Witness Statement of Oswaldo Tovar Jumpa, dated 18 April 2022; (iv) Witness Statement of Claudia Gabriela Bedoya Arbañil, dated 18 April 2022; (v) Witness Statement of Zoraida Alicia Olano Silva, dated 18 April 2022; (vi) Witness Statement of Marco Antonio Camacho Sandoval, dated 18 April 2022; (vii) Witness Statement of Colón Haraldo Cruz Negrón, dated 18 April 2022; (viii) Expert Report on Peruvian Constitutional Law of Francisco Eguiguren Praeli, dated 4 May 2022; (ix) Report of Expert in Peruvian Civil Law Rómulo Morales Hervias, dated 4 May 2022; (x) Report from Experts in Peruvian Tax Law Jorge Bravo and Jorge Picón, dated 4 May 2022; (xi) International Mining Tax Expert Report of Stephen F. Ralbovsky, dated 4 May 2022; and (xii) First Quantum Expert Report of Isabel Santos Kunsman, dated 4 May 2022.

53. On 17 May 2022, the Tribunal noted that the Parties disagreed on a number of translations of accompanying documentation and invited them to attempt to reach an agreement on such translations in accordance with Section 12.6 of Procedural Order No. 1.

54. On 26 May 2022, the Parties indicated that they had agreed to adopt the Respondent's translations of the disputed provisions of CA-46, CA-181, and CE-153 and that they did not reach an agreement with respect to the translation of the disputed provisions of CA-2 and CE-629.

55. On 27 May 2022, the Respondent filed a corrected translation of CE-153, pursuant to the translation agreed upon by the Parties, which the Claimant confirmed as reflecting their agreed upon translation.

56. On 31 May 2022, the Tribunal took note of the Parties' communications with respect to translations and reserved the right to appoint at a later stage a certified translator to translate documents pursuant to Section 12.6 of Procedural Order No. 1.

57. On 6 June 2022, the Parties submitted their respective Document Production Schedules.

58. On 4 July 2022, the Tribunal issued Procedural Order No. 2 regarding Document Production.

59. On 14 September 2022, the Claimant submitted its Reply and Counter-Memorial on Jurisdiction dated 13 September 2022, with exhibits CE-907 to CE-1095 and legal authorities CA-293 to CA-430 (the **Claimant's Reply**). The pleading was also

accompanied by ten witness statements and six expert reports, as follows: (i) Witness Statement of Carlos Alberto Herrera Perret, dated 13 September 2022; (ii) Reply Witness Statement of Ramiro Aquiño, dated 13 September 2022; (iii) Reply Witness Statement of María Chappuis Cardich, dated 13 September 2022; (iv) Reply Witness Statement of Pedro Choque Ticona, dated 13 September 2022; (v) Reply Witness Statement of Randy L. Davenport, dated 13 September 2022; (vi) Reply Witness Statement of Leonel Estrada Gonzales, dated 13 September 2022; (vii) Reply Witness Statement of Hans Flury, dated 13 September 2022; (viii) Reply Witness Statement of Cristián Morán, dated 13 September 2022; (ix) Reply Witness Statement of Hugo Santa María, dated 13 September 2022; (x) Reply Witness Statement of Julia Torreblanca, dated 13 September 2022; (xi) Second Expert Report of Pablo T. Spiller and Carla Chavich, dated 13 September 2022; (xii) Reply Expert Report of Alfredo Bullard, dated 13 September 2022; (xiii) Reply Expert Report of Luis Hernández Berenguel, dated 13 September 2022; (xiv) Reply Expert Report of James M. Otto, dated 13 September 2022; (xv) Reply Expert Report of María del Carmen Vega, dated 13 September 2022; and (xvi) Expert Report of Gary Sampliner, dated 13 September 2022.

60. On 3 November 2022, the Respondent requested the Tribunal's approval of an extension of time for the filing of its Rejoinder on the Merits and Reply on Jurisdiction until 8 November 2022, which was agreed upon by the Claimant. On the same day, the Tribunal approved the extension as agreed by the Parties.

61. On 9 November 2022, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction dated 8 November 2022, with exhibits RE-175 to RE-208, RE-211 to RE-214, RE-219 to RE-263, RE-265 to RE-308, RE-310, and RE-312 to RE-351, and legal authorities RA-91 to RA-174 (the **Respondent's Rejoinder**). The pleading was also accompanied by eight witness statements and five expert reports, as follows: (i) Second Witness Statement of César Augusto Polo Robilliard, dated 3 November 2022; (ii) Second Witness Statement of Juan Felipe Guillermo Isasi Cayo, dated 3 November 2022; (iii) Second Witness Statement of Oswaldo Tovar Jumpa, dated 3 November 2022; (iv) Second Witness Statement of Claudia Gabriela Bedoya Arbañil, dated 3 November 2022; (v) Second Witness Statement of Zoraida Alicia Olano Silva, dated 3 November 2022; (vi) Second Witness Statement of Marco Antonio Camacho Sandoval, dated 3 November 2022; (vii) Second Witness Statement of Colón Haraldo Cruz Negrón, dated 3 November 2022; (viii) Witness Statement of Jorge Orlando

Sarmiento Díaz, dated 26 October 2022; (ix) Second Expert Report on Peruvian Constitutional Law of Francisco Eguiguren Praeli, dated 3 November 2022; (x) Second Report of Expert in Peruvian Civil Law Rómulo Morales Hervias, dated 3 November 2022; (xi) Second Report from Experts in Peruvian Tax Law Jorge Bravo and Jorge Picón, dated 3 November 2022; (xii) Second International Mining Tax Expert Report of Stephen F. Ralbovsky, dated 3 November 2022; and (xiii) Second Quantum Expert Report of Isabel Santos Kunsman, dated 8 November 2022.

62. On 5 December 2022, the Tribunal noted that the Parties disagreed on a number of translations of accompanying documentation and invited them to attempt to reach an agreement on such translations in accordance with Section 12.6 of Procedural Order No. 1.

63. On 17 December 2022, the Parties indicated that they had agreed to adopt the Respondent's translations of the disputed provisions of CA-102, CA-186, CE-137, CE-182, CE-221, and CE-274, had made further edits to the translations of the disputed provisions of CA-54, CE-098, and CE-962, and did not reach an agreement with respect to the translation of the disputed provisions of CE-947.

64. On 17 December 2022, the Claimant filed its Rejoinder on Jurisdiction dated 16 December 2022, with exhibits CE-1096 to CE-1122, and legal authorities CA-431 to CA-447 (the **Claimant's Rejoinder**). The pleading was also accompanied by one witness statement and three expert reports, as follows: (i) Rejoinder Witness Statement of Carlos Alberto Herrera Perret, dated 16 December 2022; (ii) Rejoinder Expert Report of Alfredo Bullard, dated 16 December 2022; (iii) Rejoinder Expert Report of Luis Hernández Berenguel, dated 16 December 2022; and (iv) Rejoinder Expert Report of Gary Sampliner, dated 16 December 2022.

65. On 19 December 2022, the Tribunal took note of the Parties' communications with respect to translations and reserved the right to appoint at a later stage a certified translator to translate documents pursuant to Section 12.6 of Procedural Order No. 1.

66. On 3 January 2023, the Tribunal noted that the Parties disagreed on a number of translations of accompanying documentation and invited them to attempt to reach an agreement on such translations in accordance with Section 12.6 of Procedural Order No. 1.

67. On 10 January 2023, the Parties indicated that they agreed to a revised version of the disputed provisions in exhibits RE-88, CA-14 (Article 28), and CA-181 and that they did not reach an agreement with respect to the translation of the disputed provisions in exhibits CE-947, RE-101, and CA-14 (Article 3).

68. On the same day, the Tribunal took note of the Parties' communications with respect to translations and reserved the right to appoint at a later stage a certified translator to translate documents pursuant to Section 12.6 of Procedural Order No. 1.

69. On 31 January 2023, the Claimant requested that, pursuant to Claimant's Document Request No. 1(d), the Tribunal order the Respondent to produce copies of the 105 documents Peru produced in response to Document Request No. 1(a) in the *SMM Cerro Verde* Arbitration, and all other documents responsive to Claimant's Document Request No. 1(d). By this same communication, the Claimant also requested leave to submit the full audio recording of the Mining Royalties Forum to the record.

70. On 24 February 2023, the Respondent submitted comments to the Claimant's letter of 31 January 2023.

71. Also on 24 February 2023, the United States of America (the **Non-Disputing Party** or **NDP**) submitted an NDP submission.

72. On 27 February 2023, the Respondent requested that the Tribunal exclude from the record twelve new exhibits submitted by the Claimant with its Rejoinder on Jurisdiction and also to grant the Respondent leave to submit to the record five new documents providing the context in which the 2006 Mining Council Resolution was issued, and four additional documents responsive to new documents added to the Claimant's Rejoinder on Jurisdiction or which the Respondent inadvertently omitted from its Rejoinder on the Merits and Reply on Jurisdiction.

73. Also on 27 February 2023, the Claimant requested leave to submit additional comments on the Respondent's communication of 24 February 2023. On that same date, the Tribunal invited the Claimant and the Respondent to submit additional comments by 28 February and 4 March 2023, respectively.

74. On 28 February 2023, the Tribunal invited the Claimant to provide comments on the Respondent's communication of 27 February 2023 by 7 March 2023.

75. On 1 March 2023, the Claimant submitted comments dated 28 February 2023 to the Respondent's letter of 24 February 2023.

76. On 4 March 2023, the Respondent submitted comments in response to the Claimant's letter received on 1 March 2023.

77. On 7 March 2023, the NDP indicated that it intended to attend the Hearing in person for at least a portion of it, and that it may also attend the Hearing virtually as necessary. The NDP reserved its right to provide an oral submission under Article 10.20(2) of the TPA and further advised that it would decide whether to provide an oral NDP submission during the Hearing after it had an opportunity to review the Parties' responses to its written submission. On 8 March 2023, the Claimant submitted comments dated 7 March 2023 on the Respondent's letter dated 27 February 2023. On the same date, the Respondent requested leave to submit comments on the Claimant's letter by 13 March 2023.

78. On 9 March 2023, the Respondent sought leave from the Tribunal to use the transcripts from the *SMM Cerro Verde* Arbitration at the Hearing for impeachment purposes and asked the Tribunal to establish a set of ground rules to govern both Parties' use thereof. On the same date, the Tribunal invited the Claimant's comments on the Respondent's request by 13 March 2023.

79. Also on 9 March 2023, the Tribunal took note of the Respondent's request of 8 March 2023 for leave to submit a reply to the Claimant's letter dated 7 March 2023. By this same communication, the Tribunal informed the Parties that it dit not see the need to open a further round of submissions on the issues raised in the Respondent's communication of 8 March 2023, indicating that it was sufficiently briefed on all aspects relevant to its decision.

80. On 10 March 2023, the Parties circulated a list of witnesses and experts they intended to call for direct and cross-examination at the Hearing.

81. On 13 March 2023, the Tribunal advised the Parties that it did not wish to call additional witnesses to the Hearing.

82. On 14 March 2023, the Tribunal issued Procedural Order No. 3 on the issues addressed in the Claimant's letters of 31 January 2023, 28 February 2023, and 7 March 2023 and the Respondent's letters of 24 February 2023, 27 February 2023, and 4 March 2023.

The Tribunal also provided the Parties with a Draft Confidentiality Protocol to be incorporated into Procedural Order No. 3 and invited the Parties' comments by 18 March 2023.

83. On the same day, the Claimant sought leave from the Tribunal to submit the full transcript and recording of the hearing in the *SMM Cerro Verde* Arbitration into the record, without limiting their use to impeachment purposes, and the Tribunal invited the Respondent's comments on this request by 17 March 2023.

84. Still on the same day, the Respondent sought leave from the Tribunal to allow one its witnesses, Mr. Felipe Isasi, to testify remotely at the Hearing.

85. On 15 March 2023, the Tribunal invited the Claimant's comments on the Respondent's request of 14 March 2023.

86. On 16 March 2023, the Claimant submitted a letter to the Tribunal requesting the Tribunal to order the Respondent to submit into the record nine SUNAT documents subject to the Tribunal's order in Procedural Order No. 3 in their unredacted form and to grant the Claimant's application to introduce nine additional documents into the record. On 17 March 2023, the Tribunal invited the Respondent's comments on the Claimant's request by 21 March 2023.

87. On 17 March 2023, the Claimant informed that, in light of the Respondent's representations and the documents submitted regarding Mr. Isasi's medical condition, it did not object to Mr. Isasi testifying remotely at the Hearing.

88. Also on 17 March 2023, and pursuant to Procedural Order No. 3, the Respondent introduced Exhibits RE-193 (updated)[13], and RE-352 through RE-457. On that same date, the Respondent opposed the Claimant's request of 14 March 2023 and reiterated its request that the hearing transcripts and recordings in the *SMM Cerro Verde* Arbitration be admitted to the record for impeachment purposes only.

89. On 18 March 2023, pursuant to the Tribunal's instructions in Procedural Order No. 3, the Claimant introduced Exhibit CE-1123 together with an accompanying transcript and translation.

[13] Exhibit RE-193 comprised a redacted version of the full Resolution No. 095-014-0000747/SUNAT dated 20 May 2009, and an updated English translation.

90. On 18 and 19 March 2023, the Parties submitted their views on whether written comments should be submitted in advance of the Hearing in relation to the documents submitted to the record in accordance with Procedural Order No. 3 and their comments on the Confidentiality Protocol.

91. On 20 March 2023, the Pre-Hearing Call took place.

92. On 22 March 2023, the Respondent submitted a letter dated 21 March 2023 in which it requested that the Tribunal deny the Claimant's requests set out in its letter of 16 March 2023 and grant the Respondent leave to submit into the record the United States' non-disputing party submission in the *Koch v. Canada* case. On 23 March 2023, the Claimant requested leave to provide comments on the Respondent's letter dated 21 March 2023. On the same date, the Respondent opposed the Claimant's request.

93. On 23 March 2023, the Parties provided the Tribunal with their joint and unilateral positions on additional amendments to the draft Confidentiality Protocol to be incorporated into Procedural Order No. 3.

94. Also on 23 March 2023, the Tribunal issued Procedural Order No. 4 on the Organization of the Hearing and Procedural Order No. 5 on the use of the transcripts and recordings of the hearing in the *SMM Cerro Verde* Arbitration, informing of its decision to admit such documents to the record without limitation as to their use at the Hearing, inviting the Parties to agree on any redactions as required by the *SMM Cerro Verde* confidentiality order and produce the redacted transcripts by 31 March 2023.

95. On the same date, the Tribunal invited the Claimant to submit a response to the Respondent's communication of 21 March 2023 by 29 March 2023 and the Respondent to submit a reply by 5 April 2023.

96. On 24 March 2023, the Tribunal advised the Parties that it did not wish to request further written comments on the additional evidence submitted to the record in accordance with Procedural Order No. 3 and noted that the Parties would have a full opportunity to be heard on all of the evidence on the record during the Hearing and in post-Hearing briefs, if required.

97. Also on the same day, after having considered the Parties' positions, the Tribunal issued the Confidentiality Protocol, which was incorporated as Annex A to Procedural Order No. 3.

98. On 30 March 2023, the Claimant submitted comments dated 29 March 2023 to the Respondent's letter dated 21 March 2023. In its letter, the Claimant reiterated its request that the Tribunal grant its application set out in its letter of 16 March 2023 to introduce further documents into the record and to also order Peru to submit further documents into the record.

99. On 3 April 2023, the President made a disclosure to the Secretary-General of ICSID, which was circulated to the Parties on that same date.

100. On 4 April 2023, the Parties jointly requested leave to submit to the record the 6 May 1996 version of the Mining Law that was in force when the feasibility study for the 1998 Stability Agreement was approved and an accompanying English language translation as well as other translations.

101. On 5 April 2023, in view of the Parties' agreement of 4 April 2023 and pursuant to Section 17.3 of Procedural Order No. 1, the Tribunal decided to grant leave to the Parties to submit these documents into the record. On the same date, the Claimant introduced to the record Legal Authority CA-448 together with a translation of CA-432.

102. Also on 5 April 2023, and following the Parties' communications of 4 April 2023, the Tribunal issued further instructions regarding the submission of the redacted and unredacted copies of the transcripts and recordings of the hearing in the *SMM Cerro Verde* Arbitration.

103. On 6 April 2023, the Respondent submitted comments dated 5 April 2023 on the Claimant's letter dated 29 March 2023. In its letter, the Respondent reiterated its request that the Tribunal deny each of the Claimant's requests and also requested that the Tribunal grant the Respondent leave to submit into the record the document that it requested in its communication of 21 March 2023 and to submit a copy of the procedural order no. 7 issued in *Legacy Vulcan v. Mexico*.[14]

104. On 8 April 2023, the Parties submitted their respective comments dated 7 April 2023 on the NDP submission. Together with its comments, the Claimant submitted Legal Authorities CA-0449 to CA-0459.

[14] *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7 dated 11 July 2022 (**RA-176**).

105. On 13 April 2023, the Tribunal issued Procedural Order No. 6 on, *inter alia*, the Claimant's request of 16 March 2023 and the Respondent's requests dated 21 March and 5 April 2023.

106. On 14 April 2023, the Parties shared the order of appearance of their respective witnesses and experts.

107. Also on 14 April 2023, pursuant to Procedural Order No. 6, the Respondent submitted to the record Exhibits RA-175 and RA-176.

108. On 16 April 2023, also pursuant to Procedural Order No. 6, the Claimant introduced to the record Exhibits CE-1124 to CE-1132 and Legal Authority CA-0460.

109. On 17 April 2023, pursuant to Procedural Order No. 5, the Claimant submitted to the record the transcripts of the hearing in the *SMM Cerro Verde* Arbitration as Exhibits CE-1133 to CE-1142, with redactions to the Day 1 transcript agreed by the Parties.

110. On 21 April 2023, the Respondent requested leave from the Tribunal to introduce eight new exhibits to the record.

111. Also on 21 April 2023, the NDP confirmed that it would be making an oral submission at the Hearing.

112. On 24 April 2023, the Claimant opposed the Respondent's request for leave of 21 April 2023.

113. Also on 24 April 2023, the Claimant advised that one of its witnesses, Mr. Hans Flury, would not be able to testify at the Hearing due to health reasons.

114. On 25 April 2023, the Tribunal invited the Parties' comments as to whether the Tribunal may rely on Mr. Flury's witness statements (CWS-7 and CWS-18) in light of Section 19.6 of Procedural Order No. 1, and to confer regarding the impact of Mr. Flury's absence from the Hearing on the Hearing Agenda and propose a revised Hearing Agenda.

115. On 26 April 2023, the Tribunal issued Procedural Order No. 7 rejecting the Respondent's request to add eight new exhibits to the record.

116. On the same date, the Claimant wrote to the Tribunal complaining of the Respondent's continuing failure to submit to the recording certain documents pursuant to Procedural

Order No. 3, and the Tribunal urged the Respondent to submit the referred documents, at the latest, on 28 April 2023.

117. On 27 April 2023, the Parties submitted comments regarding the Tribunal's reliance on Mr. Flury's witness statements given his inability to testify at the Hearing.

118. From 1 to 12 May 2023, the Hearing took place in Washington D.C. The following participants were present:[15]

Tribunal:	
Inka Hanefeld	President
Guido Santiago Tawil	Arbitrator
Bernardo M. Cremades	Arbitrator
Assistant to the Tribunal:	
Charlotte Matthews	Assistant to the Tribunal
ICSID Secretariat:	
Marisa Planells-Valero	Secretary of the Tribunal
For the Claimant:	
Counsel	
Dietmar W. Prager	Debevoise & Plimpton LLP
Laura Sinisterra	Debevoise & Plimpton LLP
Nawi Ukabiala	Debevoise & Plimpton LLP
Julio Rivera Ríos	Debevoise & Plimpton LLP
Sebastian Dutz	Debevoise & Plimpton LLP
Federico Fragachán	Debevoise & Plimpton LLP
Michelle Huang	Debevoise & Plimpton LLP
Lucía Rodrigo	Debevoise & Plimpton LLP
Astrid Medianero Bottger*	Debevoise & Plimpton LLP
Mary Grace McEvoy	Debevoise & Plimpton LLP
Reggie Cedeno	Debevoise & Plimpton LLP
Thomas McIntyre	Debevoise & Plimpton LLP
Camila Isern*	Debevoise & Plimpton LLP
Evelin Caro Gutierrez*	Debevoise & Plimpton LLP
Luis Carlos Rodrigo Prado	Rodrigo, Elías & Medrano
Francisco Cárdenas Pantoja	Rodrigo, Elías & Medrano
Lourdes Castillo Crisóstomo	Rodrigo, Elías & Medrano
José Govea	Rodrigo, Elías & Medrano
Alejandro Tafur	Rodrigo, Elías & Medrano
Luis De la Cruz Rodríguez*	Rodrigo, Elías & Medrano
Sandy Capillo Solis*	Rodrigo, Elías & Medrano
Party representatives	
Dan Kravets	Freeport-McMoRan Inc.
Scott Statham	Freeport-McMoRan Inc.

[15] Based on the list of participnats dated 30 April 2023, * denotes remote participation in the Hearing.

Experts

James M. Otto	
María del Carmen Vega	
Alfredo Bullard	Bullard Abogados
Milan Pejnovic	Bullard Abogados
Luis Hernández Berenguel	
Patricia Tamashiro	
Gary Sampliner	
Pablo T. Spiller	Compass Lexecon
Carla Chavich	Compass Lexecon
Andrés Barrera	Compass Lexecon
Abigail Brown	Compass Lexecon

Witnesses

Julia Torreblanca
Randy L. Davenport
María Chappuis Cardich
Leonel Estrada Gonzales
Carlos Herrera Perret

For the Respondent:

Counsel

Stanimir A. Alexandrov	Stanimir A. Alexandrov, PLLC
Jennifer Haworth McCandless	Sidley Austin LLP
Marinn Carlson	Sidley Austin LLP
María Carolina Durán	Sidley Austin LLP
Courtney Hikawa	Sidley Austin LLP
Ana Martínez Valls	Sidley Austin LLP
Verónica Restrepo	Sidley Austin LLP
Angela Ting	Sidley Austin LLP
Nick Wiggins	Sidley Austin LLP
Natalia Zuleta	Sidley Austin LLP
Gavin Cunningham	Sidley Austin LLP
Kevin Dugan	Sidley Austin LLP
Ara Lee	Sidley Austin LLP
Sadie Claflin	Sidley Austin LLP
Noah Goldberg	Sidley Austin LLP
Ricardo Puccio	Estudio Navarro & Pazos Abogados S.A.C.
Oswaldo Lozano*	Estudio Navarro & Pazos Abogados S.A.C.
Sharon Fernández Torres*	Estudio Navarro & Pazos Abogados S.A.C.
Andrea Navea Sánchez*	Estudio Navarro & Pazos Abogados S.A.C.
Renzo Esteban Lavado*	Estudio Navarro & Pazos Abogados S.A.C.

Party representatives

Vanessa Del Carmen Rivas Plata Saldarriaga	Ministry of Economy and Finance, Republic of Peru
Mijail Feliciano Cienfuegos Falcón	Ministry of Economy and Finance, Republic of Peru
Edmóstines Montoya Jara*	SUNAT, Republic of Peru

Experts

Steve Ralbovsky	
Francisco Eguiguren	
Rómulo Morales	
Jorge Bravo	Estudio Picón & Asociados, Asesores Tributarios
Jorge Picón	Estudio Picón & Asociados, Asesores Tributarios
Isabel Kunsman	Alix Partners
Alex Huertas	Alix Partners

Witnesses

Felipe Isasi*	
César Polo	
Oswaldo Tovar	
Gabriela Bedoya	
Haraldo Cruz	
Zoraida Olano	
Jorge Sarmiento	

NDP Representatives:

David M. Bigge	Chief of Investment Arbitration, U.S. Department of State
Alvaro J. Peralta	Attorney-Adviser, U.S. Department of State

Court Reporters:

Dawn Larson	WW Reporting
Leandro Iezzi	D-R Esteno
Marta Rinaldi	D-R Esteno

Interpreters:

Charles Roberts	English-Spanish Interpretation
Silvia Colla	English-Spanish Interpretation
Daniel Giglio	English-Spanish Interpretation

119. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Experts

James M. Otto	
María del Carmen Vega	
Alfredo Bullard	Bullard Abogados
Luis Hernández Berenguel	
Gary Sampliner	
Pablo T. Spiller	Compass Lexecon
Carla Chavich	Compass Lexecon

Witnesses

Julia Torreblanca

Randy L. Davenport
María Chappuis Cardich
Leonel Estrada Gonzales
Carlos Herrera Perret

On behalf of the Respondent:
Experts

Steve Ralbovsky	
Francisco Eguiguren	
Rómulo Morales	
Jorge Bravo	Estudio Picón & Asociados, Asesores Tributarios
Jorge Picón	Estudio Picón & Asociados, Asesores Tributarios
Isabel Kunsman	Alix Partners

Witnesses
Felipe Isasi*
César Polo
Oswaldo Tovar
Gabriela Bedoya
Haraldo Cruz
Zoraida Olano
Jorge Sarmiento

120. On 30 June 2023, the Parties submitted their agreed corrections to the Hearing transcript.

121. On 14 July 2023, the Parties filed their Post-Hearing briefs.

122. On 18 July 2023, Prof. Cremades made a disclosure, which was transmitted to the Parties on that same date.

123. On 18 October 2023, the Claimant wrote to the Tribunal "*seeking leave to submit into the record the receipt evidencing SMCV's payment of certain outstanding liabilities resulting from Peru's breaches of the Stability Agreement and the TPA pursuant to Sections 17.3 and 17.4 of Procedural Order No. 1.*"

124. On 20 October 2023, the Respondent indicated that it was no longer represented by the law firm Sidley Austin LLP and that it was conducting an internal process to retain external counsel and requested an extension of time until 17 November 2023 to respond to the Claimant's communication of 18 October 2023.

125. On 23 October 2023, the Tribunal granted the Respondent's request.

126. On 13 November 2023, the Respondent notified the Tribunal that it had appointed the firms Baker Botts LLP and Stanimir A. Alexandrov PLLC as external counsel to represent the Republic of Peru in the proceedings.

127. On 17 November 2023, the Respondent commented on the Claimant's letter of 18 October 2023, indicating that it did not object to the Claimant's request to submit the exhibit allegedly evidencing SMCV's payment of certain outstanding liabilities.

128. On 20 November 2023, the Tribunal granted the Claimant's request of 18 October 2023 to introduce the new exhibit allegedly reflecting SMCV's payment of approximately USD 26 million in outstanding liabilities.

129. On 21 November 2023, pursuant to the Tribunal's instructions, the Claimant submitted this new exhibit as Exhibit CE-1143.

130. On 10 January 2024, the Tribunal advised the Parties that it considered the record to be closed and invited them to submit their respective statements of costs.

131. On 31 January 2024, the Parties submitted their statements of costs.

132. On 1 March 2024, the Respondent sought leave from the Tribunal to submit on the record the costs submission filed by the claimant in the *SMM Cerro Verde* Arbitration. On 12 March 2024, the Claimant opposed the Respondent's request.

133. On 14 March 2024, the Tribunal issued Procedural Order No. 8 rejecting the Respondent's request of 1 March 2024.

134. Also on 14 March 2024, the Tribunal declared the proceeding closed in accordance with ICSID Arbitration Rule 38.

III. CHRONOLOGY OF UNDISPUTED FACTS

135. The following chronology of facts sets out in summary fashion the undisputed events forming the factual background of the dispute.

A. The initial exploration of the Cerro Verde mine (1880s to 1970s)

136. In the mid-1880s, mining activities began at Cerro Verde, an open-pit copper and molybdenum mining complex located in the Arequipa Province of Peru.[16] Cerro Verde's mineral deposits contain three types of copper ores: oxides, secondary sulfide, and primary sulfide.[17] Each type of ore contains a different level of copper and is processed in a different manner, reflecting its copper content, the composition of the ore, and the cost to process the ore. While oxides and secondary sulfides are processed through leaching and solvent extraction/electrowinning (**SX/EW**) facilities, primary sulphides are usually processed through flotation in a concentrator plant. For most of Cerro Verde's history, mining operations have focused exclusively on the oxides and secondary sulfides.

137. From 1916 to 1970, Cerro Verde was owned by the U.S. company Anaconda Copper Mining (**Anaconda**), which commenced an initial exploration of the mine that led to it ultimately purchasing Cerro Verde's mineral rights.[18]

138. Anaconda initially exported excavated ore for processing abroad and in 1964, conducted additional studies concluding that local processing was feasible.[19]

139. In the late 1960s, the nationalization of large sectors of the Peruvian economy began.[20]

140. In the early 1970s, the state-owned company Empresa Minera del Perú (**Minero Peru**) took over the property of the Cerro Verde mine and operated it until 1993. The Government granted mining rights to Minero Peru to extract ore from the two open pits at Cerro Verde.[21] These open pits were known as Cerro Verde and Santa Rosa, and the Ministry of Energy and Mines (**MINEM**) referred to them together as the "*Economic and Administrative Unit known as Cerro Verde*."[22]

---

[16] "South America", Freeport-McMoRan dated 12 June 2019, *available at* https://www.fcx.com/operations/south-america#cerro_verde_link (**CE-222**).
[17] Claimant's Memorial, ¶ 30; Respondent's Counter-Memorial, ¶ 64.
[18] Claimant's Memorial, ¶ 32; Respondent's Counter-Memorial, ¶ 67.
[19] Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú dated 1 February 1972 (**CE-291**), Vol. II, pp. I-1 to I-2.
[20] Claimant's Memorial, ¶ 32.
[21] Respondent's Counter-Memorial, ¶ 67; Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM dated 15 December 1970 (**CE-287**); Establishing the Right of the State Over Expired Metal Concessions, Supreme Decree No. 012-72-EM/DGM, 20 January 1972 (**CE-289**).
[22] Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM dated 15 December 1970 (**CE-287**); Establishing the Right of the State Over Expired Metal Concessions, Supreme Decree No. 012-72-EM/DGM, 20 January 1972 (**CE-289**).

B. The initial development of the Cerro Verde mine and the first feasibility studies to build a concentrator (1971-1985)

141. On 3 October 1971, Minero Peru signed a contract with engineering firms Wright Engineers Ltd., British Smelter Constructions Ltd., and Ralph M. Parsons Co., to help secure financing to construct facilities to process the oxides at Cerro Verde, and provide engineering, procurement, construction management and start-up supervision for the project.[23]

142. On 27 December 1971, Minero Peru signed a second contract with British Smelter Constructions Ltd. and Wright Engineers Ltd. to conduct a feasibility study for processing options for the entirety of the "*Cerro Verde Economic and Administrative Unit*," including the primary sulfides.[24]

143. On 7 February 1972, the engineering firms British Smelter Constructions Ltd. and Wright Engineers Ltd. submitted their feasibility study,[25] which explored the possibility of exploiting the Cerro Verde mine in two different stages:

- first, the study recommended building leaching facilities for the oxide ore near the surface;
- second, the study proposed building a concentrator with a capacity of 20,000 MT/d to process the primary sulfides, which cannot be efficiently processed through leaching.

144. On 5 March 1975, after Minero Peru conducted further exploration of the primary sulfides revealing that minable ore at Cerro Verde exceeded an estimated 1 billion tons with an average grade of more than 0.5% copper, a 1975 feasibility study concluded that the enormous primary sulfide deposit could justify building a concentrator four to six times larger than the 20,000 MT/d concentrator.[26]

145. In 1976, Minero Peru decided to proceed to construct an on-site leaching plant to process oxide ore, abandoning plans to build a concentrator plant.[27]

---

[23] Wright Engineers Ltd., Copper: From Oxides to Cathodes dated April 1978 (**CE-296**), p. 3; Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú dated 1 February 1972 (**CE-290**), Vol. I, Introduction, p. iv.
[24] Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú dated 1 February 1972 (**CE-290**), Vol. I, Introduction, p. iv.
[25] Claimant's Memorial, ¶ 35; Respondent's Counter-Memorial, ¶ 67; Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú dated 1 February 1972 (**CE-290**).
[26] Ralph M. Parsons Co., Cerro Verde Project, Stage II: Preliminary Feasibility Study dated 5 March 1975 (**CE-292**), vol. I, p. I-2-3.
[27] Claimant's Memorial, ¶¶ 36-37; Respondent's Counter-Memorial, ¶ 67.

146. On 15 July 1976, MINEM granted Minero Peru's request to expand its two special mining rights within the "*Cerro Verde Mining Unit.*"[28] It also granted it a mining concession to explore and extract mineral resources in an area called "*Cerro Verde No. 1, No. 2, and No. 3.*"[29]

147. On 13 January 1977, MINEM granted Minero Peru an additional "*special right*" to process the minerals that it extracted from Cerro Verde No. 1, No. 2, and No. 3 through a Beneficiation Plant.[30]

148. On 1 April 1977, Minero Peru's leaching plant started to operate with a capacity to produce 33,000 MT/year of copper cathodes from oxide ore.[31]

149. In 1977 and 1980, Minero Peru continued to explore the possibility of constructing a concentrator in two additional feasibility studies, which considered construction of a 60,000 MT/d concentrator but concluded that a plant of such size could not be built without an expensive new power source.[32]

150. In 1979, Minero Peru constructed a pilot concentrator with a capacity of 100 MT/d.[33] Minero Peru used this concentrator primarily to test the efficiency of the flotation process on Cerro Verde's primary sulfides, which Minero Peru would eventually have to process in order to extend the life of the mine beyond exhaustion of the oxide and secondary sulfide reserves.[34]

151. In October 1981, Minero Peru partnered with Kuhn Loeb Lehmann Brothers International Inc., a financial advisory firm, to seek USD 288 million in foreign investment to construct and operate a concentrator based on the 1980 Feasibility Study.[35]

---

[28] Supreme Decree No. 027-76-EM/DGM dated 19 July 1976 (**CE-2**).
[29] Supreme Decree No. 027-76-EM/DGM dated 19 July 1976 (**CE-2**).
[30] Supreme Decree No. 002-77-EM/DGM dated 13 January 1977 (**CE-295**).
[31] Wright Engineers Ltd., Copper: From Oxides to Cathodes dated April 1978 (**CE-296**), p. 2.
[32] Claimant's Memorial, ¶ 39; Ralph M. Parsons Co., Feasibility Study dated 1977 (**CE-294**); Minero Perú & Kuhn Loeb Lehmann Brothers International Inc., Cerro Verde II: Project Memorandum dated October 1981 (**CE-297**), p. 1.
[33] Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo dated April 1993 (**CE-321**), p. 1.1.
[34] Wright Engineers Ltd., Cerro Verde—II Stage Sulfide Ore: Feasibility Study dated March 1985 (**CE-300**), p. 1-1.
[35] Minero Perú & Kuhn Loeb Lehmann Brothers International Inc., Cerro Verde II: Project Memorandum dated October 1981 (**CE-297**), p. 1.

152. In December 1984, at Minero Peru's request, MINEM consolidated the three special mining rights into a single mining right covering 7,455 hectares, including both pits, which was entitled "*Cerro Verde No. 1, No. 2, and No. 3*."[36]

153. In March 1985, Wright Engineers Ltd. completed another concentrator feasibility study. The study's "*principal conclusion*" was that Cerro Verde's primary sulfides represented "*one of the most viable of the future porphyry copper projects in world inventory at the present time*."[37]

C. The adoption of a mining regulatory framework in Peru, the privatization of Cerro Verde, and the creation of SMCV (1981-1994)

154. On 12 June 1981, Peru adopted the General Mining Law (**L.D. 109**), that provided the legal framework for mining activities. In particular, L.D. 109 provided that the State may sign stabilization agreements with mining companies.[38]

155. In August 1991, Peru's President Alberto Fujimori enacted Legislative Decree No. 662 (**L.D. 662**) approving a "*Legal Stability Regime for Foreign Investment*," which set forth a number of guarantees meant to attract foreign investment such as tax stability, stability in foreign exchange, and protection of private property.[39]

156. In September 1991, the Government established a legal framework for privatization by creating the Commission to Promote Private Investment (**COPRI**) to coordinate the sale of State-owned assets, and the Special Committee to Promote Private Investment in Production Units (**CEPRI**), a committee within Minero Peru, to organize the auction of Minero Peru's holdings.[40]

157. On 6 November 1991, the Government enacted Legislative Decree No. 708, the "*Law for the Promotion of Investments in the Mining Sector*" (**L.D. 708**),[41] which supplemented the existing legal framework for mining adopted in 1981, *i.e.,* L.D. 109.

---

[36] MINEM, Supreme Resolution No. 332-84-EM/DGM dated 19 December 1984 (**CE-298**).
[37] Claimant's Memorial, ¶ 41; Wright Engineers Ltd., Cerro Verde—II Stage Sulfide Ore: Feasibility Study dated March 1985 (**CE-300**), pp. 2-4.
[38] General Mining Law, Legislative Decree No. 109 dated 12 June 1981 (**CA-37**), Articles 155, 157.
[39] Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 dated 29 August 1991 (L.D. 662) (**CE-304**); *see also* CONITE, *Peru Welcomes Investors* (detailing benefits of L.D. 662) (**CE-815**).
[40] Promotion of Private Investment in Enterprises of the State, Legislative Decree No. 674 dated 27 September 1991 (**CE-305**); CEPRI, General Act for the Promotion of Private Investment in the Production Units of Minero Perú dated 31 May 1996 (**CE-349**), pp. 1, 8; *see also* Supreme Resolution No. 142-93 dated 22 April 1993 (**CE-325**).
[41] Law for the Promotion of Investment in the Mining Sector, Legislative Decree No. 708 dated 6 November 1991 (**CA-46**).

L.D. 708 strengthened investment incentives for mining companies, including guarantees of tax and administrative stability, and set out more specific terms for stabilization agreements in the mining sector. L.D. 708 further authorized MINEM to consolidate Peru's General Mining Law into a single unified text (in Spanish, a *Texto Único Ordenado*, or **TUO**), which would combine the provisions included in L.D. 109 and L.D. 708.

158. On 13 November 1991, President Fujimori set out investor protections in greater detail in Legislative Decree No. 757 (**L.D. 757**), the "*Framework Law for Private Investment Growth*."[42]

159. On 3 June 1992, Peru published the TUO of the General Mining Law (**Mining Law**), incorporating *inter alia* L.D. No. 708's provisions on mining stabilization agreements.[43] Title Nine of the Mining Law offered incentives "*to promote private investment in mining activity,*" including the establishment of a regime for "*[t]ax, currency exchange and administrative stability*." The stability guarantees were implemented through two different types of agreements, *i.e.*, 10-year and 15-year stability agreements. Articles 78 through 81 of the Mining Law set forth the 10-year stability regime available to all concession holders that met certain criteria. Articles 82 through 85 of the Mining Law established a 15-year stability regime available to concession holders that met certain additional criteria. Article 86 provided that all mining stability agreements are adhesion contracts and must "*incorporate all the guarantees established*" by the relevant provisions of Title Nine of the Mining Law.

160. In January 1993, Minero Peru distributed to interested companies a "*Heads of Agreement*" document governing the negotiations related to a share purchase agreement for the Cerro Verde assets.[44] The Heads of Agreement *inter alia* set out the following provisions on stability contracts:

> *(a) The Purchaser shall have the right to execute a contract of guarantee of Private Investment, pursuant to Legislative Decrees No. 662 and No. 757 and to Supreme Decree No. 162-92-EF.*

[42] Framework Law for Private Investment Growth, Legislative Decree No. 757 dated 13 November 1991 (**CE-306**).
[43] Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) dated 3 June 1992 (**CA-1**).
[44] CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement dated 26 October 1993 (**CE-332**).

(b) The Purchaser shall also have the right to execute a contract of Guarantee and Measures of Promotion of Investment in Mining Activity, pursuant to Title Nine of the General Mining Law approved by Supreme Decree No. 014-92-EM, and the regulations thereunder, approved by Supreme Decree No. 024-93-EM.

(c) The Purchaser shall acknowledge that prior to the execution of the contract described in sub-section (b) hereof, the Purchaser must first have presented a Feasibility Study which meets the requirements established in the current law.

(d) The Seller shall commit to assist and cooperate with the Purchaser in the request relating to such contract which the Purchaser shall present before the Peruvian State, the aforesaid constituting the sole obligation of the Seller with respect to the execution by the Peruvian State and the Purchaser of such contract. The Seller shall not be considered responsible with respect to matters arising from or in connection with the execution of such contract above or beyond the obligations described in this sub-section (d).[45]

161. On 6 April 1993, CEPRI submitted its privatization plan for Cerro Verde, which COPRI approved on 29 April 1993.[46]

162. In April 1993, Minero Peru issued an information memorandum for the Cerro Verde mine.[47] The information memorandum states that a "*development appraisal was carried out by International Mining Consultants (IMC) in 1992, which recommended the installation of a concentrator to process 40,000 t/d of ore.*"[48] According to the memorandum, "*the mine would maintain a residual leaching and solvent extraction /electrowinning operation, which would decline in importance and cease operations by 2000*."[49] It also stated that the "*preferred option assumed the construction of a 40,000 t/d concentrator*" and "*reserves of the oxides and mixed ore are becoming rapidly depleted and it is expected that by the end of 1995 leaching of this higher grade and more leach-amenable ore will cease*."[50]

[45] CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement dated 26 October 1993 (**CE-332**), pp. 7-8.
[46] Supreme Resolution No. 142-93 dated 22 April 1993 (**CE-325**); CEPRI, Communication No. MP-096.93 dated 6 April 1993 (**CE-324**); Silva (**CWS-10**), ¶¶ 17-18.
[47] Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo dated April 1993 (**CE-321**).
[48] Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo dated April 1993 (**CE-321**), p. 1.3.
[49] Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo dated April 1993 (**CE-321**), p. 1.3.
[50] Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memo dated April 1993 (**CE-321**), p. 5.3.

163. On 1 June 1993, Minero Peru created Sociedad Minera Cerro Verde S.A.A. (**SMCV**) for the purposes of privatizing Cerro Verde.[51]

164. On 7 June 1993, MINEM issued Supreme Decree No. 024-93-EM, *i.e.*, regulations implementing Title Nine of the Mining Law (the **Mining Regulations**).[52] The Mining Regulations regulate the Mining Law's provisions relating to stabilization agreements.

165. On 20 August 1993, Minero Peru formally incorporated SMCV through a public deed. The public deed stated that Minero Peru capitalized SMCV with S/ 277 million and granted SMCV "*the mining concessions and beneficiation concessions and the assets that constitute the 'Cerro Verde' Mining Unit*."[53]

166. On 7 September 1993, Minero Peru produced a bilingual primer on stability agreements for mining companies, explaining the stability agreement regimes in Peru.[54] The primer *inter alia* stated:

> *Juridical-stability agreements ("Stability Contracts") fix the legal framework applicable to a company, in certain defined matters over a specified period of time. Whoever is protected by a Stability Contract is therefore subject to the legislation in force at the time when the agreement was signed, for the term specified in the Contract, without being affected by modifications that may be introduced later.*[55]

167. On 4 November 1993, Cyprus Minerals Company (**Cyprus**), a U.S. company, submitted the only bid for Cerro Verde.[56] At the time, Cyprus was the second-largest producer of copper in the United States, operating several large mines with similar geology to Cerro Verde.

168. In November 1993, Minero Peru issued an evaluation of Cyprus' proposal.[57] It stated that "*[t]he operating plan and high investment commitment proposed by Cyprus Minerals Co. enables the main objectives to be achieved of promoting private investment in Cerro Verde, which are […] fully mining the copper reserves contained*

---

[51] SMCV Public Deed dated 20 August 1993 (**CE-330**), Article 3; Minero Perú, Minutes of Board Meeting No. 633 dated 7 June 1993 (**CE-328**).
[52] Mining Regulations, Supreme Decree No. 024-93-EM dated 7 June 1993 (**CA-2**).
[53] SMCV Public Deed dated 20 August 1993 (**CE-330**), Clause 1.1; Minero Perú, Minutes of Board Meeting No. 634 dated 22 June 1993 (**CE-329**), p. 155; Silva (**CWS-10**), ¶ 18.
[54] Minero Perú, Stability Contracts dated 7 September 1993 (**CE-331**).
[55] Minero Perú, Stability Contracts dated 7 September 1993 (**CE-331**), p. 1.
[56] Cyprus, Cyprus Privatization Proposal dated 4 November 1993 (**CE-334**); CEPRI, Minutes of SMCV Privatization dated 3 July 1996 (**CE-351**), p. 65; Silva (**CWS-10**), ¶ 24.
[57] CEPRI, Evaluation of Proposal from Cyprus Minerals Company dated November 1993 (**CE-333**).

in both the primary and secondary sulfides; in other words, development of the second stage of Cerro Verde."[58] Other advantages of the proposed plan included the enabling of "*continuity of current operations at Cerro Verde while investments are made to improve efficiency and expand the hydro-metallurgic system and a new concentrator plant is built*" and the increase in "*minable reserves, mainly from secondary sulfides*."[59]

169. In December 1993, Cyprus engaged Fluor Daniel Wright to conduct studies relating to the feasibility of expanding SMCV's leaching operations and constructing a concentrator.[60]

170. On 17 March 1994, Minero Peru and a subsidiary of Cyprus executed an agreement (the **Share Purchase Agreement**) under which Minero Peru sold 91.65% of its shares in SMCV to the Cyprus subsidiary.[61] The Share Purchase Agreement committed the Government to executing mining and legal stability agreements with SMCV and Cyprus, and committed Cyprus to certain investments, including the construction of a "*grinding and conventional copper/molybdenum flotation circuit*"[62] with a capacity of 28 000 MT/D.[63]

171. On the same day, the Government and Cyprus signed a Guaranty Agreement—a requirement under Article 3.1(h) of the Share Purchase Agreement—by which the Government guaranteed the execution of "*any*" mining stability agreement relating to SMCV's "*business and operations*" to which SMCV was entitled within 90 days of having complied with all requirements under the Mining Law.[64]

D. SMCV enters into two stability agreements and continues to explore the feasibility of a concentrator at Cerro Verde (1994-1998)

172. On 26 May 1994, the Government and SMCV entered into a 10-year mining stability agreement (the **1994 Stability Agreement**) under Article 78 of the Mining Law. To meet the Mining Law's requirement of an "*investment program*" demonstrating a

[58] CEPRI, Evaluation of Proposal from Cyprus Minerals Company dated November 1993 (**CE-333**), p. 5.
[59] CEPRI, Evaluation of Proposal from Cyprus Minerals Company dated November 1993 (**CE-333**), p. 5.
[60] Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility dated September 1995 (**CE-348**), p. 2-2.
[61] Share Purchase Agreement dated 17 March 1994 (**CE-4**), Article 2.1.
[62] Share Purchase Agreement dated 17 March 1994 (**CE-4**), Article 3.1(f)-(g), Annex (G).
[63] Share Purchase Agreement dated 17 March 1994 (**CE-4**), Annex (G), p. 2; Aide Memoire (Cyprus) dated 9 July 1999 (**RE-100**), p. 1.
[64] Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals dated 17 March 1994 (**CE-341**), Article 1.6.

minimum USD 2 million commitment, SMCV relied on an existing Minero Peru feasibility study for small improvements to the leaching facilities.[65] The 1994 Stability Agreement concerned a USD 2.2 million investment project to install a new sorting plant and chutes and to add improvements to the existing leaching plant to allow three crushers to work simultaneously and to compile the end product in one location.

173. In January 1995, Cyprus engaged Bechtel Corporation to conduct studies relating to the feasibility of expanding SMCV's leaching operations and constructing a concentrator.[66]

174. In September 1995, Cyprus presented both the Fluor Daniel Wright and Bechtel Corporation studies to Minero Peru as a consolidated study prepared by Minerals Advisory Group (**MAG**).[67] The Fluor/MAG study found that it would be economically feasible for SMCV to construct a new leaching pad, plus associated equipment, and to expand the SX/EW plant, which would increase annual production by around 35%. However, the Bechtel/MAG study concluded that investing in a concentrator was not economically feasible, *inter alia* due to the lack of available water and power sources to support its operation. Nevertheless, it stated that "*SMCV intend[ed] to continue to evaluate the mill option with the goal [of identifying] a viable alternative*."[68]

175. On 25 January 1996, SMCV filed an application with MINEM to enter into a 15-year stability agreement pursuant to Articles 82 and 84 of the Mining Law.[69] To demonstrate that it met the USD 50 million minimum investment requirement under Articles 83 and 85 of the Mining Law, SMCV submitted a revised version of the 1995 Fluor Canada Ltd. feasibility study for the improvements, upgrades, and further development of the existing leaching facility and infrastructure (the **1996 Feasibility Study**).[70] The 1996 Feasibility Study "*covers the Cerro Verde leaching project*"[71] and the objective of the Study is "*to evaluate the feasibility of producing 105 million [pounds per year] of*

[65] 1994 Stability Agreement (**CE-344**), Article 1.3. *See also* Mining Law (**CA-1**), Article 79.
[66] Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility dated September 1995 (**CE-348**), p. 2-2.
[67] Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility dated September 1995 (**CE-348**), p. 2-2.
[68] Minerals Advisory Group LLC, Cerro Verde Expansion Project: Summary Feasibility dated September 1995 (**CE-348**), p. 2-12.
[69] SMCV, Request for Stability Agreement dated 25 January 1996 (**CE-7**), p. 3.
[70] 1996 Feasibility Study (**CE-9**).
[71] 1996 Feasibility Study (**CE-9**), Article 1.1.

cathode copper from the heap leaching of copper ore at the Cerro Verde facilities" (*i.e.* the **Leaching Project**).[72]

176. On 27 March 1996, MINEM issued a Report to "*evaluate the feasibility of producing 105 million pounds per year of copper cathodes in Cerro Verde's facilities*."[73]

177. On 6 May 1996, the Directorate General of Mining (**DGM**) approved the 1996 Feasibility Study.[74] The DGM then sent the file to the Vice-Minister of Mines to consider SMCV's application for stability pursuant to Article 83 of the Mining Law.[75] The Leaching Project was planned to be completed in 1997.[76]

178. In June 1996, ICF Kaiser completed a second study assessing the feasibility of a concentrator (**1996 Mill Feasibility Study**).[77] The 1996 Mill Feasibility Study concluded that, "*although the project ha[d] improved significantly since the earlier 1995 Study, the pretax discounted cash flow [would] still not support the required investment*" due to *inter alia* the lack of economical options for power and water.

179. On 5 September 1996, a concession to process the minerals extracted under the Beneficiation Concession was issued.[78]

180. On 16 September 1996, Cyprus sent the 1996 Mill Feasibility Study to Minero Peru, advising that constructing a concentrator was "*uneconomical*" at the time, and exercising its right under the Share Purchase Agreement to reduce its investment commitment.[79] Cyprus also requested an 18-month extension to "*perform additional studies and test work in an attempt to establish that it [was] economically feasible to construct a mill for processing the Cerro Verde sulfide ores*," which the Government granted. Cyprus commissioned Bateman Engineering to oversee additional testing of the Cerro Verde sulfide ore and to prepare a third feasibility study (the **1998 Mill Feasibility Study**).

---

[72] 1996 Feasibility Study (**CE-9**), Article 1.2.
[73] MINEM, Report No. 033-96-EM-DGM-DFM/DFAE dated 27 March 1996 (**RE-25**).
[74] MINEM, Directorial Resolution No. 158-96-EM/DGM dated 6 May 1996 (**RE-24**), Article 1.
[75] MINEM, Report No. 043-96-EM-DGM-DFM/DFAE dated 6 May 1996 (**CE-8**); MINEM, Report No. 708-97-EM/DGM/OTN dated 30 December 1997 (**CE-356**).
[76] MINEM, Directorial Resolution No. 158-96-EM/DGM dated 6 May 1996 (**RE-24**), Article 1.
[77] ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project from 1996 (**CE-350**).
[78] 1996 Beneficiation Concession, Resolution No. 339-96-EM/DGM (**CE-10**).
[79] Letter from Cyprus Climax Metals Co. to Empresa Minera del Perú S.A. dated 16 September 1996 (**CE-11**), p. 2; Share Purchase Agreement (**CE-4**), Article 4.3(b)(i).

181. In 1997, SMCV dismantled the pilot concentrator.[80]

182. On 30 December 1997, MINEM issued a report for the Vice-Minister of Mines concluding that two different mining stability agreements could not co-exist at the same time.[81] MINEM recommended that since there were "*overlapping agreements for a period of time, […] an additional clause should be included that ought to provide details on the effective period of both agreements*."[82]

183. On 6 January 1998, MINEM issued a report in response to MINEM's 30 December 1997 report expressing that it did not make sense to add an additional clause as "*the overlapping of 02 agreements during a period of time*" does not "*violate legal provisions or affect[] the interests of the parties*."[83]

184. On 26 February 1998, Peru entered into a Stability Agreement with SMCV (the **1998 Stability Agreement**) under Article 82 of the Mining Law by which Peru granted SMCV administrative and fiscal stability for a 15-year period from 1 January 1999 to 31 December 2013, with respect to the regimes existing on 6 May 1996.[84] The Agreement concerned a USD 237 million investment project to expand the production capacity of the leaching plant from 72 million pounds of copper cathodes per year to 105 million pounds. Specifically, the Agreement provided that "*the modifications or new rules that may be issued*" during the 15-year period of stabilization "*will not affect [SMCV] in any way*," including any changes to the income tax regime, custom duties or municipal taxes. The Agreement also excluded the application of any law passed after 6 May 1996 that "*directly or indirectly, denaturalizes the guarantees provided*" by the Agreement.

185. On 25 March 1998, Cyprus delivered the 1998 Mill Feasibility Study to Minero Peru.[85] The Study concluded for the third time that the "*economics*" of the proposal "*do not*

[80] Aquiño I (**CWS-1**), ¶ 31; Ralbovsky I (**RER-4**), ¶ 61.
[81] MINEM, Report No. 708-97-EM/DGM/OTN dated 30 December 1997 (**CE-356**).
[82] MINEM, Report No. 708-97-EM/DGM/OTN dated 30 December 1997 (**CE-356**), p. 2.
[83] MINEM, Report No. 002-98-EM/OGAJ dated 6 January 1998 (**RE-23**).
[84] Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. dated 26 February 1998 (**CE-12**).
[85] Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study dated 16 March 1998 (**CE-13**), p. 1-1.

support a prudent investment for construction and operation of a copper sulfide ore concentrator."[86]

E. The 1998 Stability Agreement enters into force and SMCV continues to invest in Cerro Verde (1998-2001)

186. On 15 June 1998, SMCV sent a letter to MINEM stating that it had been operating the Leaching Project for ninety consecutive days, in accordance with Clause 6.1 of the 1998 Stability Agreement. SMCV's letter stated that on "*March 31, 1998, the project for which the contract was entered into has completed the ninetieth day of continuous operation*."[87]

187. In September 1998, an audit confirmed that SMCV was in compliance with the 1996 Feasibility Study.[88]

188. On 23 November 1998, MINEM certified SMCV's sworn statement submitted in accordance with Article 30 of the Regulations that it had substantially implemented the 1996 Feasibility Study, thus "*[c]onfirm[ing] that [SMCV] enjoys Tax Stability for the Regime in force as of May 6, 1996*."[89]

189. On 30 November 1998, SMCV informed the Peruvian tax agency, the National Superintendence of Customs and Tax Administration (**SUNAT**), and MINEM of its intent to rely on the stabilized regime under the 1998 Stability Agreement as of 1 January 1999.[90]

190. In October 1999, Phelps Dodge Corporation (**Phelps Dodge**) acquired Cyprus and with it a majority of SMCV and the Cerro Verde mining operations.[91]

191. Between October and November 1999, SMCV acquired used mining equipment for USD 4.5 million in order to increase daily ore extraction from 120,000 to 161,000 MT.[92]

---

[86] Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study dated 16 March 1998 (**CE-13**), pp. 2-7.
[87] Letter from SMCV to MINEM dated 15 June 1998 (**RE-101**).
[88] 1998 Dictamen Auditec, Fiscal and Accounting Report of SMCV Investments dated September 1998 (**CE-14**).
[89] MINEM, Directorial Resolution No. 342-98-EM/DGM dated 23 November 1998 (**CE-360**), Preamble and Articles 1, 2 (referring to: Mining Regulations (**CA-2**), Article 30); Mining Law (**CA-1**), Article 80(a).
[90] SMCV Letter to SUNAT dated 30 November 1998 (**CE-361**); SMCV Letter to MINEM dated 30 November 1998 (**CE-362**) (referring to: Mining Regulations (**CA-2**), Article 33).
[91] Claimant's Notice of Arbitration, ¶ 30; Claimant's Memorial, ¶ 84; Respondent's Counter-Memorial, ¶ 67; Morán I (**CWS-8**), ¶¶ 10-11.
[92] Phelps Dodge, Cerro Verde Assessment dated October-November 1999, (**CE-363**), p. 14.

192. In the early 2000s, certain disagreements between Minero Peru and Cyprus arose in connection with the performance of the Share Purchase Agreement.[93]

193. On 6 September 2000, the Peruvian Congress repealed the benefit of investing retained earnings under Article 72 of the Mining Law.[94]

194. On 30 March 2001, following negotiations, Minero Peru and Phelps Dodge settled their dispute concerning the performance of the Share Purchase Agreement through an agreement (the **Settlement Agreement**).[95] In the Settlement Agreement, Minero Peru relinquished its claim in exchange for Phelps Dodge's commitment to (i) make at least USD 50 million in further investments at Cerro Verde over the following three years, and (ii) further explore the feasibility of processing the primary sulfides for three more years.[96] Pursuant to the Settlement Agreement, SMCV invested USD 25 million to expand Cerro Verde's leaching facilities between 2001 and 2002.[97]

195. In October 2001, SMCV and Empresa de Generación de Arequipa S.A. (**EGASA**), the regional State-owned energy company, agreed to invest in a hydroelectric dam on the nearby Pillones River.[98] SMCV ultimately finalized this agreement in April 2004, contributing 40% of the USD 17 million in capital costs required for the project.[99]

F. SMCV assesses the construction of a concentrator at Cerro Verde again and Peru adopts a Mining Royalty Law (2002-2004)

196. In 2002, following "*significant improved economics*" of copper prices, SMCV conducted another pre-feasibility study for the construction of a concentrator studying two concentrator options (the **2002 Pre-Feasibility Study**).[100] One option foresaw the construction of a concentrator of 100,000 MT/D, the other of 50,000 MT/D.[101] The 2002 Pre-Feasibility Study assessed the feasibility of such options and *inter alia* described

[93] Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. dated 30 March 2001 (**CE-17**).
[94] Stability Agreements with the State, Law No. 27343 dated 5 September 2000 (**CA-79**), Article 4.
[95] Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. dated 30 March 2001 (**CE-17**).
[96] Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. dated 30 March 2001 (**CE-17**).
[97] Claimant's Memorial, ¶ 87; Respondent's Counter-Memorial, ¶ 81.
[98] SMCV, Framework Agreement for the Pillones Dam Investment dated 1 October 2001 (**CE-375**).
[99] EGASA and SMCV, Consortium Contract for the Construction of the Pillones Dam dated 27 April 2004 (**CE-430**), ¶¶ 5.1 and 5.3.
[100] 2002 Pre-Feasibility Study dated December 2002 (**CE-928**), p. 1; SMCV, Primary Sulfide Preliminary Pre-Feasibility Study, Volumes II and III, December 2002 (excerpts) (**RE-351**).
[101] 2002 Pre-Feasibility Study dated December 2002 (**CE-928**), p. 1.

the stability agreements in force at Cerro Verde.[102] The 2002 Pre-Feasibility Study noted that it was "*not understood how to repatriate the funds from the reinvestment of profits credit*."[103]

197. On 23 September 2002, in response to inquiries from a taxpayer, SUNAT issued Report No. 263-2002-SUNAT/K00000, a publicly available report, explaining the scope of mining stabilization agreements (the **2002 SUNAT Report**).[104] The taxpayer had asked SUNAT if a mining company that had signed a mining stabilization agreement with respect to one of its beneficiation plants had to pay a newly created tax with respect to certain activities that were related to its investment project. SUNAT responded that "*Tax Stability [Agreements] entered into pursuant to Title Nine of the TUO of the General Mining Law only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an Administrative-Economic Unit*."[105]

198. Beginning in late 2002 and early 2003, as rapidly increasing copper prices led to increased mining profits, some Peruvian politicians began asserting that mining companies should be more heavily taxed and pushed to assess a royalty based on a percentage of mining profits.[106]

199. On 31 January 2003, Minister of Energy and Mines Jaime Quijandría issued an opinion warning that a royalty regime would be "*counterproductive to the Government's current goal of promoting the country's development on the basis of private investment*" in light of the "*hugely negative effect that levying a royalty would have on [Peru's] competitiveness and on its ability to attract investment*."[107]

200. In June 2003, Phelps Dodge retained Fluor Canada Ltd. to conduct a feasibility study for the construction of the concentrator at issue in this arbitration (the **Concentrator, the Concentrator Project, or Concentrator Plant**), which was issued in May 2004.[108]

---

[102] 2002 Pre-Feasibility Study dated December 2002 (**CE-928**), pp. 58 *et seq*.
[103] 2002 Pre-Feasibility Study dated December 2002 (**CE-928**), p. 17.
[104] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002 (**RE-26**).
[105] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002 (**RE-26**), p. 3.
[106] "Tax Avoidance in the Chilean Mining Sector?," *La República* dated 16 May 2003 (**CE-389)**; "The Hundred Days Proposal," *Arequipa Al Día* dated 5 February 2003 (**CE-387**).
[107] Official Letter No. 133-2003-EM/DM dated 31 January 2003 (**CE-386**).
[108] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. I, p. 1.

201. On 3 July 2003, Ms. Torreblanca of SMCV wrote to Ms. Chappuis, then head of the DGM, to request confirmation that SMCV would be entitled to apply the profit reinvestment benefit under the 1998 Stability Agreement.[109] Ms. Torreblanca explained that SMCV's decision to build the Concentrator "*was directly related*" to its right to reinvest non-distributed profits back into the project.

202. On 5 September 2003, MINEM issued a report stating that the project for the primary sulfide exploitation could be eligible for reinvestment of profits.[110]

203. On 8 September 2003, the DGM replied to SMCV in a report written by a MINEM attorney and engineer and approved by Ms. Chappuis. The report stated:

> *About the question whether the stabilized regime would be applicable to the company, the prohibition contained in Article 8 of Supreme Decree No. 027-98-EF points out that the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement.*[111]

204. In another report dated the same day, the DGM responded to SMCV's inquiry of whether SMCV was entitled to apply for the profit reinvestment benefit. The DGM stated that SMCV could apply to reinvest its profits into the Concentrator Project.[112]

205. On 4 November 2003, in an opinion delivered to Congress, the Minister of Energy and Mines opined that a royalty would "*not be advantageous*" because it "*would make us less competitive in comparison to other countries for the purpose of attracting such national or foreign private investments as are necessary to develop our great potential mineral resources*."[113] The Minister also explained that "*the biggest companies with investments, some of which are still in the process of recouping their investment, have Tax Stability Agreements, so that the proposed royalty tax would not be applicable to them in practice*."[114]

206. On 26 November 2003, the Energy and Mines Commission of the Peruvian Congress issued a report recommending approval of a royalty.[115] The report clarified that the

[109] SMCV, Petition No. 1418719 to MINEM dated 3 July 2003 (**CE-394**).
[110] MINEM, Report No. 510-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-399**).
[111] MINEM, Report No. 509-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-398**), p. 1.
[112] MINEM, Report No. 510-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-399**), p. 2.
[113] MINEM, Communication No. 1609-2003-MEM/DM dated 4 November 2003 (**CE-404**), p. 2.
[114] MINEM, Communication No. 1609-2003-MEM/DM dated 4 November 2003 (**CE-404**), p. 2.
[115] Congress, Opinion No. 4462/2002-CR, 4776/2002-CR, 8328/2003-CR, 8561/2003-CR, and 8906/2003-CR dated 5 December 2003 (**CE-415**).

royalty would apply to companies with mining stability agreements once the term of the respective stability agreements would end.[116]

207. On 28 January 2004, Ms. Torreblanca submitted on behalf of SMCV a request to MINEM for permission to reinvest profits to construct "*a concentrator to process the primary sulfide ore*" at Cerro Verde.[117]

208. On 11 March 2004, Vice Minister of Mines, Mr. César Polo, who spearheaded the drafting of the regulations applicable to mining stabilization agreements in 1992, explained at the Mining Royalties Forum organized by Peru's Congress that:

> *Stabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project], or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to stabiliz[e] for that investment, for that development, not for the whole company.*[118]

209. In April 2004, in a presentation before Congress, Congressman Diez Canseco argued that "*[m]any of these [stability] agreements are a questionable legacy of Fujimori[] and should be reviewed and renegotiated*."[119]

210. On 28 April 2004, the Peruvian Executive proposed an alternative to Congress' draft royalty law, under which a one to three percent royalty would be applied as a prepayment of future income taxes, which the Government argues was necessary to "*allow the country to remain attractive to investors*."[120] This proposal was rejected on 11 May 2004.[121]

---

[116] Congress, Opinion No. 4462/2002-CR, 4776/2002-CR, 8328/2003-CR, 8561/2003-CR, and 8906/2003-CR dated 5 December 2003 (**CE-415**), p. 1; Congress, Draft Law No. 08561-2003-CR dated 14 October 2003 (**CE-403**), p. 8; Congress, Draft Law No. 08906-2003-CR dated 6 November 2003 (**CE-406**).
[117] SMCV, Petition No. 3616468 to MINEM dated 28 January 2004 (**CE-421**).
[118] Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic dated 11 March 2004 (excerpts) (**RE-185**), at timestamps 00:09:37 - 00:10:03; 2004 Mining Royalties Forum (full audio file and transcript) dated 11 March 2004 (**CE-1123**); MEF, Evaluation of Royalty Application dated 11 March 2004 (**CE-19**).
[119] Javier Diez Canseco, Mining Royalties and the Need to Reform Mining Taxation: Who Is Opposed? dated April 2004 (**CE-429**).
[120] Congress, Draft Law No. 10443/2003-CR dated 28 April 2004 (**CE-431**), Article 4; "Peru's Congress to Examine Mine Royalty Proposals," *Osterdowjones Commodity Wire* dated 30 April 2004 (**CE-433**).
[121] Congress, Committee on Economy & Financial Intelligence, Minutes dated 11 May 2004 (**CE-437**), p. 17.

211. On 11 May 2004, the DGM found that SMCV's application of January 2004 under the profit reinvestment program for the construction of the Concentrator had to be corrected on a number of issues.[122]

212. On 21 May 2004, a congressman submitted a proposed royalty bill that would apply to all mining companies, "*including those owners who have […] stability agreements.*"[123]

213. In May 2004, Fluor delivered its feasibility study for the Concentrator (the **2004 Feasibility Study**).[124] The study considered four design options and confirmed that the earlier energy and water limitations of the mine were resolved.[125] The 2004 Feasibility Study assumed that the 1998 Stability Agreement would apply to the Concentrator.[126]

214. On 3 June 2004, the Peruvian Congress adopted the Mining Royalty Law, imposing an *ad valorem* royalty on the "*holders of mining concessions*" for the extraction of ores (the **Royalty Law**).[127] The law set forth three brackets for the payment of mining royalties: it imposed a 1% royalty for revenues of up to USD 60 million per year, a 2% royalty for revenues of up to USD 120 million per year, and a 3% royalty for revenues in excess of USD 120 million per year.[128]

215. On 9 June 2004, MINEM's Regional Director of Energy and Mines in Arequipa, Juan Muñiz, stated that the Royalty Law should be "*reevaluated and reformulated*," noting that it would not apply to many companies in light of stability agreements in place.[129]

216. On 11 June 2004, Ms. Chappuis sent an email to her team, including Mr. Tovar, MINEM's Director of Mining Promotion and Development, in which she asked: "*request for inclusion of the Sulfides Project in SA of [Cerro Verde]…is this legal*?."[130]

217. On 23 June 2004, the Royalty Law was signed and published in the Official Gazette on the following day.[131]

---

[122] MINEM, Report No. 454-2004-MEM dated 11 May 2004 (**CE-436**).
[123] Congress, Draft Law No. 10636/2003-CR dated 21 May 2004 (**CE-438**), Article 4.
[124] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**).
[125] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. I, p. 30.
[126] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. IV, pp. 14-15.
[127] Royalty Law No. 28258 dated 24 June 2004 (**CA-6**).
[128] Royalty Law No. 28258 dated 24 June 2004 (**CA-6**), Article 5.
[129] "Royalty Law Aimed at the Small-Scale Mining Sector," *Arequipa Al Día* dated 9 June 2004 (**CE-441**).
[130] Email from Maria Chappuis to Rosario Padilla, Jaime Chávez Riva Gálvez, Oswaldo Tovar, Luis Saldarriaga Colona, and Luis Panizo, "Meeting with Cerro Verde – New SA" dated 11 June 2004 (**RE-198**).
[131] Royalty Law No. 28258 dated 24 June 2004 (**CA-6**).

218. On the same day, the Government proposed several amendments related to the mechanism for calculating the royalty, including creating a floor tied to international mineral prices below which the royalty would not apply.[132]

219. Still on the same day, the Mining Society, a business association of companies involved in the extractive sector in Peru, announced that it planned to collect 5,000 signatures to file a lawsuit challenging the Royalty Law's constitutionality.[133]

220. In a presentation dated 8 July 2004, SMCV *inter alia* noted that there was a "*need for certainty*" with respect to the envisioned investment in the Concentrator. The presentation stated that "*[i]f the proposed expansion is not included as part of the Cerro Verde 1, 2, 3 Production Unit, there will be an overlap, confusion as to the tax treatment applicable and possible questioning of taxes already paid*" and that "*Cerro Verde requires the certainty that only a Stability Agreement is able to give in order to carry out the investment of more than US$ 800 MM*."[134] The presentation referred to a "*requested addendum*" to provide such certainty.[135]

221. In a presentation "*to the Ministry of Energy and Mines*" dated August 2004 and titled "*Justification of a Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement*", SMCV stated that it was requesting that an addendum be included in the Annex I of the 1998 Stability Agreement to cover the "*Beneficiation Concession: Primary Sulfides Concentrator*."[136] The presentation further stated "*SMCV requires certainty today with regard to clarity in the Agreement to make an investment decision of more than US$800 million*."[137] The presentation further referred to the 2002 SUNAT Report.[138]

222. On 25 August 2004, a draft Phelps Dodge presentation titled "*PDMC Growth Projects Cerro Verde Sulfide Update*" prepared for the October 2004 board meeting of the company was shared by email by a senior Phelps Dodge official. The presentation

---

[132] Congress, Draft Law No. 10876/2003 dated 24 June 2004 (**CE-446**), pp. 2-3.
[133] "Miners to Take Legal Action Against Royalty," *Business News Americas* dated 24 June 2004 (**CE-447**).
[134] Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future" dated 8 July 2004 (**CE-450**), slide 45.
[135] Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future" dated 8 July 2004 (**CE-450**), slide 45.
[136] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 11.
[137] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 47 (emphasis omitted).
[138] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 39.

described the political environment in Peru,[139] included the modification of the 1998 Stability Agreement in the project timeline,[140] and noted that "*the Mines Ministry has proposed a process to include sulfide plant in the facility covered by the existing stability agreement*" and that this would "*shield the sulfide operation from the royalty*."[141] Furthermore, the project economics "*assume[d] success [in] including [the] sulfide project in [the] existing stability agreement*."[142]

223. On 26 August 2004, Mr. Harry Conger of Phelps Dodge responded to the email of 25 August 2004 in which he stated:

> *On the stability agreement we will be submitting the application to modify the beneficiation concession contained within our current stability agreement in person on Friday. We continue to get positive signals that this will be a fast track process and that there are no barriers. We may not even be required to go for public comment but we will not know for sure until we meet on Friday.*[143]

224. On 27 August 2004, SMCV submitted a request to expand the Beneficiation Concession to the DGM in order to include the Concentrator within the Beneficiation Concession.[144]

225. On 3 September 2004, SMCV resubmitted to the DGM its application under the profit reinvestment program for the construction of the Concentrator.[145]

226. In September 2004, Fluor presented its updated study, which focused on a 108,000 MT/d concentrator and considered the Royalty Law.[146] Fluor's analysis assumed that "*no royalties will be assessed during the stability agreement*" through the

---

[139] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 2.
[140] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 5.
[141] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 6.
[142] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 9.
[143] Email Correspondence between H. (Red) Conger, Dennis Bartlett, Timothy Snider, Lowell Shonk, Randy Davenport, Jorge Riquelme, William Brack, and Cristian Strickler, "CV Sulfide Board Update" dated 25 and 26 August 2004 (**RE-323**).
[144] SMCV, Petition No. 1487019 to MINEM dated 27 August 2004 (**CE-457**).
[145] SMCV, Petition No. 1488199 to MINEM dated 3 September 2004 (**CE-462**); MINEM, Report No. 454-2004-MEM dated 11 May 2004 (**CE-436**).
[146] Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update dated September 2004 (**CE-459**), pp. 1, 48.

end of 2013, but that "*[t]he project economics include a tiered royalty structure from 1% to 3% on Net Smelter Returns starting in 2014.*"[147]

227. Between 13 and 15 September 2004, email correspondence within Phelps Dodge was shared ahead of a Phelps Dodge board meeting scheduled in October 2004, attaching a presentation to be made at such meeting.[148] The presentation *inter alia* stated:

> *Cerro Verde's existing mining and beneficiation concessions are protected by an [sic] pre-existing stability agreement until 2013*
>
> *The agreement shields operations on the concessions from the royalty and provides a tax credit for profit reinvestment*
>
> *In late August, Cerro Verde applied to include the sulfide project in the existing beneficiation concession*
>
> *The Mines Ministry is expected to approve the application by early October*[149]

228. On 22 September 2004, Phelps Dodge submitted a memorandum to the board in advance of the board meeting scheduled in October 2004.[150] The memorandum to the board *inter alia* stated under "*Open Items*" that "*the application to include the sulfide project in the beneficiation concession covered by the existing stability agreement (and thus avoid any royalties for the life of the original agreement) was submitted to the Mining Ministry on August 27.*"[151]

G. SMCV invests USD 850 million in the Concentrator, MINEM approves SMCV's requests for profit reinvestment and the extension of the Beneficiation Concession (2004)

229. On 5 October 2004, Sumitomo Metal Mining, Sumitomo Corporation, and Phelps Dodge executed heads of agreement, according to which Phelps Dodge agreed to make SMCV issue additional capital shares, and to assign the corresponding preferential

---

[147] Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update dated September 2004 (**CE-459**), p. 46.
[148] Email Correspondence between H. (Red) Conger, Dennis Bartlett, Timothy Snider, Lowell Shonk, Jorge Riquelme, and William S. Brack, "FW: Cerro Verde Board Presentations" (Attaching Draft Presentation, "Cerro Verde Sulfide Project Permitting and Financial Status") dated 13-15 September 2004 (**RE-322**).
[149] Email Correspondence between H. (Red) Conger, Dennis Bartlett, Timothy Snider, Lowell Shonk, Jorge Riquelme, and William S. Brack, "FW: Cerro Verde Board Presentations" (Attaching Draft Presentation, "Cerro Verde Sulfide Project Permitting and Financial Status") dated 13-15 September 2004 (**RE-322**), slide 2.
[150] Phelps Dodge Corporation, "Cerro Verde Sulfide Project, Background Materials" dated 22 September 2004 (**RE-314**), p. 122 of the pdf.
[151] Phelps Dodge Corporation, "Cerro Verde Sulfide Project, Background Materials" dated 22 September 2004 (**RE-314**), p. 122 of the pdf.

rights certificates to enable Sumitomo Metal Mining and Sumitomo Corporation to collectively acquire 21% of the outstanding capital shares of SMCV for approximately USD 265 million.[152]

230. On 7 October 2004, Phelps Dodge entered into heads of agreement with Buenaventura, a minority shareholder in SMCV and one of Peru's leading mining companies, which contemplated Buenaventura's acquisition of a total of 17% to 20% of SMCV's outstanding capital shares for approximately USD 99.85 million.[153]

231. On 11 October 2004, SMCV's board of directors conditionally approved an investment of USD 850 million for the construction of the Concentrator, specifying that approval would "*depend on obtaining the required permits and the financing necessary for the project*."[154]

232. On 12 October 2004, the President of Peru, Alejandro Toledo, met with Phelps Dodge's president, Timothy Snider.[155] After the meeting, President Toledo reportedly "*congratulate[d] the company*," expressed gratitude "*for trusting Peru*," and "*wish[ed] [Phelps Dodge] good luck*," while asserting that "*we will fulfill our responsibility to maintain economic and legal stability*."[156]

233. On 26 October 2004, MINEM approved SMCV's request to construct the Concentrator and to expand the Beneficiation Concession.[157]

234. On 29 October 2004, Ms. Padilla, a MINEM legal advisor, issued a report approving SMCV's request under the profit reinvestment program, sending it to Ms. Chappuis and Mr. Tovar for further review.[158]

235. On 30 November 2004, MINEM approved SMCV's request under the profit reinvestment program.[159]

---

[152] Phelps Dodge, Sale of Interests in South American Operations: Principal Terms dated 5 October 2004 (**CE-468**), p. 4.
[153] Phelps Dodge, Sale of Additional Interest in Cerro Verde to Buenaventura: Principal Terms dated 7 October 2004 (**CE-469**), p. 1.
[154] SMCV, Board of Directors Meeting Minutes dated 11 October 2004 (**CE-470**).
[155] "Peru: President Toledo Announces an Investment of US$850 Million in Cerro Verde," *Europa Press* dated 12 October 2004 (**CE-471**).
[156] "Peru: President Toledo Announces an Investment of US$850 Million in Cerro Verde," *Europa Press* dated 12 October 2004 (**CE-471**).
[157] MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM dated 26 October 2004 (**CE-476**).
[158] MINEM, Report No. 1334-2004-EM-DGM/TNO dated 29 October 2004 (**CE-477**).
[159] MINEM, Report No. 841-2004-MEM/DGM/PDM dated 30 November 2004 (**CE-479**).

236. On 1 December 2004, Ms. Chappuis agreed with Ms. Padilla's report approving SMCV's request to benefit from the profit reinvestment program.[160]

237. On 3 December 2004, the Ministry of Economy and Finance (**MEF**) added its approval to SMCV's request to benefit from the profit reinvestment program.[161]

238. On 9 December 2004, the Minister of Energy and Mines gave final approval to SMCV's request to apply the profit reinvestment benefit to construct the Concentrator.[162] It stated that the profits that would benefit from the profit-reinvestment program had to be "*exclusively generated by the 'Cerro Verde Leaching Project.'*"[163]

239. In December 2004, SMCV began construction of the Concentrator, which was completed in 2006.[164]

H. The Royalty Law and SMCV's profit reinvestment benefit are challenged, SMCV, Phelps Dodge, MINEM and SUNAT express positions on stability guarantees, and changes occur in SMCV's corporate structure (2004-2008)

240. On 24 November 2004, over 5,000 Peruvian citizens filed a suit challenging the Royalty Law before the Constitutional Tribunal.[165]

241. On 17 January 2005, Congressman Diez Canseco sent a letter to MINEM inquiring about whether the "*Cerro Verde II Mining Project [] requested that they be given the reinvestment of profits tax incentive*" and "*what [] technical and legal support and the cost-analysis on the basis of which this request has been accepted or rejected*."[166]

242. On 17 February 2005, Mr. Haraldo Cruz, SUNAT's Regional Intendent for Arequipa, sent a form letter to SMCV with instructions on how to declare and pay royalties in the event that it was under an "*obligation*" to do so as the "*holder[] of [a] mining concession*[]."[167] The letter explained that "*in order to determine the amount of the economic consideration and to be able to file the return and pay the Mining Royalty,*

[160] MINEM, Report No. 1334-2004-EM-DGM/TNO dated 29 October 2004 (**CE-477**).
[161] MEF, Report No. 209-2004-EF/66.01 dated 3 December 2004 (**CE-22**); MEF, Letter No. 942-2004-EF/10 dated 3 December 2004 (**CE-21**).
[162] MEF, Ministerial Resolution No. 510-2004-MEM/DM dated 9 December 2004 (**CE-23**).
[163] MEF, Ministerial Resolution No. 510-2004-MEM/DM dated 9 December 2004 (**CE-23**), Article 1.
[164] Claimant's Memorial, ¶¶ 117, 155; Respondent's Counter-Memorial, ¶ 67.
[165] Unconstitutionality Claim re: Mining Royalty Law, Case No. 48-2004-AI dated 24 November 2004 (**CE-478**).
[166] Congressman Diez Canseco to Minister Sánchez Mejía, Communication No. 083-2005-JDC/CR dated 17 January 2005 (**CE-942**).
[167] SUNAT Letter to SMCV dated 17 February 2005 (**CE-482**).

you must download every month from Virtual SUNAT […] the file that contains the information about your Production Unit(s)."[168]

243. On 23 February 2005, the Minister of Energy and Mines responded to Congressman Diez Canseco's letter of 17 January 2005 confirming that the investments to be carried out by SMCV complied with the rules for the application of the tax benefits to retained earnings allocated to investment programs.[169]

244. On 23 February 2005, Congressman Diez Canseco published an article in the newspaper *La República* addressing the "*offensive against mining royalties*" in relation to the Mining Society's case before the Constitutional Tribunal.[170]

245. On 2 March 2005, Congressman Diez Canseco published another article in *La República* describing public officials in Peru as "*"borrowed" from the private sector*" and "*defending the illegitimate private interests against the country*."[171]

246. On 4 March 2005, SMCV sent a response to SUNAT explaining that SMCV was entitled to stability, and that the mining royalty "*is not applicable to Cerro Verde by application of the […] Stability Agreement*."[172]

247. On 5 March 2005, *La República* published an article on mining companies' appeal to the judiciary "*to avoid paying royalties*."[173]

248. On 7 March 2005, Phelps Dodge issued its annual SEC 10K report for 2004, stating in relation to the Royalty Law that "*it is not clear what, if any, effect the new royalty law will have on the operations at Cerro Verde*."[174]

249. On 8 March 2005, MINEM officials met with Phelps Dodge at a mining conference in Canada to discuss the scope of stability guarantees.[175] During those meetings, Mr. Tovar met *inter alia* with Mr. Conger. The internal aide-mémoire sent to Mr. Polo and Mr. Tovar by a MINEM official indicated that:

---

[168] SUNAT Letter to SMCV of 17 February 2005 (**CE-482**), p. 1.
[169] MINEM, Communication No. 272-2005-MEM/DM dated 23 February 2005 (**CE-943**).
[170] "The Offensive Against Mining Royalties," *La República* dated 23 February 2005 (**CE-483**).
[171] "Mining Royalties: Sleeping with the Enemy," *La República* dated 2 March 2005 (**CE-485**).
[172] SMCV, Letter No. SMCV-AL-279/2005 to SUNAT dated 4 March 2005 (**CE-486**).
[173] "Mining companies appeal to the Courts to avoid paying royalties," *La República* dated 5 March 2005 (**CE-487**).
[174] Phelps Dodge, SEC Form 10-K for 2004 dated 7 March 2005 (**CE-901**), p. 80.
[175] Email from Alicia Polo y La Borda to Oswaldo Tovar, "Aide Memoire-meetings.doc" (with attachment), 4 March 2005 (**RE-4**); Email from César Zegarra to Oswaldo Tovar and César Polo, "Aide Memoire" (with attachment) dated 8 March 2005 (**RE-5**).

> *There are mining concessionaires that have signed administrative and tax stability agreements with the State regarding specific mining projects, entered into under the Single Unified Text of the Mining Royalty Law, the model agreement for which was approved via Supreme Decree No. 04-94- EM.[]*
>
> *In this respect, for purposes of enforcing the guarantees agreed to by the Peruvian State, for mining royalties, it is the mining companies' responsibility to inform the entity tasked with managing and collecting the royalty about the mining projects and concessions that would be covered by such guarantees.*[176]

250. On 9 March 2005, at the same conference, Phelps Dodge held a presentation titled "*Peru and Phelps Dodge: Partners in Progress*." The presentation noted that the "*Stability contract provides certainty to make $850 million investment decision*."[177]

251. On the same day, an article in *La República* reported about the calls for mining companies to comply with the payment of royalties to regions.[178]

252. On 16 March 2005, Sumitomo Metal Mining, Sumitomo Corporation, Buenaventura, Phelps Dodge, SMCV, and others entered into a participation agreement for the purpose of obtaining financing for the Concentrator (the **Participation Agreement**).[179] The Participation Agreement recognized that the Concentrator would be located "*within the concessions of SMCV*" and developed according to the plan set out in the 2004 Feasibility Study and its September 2004 update.

253. On 30 March 2005, SUNAT asked MINEM to send "*a list of mining companies that have signed agreements of guarantees and measures for the promotion of investments entered under the scope of the Single Unified Text [TUO] of the General Mining Law, detailing the Tax ID number, company name, production units, and/or concessions or projects included under the agreement*."[180] In addition, the letter requested MINEM to provide SUNAT with the "*scopes of the agreements of guarantees and measures for the promotion of investments*" to determine whether "*mining companies that at the date of*

[176] Email from César Zegarra to Oswaldo Tovar and César Polo, "Aide Memoire" (with attachment) dated 8 March 2005 (**RE-5**).
[177] Phelps Dodge, Peru and Phelps Dodge: Partners in Progress dated 9 March 2005 (**CE-945**), slide 16.
[178] "Mining companies urged to comply with the payment of royalties to regions," *La República* dated 9 March 2005 (**CE-489**).
[179] Participation Agreement (**CE-906**).
[180] Administrative File of Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**RE-175**), p. 14.

enactment of [the Royalty Law] had signed the aforementioned agreements for the projects included therein, are obliged to pay the Mining Royalty."[181]

254. On 1 April 2005, the Constitutional Tribunal upheld the Royalty Law.[182] The Constitutional Tribunal held that the mining royalty was not a tax but rather an "*economic consideration*" for the extraction of sovereign resources consistent with the right to property. In addition, the Constitutional Tribunal held that "*with the establishment of the mining royalty, the State has not breached the commitment to respect the attributes conferred by the Law on the investors holding the concession, since the nature of these acts—ascribed to public law—do not grant the concession holder immutability of the legal regime, for which contract-laws operate, nor do they rule out the intervention of the State through the exercise of its ius imperium and it is justified by the public interest*."[183]

255. On 6 April 2005, Congressman Diez Canseco published an article in La República titled "*Mining Royalties: and the winner is…Peru!*."[184] Congressman Diez Canseco stated that "*the recognition that the mining royalty is NOT tax […] means that it must be universally applied without being stymied or distorted by tax stability agreements signed behind Peruvians' backs*."[185]

256. On 7 April 2005, La República reported that MINEM officials, including Minister of Energy and Mines Mr. Glodomiro Sánchez Mejía, were "*analyzing the ruling by the Constitutional Tribunal […] to determine whether [it would] apply to companies that enjoy tax stability agreements*."[186]

257. On 14 April 2005, Mr. Felipe Isasi Cayo, MINEM's Director General of Legal Affairs, prepared a legal report addressed to Minister of Energy and Mines Mr. Glodomiro Sánchez Mejía, which analyzed in detail the application of the Royalty Law to companies with stability agreements in light of the Constitutional Tribunal's ruling (the **April 2005 Report**).[187] The Report stated:

[181] Administrative File of Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**RE-175**), pp. 14-15.
[182] Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC dated 1 April 2005 (**CE-490**).
[183] Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC dated 1 April 2005 (**CE-490**), ¶ 109.
[184] "Javier Diez Canseco, "Mining Royalites: Peru Won" *La República* dated 6 April 2005 (**CE-491**).
[185] "Javier Diez Canseco, "Mining Royalites: Peru Won" *La República* dated 6 April 2005 (**CE-491**).
[186] "Constitutional Tribunal ruling on mining companies analyzed" *La República* dated 7 April 2005 (**CE-492**).
[187] MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**).

> *The stability granted by the Agreements on Guarantees and Measures to Promote Investment guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. If a mining titleholder has economic administrative units or mining concessions that are not part of the project subject to stability, the regulation establishes that such titleholder must keep the accounting of the project separately. Consequently, it is not the mining titleholder (individuals or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.*[188]

258. On the same day, MINEM sent SUNAT a list of mining companies that had entered into mining stabilization agreements.[189] The document containing such list includes (1) the names of the companies that had signed mining stabilization agreements, (2) the name of the projects that were the subject of these agreements, (3) the amount of the investment, (4) the number of years of granted stability, and (5) the start and end dates of the stabilization period.[190] The list includes SMCV's investment valued at USD 237,517,000 for the "*Cerro Verde Leaching*" project.[191]

259. On 22 April 2005, an article by *El Peruano* reported that the Minister of Energy and Mines sent the MEF and SUNAT information on the "*mining companies that signed […] administrative guarantees with the State*" and that he would make a statement jointly with the MEF to "*bring an end to the state of uncertainty existing in the mining sector*" regarding which companies would be exempt from paying royalties.[192]

260. On 29 April 2005, Mr. Polo sent an internal email to Mr. Isasi attaching a draft news release.[193] The draft news release provided an explanation in relation to the "*guarantee agreements signed by the State*," in particular on the applicability of royalties to mining companies that had entered into stabilization agreements.[194]

---

[188] MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.
[189] Administrative File of Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**RE-175**), pp. 10-13.
[190] Administrative File of Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**RE-175**), p. 13.
[191] Administrative File of Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**RE-175**), p. 13.
[192] "MEF and MEM Will Issue Analysis on Royalties Next Week" *El Peruano* dated 22 April 2005 (**CE-495**).
[193] Email from César Polo to Felipe Isasi dated 29 April 2005, 8:41 p.m. PET (**CE-947**).
[194] Email from César Polo to Felipe Isasi dated 29 April 2005, 8:41 p.m. PET (**CE-947**).

261. On 6 May 2005, the Minister of Economy and Finance reportedly explained that the only way for a company to remain exempt from the payment of mining royalties would be for it to hold an administrative stability contract.[195] The Minister also confirmed that MINEM had sent SUNAT information on mining stability agreements currently in force.

262. In May 2005, pursuant to the terms of the Participation Agreement, SMCV initiated a capital increase by issuing preferential subscription rights for 122,746,913 capital increase shares, of which Phelps Dodge (through Cyprus) acquired 101,250,165.[196]

263. The same month, Phelps Dodge transferred its rights to purchase those shares to Buenaventura and to SMM Cerro Verde Netherlands B.V. (**SMM Cerro Verde**), a Dutch entity incorporated by Sumitomo Metal Mining and Sumitomo Corporation for the purpose of investing in the Concentrator.[197]

264. On 1 June 2005, SMM Cerro Verde, Sumitomo Metal Mining, Sumitomo Corporation, Buenaventura, Phelps Dodge, SMCV, and others entered into a Shareholders' Agreement.[198]

265. On 3 June 2005, Mr. Isasi sent the Minister of Energy and Mines an e-mail containing a presentation on mining royalties and the effects of the judgement of the Constitutional Tribunal.[199] The presentation concluded that "*all mining titleholders pay, but not for all of their projects.*"[200] The presentation further stated "*the mining titleholders who, prior to the Mining Royalty Law, entered into Contratos-Ley with Administrative Stability; the value of the concentrates extracted for the stabilized project will be excluded from the base for calculating the royalty.*"[201]

---

[195] "Mining Royalties to Be Defined over the Next Few Days" *Arequipa Al Día* dated 6 May 2005 (**CE-500**).
[196] SMCV, Financial Statements 2005-2006 dated 9 February 2007 (**CE-561**), p. 8.
[197] SMCV, Board of Directors Meeting Minutes of 28 April 2005 (**CE-497**); SMCV Financial Statements 2005-2006 dated 9 February 2007 (**CE-561**), p. 8.
[198] Shareholders Agreement Among SMM Cerro Verde, Sumitomo Metal Mining, Sumitomo Corp., Summit Global Management B.V., Buenaventura, Cyprus, Phelps Dodge, and SMCV dated 1 June 2005 (**CE-502**).
[199] MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sánchez dated 3 June 2005 4:10 PM PET (**CE-948**)
[200] MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez dated 3 June 2005 4:10 PM PET (**CE-948**), slide 33.
[201] MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez dated 3 June 2005 4:10 PM PET (**CE-948**), slide 33.

266. On 8 June 2005, the Minister of Energy and Mines and Mr. Isasi made a publicly televised presentation before the Energy and Mines Congressional Committee explaining the relationship between the Royalty Law and mining stabilization agreements.[202] The Minister stated that "*then, who pays royalties? All mining titleholders pay royalties, but not for all of their projects.*"[203] Mr. Isasi clarified that "*the obliged subject is a mining company but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects*."[204]

267. On 22 August 2005, in an article published in *El Comercio*, SMCV's president described the Concentrator as the largest mining investment in Peru's history, noting that the company was "*disburs[ing] US$850 million in one phase*" because it had a "*high degree of confidence about the possibility of doing business in Peru*."[205] He noted that SMCV had signed a stability agreement for the "*original concession*" and "*believe[d]*" that the Concentrator was "*part of [it]*."[206] When asked whether the company would pay royalties once the Concentrator would start producing, he answered that "[i]*t depends on the tax authorities in Peru*."[207]

268. On 25 August 2005, in an article published in La República, Congressman Diez Canseco stated that "*[t]he way Cerro Verde and its expansion […] have been handled has been shrouded in opaque trappings*" and criticized that "*[t]here are too many questions that beg to be answered by [MINEM], the regional authorities, and the company itself*." Noting that "*the price of copper is breaking all-time records*" and generating "*huge profits for mining companies, including Cerro Verde in Arequipa*," he questioned why SMCV did "*not pay Mining Royalties*" and why SMCV had been permitted to use the

[202] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (**RE-29**); Audio of the Session of the Energy and Mines Congressional Committee dated 8 June 2005 (excerpts) (**RE-104**).
[203] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (**RE-29**) (excerpts), p. 26.
[204] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (excerpts) (**RE-29**), p. 29.
[205] "In Two Years We Will Triple Our Production," *El Comercio* dated 22 August 2005 (**CE-505**), p. 2.
[206] "In Two Years We Will Triple Our Production," *El Comercio* dated 22 August 2005 (**CE-505**), p. 2.
[207] "In Two Years We Will Triple Our Production," *El Comercio* dated 22 August 2005 (**CE-505**), p. 2.

"*questionable Profit Reinvestment benefit, despite the fact that the Law that allowed it was repealed in 2000*."[208]

269. On 15 September 2005, Congressman Alejandro Oré requested the Minister of Energy and Mines to provide "*information relating to the legal stability agreement entered into with the mining company Phelps Dodge about the Cerro Verde mine, as well as the amending agreement that authorizes reinvestment of profits in the amount of US$800 million in expansion projects*."[209]

270. On 16 September 2005, Congressman Diez Canseco demanded that the Minister of Energy and Mines revoke SMCV's authorization to reinvest profits, and "*demand[] [...] that Cerro Verde comply with the payment of royalties*," threatening to file "*a compliance action or process*" or to "*denounce [the Minister] constitutionally*" if he failed to do so.[210]

271. On 19 September 2005, Congressman Diez Canseco proposed a congressional investigative committee to "*clarify the facts relating to the granting of tax benefits*" for the Concentrator "*in order to determine [...] the possible irregularities that may have been committed and establish any administrative and legal responsibilities that might exist*."[211]

272. On 19 September 2005, Mr. Isasi sent an e-mail to several MINEM officials forwarding a presentation by Congressman Diez Canseco and suggesting a draft presentation in reply.[212] Mr. Isasi's draft presentation noted among other things that the "*Stability Agreement only applies to the Leaching Project*" and the "*Cerro Verde primary sulfide project is not part of the stabilized regime contemplated in the February 13, 1998 agreement*."[213]

273. On 20 September 2005, according to a press article, the Minister of Energy and Mines stated that the expansion of primary sulfides in the Cerro Verde mine was subject to

---

[208] Javier Diez Canseco, "Questions About Cerro Verde," *La República* dated 25 August 2005 (**CE-506**), p. 1.
[209] Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía dated 15 September 2005 (**CE-507**).
[210] "Minera Cerro Verde Under JDC's Magnifying Glass" *La República* dated 16 September 2005 (**CE-508**); "Congressman Diez Canseco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties" *El Heraldo* dated 16 September 2005 (**CE-509**), p. 2.
[211] Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR dated 19 September 2005 (**CE-510**), p. 2.
[212] Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jaime Chávez Riva dated 19 September 2005, 10:00 AM (**CE-952**).
[213] Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jaime Chávez Riva dated 19 September 2005, 10:00 AM (**CE-952**), pp. 2-3.

royalties.[214] The article also acknowledged that "*Phelps Dodge argued that the stability agreement underlying its current operations should probably also cover its expansion project of USD 850M.*"[215]

274. On 22 September 2005, Mr. Isasi sent an internal report to the Minister of Energy and Mines to address Congressman Ore's request of 15 September 2005 (the **September 2005 Report**).[216]

275. On 30 September 2005, SMCV entered into a master participation agreement (the **Master Participation Agreement**) with interested lenders to finance the Concentrator.[217] Together, the lenders agreed to lend up to USD 450 million for the project.

276. On 30 September 2005, the Minister of Energy and Mines sent Congressman Diez Canseco copies of the "*technical file*" for the Concentrator.[218]

277. On 3 October 2005, the Minister of Energy and Mines sent a letter to Congressman Oré forwarding Mr. Isasi's September 2005 report (the **October 2005 Letter**).[219] He noted that "*[u]nlike the Leaching Project […] the Primary Sulfide Project will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of an Agreement for Promotion and Guarantee of Investment has not been applied for.*"[220]

278. On 4 October 2005, Congressman Diez Canseco wrote to the Minister of Energy and Mines, formally requesting information on MINEM's position regarding SMCV's payment of royalties in relation to the Leaching Project and the Concentrator Project.[221]

279. On 5 October 2005, a Working Group by the Congressional Energy and Mines Commission was created to "*investigate the alleged tax benefits received by [SMCV]*" and "*adopt the appropriate measures*."[222]

---

[214] "Minister: Cerro Verde Expansion Subject to Royalty" *Business News Americas* dated 20 September 2005 (**CE-511**).
[215] "Minister: Cerro Verde Expansion Subject to Royalty" *Business News Americas* dated 20 September 2005 (**CE-511**).
[216] MINEM, Report No. 385-2005-MEM/OGJ dated 22 September 2005 (**CE-512**).
[217] Master Participation Agreement dated 30 September 2005 (**CE-513**).
[218] MINEM Report No. 1719-2005-MEM/DM dated 30 September 2005 (**CE-954**).
[219] MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**).
[220] MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**).
[221] Letter No. 0461-2005-JDC/CR dated 4 October 2005 (**RE-2**).
[222] Congress, Energy & Mines Commission, Minutes of Sixth Regular Session dated 5 October 2005 (**CE-516**), pp. 2-3.

280. On 24 October 2005, Minister Sánchez Mejía sent a report to a member of the Working Group regarding the tax benefits granted to SMCV for the Concentrator Project.[223]

281. On 31 October 2005, Congressman Diez Canseco sent a letter to Minister Sanchez requesting information on the measures that MINEM had "*taken in order to ensure the collection of the Mining Royalty, both in a general sense and for specific cases such as that of [SMCV]*."[224]

282. On 8 November 2005, the Minister of Energy and Mines sent a letter to Congressman Diez Canseco in response to the latter's request for information regarding MINEM's position on SMCV's royalty payments (the **November 2005 Letter**).[225] The Minister stated that

> *In the first place, it is necessary to distinguish the legal treatment of the 'Cerro Verde Leaching' project, which is covered by an Agreement on Guarantees and Measures to Promote Investment, from that applicable to the new Primary Sulfide Project in which the profits from that old Leaching project will be reinvested. The Primary Sulfide project does not enjoy protection under any Guarantee or Stability agreement.*
>
> *[…]*
>
> *This new Sulfide Project has not been the subject of a new Agreement on Guarantees and Measures to Promote Investment in the mining business, so that it will have to pay the applicable royalties when it goes on line. If the company fails to honor this obligation, the National Superintendence of Tax Administration (SUNAT) must exercise the applicable administrative powers to make its collection effective.*
>
> *Additionally, it should be noted that it is not correct to claim that the profit reinvestment benefit applied to the Primary Sulfide Project (Cerro Verde 2). This project is the recipient of the profits from the Cerro Verde Leaching Project (Cerro Verde 1); these profits enjoy the benefit of reinvestment free of income tax by virtue of the Agreement on Guarantees and Measures to Promote Investment dated February 13, 1998.*[226]

[223] MINEM Report No. 1884-2005-MEM/DM dated 24 October 2005 (**CE-955**).
[224] Communication No. 0491-2005-JDC/CR from Congressman Diez Canseco to Minister Sánchez Mejía dated 31 October 2005 (**CE-956**).
[225] MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**), p. 1.
[226] MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**), pp. 1-3.

283. On 16 January 2006, Mr. Isasi sent an internal report to the Minister of Energy and Mines to address Congressman Diez Canseco's request for information on "*the measures MINEM has taken to ensure the collection of the mining royalty*."[227] The report stated that "*determining who is obligated to pay the aforementioned economic consideration is the responsibility of the Ministry of Energy and Mines*."[228]

284. In January 2006, Ms. Torreblanca, as the then Legal and Environmental Director of SMCV, made a presentation before the Congressional Working Group.[229] Her presentation explained that "*under the Stability Agreement, Cerro Verde's rights and obligations contained in the tax regime in force as of May 6, 1996, are stabilized*."[230] It further stated that "*the expansion of the Current Operations of the Cerro Verde Production Unit, through the exploitation of primary sulfides, allows the mineral contained within the same geometric solid mass and the same mining concession to be exploited through two different processes. Cerro Verde, unlike other mining companies, has a single Production Unit, made up of the Cerro Verde Nos. 1, 2 and 3 mining concession and the Cerro Verde Beneficiation Plant beneficiation concession*."[231]

285. On 26 February 2006, Phelps Dodge filed its 10K Form for fiscal year 2005 noting that "*it is not clear what, if any, effect the new royalty law will have on operations at Cerro Verde*."[232]

286. In March 2006, the Congressional working group met with the Mayor Cecilia Elizabeth Linares and Mayor Juan Víctor Flores of the districts of Yarabamba and Uchumayo, where Cerro Verde is located. According to the *El Heraldo* newspaper, the Mayors criticized the fact that SMCV "*does not pay taxes or fees for the exploitation of Cerro Verde II [the Concentrator], nor does it help the development in the district through public interest work*."[233] The article reports that Congressman Olaechea confirmed that "*[t]he legislation on tax stability exempts [SMCV] from paying income tax on profits*," that "*in February 1998 the State signed a tax stability agreement [with SMCV] […]*

[227] MINEM, Report No. 015-2006-MEM/OGJ dated 16 January 2006 (**CE-957**).
[228] MINEM, Report No. 015-2006-MEM/OGJ dated 16 January 2006 (**CE-957**).
[229] Torreblanca I (**CWS-11**), ¶ 43; SMCV, Presentation Before the Congressional Working Group dated 31 January 2006 (**CE-523**).
[230] SMCV, Presentation Before the Congressional Working Group dated 31 January 2006 (**CE-523**), p. 48.
[231] SMCV, Presentation Before the Congressional Working Group dated 31 January 2006 (**CE-523**), p. 48.
[232] Phelps Dodge, SEC Form 10-K for Fiscal Year 2005 dated 26 February 2006 (**RE-184**), p. 83.
[233] "Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works" *El Heraldo* dated 29 March 2006 (**CE-525**).

where it was exempted from said payment," and that "*the solution is to find other ways, not ignoring the law, to achieve a good outcome*."[234]

287. On 24 April 2006, *La República* reported about the Chairman of the Energy Commission of the Congress' statement regarding legal stability agreements of mining companies.[235] The article reports that the Chairman stated that "*some mining companies don't pay because SUNAT doesn't assess them. There is no political will to assess them. SUNAT should begin an assessment process to get these companies to pay*."[236]

288. On 26 April 2006, SMCV obtained the remaining financing required for the construction of the Concentrator through a corporate bonds issuance program for USD 90 million.[237]

289. On 3 May 2006, the Minister of Energy and Mines and Mr. Isasi made a televised presentation before Congress's Energy and Mines Congressional Committee explaining the scope of the 1998 Stability Agreement.[238] Mr. Isasi stated that "*Cerro Verde's [Concentrator Project] is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract. It is a new project that does not benefit from tax, exchange rate and administrative stability*."[239] Mr. Isasi also intervened at the Energy and Mines Congressional Committee Session of the same day noting that "*[o]ne very important thing to clarify is that these agreements do not shield all companies nor all mining concessions. That must be made quite clear. The only thing it does is to provide guarantees to a specific investment project which has been described in a feasibility study and integrated into an agreement*."[240] The MINEM presentation further stated that "*stability is given to the investment project*

[234] "Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works" *El Heraldo* dated 29 March 2006 (**CE-525**).
[235] "SUNAT must impose assessments against the big companies that don't pay royalties" *La República* dated 24 April 2006 (**CE-1042**).
[236] "SUNAT must impose assessments against the big companies that don't pay royalties" *La República* dated 24 April 2006 (**CE-1042**).
[237] SMCV, Financial Statements 2005-2006 dated 9 February 2007 (**CE-561**), p. 26.
[238] Audio of the Cerro Verde Working Group Before the Energy and Mines Congressional Committee dated 3 May 2006 (**RE-103**).
[239] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated May 2006 (**RE-3**), slide 12.
[240] Audio of the Session of the Energy and Mines Commission, Congress of the Republic dated 3 May 2006 (**RE-88**).

clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession."[241]

290. On 3 May 2006, the Congressional Energy and Mines Committee held a session which featured presentations by MINEM[242] among others. The presentation of MINEM stated that "*whoever enters into a Contrato-Ley with the State, protects its investment against modifications subsequent to the stabilized regime*" and that "*a Contrato-Ley with Administrative Stability, prior to the Royalty Law, protects against this new obligation the investments set out in the contract*."[243] The presentation added that "*[a]ll mining titleholders pay, but not for all their projects*" and that "*mining titleholders who, prior [to] the Mining Royalty Law, entered into Contratos-Ley with Administrative Stability; they shall exclude the value of the concentrates (or equivalents) resulting from the stabilized project from the base for calculating the royalty*."[244]

291. On 4 May 2006, the newspaper *El Comercio* reported that a SUNAT high official and the Minister of Economy and Finance stated in a presentation to the Peruvian Congress that some mining companies, including SMCV, were not paying royalties because they had concluded stability agreements.[245]

292. On 11 May 2006, SMCV provided additional information about SMCV's reinvestment of profits to the Congressional working group upon their request.[246]

293. In June 2006, Ms. Bedoya, a SUNAT official, issued an internal report on the application of the 1998 Stability Agreement in which she concluded that in relation to "*the activities generated by the "Expansion of Cerro Verde's Current Operations – Primary Sulfides Project", SMCV must pay the corresponding mining royalties because*

[241] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated May 2006 (**RE-3**), slide 8.
[242] MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission dated 3 May 2006 (**CE-962**); Transcripts of Congressional Session before the Energy and Mines Commission dated 3 May 2006 (**CE-963**).
[243] MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission dated 3 May 2006 (**CE-962**), slides 14, 18.
[244] MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission dated 3 May 2006 (**CE-962**), slide 20; Transcripts of Congressional Session before the Energy and Mines Commission dated 3 May 2006 (**CE-963**), p. 23.
[245] "*Congresistas critican contratos de estabilidad y mineras los defienden*," *El Comercio* dated 4 May 2006 (**CE-24**).
[246] SMCV, Letter No. SMCV-AL-686-2006 dated 11 May 2006 (**CE-529**).

said investment is outside the scope of the agreement of guarantees signed with the Peruvian State."[247] She explained that:

> *the benefits conferred by Tax Stabilization Agreements entered into pursuant to Title Nine of the Unified Text of the Mining Law apply to the titleholder of the mining activity and, although they temporarily stabilize the tax regime in force on the date of the approval of the Feasibility Study, said benefits must only be applied to activities related to the investment developed in a given concession or Administrative Economic Unit, that was the subject of the respective agreement, that is, the investment related to the project for which the agreement was entered into. […] In this regard, and since the project to expand SMCV's current operations through a primary sulfide concentrator plant pertains to a completely different investment than the Leaching Project, as approved for the purposes of entering into the agreement of guarantees, as described in detail in section 1.2 of this report, we can conclude that said expansion would not be within the scope of the agreement of guarantees, since it is a new investment not contemplated by the parties when the agreement was entered into.*[248]

294. On 15 June 2006, an article in *La República* reported that the Director General of Mining noted that "*for better or worse, the Peruvian State signed stability agreements with several companies and therefore these agreements must be honored*."[249] The article further reported about the suggestion made to SMCV to pay an "*advance […] of royalties and taxes for the years after the termination of its Stability Agreement*" in order to "*mitigate protests*."[250]

295. On 16 June 2006, Mr. Isasi sent the Minister of Energy and Mines another report (the **June 2006 Report**) concluding that the Concentrator was outside the scope of SMCV's Stabilization Agreement. The Report stated that "*stabilization is not granted in a general way to a company or for a specific mining concession, but in relation to a specific project, clearly delimited and approved by the Ministry of Energy and Mines, because the purpose is to confer legal certainty on the investor in the sense that the internal rate of return of their new guaranteed investment will not be affected by*

[247] SUNAT, In*forme sobre la Aplicación del Contrato de Garantías y Medidas de Promoción a la Inversión y la Regalía Minera respecto de la Ampliación de las Operaciones Actuales de Cerro Verde – Proyecto de Sulfuros Primarios* dated June 2006 (**RE-179**), p. 9.
[248] SUNAT, *Informe sobre la Aplicación del Contrato de Garantías y Medidas de Promoción a la Inversión y la Regalía Minera respecto de la Ampliación de las Operaciones Actuales de Cerro Verde – Proyecto de Sulfuros Primarios* dated June 2006 (**RE-179**), p. 5
[249] "Advance Payment of Royalties Proposed," *La República* dated 15 June 2006 (**CE-533**), p. 1.
[250] "Advance Payment of Royalties Proposed," *La República* dated 15 June 2006 (**CE-533**), p. 2.

subsequent legislative innovations."[251] Mr. Isasi concluded that the 1998 Stability Agreement "*deals only with the 'Cerro Verde Leaching Project*'" and "*cannot be extended to the entire company or to other non-stabilized projects*," and SMCV was thus required to pay royalties for the Concentrator.[252]

296. On 19 June 2006, *La República* reported that local Arequipa leaders voiced objections against the profit-reinvestment benefit which "*they considered to be a benefit granted unlawfully*" to Cerro Verde.[253]

297. On 21 June 2006, Congressman Diez Canseco proposed a bill to retroactively repeal the Ministerial Resolution that accorded SMCV the profit reinvestment benefit for the Concentrator.[254] The draft bill referred to the Minister of Energy and Mines' November 2005 letter.[255]

298. On 23 June 2006, roundtable discussions commenced with representatives from SMCV, MEF, and MINEM, including the Minister of Energy and Mines and Mr. Isasi to address Arequipa's fiscal and social concerns in relation to Cerro Verde, in particular "*the situation arising from the reduction in revenues generated by the mining canon tax and other problems related to the company's social responsibility and environmental problems*" (the **Roundtable Discussions**).[256] The parties to the Roundtable Discussions agreed to "*discuss the applicability of mining royalties to investments in [the Concentrator]*."[257] A presentation prepared by MINEM for the purpose of the Roundtable Discussions stated that the reinvestment of profits approval "*stemming from the leaching project in the new primary sulfides project […] is in accordance with the law*"[258] but that "*any profits generated by the sulfides project may not be reinvested with*

[251] MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**).
[252] MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**), Section I, ¶¶ 5.2-5.3, Section III, ¶¶ 4.3-4.5.
[253] "Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000," *La República* dated 19 June 2006 (**CE-535**), p. 1.
[254] Congress, Draft Bill No. 14792/2005-CR dated 21 June 2006 (**CE-536**), pp. 4-7.
[255] Congress, Draft Bill No. 14792/2005-CR dated 21 June 2006 (**CE-536**), p. 9.
[256] Congress, Pro-Investment Commission, Minutes of the Session dated 23 June 2006 (**CE-537**).
[257] Congress, Pro-Investment Commission, Minutes of the Session dated 23 June 2006 (**CE-537**).
[258] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 7.

a tax benefit."[259] It also clarified that the Cerro Verde Leaching Project was not subject to the Royalty Law,[260] but that:

> *Cerro Verde's primary sulfide project is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract.*
>
> *It is a new project that does not benefit from tax, exchange rate and administrative stability.*
>
> *In consequence, the sulfides project will pay royalties when it enters into production.*[261]

299. The Parties, however, dispute whether such presentation was made during the Roundtable Discussions.

300. Following the meeting, the newspaper El Heraldo reported that the Minister of Economy stated that "*the authorization for the reinvestment of profits is legal, because it will generate greater benefits for the future*" and proposed "*that [SMCV] advance part of the payment of their taxes for next year […] to cover the shortfall in the budgets of the Region and the municipalities of Arequipa*," which was reportedly "*accepted by the representative from Cerro Verde*."[262] The newspaper El Correo reported that the Minister of Energy and Mines stated that while the reinvestment of profits would "*decrease the income for Arequipa for two years, in the mid- and long-term this region will obtain more resources from income tax*."[263]

301. On 10 July 2006, the parties to the Roundtable Discussions reconvened.[264] SMCV reportedly accepted a proposal to pay S/ 13 million to help finance the budget deficit of Arequipa.[265] *El Heraldo* reported that some members of Congress argued that even if SMCV was "*legally exempt from paying royalties,*" it still had "*a moral obligation to*

---

[259] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 9.
[260] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 11.
[261] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 15.
[262] "Congressional Pro-Investment Commission Seeks Solution to Demand Regarding Payment of Taxes of the Cerro Verde Company" *El Heraldo* dated 23 June 2006 (**CE-538**), p. 1.
[263] "Roundtable Discussion Initiated to Resolve Cerro Verde Case" *El Correo* dated 26 June 2006 (**CE-539**).
[264] "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million" *El Heraldo* dated 10 July 2006 (**CE-541**).
[265] "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million" *El Heraldo* dated 10 July 2006 (**CE-541**).

share its profits with Arequipa's society," noting that the price of copper had increased over three-fold since "*the date of signing the Stability Agreement*."[266]

302. On 20 July 2006, Mr. Martínez Palacios, a local union leader in Arequipa, filed a complaint against SMCV through SUNAT's internal complaint procedure challenging SMCV's use of the reinvestment benefit.[267]

303. On 2 August 2006, SMCV signed a formal agreement with the Government represented by the Prime Minister, the Minister of Energy and Mines, and Arequipa politicians committing to (i) finance and prepare feasibility studies for the construction of a potable water treatment plant and a wastewater treatment plant, (ii) pay for the construction of the potable water treatment plant, and (iii) cover Arequipa's budget deficit in investment expenses for local communities from June 2006 to May 2007 (the **Roundtable Discussion Agreement**).[268]

304. In August 2006, members of Congress proposed amending the Royalty Law so that all mining companies, even those with mining stability agreements, would be obliged to pay royalties.[269] The Prime Minister stated that the Government would not support this bill since it had to "*honor the principle of legal stability*" and that they "*could not toy around with such a serious issue*."[270]

305. In September 2006, the Minister of Energy and Mines claimed that the proposed bill would be "*unconstitutional*" and that it would entitle companies with stability agreements to "*file administrative and judicial challenges, and even resort to international arbitration*."[271]

306. On 19 November 2006, Freeport and Phelps Dodge announced that they had signed a definitive merger agreement according to which Freeport would acquire Phelps Dodge for approximately USD 25.9 billion in cash and stock.[272]

---

[266] "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million" *El Heraldo* dated 10 July 2006 (**CE-541**), p. 2.
[267] Dante Martínez, Complaint to SUNAT No. 016278 dated 25 July 2006 (**CE-1040**).
[268] Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV dated 2 August 2006 (**CE-544**), Clauses 2 and 3.
[269] "The Government Agrees Not to Change the Mining Royalty Law" *Gestión* dated 10 August 2006 (**CE-546**).
[270] "The Government Agrees Not to Change the Mining Royalty Law" *Gestión* dated 10 August 2006 (**CE-546**), p. 1.
[271] "Mining Royalty Bill Is Unconstitutional" *Andina* dated 12 September 2006 (**CE-551**).
[272] Freeport-McMoRan Copper & Gold Inc., Annual Report 2006 dated 15 March 2007 (**CE-902**), p. 25.

307. On 21 December 2006, in the wake of increases in the price of metals in international markets and with the objective of "*us[ing] the resources from the private funds to help improve the living conditions of the populations located in the areas of influence of […] mining activities*," the Government issued a Decree creating the Programa Minero de Solidaridad con el Pueblo (the **Voluntary Contribution Program**).[273] Under the Voluntary Contribution Program, mining companies could agree on a voluntary basis to pay 3% of their net profits for use in improving local and regional infrastructure, as well as in social projects. Annexed to the Decree was a standard form contract that both stabilized and non-stabilized mining companies could sign to enroll in the Voluntary Contribution Program. Under the Program, companies that decided to contribute and which were also required to pay mining royalties could pay a lesser amount to the Voluntary Contribution Program.[274] Contributions could be made for up to four years starting in 2007.[275]

308. On 2 January 2007, SMCV notified the DGM pursuant to Article 38 of the Regulations on Mining Procedures that it had completed construction of the Concentrator.[276]

309. In January 2007, SMCV signed a standard form agreement with the Government to contribute 3% of its annual net profits in voluntary contributions.[277]

310. On 9 February 2007, SMCV's financial statements for 2005 and 2006 were published and noted that "*[a]s of December 31, 2006, the agreement between the Peruvian Government and the Company regarding this voluntary contribution is in the process of being signed. In Management's opinion, the provision of US$40 million related to the construction of the water plants described in Note 12 will be considered as a credit against this voluntary contribution in the 2.75% portion corresponding to the Local Mining Fund*."[278]

[273] Voluntary Contribution Program, Supreme Decree No. 071-2006-EM dated 21 December 2006 (**CA-131**).
[274] Voluntary Contribution Program, Supreme Decree No. 071-2006-EM dated 21 December 2006 (**CA-131**), clause 3.1.2).
[275] Voluntary Contribution Program, Supreme Decree No. 071-2006-EM dated 21 December 2006 (**CA-131**), Clause 8.
[276] SMCV, Petition No. 1659321 dated 2 January 2007 (**CE-558**), p. 2; Regulations on Mining Procedures, Supreme Decree No. 018-92-EM dated 7 September 1992 (**CA-48**), Article 38.
[277] SMCV, Voluntary Contribution Agreement dated 18 January 2007, (**CE-27**) Clause 3.1.
[278] SMCV, Financial Statement 2006 dated 9 February 2007 (**CE-561**) p. 31.

311. On 26 February 2007, after conducting final engineering inspections, the DGM gave final confirmation of the expansion of the Beneficiation Concession to 147,000 MT/d and authorized SMCV to operate the Concentrator.[279]

312. On 19 March 2007, Freeport completed its acquisition of Phelps Dodge, thus becoming the indirect majority owner of SMCV.[280]

313. On 10 August 2007, SMCV and the Government executed a final version of the Voluntary Contribution Program Agreement (the **Voluntary Contribution Agreement**).[281]

314. On 20 September 2007, SUNAT issued a report noting that "*[t]he tax stability guaranteed through an agreement signed with the State under Title Nine of the TUO of the General Mining Law benefits the mining activity titleholder for a period of 15 years only for the investment activities that are the subject matter of the agreements and were indicated in the Feasibility Study, taking into account the definitive amount required for its performance in a given concession or Administrative Economic Unit*."[282]

315. On 12 November 2007, Mr. Dante Martínez, the president of the Arequipa Association of Electric Service Users filed complaints against SMCV with SUNAT alleging that the company had improperly evaded royalties through "*fraudulent actions*" and collusion from Peruvian officials and demanding that SUNAT assess royalties against SMCV.[283]

316. On 20 November 2007, SUNAT's National Intendent sent a letter to the Director General of Mining in which he requested that MINEM "*send [] the list of parties required to pay the mining royalty from June 2004 to date*," noting that certain cases "*are not included on the list*," or "*are included in the list but the information on their mining concessions does not include all the concessions under their responsibility*."[284] SUNAT's National Intendent noted that SUNAT has been unable "*to begin the process of determining [mining companies] who have failed to file their sworn statement, which*

[279] MINEM, Directorial Resolution No. 056-2007-MEM/DGM dated 26 February 2007 (**CE-28**); MINEM, Report No. 165-2007-MINEM-DGM/PDM dated 19 February 2007 (**CE-562**), p. 21; MINEM, Directorial Resolution No. 081-2007-MEM/DGM dated 11 April 2007 (**CE-564**).
[280] Freeport-McMoRan Copper & Gold Inc., Annual Report 2007 dated 17 March 2008 (**CE-903**), p. 5; SEC Filing, Freeport Completes Acquisition of Phelps Dodge Corp. dated 19 March 2007 (**CE-29**); Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart dated 21 February 2020 (**CE-265**).
[281] SMCV, Voluntary Contribution Agreement dated 10 August 2007 (**CE-560**).
[282] SUNAT, Report No. 166-2007-SUNAT/2B0000 dated 20 September 2007, *available at* https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm (**RE-27**).
[283] Dante Martínez, Superior Civil Court Complaint dated 28 April 2009 (**CE-588**).
[284] SUNAT, Report No. 261-2007-SUNAT/2E0000 dated 20 November 2007 (**CE-568**).

must be filed monthly by the parties that your office indicates, are required to pay the mining royalty."[285] He further noted that the delay with which information was filed to SUNAT "*means that the information on production units and mining concessions is made available to the regulated entities on a date quite close to the deadline for paying the mining royalty and filing the respective statement, which does not give enough time for solving any inconveniences that may arise*."[286]

317. On 14 December 2007, MINEM's Director General of Mining replied to SUNAT's National Intendent's letter of 20 November 2007 and indicated that MINEM would send the list "*approximately in […] February 2008*," as MINEM needed additional time to assess the "*ownership of concessions and [Economic Administrative Units]*."[287]

318. On 29 January 2008, MINEM's Director General of Mining sent the "*information of entities that are obligated to pay mining royalties*" to SUNAT, in the form of a letter enclosing (i) Mr. Isasi's September 2005 Report regarding the reinvestment of profits, (ii) the Minister of Energy and Mines' November 2005 Letter, and (iii) Mr. Isasi's June 2006 Report.[288] The letter explained to SUNAT that "*this information is sent considering the implications that the [Stability Agreement] might have on the payment of Mining Royalties corresponding to the Primary Sulfides Project, located in the 'Cerro Verde 1, 2, 3' mining concession, of [SMCV]*."[289]

I. SUNAT commences an audit of SMCV, a number of assessments are imposed on SMCV, SMCV further invests in the Cerro Verde mine, and Peru amends its Mining Law (2008-2014)

319. In early 2008, SUNAT reportedly commenced an audit of SMCV.[290]

320. On 2 June 2008, SMCV received an audit letter from SUNAT asserting that SMCV had not filed documents related to the payment of royalties for the sales of copper ore from the Concentrator for 2006 and 2007.[291] SUNAT also stated that if SMCV did not agree with the scope of the request, SMCV could submit a responsive brief.[292]

---

[285] SUNAT, Report No. 261-2007-SUNAT/2E0000 dated 20 November 2007 (**CE-568**), p. 1.
[286] SUNAT, Report No. 261-2007-SUNAT/2E0000 dated 20 November 2007 (**CE-568**), p. 2.
[287] MINEM, Report No. 1169-2007-MEM-DGM dated 14 December 2007 (**CE-570**), pp. 1-2.
[288] MINEM, Report No. 077-2008-MEM-DGM dated 29 January 2008 (**CE-573**).
[289] MINEM, Report No. 077-2008-MEM-DGM dated 29 January 2008 (**CE-573**).
[290] "SUNAT: Cerro Verde Does Have to Pay Royalties" *El Correo De Arequipa* dated 12 December 2008 (**CE-582**).
[291] SUNAT, Inductive Letter No. 108052004279 dated 30 May 2008 (**CE-577**).
[292] SUNAT, Inductive Letter No. 108052004279 dated 30 May 2008 (**CE-577**).

321. On 4 June 2008, Ms. Torreblanca sent a reply to the audit notification stating that SMCV was "*not subject to the obligation to pay mining royalties and, therefore, it [was] not appropriate*" to file the requested documents.[293]

322. In July 2008, Ms. Torreblanca and Mr. Isasi met and discussed MINEM's position on the scope of the 1998 Stability Agreement.[294]

323. On 31 October 2008, SUNAT issued a resolution dismissing Mr. Martínez's complaint alleging that SMCV was committing tax fraud and amending the terms of the Stabilization Agreement by using the profit reinvestment benefit to construct the Concentrator.[295]

324. On 12 December 2008, the newspaper *El Correo de Arequipa* published an interview with SUNAT's Regional Intendent for Arequipa in which he stressed that SUNAT had "*determined that Cerro Verde must pay mining royalties.*"[296] SUNAT's Regional Intendent explained that in early 2008 SUNAT had "*initiated an audit process of [SMCV]*" "*in order to support and assess the payment of [mining royalties]*."[297]

325. In April 2009, Mr. Martínez filed claims against SUNAT before the Contentious Administrative Courts, complaining of SUNAT's "*systematic reluctance to comply with its duties to assess and collect taxes and royalties evaded by SMCV*."[298]

326. Between August 2009 and February 2020, SMCV was involved in a number of proceedings concerning assessments issued by SUNAT. The Tribunal has described these SUNAT assessments of royalties and taxes forming the basis of the Claimant's claims in further detail in a separate section of this Award in paras. 342 *et seq.* below.

327. In 2011, the Mining Society engaged Apoyo Consultoría (**APOYO**) to prepare a new tax and contributory scheme that the Mining Society could present to the Government, similar to the Voluntary Contribution Program.[299]

---

[293] SMCV, Letter No. SMCV-AL-1346-2008 dated 4 June 2008 (**CE-578**), p. 1.
[294] Claimant's Memorial, ¶ 166; Torreblanca I (**CWS-11**), ¶ 71; Respondent's Counter-Memorial, ¶ 259; Isasi I (**RWS-2**), ¶ 71.
[295] First Instance Administrative Court Decision, Judgment No. 69-2012 dated 16 August 2012 (**RE-191**), p. 9.
[296] "SUNAT: Cerro Verde Does Have to Pay Royalties," *El Correo De Arequipa* dated 12 December 2008 (**CE-582**).
[297] "SUNAT: Cerro Verde Does Have to Pay Royalties," *El Correo De Arequipa* dated 12 December 2008 (**CE-582**).
[298] Dante A. Martínez, "The Greatest Tax Fraud in the History of Peru" *Con Nuestro Perú* dated 15 January 2011 (**CE-603**), ¶ 26.
[299] Santa María I (**CWS-9**), ¶ 10; Camacho I (**RWS-6**), ¶ 26.

328. On 16 March 2011, SMCV submitted to MINEM a request to sign a new 15-year stabilization agreement to build a second concentrator plant to expand Cerro Verde's copper concentrate production and to improve the existing facilities.[300]

329. On 2 September 2011, APOYO submitted the final proposal for the new tax and contributory scheme to the Government.[301]

330. On 28 September 2011, the Government enacted Laws Nos. 29788 to 29790, which amended the royalty regime and created the special mining tax (**SMT** or **IEM**) and the special mining contribution (**GEM**).[302] Law 29788 amended the royalty regime to change the method of calculating royalties, which essentially meant that mining companies would pay more royalties when making bigger profits, and less when making small profits or losses. Law 29789 created the SMT, an additional tax based on a company's operating profit. Law 29790 created the GEM as a voluntary payment, which like royalties and the SMT would be calculated quarterly based on the operating profit from stabilized concessions. A GEM Regulation Model Agreement was annexed to Law 29790.[303]

331. In early October 2011, Ms. Torreblanca sent an internal email within SMCV and Freeport stating that representatives of MINEM and the Ministry of Economy confirmed that "*no one wants Cerro Verde or any other company to pay double*" and that "*the laws are clear, companies should either pay GEM or IEM + royalties, not both.*"[304]

332. On 7 October 2011, SMCV sent a letter to Guillermo Shinno, the Director General of Mining, explaining SMCV's situation and requesting "*urgent confirmation of the scope of the [Stability] Agreement for the application of the [GEM*]."[305] The letter set out SMCV's understanding that, after signing a GEM Agreement, the company would be subject "*exclusively […] to the [GEM][…] with respect to the operating profits from the sale of the metallic minerals […] from the 'Cerro Verde Nos. 1, 2 and 3' mining*

[300] Stability Agreement between Peru and SMCV dated 17 July 2012 (**CE-644**), Clause 1.1.
[301] APOYO Consultoria, Proposal for a New Framework for Taxes, Contributions, and Mining Contributions in Peru dated 2 September 2011 (**CE-622**).
[302] Mining Royalties Law, Law Modifying Law No. 28258, Law No. 29788 dated 28 September 2011 (**CA-179**); Creating the Special Mining Tax, Law No. 29789 dated 28 September 2011 (**CA-180**); Establishing GEM Legal Framework, Law No. 29790 dated 28 September 2011 (**CA-181**).
[303] Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF dated 29 September 2011 (**CA-182**).
[304] Emails exchanged between Julia Torreblanca, *et al.* dated 11 October 2011, 1:05 AM PET (**CE-1052**); Emails exchanged between Julia Torreblanca, *et al.* dated 12 October 2011, 1:26 PM PET (**CE-1050**).
[305] SMCV, Letter No. SMCV.VL&RG-1896-2011 dated 7 October 2011 (**CE-628**).

concession and the 'Cerro Verde Beneficiation Plant' beneficiation concession, which are the subject of the [Stability Agreement]." The letter also stated SMCV's view that "*as long as the Agreement is in force (i.e., until December 31, 2013) neither mining royalties […] nor special mining tax […] would apply*" to the Mining and Beneficiation Concessions.[306]

333. On 13 October 2011, the Minister of Energy and Mines requested the MEF to issue an opinion regarding the first clause of the Model GEM Agreement. In particular, the Minister requested an opinion as to whether the reference to the Agreements for Promotion and Guarantee of Investment entered into under the General Mining Law should be contained verbatim in the description of the "*Agreement*" item, *i.e.*, the name of the mining project that enjoys the stabilized legal regime, and not other economic transactions that may be considered connected or related.[307] In addition, the Minister requested "*clarification as to whether the mining projects that enjoy the stabilized legal regime, in addition to being subject to the payment of the [GEM], can be bound by the tax regimes related to the Special Mining Tax and to that of the Mining Royalty amended by Law No. 29788*."[308]

334. On 14 October 2011, MEF's General Director of Fiscal Policy prepared a Report in response to a request from the Minister of Energy and Mines, who asked MEF to clarify whether "*mining projects that [benefit from a] stabilized legal regime, in addition to being subject to the payment of the [GEM], can be bound to the tax regimes relative to the [IEM] and to the Mining Royalty*." The report concluded that "*without prejudice to its concrete application according to the specificities of each case, the new tax scheme on the mining activity establishes a [GEM] applicable by virtue of an Agreement to those engaged in mining activity for that which is covered by the stability of [a mining stabilization agreement] and a general regime that considers [an IEM] and a Mining Royalty on that which is not included in the aforementioned Agreements*."[309]

335. On 26 October 2011, Ms. Torreblanca followed up with another letter on behalf of SMCV to Mr. Shinno, reiterating that SMCV had a Stability Agreement in force that "*includes the 'Cerro Verde Nos. 1, 2 and 3' mining concession as well as the 'Cerro*

[306] SMCV, Letter No. SMCV.VL&RG-1896-2011 dated 7 October 2011 (**CE-628**).
[307] MINEM, Communication No. 096-2011-EF/DM dated 13 October 2011 (**CE-986**).
[308] MINEM, Communication No. 096-2011-EF/DM dated 13 October 2011 (**CE-986**).
[309] MEF, Report No. 206-2011-EF/61.01 dated 14 October 2011 (**CE-629**).

Verde Beneficiation Plant' beneficiation concession, from which all the ore corresponding to the Cerro Verde production unit, the only one the company has, is extracted and processed." The letter requested confirmation that if SMCV signed the GEM Agreement, "*[SMCV] will pay the GEM as of October 1, 2011, and will not pay either the Special Mining Tax approved by Law No. 29789 or the Mining Royalties set forth in Law No. 28258 for the concessions mentioned in the preceding paragraph until December 31, 2013, the expiration date of the Stability Agreement*."[310]

336. On 5 December 2011, SMCV wrote to Minister of Economy and Finance, Mr. Miguel Castilla Rubio, stressing that it was "*necessary to have absolute clarity regarding the scope of the GEM and the inapplicability of the Special Mining Tax […] and the Mining Royalties to the concessions for which the GEM would be paid*" before it entered into the GEM Agreement.[311] SMCV requested that "*as has been verbally stated to us by several authorities, please confirm that upon signing the [GEM] Agreement […] [SMCV] will only have to pay the GEM and will pay neither the Special Mining Tax nor the Mining Royalty for the concessions included in the [Stability Agreement]*."

337. On 28 December 2011, MINEM's Mr. Shinno responded to SMCV's letters, in which he stated that SMCV's request for clarification "*exceed[ed] the competence of the Energy and Mines Sector*."[312] Mr. Shinno attached a 14 October 2011 MEF Report, which took the position that MEF, the Ministry of which SUNAT forms part, "*has no jurisdiction to determine the content of [the Stability Agreement], […] or to define their scope and content*."[313] The MEF 2011 Report was prepared in response to a request from the then-Minister of Energy and Mines, Mr. Carlos Herrera Descalizi. In particular, Minister Herrera asked MEF to clarify whether "*mining projects that benefit from a stabilized legal regime, in addition to being subject to the payment of the [GEM], can be bound to the tax regimes relative to the [IEM] and to the Mining Royalty.*"[314]

338. On 16 January 2012, the Director General of Mining approved the technical-economic feasibility study for SMCV's new investment at Cerro Verde.[315]

---

[310] SMCV, Letter No. SMCV-VL&RG-1968-2011 dated 26 October 2011 (**CE-630**).
[311] SMCV, Letter No. SMCV-VL&RG-2217-2011 dated 5 December 2011 (**CE-631**).
[312] MINEM, Official Letter No. 1333-2011-MEM/DGM dated 28 December 2011 (**CE-632**).
[313] MEF, Report No. 206-2011-EF/61.01 dated 14 October 2011 (**CE-629**), p. 2, Section II, ¶¶ 2-3.
[314] MEF, Report No. 206-2011-EF/61.01 dated 14 October 2011, (**CE-629**), Background.
[315] 2012 Stability Agreement (**CE-644**), clause 2.

339. On 28 February 2012, Ms. Torreblanca signed an agreement committing to pay the GEM on behalf of SMCV (the **GEM Agreement**) from the fourth quarter of 2011 until the end of 2013.[316] The GEM Agreement followed the text of the GEM Model Agreement, and obliged SMCV to make GEM payments based on its "*quarterly operating profit, from the concessions included in*" the 1998 Stability Agreement.

340. On 17 July 2012, Peru and SMCV entered into the 2012 Stability Agreement (the **2012 Stability Agreement**).[317] The 2012 Stability Agreement concerned a USD 3.57 billion investment to build within Cerro Verde's Mining and Beneficiation Concessions, among other things, a second concentrator plant to expand Cerro Verde's copper concentrate production, as well as to improve the existing processing facilities (both the leaching and concentrator facilities), as described in the accompanying feasibility study.[318] According to the agreement, the new investments would start benefitting from the stabilized regime in 2016, once the investments were completed.[319]

341. On 12 July 2014, Congress enacted Law 30230, incorporating a new Article 83-B to the Mining Law to provide that, for certain types of stability agreements, the stability guarantees apply "*solely to the activities […] expressly mentioned in the Investment Program included in the Feasibility Study that forms part of the Stability Agreement; or the additional activities that may be carried out subsequent to the implementation of the Investment Program, provided that such activities are […] connected to the objective of the Investment Project*."[320] In the draft bill, Congress stated that the provision was intended to "*establish a clearer regulatory framework in accordance with the principle of legal certainty*."[321] In particular, Congress stated that the existing legal framework did not "*stabilize pre-existing assets or investments, nor those investments that are not included in [f]easibility [s]tud[ies]*," and thus that the new provision would clarify how investors could claim stability for "*additional activities*" not included in the feasibility study.[322] Congress proposed the new law so that "*the effect of the contractual benefit rests exclusively on the activities of the mining company in favor of which the investment*

[316] Agreement for the Assessment of Gravamen Especial a la Mineria Approved by Law No. 29790 dated 28 February 2012 (**CE-64**).
[317] 2012 Stability Agreement (**CE-644**).
[318] 2012 Stability Agreement (**CE-644**), Clauses 1.2.1, 5.1.
[319] 2012 Stability Agreement (**CE-644**), Clause 8.
[320] Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230 dated 12 July 2014 (**CA-209**), Article 83-B.
[321] Congress, Draft Bill Law No. 30230 (**CE-823**), p. 11.
[322] Congress, Draft Bill Law No. 30230 (**CE-823**), p. 9.

is made, whether those are expressly mentioned in the Investments Program contained in the Feasibility Study that is part of the [stabilization agreements]; or, additional activities that are carried out after the execution of the Investments Program."[323]

J. SMCV is involved in proceedings in relation to assessments issued by SUNAT (2009-2020)

342. Between August 2009 and February 2020, SMCV was involved in a number of proceedings concerning assessments issued by SUNAT, including royalty assessments, General Sales Tax (**GST**) assessments, income tax assessments, additional income tax assessments, temporary tax on net assets assessments, special mining tax assessments and complementary mining pension fund assessments. During this period, SMCV also requested reimbursement of GEM overpayments. These proceedings are further particularized below.

1. The Royalty Assessments imposed on SMCV

a) The 2006-2007 Royalty Assessments before SUNAT

343. On 17 August 2009, SUNAT issued assessments against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007.[324] SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to present certain required documents and file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 18.25% per annum running from the dates SUNAT claimed SMCV should have filed each monthly royalty declaration (together, the **2006-2007 Royalty Assessments**).[325]

344. On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments.[326]

345. On 31 March 2010, SUNAT rejected SMCV's reconsideration request for the 2006-2007 Royalty Assessments.[327] SUNAT found among others:

---

[323] Executive Power, Statement of Reasons for Bill No. 3627/2013-PE dated 2014 (**RE-50**), p. 10.
[324] SUNAT, 2006/07 Royalty Assessments dated 17 August 2009 (**CE-31**), Annex No. 1, pp. [1-3].
[325] SUNAT, 2006/07 Royalty Assessments dated 17 August 2009 (**CE-31**); SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments dated 31 March 2010 (**CE-38**), pp. 58-60.
[326] SMCV, Request for Reconsideration, 2006/07 Royalty Assessments dated 15 September 2009 (**CE-32**).
[327] SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments dated 31 March 2010 (**CE-38**).

[T]he guarantee of stability granted by the [Stability Agreement] only encompasses the activities related to the investment project contained in the Technical-Economic Feasibility Study submitted by the investor for this purpose, since the purpose of the agreement is for the investor to know in advance which rules will apply to its investment during the life of the agreement.

[…]

[T]he benefits conferred through the Tax Stability Agreement signed under the General Mining Law, inure to the owner of the mining activity with respect to the activities related to the investment project that has been the object of the respective agreement, i.e., to the investment contained in the Technical-Economic Feasibility Study filed for this purpose […] *and does not fall under the concessions or Economic Administrative Unit, as the appellant asserts, independently of the investment, since this would distort the agreement, as the purpose of the agreement is unknown.*[328]

b) The 2008 Royalty Assessments before SUNAT

346. On 1 June 2010, SUNAT issued additional royalty assessments against SMCV for minerals processed in the Concentrator from January 2008 to December 2008.[329] SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at rates of 18.25% (through February 2010) and 14.6% (subsequently) per annum, calculated from the dates SUNAT claimed SMCV should have filed each monthly royalty declaration (together, the **2008 Royalty Assessments**).

347. On 15 July 2010, SMCV requested that SUNAT reconsider the 2008 Royalty Assessments.[330]

348. On 31 January 2011, SUNAT rejected SMCV's reconsideration request of the 2008 Royalty Assessment.[331]

[328] SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments dated 31 March 2010 (**CE-38**), pp. 31, 34.
[329] SUNAT, 2008 Royalty Assessments dated 1 June 2010 (**CE-39**), Annex 1, p. 13.
[330] SMCV, Request for Reconsideration, 2008 Royalty Assessments dated 15 July 2010 (**CE-600**).
[331] SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments dated 31 January 2011 (**CE-46**).

c) The 2009 Royalty Assessments before SUNAT

349. On 27 June 2011, SUNAT issued royalty assessments against SMCV for the minerals processed in the Concentrator from January 2009 to December 2009.[332] SUNAT also issued penalties equivalent to 10% of unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at rates of 18.25% (through February 2010) and 14.6% (subsequently) per annum running from the dates SUNAT asserted SMCV should have filed each monthly royalty declaration (together, the **2009 Royalty Assessments**).

350. On 9 August 2011, SMCV requested that SUNAT reconsider the 2009 Royalty Assessments.[333]

351. On 21 December 2011, SUNAT rejected SMCV's reconsideration request for the 2009 Royalty Assessments.[334]

d) The Tax Tribunal proceedings concerning the 2006-2007 and 2008 Royalty Assessments

352. On 12 May 2010, SMCV challenged the 2006-2007 Royalty Assessments before the Tax Tribunal, a body under the purview of the MEF serving as the final administrative appeal instance for royalty and tax matters (the **2006-2007 Royalty Case**).[335] The 2006-2007 Royalty Case was assigned to Chamber 10, one of the Tax Tribunal's eleven chambers, and to Mr. Luis Cayo Quispe as the *vocal ponente*, *i.e.,* the Tax Tribunal decision-maker responsible for conducting the initial analysis of the case and preparing a draft resolution.[336]

353. On 10 March 2011, SMCV filed a challenge to the 2008 Royalty Assessments (the **2008 Royalty Case**).[337] The 2008 Royalty Case was assigned to Chamber 1 and to *vocal*

[332] SUNAT, 2009 Royalty Assessments dated 27 June 2011 (**CE-54**).
[333] SMCV, Request for Reconsideration, 2009 Royalty Assessments dated 9 August 2011 (**CE-55**).
[334] SUNAT, Resolution No. 055-014-0001495/SUNAT dated 21 December 2011 (**CE-58**).
[335] SMCV, Challenge to Tax Tribunal, 2006/07 Royalty Assessments dated 12 May 2010 (**CE-40**); MEF Internal Regulations, Ministerial Resolution 213-2020/EF/4 dated 24 July 2020 (**CA-250**) Article 16; Manual of the Operation and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 dated 5 October 2012 (**CA-186**,), pp. 1, 3.
[336] Tax Tribunal, Decision No. 08997-10-2013 dated 30 May 2013 (**CE-88**); Estrada ¶ 37; Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13 dated 31 October 2012 (**CA-196**), p. [13], ¶ 11.
[337] SMCV, Challenge to Tax Tribunal, 2008 Royalty Assessments dated 10 March 2011 (**CE-49**).

ponente Ms. Licette Zuñiga Dulanto, who was also the presiding vocal of her Chamber.[338]

354. On 22 March 2013, the Tax Tribunal President Ms. Olano's assistant, Ms. Villanueva, wrote an email to President Olano noting: "*Zoraida: I am sending you the arguments of both sides, as well as the main clauses of the stability agreement. There are good arguments for both sides, I am more or less leaning to one side. Please read the arguments when you can and we can talk about it. I'll continue working on this*."[339]

355. On 5 April 2013, Chamber 10 held its oral hearing on the 2006-2007 Royalty Case.[340]

356. On 9 April 2013, Chamber 1 scheduled its oral hearing on the 2008 Royalty Case for 2 May 2013.[341]

357. On 21 May 2013, the presiding vocal of Chamber 10 hearing the 2006-2007 Royalty Case, Mr. Carlos Moreano, emailed President Olano to inquire about the "*Cerro Verde file*" as follows:

> *Zoraida: A question regarding the Cerro Verde file. We were informed that Ursula Villanueva made a draft that was returned to Chamber 1, Dr. Cayo [vocal ponente of the 2006/07 Royalty case for Chamber 10] tells me that he will coordinate with Licette [Zuñiga, presiding vocal of Chamber 1 hearing the 2008 Royalty case] since we have the same subject matter.*[342]

358. On the same day, Chamber 1 issued the resolution in the 2008 Royalty Case.[343] The resolution upheld the 2008 Royalty Assessments noting:

> *[T]he benefits of legal stability are not granted in a general manner to the owner of the mining activity or any given mining concession, but rather in relation to a specific investment project that is clearly delimited in the Feasibility Study […] while the benefits conferred under stability contracts go to the owner of the mining activity for the purpose of promoting the investment that develops into a concession or an Economic-Administrative Unit, said benefits apply only to the activities related to the investment in question, the object of which is delimited*

[338] Tax Tribunal, Decision No. 08252-1-2013 dated 21 May 2013 (**CE-83**), p. 24.
[339] Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva dated 22 March 2013, 4:02 PM PET (**CE-648**).
[340] Evidence of Oral Hearing Report No. 0286-2013-EF/TF dated 5 April 2013 (**CE-79**).
[341] Notification of Oral Hearing Report No. 0411-2013-EF/TF dated 9 April 2013 (**CE-80**).
[342] Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 21 May 2013, 10:05 AM PET (**CE-650**).
[343] 21 May 2013 Tax Tribunal Decision, No. 08252-1-2013 (**CE-83**).

> *in the Feasibility Study, which, in the present case, is in reference to the activities related to the "Cerro Verde Leaching Project."*[344]

359. On 22 May 2013, Mr. Moreano wrote an email to President Olano noting:

> *Zoraida: […] the ideal thing would have been for Chamber 1 to hold a session on the Cerro Verde file after coordinating with us, who have [a case with] the same subject matter and from the same taxpayer, it was the right thing to do; as always happens, if we do not call we will not find out anything.*[345]

360. On 24 May 2013, Mr. Cayo, the *vocal ponente* of Chamber 10, wrote to President Olano noting:

> *Dear Zoraida[:] At the end of the day yesterday, I received a call from Licette to have a meeting now starting at 8:30. However, as I told her, I have to attend the oral hearings we had already scheduled for today, and they are starting early in the morning. If all goes well, we should be finished by 11.00 am. As soon as I finish I will contact you and Licette.*[346]

361. On the same day, President Olano confirmed the meeting and asked Mr. Cayo to bring, in addition to the 2006-2007 Royalty Case, "*the case file 1889-2012*", *i.e.,* the 2009 Royalty Case, which had also been assigned to Chamber 10 at the beginning of 2012. She stated: "*Luis: Then we will wait for you when you finish your oral reports as I have a meeting later. Do you have a file number 1889-2012, which is also on the same subject?*"[347]

362. On 30 May 2013, Chamber 10 issued its resolution upholding the 2006-2007 Royalty Assessments.[348]

363. On 20 June 2013, the Tax Tribunal notified SMCV of the 2008 Royalty Case resolution.[349]

---

[344] 21 May 2013 Tax Tribunal Decision, No. 08252-1-2013 (**CE-83**), p. 15.
[345] Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 22 May 2013 8:58 AM PET (**CE-652**).
[346] Email from Luis Gabriel Cayo Quispe to Zoraida Alicia Olano Silva and Licette Isabel Zuñiga Dulanto dated 24 May 2013, 8:31 AM PET (**CE-654**).
[347] Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto dated 24 May 2013, 10:23 AM PET (**CE-655**).
[348] Tax Tribunal, Decision No. 08997-10-2013 dated 30 May 2013 (**CE-88**).
[349] Receipt Notice of Resolutions No. 08252-1-2013 and No. 08997-10-2013 dated 20 June 2013 (**CE-89**).

364. On 26 June 2013, SMCV submitted requests asking the Tax Tribunal to waive penalties and interest in both the 2006-2007 and 2008 Royalty Assessments.[350] SMCV's requests were based on Article 170 of the Peruvian Tax Code, which provides that penalties and interest should be waived where interpretation of the applicable legal provisions is subject to "*reasonable doubt*" as a result of their imprecision, obscurity, or ambiguity.[351]

365. On 15 July 2013, the Tax Tribunal rejected both of SMCV's requests of 26 June 2013 on the ground that SMCV had not invoked the argument in its initial challenge.[352]

366. On 4 October 2013, SMCV requested, under protest, to enter into a deferral and instalment plan to jointly pay the 2006-2007 and 2008 Royalty Assessments.[353]

367. On 10 October 2013, SUNAT approved SMCV's request, under protest, to enter into a deferral and instalment plan to jointly pay the 2006-2007 and 2008 Royalty Assessments.[354]

e) The court proceedings involving the 2006-2007 and 2008 Royalty Assessments

368. On 19 September 2013, SMCV challenged the Tax Tribunal's resolutions confirming the 2008 Royalty Assessment and 2006-2007 Royalty Assessments to the Contentious Administrative Courts.[355]

369. On 17 December 2014, the Contentious Administrative Court decided in SMCV's favor in the 2008 Royalty Case, annulling the 2008 Royalty Assessments.[356]

---

[350] SMCV, Letter to the President of Chamber 10 (Royalties 2006/07) dated 26 June 2013 (**CE-656**); SUNAT Letter to Tax Tribunal Chamber 1, Resolution No. 8252-1-2013 dated 26 June 2013 (**CE-90**); SMCV, Supplemental Brief to Tax Tribunal (2006/07 Royalty Assessment) dated 9 July 2013 (**CE-658**); SMCV, Supplemental Brief to Tax Tribunal (2008 Royalty Assessment) dated 9 July 2013 (**CE-659**).
[351] Tax Code, Supreme Decree No. 133-2013-EFdated 22 June 2013 (**CA-14**), Article 170.
[352] Tax Tribunal, Decision No. 11667-10-2013 dated 15 July 2013 (**CE-91**), p. 5; Tax Tribunal, Decision No. 11669-1-2013 dated 15 July 2013 (**CE-92**), p. 5.
[353] SMCV, Request under Protest to Enter into Deferral and Installment Plans (2006-07, 2008 Royalty Assessments) dated 4 October 2013 (**CE-664**).
[354] SUNAT, Resolution No. 0510170003363 dated 10 October 2013 (**CE-99**).
[355] SMCV, Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments dated 18 September 2013 (**CE-97**); SMCV, Administrative Court Appeal of the Tax Tribunal's Decision, 2006/07 Royalty Assessment dated 27 September 2013 (**CE-98**).
[356] Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment dated 17 December 2014, (**CE-122**), p. 26, ¶ 34.

370. On 29 January 2016, SUNAT appealed the 2008 Royalty Case decision in SMCV's favor to the Superior Court of Justice (the **Appellate Court**), which reversed the first instance court's decision annulling the 2008 Royalty Assessments.[357]

371. On 23 February 2016, SMCV filed an appeal in cassation before the Supreme Court of Justice (the **Supreme Court**) seeking to annul the Appellate Court's decision on the 2008 Royalty Assessment.[358]

372. On 14 April 2016, the Contentious Administrative Court upheld the 2006-2007 Royalty Assessments.[359]

373. On 2 May 2016, SMCV appealed the Contentious Administrative Court's decision on the 2006-2007 Royalty Assessments to the Appellate Court.[360]

374. On 12 July 2017, a majority of the Appellate Court dismissed the appeal on the 2006-2007 Royalty Assessments, echoing the Contentious Administrative Court's holding.[361]

375. On 9 August 2017, SMCV filed an appeal in cassation before the Supreme Court on the 2006-2007 Royalty Assessments.[362]

376. On 18 August 2017, the Supreme Court upheld the Appellate Court's decision on the 2008 Royalty Assessment and dismissed SMCV's appeal.[363]

377. On 20 November 2018, the Supreme Court upheld the Appellate Court's decision on the 2006-2007 Royalty Assessments and dismissed SMCV's appeal.[364] As fewer than four justices concurred, the Court had to summon an additional justice or justices and schedule a new hearing for the parties to argue their case with the additional justice or justices present.[365]

---

[357] Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment dated 29 January 2016 (**CE-137**).
[358] SMCV, Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment dated 23 February 2016 (**CE-138**).
[359] Contentious Administrative Court, Decision, No. 07649-2013, 2006/07 Royalty Assessments dated 14 April 2016 (**CE-689**).
[360] SMCV, Appellate Court Appeal of the Administrative Court Decision dated 2 May 2016 (**CE-144**).
[361] Appellate Court, Decision No. 48, File No. 7649-2013 dated 12 July 2017 (**CE-274**).
[362] SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment) dated 9 August 2017 (**CE-697**).
[363] Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment dated 18 August 2017 (**CE-153**).
[364] Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) dated 20 November 2018 (**CE-739**), pp. 1-35.
[365] 2014 TUO of the Organic Law of the Judiciary dated 2014 (**CA-203**), Articles 141, 144, 145.

378. On 27 February 2020, SMCV applied to withdraw its appeal to the Supreme Court on the 2006-2007 Royalty Assessments.[366]

379. On 7 October 2020, the Supreme Court case on the 2006-2007 Royalty Assessments was formally concluded when the Supreme Court approved SMCV's withdrawal.[367]

380. On 29 December 2020, the Supreme Court notified SMCV of the justices' votes and opinions on the 2006-2007 Royalty Assessments.[368]

f) The 2009 Royalty Assessment before the Tax Tribunal and SUNAT's further Royalty Assessments for 2010, 2011, 2012, and 2013

381. On 16 January 2012, SMCV challenged SUNAT's 2009 Royalty Assessment before the Tax Tribunal.[369]

382. On 13 April 2016, SUNAT issued royalty assessments against SMCV for 2010 and the first three quarters of 2011 (together with penalties and interest, the **2010-2011 Royalty Assessments**).[370] Along with the royalty assessments, SUNAT assessed penalties of 10% of the unpaid royalties and additional penalties for SMCV's failure to file royalty declarations and for SMCV's failure to prove that it kept a separate accounting for the Concentrator, which SUNAT argued SMCV was required to do under Article 22 of the Regulations.[371] SUNAT imposed interest on the unpaid royalties and penalties at the rate of 14.6% per annum running from the dates SUNAT asserted SMCV should have filed each monthly royalty declaration.[372]

383. On 11 May 2016, SMCV submitted a request for reconsideration for the 2010-2011 Royalty Assessments, also requesting in the alternative that SUNAT waive penalties and interest based on "*reasonable doubt*" in the interpretation of the Mining Law.[373]

---

[366] SMCV, Withdrawal, 2006/07 Royalty Case, Docket 18174-2017 dated 27 February 2020 (**CE-242**).
[367] Supreme Court, Resolution Approving SMCV's Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment) dated 7 October 2020 (**CE-789**).
[368] Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessment) (**CE-794**).
[369] SMCV, Appeal of SUNAT 2009 Royalty Assessments dated 16 January 2012 (**CE-62**).
[370] SUNAT, 2010/11 Royalty Assessments dated 13 April 2016 (**CE-142**).
[371] SUNAT, Fine Resolution No. 052-002-0006603 to No. 052-002-0006645 (2010/11 Royalty Assessments) dated 13 April 2016 (**CE-688**); SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments dated 29 December 2016 (**CE-150**), pp. 114, 122-125.
[372] SUNAT, 2010/11 Royalty Assessments dated 13 April 2016 (**CE-142**), Annex No. 1.
[373] SMCV, Reconsideration Request of SUNAT, 2010/11 Royalty Assessments dated 11 May 2016 (**CE-146**), pp. 37-39, 68-85, ¶¶ 3.3, 4.4.1-4.4.12.

384. On 29 December 2016, SUNAT rejected SMCV's request for reconsideration of the 2010-2011 Royalty Assessments, noting that "*the benefits of legal stability [] are granted […] in relation to a specific investment, with a defined plan and an expected production of copper cathodes, clearly delimited in the Feasibility Study*."[374] SUNAT also rejected SMCV's request to waive penalties and interest.[375]

385. On 22 March 2017, SMCV challenged SUNAT's 2010-2011 Royalty Assessments before the Tax Tribunal (the **2010-2011 Royalty Case**).[376]

386. On 29 December 2017, SUNAT issued royalty assessments against SMCV for minerals processed in the Concentrator for the fourth quarter of 2011 (together with penalties and interest, the **Q4 2011 Royalty Assessment**).[377] SUNAT also assessed a penalty equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 14.6% per annum from 29 February 2012.

387. On 15 February 2018, SMCV submitted a request for reconsideration to SUNAT of the Q4 2011 Royalty Assessment.[378]

388. On 28 March 2018, SUNAT assessed royalties for the minerals processed in the Concentrator in 2012 (the **2012 Royalty Assessment**).[379] SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 14.6% per annum, calculated from the dates SUNAT asserted SMCV should have filed each quarterly royalty declaration.

389. On 4 May 2018, the Tax Tribunal's Technical Office assigned the 2010-2011 Royalty Case to Mr. Ninacondor as *vocal ponente*.[380]

---

[374] SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments dated 29 December 2016 (**CE-150**), p. 70.
[375] SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments dated 29 December 2016 (**CE-150**), pp. 125-131, ¶ 3.4.4.
[376] SMCV, Appeal of SUNAT, 2010/11 Royalty Assessment dated 22 March 2017 (**CE-151**).
[377] SUNAT, Fine Resolution No. 012-002-0031073, Q4 2011 Royalty Assessment dated 29 December 2017 (**CE-701**); SUNAT, Fine Resolution No. 012-002-0031074, Q4 2011 Royalty Assessment dated 29 December 2017 (**CE-702**).
[378] SMCV, Request for Reconsideration, 4Q 2011 Royalty Assessments dated 15 February 2018 (**CE-175**).
[379] SUNAT, 2012 Royalty Assessments dated 28 March 2018 (**CE-176**).
[380] MEF, Supreme Resolution No. 013-2018-EF dated 3 May 2018 (**CE-177**), Article 1; Tax Tribunal, Decision No. 06575-1-2018 dated 28 August 2018 (**CE-194**), p. 41.

390. On 17 May 2018, SMCV submitted a request for reconsideration for the 2012 Royalty Assessment.[381]

391. On 20 June 2018, SMCV requested that Mr. Ninacondor recuse himself from the 2010-2011 Royalty Case on the grounds that he failed to meet the requirements of independence and impartiality.[382]

392. On 20 June 2018, Ms. Gina Castro Arana, head of the Technical Office, sent President Olano draft minutes of a plenary meeting dated the same day, stating that SMCV's "*petition for self-recusal was deliberated and it was unanimously agreed that the petition for self-recusal that was filed was inadmissible*."[383]

393. On 21 June 2018, Ms. Castro Arana sent President Olano a revised version of the minutes.[384] The draft minutes concluded that there was no basis for recusal because SUNAT did not qualify as "*administrado*" or "*third party to the proceedings*," but was an "*administrative authority*." President Olano forwarded the draft to the *vocales* informing them that it contained the "*draft minutes for today's meeting at 5pm*" and stating to "*please let me know if you agree.*"[385] Several *vocales* responded to voice their disagreement, including the vocales of Chamber 5.[386] The dissenting *vocales* sent a first draft of their dissenting vote a few hours later and the final draft at noon the next day.[387]

394. On 22 June 2018, the Plenary Chamber of the Tax Tribunal voted to reject SMCV's recusal request.[388]

---

[381] SMCV, Request for Reconsideration, 2012 Royalty Assessments dated 17 May 2018 (**CE-178**).
[382] SMCV, Submission Requesting Removal of Judge Ninacondor dated 20 June 2018 (**CE-180**), pp. 3-4.
[383] *Acta de Sala Plena – Abstención vs MN Cerro Verde*, attached to email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 20 June 2018, 8:32 PM PET (**CE-714**), p. 4; Email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 20 June 2018, 8:32 PM PET (**CE-713**).
[384] Email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 21 June 2018, 11:01 AM PET (**CE-715**); *Acta de Sala Plena – Abstencion vs. MN Cerro Verde*, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 21 June 2018, 11:01 AM PET (**CE-716**), pp. 4-5.
[385] Email from Zoraida Alicia Olano Silva to the *vocales* dated 21 June 2018, 11:21 AM PET (**CE-717**); Draft Abstention, Attachment to Email from Zoraida Alicia Olano Silva to the vocales dated 21 June 2018, 11:21 AM PET (**CE-718**).
[386] Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva dated 21 June 2018, 11:38 AM PET (**CE-719**); *Acta de Sala Plena – Abstencion vs. MN Cerro Verde*, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 21 June 2018, 11:01 AM PET (**CE-716**), p. 4.
[387] Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva dated 21 June 2018, 3:48 PM PET (**CE-721**); Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva dated June 22, 2018, 12:11 PM PET (**CE-722**); Draft Dissenting Vote, Attached to Email from Gabriela Patricia Marquez Pacheco to Zoraida Alicia Olano Silva dated 22 June 2018, 12:11 PM PET (**CE-723**).
[388] Tax Tribunal, Rejection of SMCV's Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 dated 22 June 2018 (**CE-181**).

395. On 6 and 18 July 2018, the Tax Tribunal scheduled hearings for both the 2009 Royalty Case and the 2010-2011 Royalty Case on 9 August 2018.[389]

396. On 9 August 2018, the hearings for both the 2009 Royalty Case and the 2010-2011 Royalty Case took place.

397. On 15 August 2018, Chamber 2 of the Tax Tribunal issued a resolution confirming SUNAT's 2009 Royalty Assessment.[390] The Tax Tribunal also rejected SMCV's request to waive penalties and interest.

398. On 28 August 2018, Chamber 1 of the Tax Tribunal issued a resolution confirming SUNAT's 2010-2011 Royalty Assessments.[391] The Tax Tribunal also rejected SMCV's request to waive penalties and interest.

399. On 12 September 2018, the Government amended the Tax Code to require *vocales* to abstain from participating in proceedings if they had worked for SUNAT within the last 12 months and "*directly and actively*" participated in the SUNAT proceedings at issue before the Tax Tribunal.[392]

400. On 28 September 2018, SUNAT assessed royalties for the minerals processed in the Concentrator in 2013 (the **2013 Royalty Assessment**).[393] SUNAT also assessed penalties equivalent to 10% of the unpaid royalties, additional penalties for SMCV's failure to file royalty declarations, and interest on the unpaid royalties and penalties at the rate of 14.6% per annum, calculated from the dates SUNAT asserted SMCV should have filed each quarterly royalty declaration.

401. On 10 and 18 October 2018, SUNAT issued writs of execution of the 2010-2011 and 2009 Royalty Assessments, respectively.[394]

---

[389] Tax Tribunal, Notice of Oral Hearing No. 1170-2018-EF/TF, 2010/11 Royalty Assessments dated 18 July 2018 (**CE-185**); Tax Tribunal, Notice of Oral Hearing No. 1065-2018-EF/TF, 2009 Royalty Assessments dated 6 July 2018 (**CE-183**).
[390] SMCV, Appeal of SUNAT 2009 Royalty Assessments dated 12 January 2012 (**CE-62**); Tax Tribunal, Chamber 2 Decision No. 06141-2-2018 dated 15 August 2018 (**CE-188**).
[391] Tax Tribunal, Decision No. 06575-1-20, 2010/11 Royalty Assessments dated 28 August 2018 (**CE-194**).
[392] Amendments to the Tax Code, Legislative Decree No. 1421 dated 12 September 2018 (**CA-238**); Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Article 100.
[393] SUNAT, 2013 Royalty Assessments dated 28 September 2018 (**CE-195**).
[394] SUNAT, Coercive Enforcement Resolution, No. 011-006-0056517, 2010/11 Royalty Assessments dated 10 October 2018 (**CE-727**); SUNAT, Writ of Execution No. 011-006-0056535, 2009 Royalty Assessments dated 18 October 2018 (**CE-729**).

402. On 12 October 2018, SUNAT denied SMCV's request for reconsideration of the Q4 2011 Royalty Assessment.[395] SUNAT also declined to waive penalties and interest.

403. On 15 and 18 October 2018, SMCV requested that SUNAT suspend execution proceedings and recalculate the interest owed on the 2009 and 2010-2011 Royalty Assessments, respectively.[396]

404. On 22 October 2018, SUNAT rejected SMCV's requests for the suspension of execution proceedings on the grounds that the Royalty Law does not expressly provide that Article 33 of the Tax Code applies in royalty proceedings.[397]

405. On 26 and 30 October 2018, SMCV requested under protest to enter into deferral and instalment plans to pay the 2009 and 2010-2011 Royalty Assessments.[398]

406. On 30 and 31 October 2018, SUNAT approved SMCV's request to enter into deferral and instalment plans to pay the 2009 and 2010-2011 Royalty Assessments.[399]

407. On 7 November 2018, SMCV submitted a request for reconsideration for the 2013 Royalty Assessment.[400]

408. On 21 November 2018, SMCV challenged SUNAT's Q4 2011 Royalty Assessment before the Tax Tribunal (the **Q4 2011 Royalty Case**).[401] The Technical Office assigned the Q4 2011 Royalty Case to Ms. Villanueva, a *vocal* at Chamber 9.[402]

409. On 28 December 2018 and 3 January 2019, SMCV filed complaint requests (*Recursos de Queja*) that the Tax Tribunal order SUNAT to recalculate the interest owed by SMCV on the 2009 and 2010-2011 Royalty Assessments, while reserving all rights and

---

[395] SUNAT, Resolution No. 0150140014441, Q4 2011 Royalty Assessment dated 12 October 2018 (**CE-198**), p. 1.
[396] SMCV Request to SUNAT to Suspend Execution Proceedings, 2010/11 Royalty Assessments dated 15 October 2018 (**CE-728**); SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535, 2009 Royalty Assessments dated 18 October 2018 (**CE-730**).
[397] SUNAT, Coercive Collection Resolution No. 0110070137018, 2010/11 Royalty Assessments (**CE-731**), pp. 1-2; SUNAT, Rejection of SMCV's Request for Suspension of Collection Enforcement Proceedings, 2009 Royalty Assessments dated 22 October 2018 (**CE-732**), pp. 1-2.
[398] SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2009 Royalty Assessments dated 26 October 2018 (**CE-733**); SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2010/11 Royalty Assessments dated 30 October 2018 (**CE-734**).
[399] SUNAT, Approval of SMCV's Deferral and Installment Plans, 2009 Royalty Assessments dated 30 October 2018 (**CE-735**); SUNAT, Approval of SMCV's Deferral and Installment Plans, 2010/11 Royalty Assessments dated 31 October 2018 (**CE-736**).
[400] SMCV, Request for Reconsideration, 2013 Royalty Assessments dated 7 November 2018 (**CE-203**).
[401] SMCV, Appeal to Tax Tribunal, Q4 2011 Royalty Assessments dated 21 November 2018 (**CE-740**).
[402] Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments dated 18 November 2019 (**CE-269**), p. 14.

expressly stating that the requests did not constitute acceptance of the imposed interest.[403]

410. On 4 and 7 January 2019, the Tax Tribunal dismissed both of SMCV's requests to recalculate the interest owed by SMCV on the 2009 and 2010-2011 Royalty Assessments on the ground that SMCV had already requested deferral and instalment plans for the payment of the 2009 and 2010-2011 Royalty Assessments.[404]

411. On 11 January 2019, SUNAT denied SMCV's request for reconsideration of the 2012 Royalty Assessment.[405] SUNAT also denied SMCV's request to waive penalties and interest.

412. On 19 February 2019, SMCV requested under protest to enter into deferral and instalment plans to pay the 2012 Royalty Assessment.[406]

413. On 25 February 2019, SUNAT approved SMCV's request under protest to enter into deferral and instalment plans to pay the 2012 Royalty Assessment.[407]

414. On 28 May 2019, SUNAT denied SMCV's request for reconsideration of the 2013 Royalty Assessment.[408] SUNAT also denied SMCV's request to waive penalties and interest.

415. On 25 June 2019, SMCV requested under protest to enter into deferral and instalment plans to pay the 2013 Royalty Assessment.[409]

416. On 1 July 2019, SUNAT approved SMCV's request under protest to enter into deferral and instalment plans to pay the 2013 Royalty Assessment.[410]

---

[403] SMCV, Submission Requesting Recalculation of Interest, 2009 Royalty Assessment dated 28 December 2018 (**CE-207**), pp. 26-27; SMCV, Submission Requesting Recalculation of Interest, 2010/11 Royalty Assessments dated 3 January 2019 (**CE-212**), p. 26.
[404] Tax Tribunal, Decision No. 00019-Q-2019, 2009 Royalty Assessment dated 4 January 2019 (**CE-213**); Tax Tribunal, Decision No. 00036-Q-2019, 2010/11 Royalty Assessment dated 7 January 2019 (**CE-214**).
[405] SUNAT, Resolution No. 0150140014560, 2012 Royalty Assessments dated 11 January 2019 (**CE-215**).
[406] SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2012 Royalty Assessments dated 19 February 2019 (**CE-751**).
[407] SUNAT, Approval of SMCV's Deferral and Installment Plans, 2012 Royalty Assessments dated 25 February 2019 (**CE-753**).
[408] SUNAT, Resolution No. 0150140014816, 2013 Royalty Assessments dated 28 May 2019 (**CE-220**).
[409] SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2013 Royalty Assessments dated 25 June 2019 (**CE-763**).
[410] SUNAT, Approval of SMCV's Deferral and Installment Plans, 2013 Royalty Assessments dated 1 July 2019 (**CE-760**).

417. On 18 November 2019, the Tax Tribunal confirmed SUNAT's Q4 2011 Royalty Assessment.[411] The Tax Tribunal also denied SMCV's waiver request.

418. On 9 and 13 August 2021, under protest, SMCV made payments equal to pay off the total amounts outstanding under each of the deferral and instalment plans for the Royalty Assessments.[412]

2. The GST Tax Assessments imposed on SMCV

419. On 28 December 2009, SUNAT issued a tax assessment against SMCV, charging SMCV with underpayment of GST for fiscal year 2005 (the **2005 GST Tax Assessment**).[413] In its Tax Assessment, SUNAT found that SMCV could apply the stabilized tax rate only to the sale of cathodes but had to pay the non-stabilized rate for all other sales.[414] SUNAT also found that the 1998 Stability Agreement did not cover any services provided by non-resident suppliers, irrespective of what they were used for. SUNAT also imposed penalties on SMCV. On 28 January 2010, SMCV requested reconsideration for the 2005 GST Tax Assessment.[415] On 25 October 2010, SUNAT denied SMCV's request for reconsideration for the 2005 GST Tax Assessment.[416]

420. SUNAT subsequently issued assessments, interest, and penalties on the same basis on 29 December 2010 (GST and GST on Non-Residents for 2006),[417] 27 December 2011 (GST for 2007), 20 December 2012 (GST for 2008), 27 December 2013 (GST for 2009), 24 June 2014 (GST for 2010),[418] and 29 September 2017 (GST for 2011) (collectively, the **GST Assessments**).

---

[411] Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments dated 18 November 2019 (**CE-269**).
[412] SMCV, Payment Receipt (2009 Royalty Assessments) (**CE-831**); SMCV, Payment Receipt (2010-2011 Royalty Assessments) (**CE-832**); SMCV, Payment Receipt (2012 Royalty Assessments) (**CE-833**); SMCV, Payment Receipt (2013 Royalty Assessments) (**CE-834**).
[413] SUNAT, Assessments No. 052-003-0005626 to No. 052-003-0005637 dated 28 December 2009 (**CE-35**); SUNAT, Assessments No. 052-003-0005642 to No. 052-003-0005653 dated 28 December 2009 (**CE-36**); Single Unified Text of the General Sales Tax and Selective Consumption Tax, Supreme Decree No. 055-99-EF dated 16 April 1999 (**CA-73**).
[414] SUNAT, Assessments No. 052-003-0005626 to No. 052-003-0005637 (GST for 2005) dated 28 December 2009 (**CE-35**), Annex No. 1, p. 13.
[415] SUNAT, Resolution No. 055-014-0001369 dated 25 October 2010 (**CE-42**).
[416] SUNAT, Resolution No. 055-014-0001369 dated 25 October 2010 (**CE-42**).
[417] SUNAT, Assessments No. 052-003-006737 to No. 052-003-006744 and No. 052-003-006777 to 052-003-006780 dated 29 December 2010 (**CE-43**); SUNAT, Fine Resolutions No. 052-002-0004402 to No. 052-002-0004413 dated 29 December 2010 (**CE-44**).
[418] SUNAT, Fine Resolution No. 052-002-0006091 and SUNAT Fine Resolution No. 052-002-0006102 (GST 2009) dated 24 June 2014 (**CE-112**).

421. For some of these years, SUNAT also imposed penalties on SMCV on the basis of accounting violations relating to SMCV's use of stabilized benefits, including keeping the Concentrator's accounting in U.S. dollars and failing to keep a separate account for the Concentrator based on Article 22 of the Mining Regulations.[419]

422. SMCV requested reconsideration for each of these assessments, each of which SUNAT denied.[420] SMCV then challenged each of the GST Assessments before the Tax Tribunal.

423. On 22 August 2018, the Tax Tribunal issued Resolutions on the 2005 and 2006 GST Assessments.[421] Therein, the Tax Tribunal reviewed SMCV's claims against the GST Assessments and confirmed SUNAT's analysis. The Tax Tribunal held that SMCV had failed to prove that the sale of the scrap metal was in fact an activity related to the stabilized project.

424. On 30 October 2018, the Tax Tribunal issued a Resolution on the 2007 GST Assessment, rejecting SMCV's claims.[422]

425. In February 2020, SMCV withdrew the stability-related claims from its remaining challenges againt the GST Assessments.

3. The Income Tax Assessments imposed on SMCV

426. On 27 May 2011, SUNAT issued an income tax assessment against SMCV charging SMCV with underpayment of income tax for 2006 and corresponding penalties and interest, including a 50% penalty on the unpaid taxes.[423]

427. SUNAT issued additional assessments on 28 March 2012 (Income Tax for 2007), 21 August 2013 (Income Tax for 2008), 30 October 2014 (Income Tax for 2009), 13 February 2015 (Income Tax for 2010), 31 October 2017 (Income Tax for 2011), 26 November 2019 (Income Tax for 2012), and 28 December 2020 (Income Tax for 2013) (collectively, the **Income Tax Assessments**). In certain of its Income Tax Assessments, SUNAT imposed additional fines against SMCV for (i) failing to keep separate accounts

[419] SUNAT, Fine Resolutions No. 052-002-0006090 (GST 2010), No. 052-002-0006091 (GST 2009), No. 052-002-0006101 (GST 2010), No. 052-002-0006102 (GST 2009) dated 24 June 2014 (**CE-112**); SUNAT, Resolution No. 055-014-0002103 (GST 2009 and GST 2010) dated 27 April 2015 (**CE-130**), pp. 154-157.
[420] See Appendix I.
[421] Tax Tribunal, Resolution No. 06365-2-2018 dated 22 August 2018 (**RE-173**), p. 50; Tax Tribunal, Resolution No. 06366-2-2018 dated 22 August 2018 (**CE-190**).
[422] Tax Tribunal, Resolution No. 08470-2-2018 dated 30 October 2018 (**CE-202**).
[423] SUNAT, Assessment No. 052-003-0007147 (Income Tax for 2006) dated 27 May 2011 (**CE-51**).

for the leaching facility and the Concentrator, and (ii) failing to provide SUNAT a transfer pricing study or for keeping accounting in U.S. dollars.

428. In the 2012 Income Tax Assessment, SUNAT also rejected the deduction of the GEM overpayments for Q4 2011 to Q3 2012.

429. SMCV requested reconsideration for the 2006-2012 Income Tax Assessments, all of which were denied by SUNAT, except the request to reconsider the 2012 Income Tax Assessment, which was withdrawn by SMCV in February 2020.

430. SMCV challenged the 2006-2011 Income Tax Assessments before the Tax Tribunal.

431. On 22 August 2018, the Tax Tribunal issued Resolutions on the 2006 and 2007 Income Tax Assessments in which it confirmed the assessments.[424]

432. In February 2020, SMCV withdrew the stability-related claims from its remaining challenges against the Income Tax Assessments.

4. The Additional Income Tax imposed on SMCV

433. SUNAT also issued assessments against SMCV for the Additional Income Tax (**AIT**, and collectively, the **AIT Assessments**), which is levied on any form of expense deemed an indirect profit distribution at a 4.1% rate.[425]

434. AIT Assessments for 2007 and 2008 were issued at the same time as the GST Assessments for 2007-2008 and AIT Assessments for 2009 to 2013 were issued at the same time as the Income Tax Assessments.

435. With the exception of the 2013 AIT Assessments, SMCV requested reconsideration for each of these assessments before SUNAT. SUNAT denied SMCV's reconsideration requests for the 2008 to 2011 AIT Assessments, which SMCV challenged before the Tax Tribunal.

436. In February 2020, SMCV withdrew the stability-related claims from its challenges against the AIT Assessments.

[424] Tax Tribunal, Resolution No. 06367-2-2018 (Income Tax for 2006) dated 22 August 2018 (**CE-191**); Tax Tribunal, Resolution No. 06369-2-2018 (Income Tax for 2007) dated 22 August 2018 (**CE-192**).
[425] Law Amending the Income Tax Law, Law No. 27804 dated 2 August 2002 (**CA-90**), Article 17.

5. The Temporary Tax on Net Assets Assessments imposed on SMCV

437. On 27 December 2013, SUNAT began issuing assessments against SMCV for the Temporary Tax on Net Assets (**TTNA** and collectively, the **TTNA Assessments**).[426] The TTNA is calculated by applying a 0.4% rate on any net assets (minus depreciations) exceeding one million soles recorded in the adjusted balance sheet for December 31 of the previous year.

438. On 27 December 2013, 14 August 2015, 27 July 2016, and 20 November 2019, SUNAT issued TTNA Assessments for fiscal years 2009, 2010, 2011, and 2013. SUNAT also imposed penalties for SMCV's failure to file TTNA declarations.

439. SMCV submitted requests for reconsideration for the 2009-2011 and 2013 TTNA Assessments, and it voluntarily self-declared and paid the 2012 TTNA amounts under protest in December 2017.

440. SUNAT rejected the requests for reconsideration in the 2009-2010 TTNA Assessments, which SMCV challenged before the Tax Tribunal. SUNAT did not rule on SMCV's challenge on the 2011 TTNA Assessments and SMCV thus challenged the 2011 TTNA Assessments before the Tax Tribunal.

441. The Tax Tribunal confirmed the fine that SUNAT imposed in the 2013 TTNA Assessments and did not rule on the other challenges.

442. In February 2020, SMCV withdrew its stability-related claims for the 2009-2011 TTNA Assessments before the Tax Tribunal issued a decision as well as its request for reconsideration before SUNAT for the 2013 TTNA Assessments.

6. The Special Mining Tax Assessments and Complementary Mining Pension Fund Assessments imposed on SMCV

443. On 29 December 2017 and 28 September 2018, SUNAT issued assessments against SMCV for, respectively, the fourth quarter of 2011 through the fourth quarter of 2012, and each quarter of 2013, for the SMT (collectively, the **SMT Assessments**).[427] SUNAT also imposed penalties for SMCV's failure to file SMT declarations.

---

[426] SUNAT, Assessment No. 052-003-0011208 (TTNA for 2009) dated 27 December 2013 (**CE-103**).
[427] SUNAT, Fine Resolution No. 012-002-0031072 (SMT 4Q 2011) dated 29 December 2017 (**CE-168**), Annex 1; SUNAT, Fine Resolution No. 012-002-0031093 (SMT 1Q 2012) dated 29 December 2017 (**CE-169**), Annex 1; SUNAT, Fine Resolution No. 012-002-0031094 (SMT 2Q 2012) dated 29 December 2017 (**CE-170**), Annex 1;

444. On 20 December 2019, SUNAT issued an assessment charging SMCV with contributions for fiscal year 2013 to the Complementary Mining Pension Fund (the **2013 CMPF Assessment**), a social security fund composed of 0.5% of employees' monthly gross compensation and 0.5% of mining companies' annual pre-tax income.[428]

445. SMCV submitted requests for reconsideration for the Q4 2011-2012 and 2013 SMT Assessments, both of which SUNAT rejected. SMCV also challenged the Q4 2011-2012 SMT Assessments before the Tax Tribunal, which upheld SUNAT's Assessments. SMCV also submitted a request for reconsideration for the 2013 CMPF Assessment, which SMCV eventually withdrew in February 2020.

446. On 25 June 2019 and 13 August 2019, SMCV requested under protest to enter into deferral and installment plans to pay the 2013 and Q4 2011-2012 SMT Assessments, respectively.[429] On 1 July 2019 and 16 August 2019, SUNAT approved SMCV's deferral and installment plans.[430] On 18 August 2020, SMCV agreed with SUNAT to defer and combine the two deferral and instalment plans into a single plan under a more lenient regime known as the RAF regime (*régimen de aplazamiento y fraccionamiento*).[431] On 13 August 2021, under protest, SMCV made a payment to pay off the outstanding balance under the RAF Plan.[432]

7. SMCV's requests for reimbursement of GEM payments

447. On 28 December 2017, SMCV submitted reimbursement requests to SUNAT under protest for undue GEM payments corresponding to the periods Q4 2012 to Q4 2013.[433]

SUNAT, Fine Resolution No. 012-002-0031095 (SMT 3Q 2012) dated 29 December 2017 (**CE-171**), Annex 1; SUNAT, Fine Resolution No. 012-002-0031096 (SMT 4Q 2012) dated 29 December 2017 (**CE-172**), Annex 1; SUNAT, Resolution No. 0150140014441 (SMT 4Q 2011-4Q 2012) dated 12 October 2018 (**CE-198**), pp. 39-40; SUNAT, Assessments No. 012-003-0099078 to No. 012-003-0099081 (SMT for 2013) dated 28 September 2018 (**CE-195**).

[428] SUNAT, Assessment No. 0120030109172 (CMPF for 2013) dated 20 December 2019 (**CE-237**).

[429] SMCV, Request Under Protest to Enter into Deferral and Installment Plans (SMT for 2013) dated 25 June 2019 (**CE-759**); SMCV, Request Under Protest to Enter into Deferral and Installment Plans (SMT for Q4 2011-12) dated 13 August 2019 (**CE-764**).

[430] SUNAT, Approval of SMCV's Deferral and Installment Plans (SMT for 2013) dated 1 July 2019 (**CE-760**); SUNAT, Approval of SMCV's Deferral and Installment Plans (SMT for Q4 2011-12) dated 16 August 2019 (**CE-765**).

[431] SUNAT, Approval of RAF Regime (SMT for Q4 2011-2013) dated 18 August 2020 (**CE-786**).

[432] SMT RAF Payments dated February 2021 to August 2021 (**CE-838**).

[433] SMCV, Reimbursement Request (GEM Q4 2012) dated 12 January 2018 (**CE-705**); SMCV, Reimbursement Request (GEM Q1 2013) dated 12 January 2018 (**CE-706**); SMCV, Reimbursement Request (GEM Q2 2013) dated 12 January 2018 (**CE-707**); SMCV, Reimbursement Request (GEM Q3 2013) dated 12 January 2018 (**CE-708**); SMCV, Reimbursement Request (GEM Q4 2013) dated 12 January 2018 (**CE-709**).

448. On 18 December 2018, SUNAT approved SMCV's request for reimbursement of undue GEM payments corresponding to the periods Q4 2012 to Q4 2013 and ordered the reimbursement of SMCV's overpayments plus interest.[434]

449. On 28 December 2018, SMCV submitted reimbursement requests under protest for the remaining GEM overpayments corresponding to Q4 2011 to Q3 2012.[435]

450. On 4 March 2019, SUNAT denied SMCV's request for reimbursement of GEM payments for the period Q4 2011-Q3 2012 on the basis that the statute of limitations for such claims had expired on the first business day of 2017.[436]

8. Table summary of proceedings involving SMCV

451. The undisputed administrative and judicial proceedings in Peru relevant in this case have been reproduced in annexes to both the Claimant's Memorial (see Annex A to the Claimant's Memorial) and the Respondent's Rejoinder on the Merits (see Annex A to the Respondent's Rejoinder on the Merits). The most recent summary of proceedings is the table set out in Annex A of the Respondent's Rejoinder on the Merits, which the Tribunal has reproduced and attaches to this Award as Appendix I.

9. Initiation of this arbitration

452. On 26 November 2019, Freeport submitted a Notice of Intent advising Peru that a dispute had arisen concerning Freeport's investment.[437]

453. On 28 February 2020, Freeport filed its Notice of Arbitration.[438]

IV. JURISDICTION

454. In this section of the Award, the Tribunal will deal with the Respondent's objections regarding jurisdiction.

---

[434] SUNAT, Resolution No. 012 180 0018113/SUNAT (GEM for Q4 2012) dated 18 December 2018 (**CE-746**); SUNAT, Resolution No. 012 180 0018114/SUNAT (GEM for 2013) dated 18 December 2018 (**CE-747**).
[435] SMCV, Reimbursement Request, (GEM Q4 2011) dated 28 December 2018 (**CE-208**); SMCV, Reimbursement Request, (GEM Q1 2012) dated 28 December 2018 (**CE-209**); SMCV, Reimbursement Request, (GEM Q2 2012) dated 28 December 2018 (**CE-210**); SMCV, Reimbursement Request, (GEM Q3 2012) dated 28 December 2018 (**CE-211**).
[436] SUNAT, Resolution No. 012-180-0018640/SUNAT dated 4 March 2019 (**CE-218**).
[437] Claimants' Notice of Intent to Commence Arbitration under the United States-Peru Trade Agreement dated 27 November 2019 (**CE-271**).
[438] Claimant's Notice of Arbitration.

455. Specifically, the Tribunal will have to decide on five issues:

a. Are the Claimant's claims time-barred under Article 10.18.1 of the TPA?

b. Are the Claimant's claims based on penalties and interest outside of the Tribunal's jurisdiction because they constitute "*taxation measures*" which are excluded from the scope of the TPA under Article 22.3.1 of the TPA?

c. Are the Claimant's claims arising from the Royalty and Tax Assessments based on acts or facts that occurred before the TPA entered into force, and thus outside of the Tribunal's jurisdiction under Article 10.1.3 of the TPA?

d. Is the Claimant precluded from submitting claims on the basis of the Tax and Royalty Assessments before this Tribunal on the basis of Article 10.18.4 of the TPA?

e. May the Claimant submit claims concerning the breach of the 1998 Stability Agreement on behalf of SMCV under Article 10.16.1(b) of the TPA?

456. The Parties have briefed the Tribunal on these issues and the NDP on some of them. In what follows, the Tribunal will set out its analysis of these five issues. The Tribunal reaches the conclusion that the Claimant's claims are within the jurisdiction of the Tribunal, save for the Claimant's claims based on penalties and interest assessed on Tax Assessments, which the majority finds to be outside the Tribunal's jurisdiction.

A. The Respondent's claim that the Claimant's claims are time-barred

1. The Respondent's position

457. The Respondent asserts that the Claimant has failed to file its claims within the limitations period under Article 10.18.1 of the TPA.[439]

458. The Respondent submits that the TPA prohibits the submission of claims to arbitration if more than three years have passed from the date on which a claimant first knew or should have known of the alleged breaches, and that it incurred related loss or damage. The Respondent contends that the Claimant submitted its Notice of Arbitration on 28 February 2020 but that it was aware more than three years before that date, *i.e.*, before 28 February 2017, of the Royalty and Tax Assessments, and related measures such as SUNAT's imposition of penalties and interest. Accordingly, the Claimant's claims

[439] Respondent's Counter-Memorial, ¶¶ 412 *et seq.*; Respondent's Rejoinder, ¶¶ 694 *et seq.*; Respondent's Post-Hearing Brief, ¶¶ 278 *et seq.*

based on those alleged breaches fall outside of the TPA's limitations period, and, therefore, the Tribunal lacks jurisdiction to hear those claims.[440]

459. The Respondent submits that the legal test developed by tribunals to determine whether a claimant's claims satisfy limitation periods such as the one set out in Article 10.18.1 of the TPA is the following: "*(i) first, [the tribunal] must identify the cut-off date for the three-year limitations period; (ii) second, it must determine whether the [c]laimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) third, it must determine whether the [c]laimant knew or should have known that it had incurred loss or damage before that date*."[441] Relying *inter alia* on the findings of *Corona Materials v. Dominican Republic*, the Respondent contends that the claims must have been submitted to arbitration within three years of "*the earliest possible date*" when the Claimant first knew or should have first known of the alleged breaches and loss or damage.[442] As the *Resolute Forest v. Canada* tribunal explained, "*[t]he triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result*."[443] The Respondent further argues that the TPA's limitations period should be interpreted strictly to bar untimely claims,[444] and that its interpretation of the TPA is consistent with that of the United States.[445]

460. The Respondent alleges that the Claimant had knowledge prior to the 28 February 2017 cut-off date of the alleged breaches of the 1998 Stability Agreement and the TPA.[446]

---

[440] Respondent's Counter-Memorial, ¶ 412; Respondent's Rejoinder, ¶ 694.
[441] Respondent's Counter-Memorial, ¶ 412, referring to: *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award dated 3 June 2021 (**RA-1**), ¶ 217; *Spence International Investments LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award dated 25 October 2016 (**RA-2**), ¶¶ 208-213; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections In Accordance with Article 10.20.5 of the DR-CAFTA dated 31 May 2016 (**RA-3**), ¶¶ 193, 198, 217.
[442] Respondent's Counter-Memorial, ¶ 412, referring to: *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**), ¶ 198; *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶ 139 (citing *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**)).
[443] Respondent's Counter-Memorial, ¶ 430, referring to: *Resolute Forest Products, Inc. v. Canada*, PCA Case No. 2016/13, Decision on Jurisdiction and Admissibility dated 30 January 2018 (**RA-5**), ¶ 153.
[444] Respondent's Counter-Memorial, ¶ 417, referring to: *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**), ¶ 199; *Resolute Forest Products v. Canada*, Decision on Jurisdiction (**RA-5**), ¶ 153; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction dated 20 July 2006 (**RA-4**), ¶ 29.
[445] Respondent's Comments on the US NDP Submission, ¶¶ 8 *et seq*.
[446] Respondent's Rejoinder, ¶ 695.

a) The alleged breaches of the 1998 Stability Agreement

461. Turning first to the alleged breaches of the 1998 Stability Agreement, the Respondent rejects the Claimant's argument that the alleged breaches occurred each time SUNAT's Royalty and Tax Assessments became binding and enforceable against SMCV, and that for each of those times, Peru committed a separate breach of the 1998 Stability Agreement.[447]

462. The Respondent argues that the date when the Claimant first knew or should have known of the alleged breaches and alleged loss or damage must be traced to a government action (or actions) that (i) forms the basis of the claimant's claim; and (ii) gives rise to an independent cause of action.[448]

463. According to the Respondent, the limitations period:

1) starts on the date the alleged government action occurred,[449]
2) does not renew each time an alleged government action occurs if the action being challenged is part of a series of similar or related actions by a respondent state,[450]
3) is not tolled by subsequent litigation related to that alleged breach.[451]

464. The Respondent argues that the first date on which the Claimant first knew or should have known of SUNAT's alleged breaches of the 1998 Stability Agreement was when SMCV was notified of the first assessment from SUNAT on 18 August 2009, indicating that SMCV owed royalty payments for its activities related to the Concentrator Project for the years 2006-2007.[452] This is because at that moment, SMCV (and thus the Claimant) knew how SUNAT interpreted the 1998 Stability Agreement and that SMCV knew or should have known that it had incurred (or would incurr) loss or damages on

[447] Respondent's Counter-Memorial, ¶ 419; Claimant's Memorial, ¶ 351.
[448] Respondent's Counter-Memorial, ¶ 420; Respondent's Rejoinder, ¶ 714, referring to: *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶¶ 210, 227; *Infinito Gold v. Costa Rica*, Award (**RA-1**), ¶ 247; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award dated 11 October 2002 (**RA-6**), ¶ 70; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility dated 14 June 2013 (**RA-7**), ¶¶ 317, 330.
[449] Respondent's Counter-Memorial, ¶ 420.
[450] Respondent's Counter-Memorial, ¶ 421, referring to: *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 81; *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**), ¶ 215.
[451] Respondent's Counter-Memorial, ¶¶ 422, 431-434; Respondent's Rejoinder, ¶¶ 726 *et seq*., referring to: *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶ 208; *Apotex v. USA*, Award on Jurisdiction (**RA-7**), ¶¶ 328, 330-332; *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 81; *Mondev v. USA*, Award (**RA-6**), ¶ 87.
[452] Respondent's Counter-Memorial, ¶¶ 424-425, referring to: Claimant's Memorial at Annex A, p. 1; SUNAT 2006/07 Royalty Assessments dated 17 August 2009 (**CE-31**), p. 1 of PDF; SMCV Request for Reconsideration, 2006/07 Royalty Assessments dated 15 September 2009 (**CE-32**), p. 1.

the basis of that interpretation.[453] The Assessment expressly stated the support and legal basis for the assessment and indicated that SMCV was required to pay royalties on that basis. In addition, the Assessment also stated the penalties and interest that SMCV owed for failing to timely pay the royalties for its Concentrator Project, as well as additional penalties. As a matter of Peruvian law, the amounts stated in the Assessment were immediately due and owing to SUNAT, and therefore were liabilities of SMCV.[454] SMCV experienced financial harm (in the form of increased liabilities) at that moment, even if its cash outlay came at a later time.

465. According to the Respondent, SMCV incurred the loss or damage at the moment that it was required to pay the Assessment, which under Peruvian law was immediately as of the date of issuance of the Assessment.[455] Therefore, the limitations period for that alleged breach should have started running on 18 August 2009.[456]

466. As for all subsequently issued Royalty Assessments against SMCV for the tax periods 2008, 2009, 2010-2011, Q4 2011, 2012, and 2013, as well as the Tax Assessments for the periods of 2005 through 2013, the Respondent rejects the Claimant's characterization of these assessments as separate acts and, therefore, separate alleged breaches of the 1998 Stability Agreement.[457] The Respondent argues that they all represent a series of similar and related actions by a respondent state because the assessments are all based on SUNAT's consistent interpretation of the scope of the very same contract, the 1998 Stability Agreement.[458]

467. Alternatively, if the Tribunal were not to accept the Respondent's proposition that the Claimant first knew or should have known of the alleged breaches on 18 August 2009, the Respondent argues that the Tribunal should conclude that the Claimant knew or should have known of the alleged breaches and loss no later than 15 September 2009, when SMCV requested SUNAT to reconsider the 2006-2007 Royalty Assessment.[459]

---

[453] Respondent's Counter-Memorial, ¶¶ 424 *et seq*.; Respondent's Rejoinder, ¶¶ 712 *et seq.*, referring to: *Resolute Forest Products v. Canada*, Decision on Jurisdiction (**RA-5**), ¶ 153.
[454] Respondent's Counter-Memorial, ¶ 427, referring to: Bravo-Picón I (**RER-3**), ¶ 61; Morales I (**RER-2**), ¶¶ 106-107.
[455] Respondent's Counter-Memorial, ¶ 438.
[456] Respondent's Counter-Memorial, ¶ 435; Respondent's Rejoinder, ¶ 698.
[457] Respondent's Counter-Memorial, ¶ 429.
[458] Respondent's Counter-Memorial, ¶ 429; Respondent's Rejoinder, ¶ 700, referring to: *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 81; *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**), ¶ 215.
[459]Respondent's Rejoinder, ¶ 701; Respondent's Counter-Memorial, ¶ 436, referring to: SMCV Request for Reconsideration, 2006/07 Royalty Assessments dated 15 September 2009 (**CE-32**).

The Respondent states that from the moment SMCV exercised its right to challenge the first assessment issued against it through SUNAT's Claims Division, SMCV was in a position to bring a legal claim challenging the measure.[460] With this challenge, SMCV formally disputed the legal basis upon which SUNAT issued the Assessment (*i.e.*, the applicability or not of the 1998 Stability Agreement).[461] The Respondent relies *inter alia* on the conclusions reached by the *Spence v. Costa Rica* tribunal, which considered the date on which a claimant challenged the respondent's regulatory conduct as the date on which the claimant knew or should have known of the alleged breach.[462] Furthermore, the Respondent follows the *Grand River v. United States* tribunal's finding that loss is incurred when liability is accrued[463] and that the Claimant (and SMCV) knew or should have known that SMCV had incurred loss by the time SMCV challenged the 2006-2007 Royalty Assessment through SUNAT's Claims Division. This is because SMCV incurred the loss or damage at the moment that it was required to pay the Assessment, which under Peruvian law was immediately as of the date of issuance of the Assessment.[464]

468. The Respondent argues that even if the Tribunal were to exclude the 2006-2007 and 2008 Royalty Assessments from its consideration because the Claimant has strategically elected not to claim for those amounts, the Claimant's claims regarding the alleged breaches of the 1998 Stability Agreement still fall outside the Tribunal's jurisdiction because the Claimant knew or should have known of the alleged breaches and related loss or damage well before the 28 February 2017 limitations period cut-off date. In particular, the Respondent states that SMCV was notified of the 2009 Royalty Assessment (which is included in Claimant's claims) on 8 July 2011, and it appealed that decision before SUNAT's Claims Division on 9 August 2011, *i.e.*, many years before the limitations cut-off in February 2017.[465]

469. The Respondent offers another alternative according to which even if the Tribunal were to consider knowledge of the alleged breaches based on Tax Assessments to be separate

[460] Respondent's Counter-Memorial, ¶ 437; Respondent's Rejoinder, ¶ 702.
[461] Respondent's Counter-Memorial, ¶ 437.
[462] Respondent's Counter-Memorial, ¶ 437, referring to: *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶ 250.
[463] Respondent's Counter-Memorial, ¶ 438, referring to: *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 77; *Mondev v. USA*, Award (**RA-6**) ¶ 87.
[464] Respondent's Counter-Memorial, ¶ 438; Bravo-Picón I (**RER-3**), ¶ 61; Morales I (**RER-2**), ¶¶ 106-107.
[465] Respondent's Rejoinder, ¶ 703.

from knowledge of the alleged breaches based on Royalty Assessments, the Claimant's claims would still fall outside of the limitations period:

1) The date when the Claimant first knew or should have known of the alleged breaches on the basis of the Royalty Assessments was 18 August 2009. As all of SUNAT's subsequent Royalty Assessments, which were made on the same legal basis, constitute a "*series of similar and related actions*," all claims for breach of the 1998 Stability Agreement arising from the Royalty Assessments must fall outside of the limitations period and, thus, fall outside of the Tribunal's jurisdiction.[466]
2) The date when the Claimant first knew or should have known of the alleged breaches on the basis of the Tax Assessments was 30 December 2009, when SMCV received notice from SUNAT that it owed GST related to the copper products produced through the Concentrator.[467] The Respondent contends that 28 January 2010, the date when SMCV challenged such Tax Assessment before SUNAT, could be the last date when the statute of limitations should have started running.[468] Since all of SUNAT's subsequent Tax Assessments constitute a "*series of similar and related actions*" in that they all rely on the same construction of the 1998 Stability Agreement, all of SMCV's breach of contract claims based on any of the subsequent Tax Assessments also fall outside of the limitations period, and, thus, outside of the Tribunal's jurisdiction.[469]

470. In any case, the Respondent asserts that all of the alternative dates it proposes occurred long before the cut-off date of 28 February 2017 and, thus, the Claimant's claims based on Royalty and Tax Assessments fall outside of the Tribunal's jurisdiction.[470]

b) The alleged breaches of the TPA

471. With respect to the alleged breaches of Article 10.5 of the TPA, the Respondent submits that most of these claims fall outside of the Tribunal's jurisdiction.

472. With respect to the Claimant's claims on the basis of legitimate expectations, arbitrary action and inconsistent and non-transparent action under Article 10.5 of the TPA, the Respondent submits that the Claimant's claims are all related to the Royalty

[466] Respondent's Counter-Memorial, ¶ 441.
[467] Respondent's Counter-Memorial, ¶ 442.
[468] Respondent's Counter-Memorial, ¶ 442; Respondent's Rejoinder, ¶ 704.
[469] Respondent's Counter-Memorial, ¶ 442.
[470] Respondent's Counter-Memorial, ¶¶ 440-444.

Assessments, and because SUNAT's Assessments are "*a series of similar and related acts of the respondent state*,"[471] the knowledge of the alleged breaches based on that series of governmental acts attaches the first act, *i.e.*, the first Assessment (the 2006-2007 Royalty Assessment). The Respondent submits that the only dates when the Claimant first knew or should have known of these alleged breaches of the TPA are, as with the alleged breaches of the 1998 Stability Agreement, either 18 August 2009 or 15 September 2009 at the latest,[472] thus making the Claimant's claims time-barred in accordance with Article 10.18.1 of the TPA. According to the Respondent, on both of those dates, the Claimant knew or should have known that SUNAT interpreted the 1998 Stability Agreement as not including activities related to the Concentrator Project.

473. With respect to the Claimant's claim on alleged due process violations, the Respondent states that the Claimant's claims are equally time-barred.[473] According to the Respondent, the Claimant first knew or should have known of the alleged TPA breach based on supposed procedural irregularities when SMCV was notified of the decisions on 20 June 2013.[474] The Respondent further argues that the time of the Claimant's knowledge of "*full extent*" of the alleged due process violations is irrelevant. Rather, what is important is the moment when the Claimant first acquired, or should have first acquired, knowledge of the breach alleged and knowledge that the Claimant or the enterprise has incurred loss or damage.[475] The Respondent argues that the Claimant's only due process claims that could remain before the Tribunal in the face of the limitations period are limited to its allegations that the Tax Tribunal (i) failed to recuse a "*conflicted decision-maker*," (ii) copy-pasted portions of the 2008 Royalty Case decision into the 2009 Royalty Case decision, and (iii) improperly assigned the 2010-2011 Royalty Case to Ms. Villanueva, because those events occurred after the cut-off date of 28 February 2017.[476]

474. With respect to the Claimant's claim that the Respondent allegedly arbitrarily failed to waive the penalties and interest assessed against SMCV for the Royalty and Tax

[471] Respondent's Rejoinder, ¶ 749, referring to: *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 81.
[472] Respondent's Counter-Memorial, ¶ 447; Respondent's Rejoinder, ¶¶ 749, 754.
[473] Respondent's Counter-Memorial, ¶¶ 451-453; Respondent's Rejoinder, ¶¶ 757 *et seq*.
[474] Respondent's Counter-Memorial, ¶ 453.
[475] Respondent's Rejoinder, ¶ 758.
[476] Respondent's Counter-Memorial, ¶ 454; Minutes of Plenary Council Meeting No. 2018-20 dated 21 June 2018 (**CE-181**); Tax Tribunal Chamber 2 Decision No. 06141-2-2018 dated 15 August 2018 (**CE-188**); Tax Tribunal Decision, No. 10574-9-2019 dated 18 November 2019 (**CE-269**); Respondent's Rejoinder, ¶ 761.

Assessments, the Respondent submits that all of the Claimant's claims concerning SUNAT's refusal to waive penalties and interest on its Royalty and Tax Assessments issued against SMCV fall outside of the Tribunal's jurisdiction.[477] First, all of the Claimant's claims based on SUNAT's decision not to waive penalties and interest arising from SUNAT's Tax Assessments against SMCV should be rejected, since Article 22.3.1 of the TPA expressly excludes taxation measures from the scope of protection under Chapter Ten of the TPA.[478] Second, with respect to the penalties and interest that SUNAT maintained on its Royalty Assessments against SMCV, the Respondent submits that the Claimant's claims under the TPA are time-barred because the Claimant first knew or should have known of the alleged Article 10.5 TPA breaches based on SUNAT's maintenance of the penalties and interest imposed on the 2006-2007 Royalty Assessments no later than 22 April 2010, when SUNAT notified SMCV that it confirmed its Royalty Assessment as well as the corresponding penalties and interest arising therefrom.[479] As SUNAT's rejections of SMCV's requests for waivers of the penalties and interest for all subsequent Royalty Assessments were all based on the same provisions of the Mining Law and Regulations and on the same interpretation of the 1998 Stability Agreement, it follows that SUNAT's rejections of SMCV's requests were all part of a "*series of similar or related actions*" by SUNAT.[480] Thus, in the Respondent's view, they do not give rise to separate breaches and the limitations period did not renew upon each denial. Accordingly, the Respondent submits that the Claimant's claims under the TPA regarding SUNAT's maintenance of the penalties and interest on the Royalty Assessments fall outside of the limitations period and, thus, the Tribunal has no jurisdiction to hear those claims.

475. The Respondent further argues that the Claimant's framing of its claims as a "*failure to waive*" penalties and interest is an attempt to delay the start date of the limitations period to as late as possible. The Respondent argues that the Claimant's real complaint is actually about SUNAT's imposition of penalties and interest, which occurred much earlier.[481] The Respondent submits that even if the Tribunal were to accept the Claimant's characterization of its penalties and interest claims, the only claim that

[477] Respondent's Rejoinder, ¶¶ 762 *et seq*.
[478] Respondent's Counter-Memorial, ¶¶ 456-458; Respondent's Rejoinder, ¶ 763.
[479] Respondent's Counter-Memorial, ¶ 459; Respondent's Rejoinder, ¶ 764.
[480] Respondent's Counter-Memorial, ¶ 462; Respondent's Rejoinder, ¶ 765; Respondent's Comments on the NDP Submission, ¶ 29.
[481] Respondent's Rejoinder, ¶ 766.

would survive the limitations period would be the claim related to the Contentious Administrative Appellate Court's decision on SMCV's waiver requests related to the 2006-2007 Royalty Assessment, which was issued on 12 July 2017.[482] The Respondent further notes that the Claimant's allegations that penalties-and-interest claims related to the Royalty Assessments only occurred each time the Assessments become final and enforceable are incorrect.[483]

476. With respect to the Claimant's claim that the Respondent allegedly arbitrarily and unreasonably refused to refund the GEM payments that SMCV made for Q4 2011 through Q3 2012, the Respondent does not dispute that the Claimant's claim was timely, given that SMCV was notified of SUNAT's decision rejecting SMCV's refund request on 22 March 2019.[484]

477. In summary, the Respondent submits that the only claims that survive the application of the limitations period of the TPA are those of alleged breaches of the TPA based on (a) due process violations related to the Tax Tribunal's alleged (i) failure to recuse a "*conflicted decision maker*", (ii) copy-and-paste of portions of the 2008 Royalty Case decision into the 2009 Royalty Case decision, and (iii) improper assignment of the 2010-2011 Royalty Case to Ms. Villanueva, (b) the Contentious Administrative Appellate Court's alleged failure to review *de novo* SMCV's waiver request related to the 2006-2007 Royalty Assessment, and (c) SUNAT's alleged failure to refund GEM payments made for Q4 2011 through Q3 2012. Among those, however, claims (b) and (c) are outside the Tribunal's jurisdiction on the basis of Article 10.1.3 of the TPA.[485]

2. The Claimant's position

478. The Claimant submits that all of its claims were submitted to arbitration within the three-year limitation period under Article 10.18.1 of the TPA.[486]

479. According to the Claimant, under the terms of Article 10.18.1 of the TPA, the limitation period can only start after a claimed breach has occurred and the claimant has incurred damage. The Claimant submits that it acquired knowledge of each of the alleged

[482] Respondent's Rejoinder, ¶ 768.
[483] Respondent's Rejoinder, ¶ 767; Respondent's Rejoinder, section III.A.1.
[484] Respondent's Rejoinder, ¶ 769; Respondent's Counter-Memorial, ¶ 464; SUNAT, Resolution No. 012-180-0018640/SUNAT dated 4 March 2019 (**CE-218**), p. 1.
[485] Respondent's Rejoinder, fn. 1395.
[486] Claimant's Reply, ¶¶ 211 *et seq.*; Claimant's Rejoinder, ¶¶ 11 *et seq.*; Claimant's Comments on the NDP Submission, ¶¶ 4 *et seq.*; Claimant's Post-Hearing Brief, ¶¶ 91 *et seq.*

breaches of the 1998 Stability Agreement and the TPA and the respective losses or damages incurred after the 28 February 2017 cut-off date.

480. The Claimant submits that the NDP submission supports its argument that Article 10.18.1 of the TPA does not bar the Claimant's claims for breaches of the 1998 Stability Agreement and Article 10.5 of the TPA.[487]

a) The alleged breaches of the 1998 Stability Agreement

481. The Claimant argues that the Respondent's breaches of the 1998 Stability Agreement did not occur until each Assessment became final and enforceable. Specifically, each final and enforceable Royalty or Tax Assessment gave rise to a separate breach of the 1998 Stability Agreement.

482. The Claimant disagrees with the Respondent's assertion that the limitation period was triggered either on 18 August 2009, 15 September 2009, or 8 July 2011, if the Tribunal excludes the 2006-2007 and 2008 Royalty Assessments from its determination of when the limitation period began to run; or either 30 December 2009 or 28 January 2010, if the Tribunal finds that knowledge of the breaches of the 1998 Stability Agreement resulting from the Tax Assessments cannot be "*imputed*" from the earlier Royalty Assessments.[488] Rather, according to the Claimant, its claims for breach of the 1998 Stability Agreement are timely.

483. First, the Claimant submits that under the terms of Article 10.18.1 of the TPA, the limitation period can only start after a claimed breach has occurred and the claimant has incurred damage. The Claimant states that the Respondent's argument that the limitation period for each of the Claimant's claims commenced at the date of notification of the 2006-2007 Royalty Assessments is incorrect because the wording of Article 10.18.1 of the TPA provides that the limitation period does not start to run until the claimant has knowledge: (i) of the alleged breach, and (ii) that the claimant or the enterprise has incurred loss or damage.[489] The Claimant submits that there is no support in the TPA for the Respondent's argument that the limitation period begins when a claimant acquires knowledge of the "*legal basis*" upon which a respondent will commit future

[487] Claimant's Comments on the US NDP Submission, ¶ 4.
[488] Claimant's Reply, ¶ 212.
[489] Claimant's Reply, ¶¶ 215-216; Claimant's Rejoinder, ¶¶ 15-19.

breaches, which will cause losses or damages to be incurred.[490] According to the Claimant, the wording of the TPA is such that it does not require knowledge that a claimant "*would incur*" loss or damage, but that it "*has incurred*" loss or damage. The Claimant submits that this approach has been confirmed by other arbitral tribunals, *e.g.*, in *Eli Lilly v. Canada*, *Resolute Forest v. Canada*, *Pope & Talbot v. Canada*, and *Mobil II v. Canada*.[491] According to the Claimant, this approach makes sense and is consistent with the intent of the Treaty parties. If the limitation period began to run before the government measure resulted in a breach and before the investor incurred loss or damage, investors would be encouraged to file international arbitration claims that are not yet ripe for adjudication.[492] The Claimant submits that the NDP submission confirms that the Claimant could not have acquired knowledge of the breach and loss resulting from each Assessment until the relevant assessment became final and enforceable.[493]

484. Furthermore, the Claimant disagrees with the Respondent's reliance on the *Grand River v. United States*, *Corona Materials v. Dominican Republic*, and *Resolute Forest v. Canada* cases when asserting that a treaty's limitations period should be interpreted strictly.[494] The Claimant purports that those decisions do not indicate that anything other than the ordinary rules of treaty interpretation apply to the interpretation of the NAFTA and CAFTA-DR limitation provisions, and that those tribunals merely observed that the limitation provisions in those treaties should be interpreted according to their plain terms and could not be modified by the tribunal.[495]

485. Second, the Claimant submits that the Respondent's breaches of the 1998 Stability Agreement did not occur until each assessment became final and enforceable.[496] According to the Claimant, it was only at such point that the relevant Assessment caused SMCV to incur loss or damage.[497] The Claimant states that the Respondent agrees that

[490] Claimant's Rejoinder, ¶ 17.
[491] Claimant's Reply, ¶ 217; Claimant's Rejoinder, ¶ 17, referring to: *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Final Award dated 16 March 2017 (**CA-411**), ¶ 167; *Resolute Forest Products v. Canada*, Decision on Jurisdiction (**RA-5**), ¶ 153; *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on Preliminary Motion by the Government of Canada dated 24 February 2000 (**CA-364**), ¶ 12; *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility dated 13 July 2018 (**CA-420**), ¶ 154.
[492] Claimant's Reply, ¶ 218.
[493] Claimant's Comments on the US NDP Submission, ¶ 8.
[494] Claimant's Reply, ¶ 219.
[495] Claimant's Reply, ¶ 219.
[496] Claimant's Reply, ¶¶ 220 *et seq.*; Claimant's Rejoinder, ¶¶ 20-25.
[497] Claimant's Reply, ¶ 220.

the Assessments did not become final and enforceable until the conclusion of the administrative process for each assessment.[498] The Claimant argues that Royalty and Tax Assessments become final and enforceable (i) on the business day after the taxpayer's deadline for submitting a challenge before SUNAT or the Tax Tribunal expires without the taxpayer having filed a challenge, (ii) on the business day after the taxpayer is served with the Tax Tribunal's resolution confirming the denial of the request for reconsideration, and (iii) if the taxpayer withdrew one or all of the claims, the business day after the taxpayer is served with the SUNAT or Tax Tribunal's resolution accepting the taxpayer's withdrawal.[499] Moreover, before the Assessments became final and enforceable, they were not final administrative decisions because SUNAT's Claims Division (or the Tax Tribunal) could have corrected the Assessments.[500] The Claimant also submits that under Peruvian law, SMCV was under no obligation to pay the Assessments until they became final and enforceable, nor could have the tax administration enforced the Assessments.[501] Therefore, only once a particular Assessment became final and enforceable did the breach of the 1998 Stability Agreement occur, because the Government through the use of its public powers implemented the non-stabilized regime against SMCV.[502] It is also on the date each Assessment became final and enforceable that SMCV incurred loss.[503]

486. The Claimant rejects the Respondent's argument that the Claimant is using a court decision or proceedings to toll the limitations period.[504] Firstly, the Claimant does not argue that the administrative review process before SUNAT's Claims Division and the Tax Tribunal "*tolled*" the limitation period but argues that the limitation period only starts to run when each Assessment became final and enforceable. Secondly, the Claimant asserts that neither SUNAT nor the Tax Tribunal are "*courts*" but administrative agencies of the MEF.[505]

487. The Claimant further disputes the Respondent's statement that if the limitation period commences only when assessments become final and enforceable against SMCV, "*any*

[498] Claimant's Reply, ¶ 220; Claimant's Rejoinder, ¶ 23.
[499] Claimant's Reply, ¶ 220, referring to: Hernández I (**CER-3**), ¶ 41; Bullard I (**CER-2**), ¶ 83.
[500] Hernández II (**CER-8**), ¶¶ 113, 116 (citing Tax Code (**CA-14**), Articles 109, 110, 127, 150).
[501] Claimant's Reply, ¶ 220; Bravo-Picón I (**RER-3**), ¶ 61; Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Article 115(a), (c); Claimant's Rejoinder, ¶ 25.
[502] Claimant's Reply, ¶ 220.
[503] Claimant's Reply, ¶ 220.
[504] Claimant's Rejoinder, ¶ 24.
[505] Claimant's Reply, ¶ 221.

claimant with genuinely untimely claims could overcome the limitations period by filing a challenge before a local administrative body or court and then waiting until the very last minute before filing its Notice of Arbitration to withdraw that challenge."[506] The Claimant notes that any claims already time-barred by the three-year limitation period under Article 10.18.1 of the TPA would also be time-barred under the far shorter periods for challenging assessments under the Peruvian Tax Code (*i.e.*, 20 working days for filing challenges before SUNAT and 15 working days for filing challenges before the Tax Tribunal), meaning that a claimant with "*untimely claims*" could not make them timely by commencing administrative review proceedings.[507]

488. Third, the Claimant submits that each final and enforceable Royalty or Tax Assessment gave rise to a separate breach of the 1998 Stability Agreement.[508] The Claimant states that the wording of Article 10.18.1 of the TPA refers to the limitation period for a "*claim*" and not for "*a series of similar or related*" claims. Moreover, Article 10.18.1 of the TPA requires knowledge of breach and loss or damages that has been incurred and not breach and loss or damages that might occur in the future.[509] The Claimant also states that under Peruvian law, each Assessment is a separate administrative act that, once it becomes final and enforceable, creates a separate cause of action for breach of the 1998 Stability Agreement.[510] In particular, (i) SMCV was required to self-assess taxes independently for each fiscal period, (ii) Article 77 of the Tax Code required SMCV to file administrative challenges for each Assessment with SUNAT's Claims Division and the Tax Tribunal, (iii) none of SUNAT's or the Tax Tribunal's resolutions had any binding or precedential effect dictating the results of future assessments or resolutions, and (iv) even after SUNAT notified SMCV of the 2006-2007 Royalty Assessments, the Government continued to confirm that the Concentrator was stabilized and that SMCV would have a very strong argument for prevailing before the Tax Tribunal.[511] In addition, the Claimant argues that it could not have acquired knowledge of the loss or damage resulting from any of the Respondent's breaches of the 1998 Stability Agreement until each of the Assessments became final and enforceable, as

[506] Claimant's Reply, ¶ 222; Respondent's Counter-Memorial, ¶ 432.
[507] Claimant's Reply, ¶ 222.
[508] Claimant's Reply, ¶ 223; Claimant's Rejoinder, ¶¶ 26 *et seq*.
[509] Claimant's Reply, ¶ 225; Claimant's Rejoinder, ¶ 28.
[510] Claimant's Reply, ¶ 226; Claimant's Rejoinder, ¶ 29.
[511] Claimant's Reply, ¶ 226; Torreblanca I (**CWS-11**), ¶¶ 80-81.

before that moment it did not yet incur any losses nor could it predict any future losses.[512]

489. Furthermore, the Claimant argues that a number of investment treaty authorities have consistently recognized that separate limitation periods apply to independent causes of action even when those causes of action result from a "*series of similar or related actions by a respondent state.*"[513] The Claimant relies on the conclusions reached *inter alia* by the *Eli Lilly v. Canada*, *Nissan v. India*, *Bilcon/Clayton v. Canada*, and *Grand River v. United States* tribunals.[514] Moreover, the Claimant states that, contrary to the claimants in the cases on which the Respondent relies, it has not alleged continuing or composite breaches in an attempt to hold Peru liable for Government actions that occurred before the cut-off date. Rather, the Claimant alleges independent breaches of the 1998 Stability Agreement based on independent causes of action arising after the cut-off date from each final and enforceable Assessment.[515] The Claimant states that the Tribunal must assess the timeliness of the Claimant's claims by reference to the actual "*breach[es] alleged*" in the Claimant's pleadings.[516] The Claimant concludes that the Respondent's own authorities (*e.g.*, *Infinito Gold v. Costa Rica, Resolute Forest v. Canada, Spence v. Costa Rica*, *Corona Materials v. Dominican Republic*, and *Apotex v. United States*) recognize that independent causes of action possess separate limitation periods.[517]

b) The alleged breaches of the TPA

490. The Claimant submits that all of its claims for breaches of Article 10.5 of the TPA are timely.[518]

---

[512] Claimant's Reply, ¶ 227; Claimant's Rejoinder, ¶ 31.
[513] Claimant's Reply, ¶ 228; Claimant's Rejoinder, ¶ 30.
[514] Claimant's Reply, ¶ 228, referring to: *Eli Lilly v. Canada*, Award (**CA-411**); *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction dated 29 April 2019 (**CA-243**); *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 March 2015 (**CA-278**), ¶¶ 281, 305; *Grand River v. USA,* Decision on Jurisdiction (**RA-4**).
[515] Claimant's Reply, ¶ 229; Claimant's Rejoinder, ¶ 33; Respondent's Counter-Memorial, ¶¶ 420-422, 429-430, 433-434, 437, 441-442, 461.
[516] Claimant's Reply, ¶ 229.
[517] Claimant's Reply, ¶ 229; Claimant's Rejoinder, ¶ 33, referring to: *Infinito Gold v. Costa Rica*, Award (**RA-1**), ¶¶ 255-256, 260, 263, 276; *Resolute Forest Products v. Canada*, Decision on Jurisdiction (**RA-5**), ¶¶ 156-158, 163; *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶ 222; *Corona Materials v. Dominican Republic*, Award on Preliminary Objections, (**RA-3**), ¶¶ 210-211; *Apotex v. USA*, Award on Jurisdiction (**RA-7**), ¶¶ 333-334.
[518] Claimant's Rejoinder, ¶¶ 34 *et seq*.

491. With respect to the Claimant's claims based on breach of legitimate expectations, arbitrary actions, inconsistent and non-transparent action, and lack of due process, the Claimant states that the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments became final and enforceable after 28 February 2017.[519] The Claimant therefore argues that it could not have acquired knowledge of the Respondent's breaches or the resulting loss or damage before that date. The Claimant disputes the Respondent's argument that claims under Article 10.5 of the TPA are time-barred because they are based on a "*series of similar or related actions by a respondent state*" and that the Claimant should have thus acquired knowledge of the breach by 15 September 2009 at the latest. The Claimant submits that the Respondent's objections fail on the same grounds as the Respondent's time-bar objection to the Claimant's Stability Agreement claims.[520] According to the Claimant, the standard for determining when causes of action for breach of the TPA arose is the same as that for determining when a cause of action for breach of the 1998 Stability Agreement arose.[521] The Claimant argues that authorities such as the *Mobil v. Canada (II)* tribunal confirm that a government decision does not give rise to a cause of action for a breach of an investment treaty until it is final and enforceable.[522] According to the Claimant, the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments each gave rise to an independent cause of action for breach of Article 10.5 of the TPA, with a separate limitation period.[523]

492. With respect to the Claimant's claims based on due process violations, the Claimant disputes the Respondent's assumption that the Claimant should have known of the alleged TPA breach when SMCV first received the decisions of the 2006-2007 and 2008 Royalty Cases.[524] The Claimant argues that it was only in 2019, when SMCV began investigating the origin of the 2006-2007 and 2008 Royalty Decisions in preparation for filing this arbitration, that it became aware that the Tax Tribunal's President Olano-Silva and Ms. Villanueva had improperly interfered in the resolution of those cases.[525] It was then only in 2021 that the Claimant was exposed to the full extent of the due

[519] Claimant's Reply, ¶ 231.
[520] Claimant's Reply, ¶ 232; Claimant's Rejoinder, ¶ 36.
[521] Claimant's Reply, ¶ 234; Claimant's Rejoinder, ¶ 36.
[522] Claimant's Reply, ¶ 233, referring to: *Mobil v. Canada (II)*, Decision on Jurisdiction and Admissibility (**CA-420**), ¶¶ 152, 172.
[523] Claimant's Reply, ¶ 234.
[524] Claimant's Reply, ¶ 235.
[525] Claimant's Reply, ¶ 236; Claimant's Rejoinder, ¶ 40.

process violation, following SMCV's request for access to public information.[526] The Claimant thus disputes that it necessarily knew of the due process violations upon receipt of the decisions themselves and argues that the facts known at the time (such as Ms. Villanueva's initials, amongst other things) were insufficient to detect a due process breach. The Claimant argues that SMCV cannot be faulted for the Respondent's own lack of transparency and that Freeport and SMCV exercised reasonable diligence when looking into the perceived procedural irregularities.[527]

493. With respect to the Claimant's claims based on the Respondent's failure to waive penalties and interest, the Claimant argues that each of the Respondent's breaches of Article 10.5 of the TPA occurred after 28 February 2017.[528]

494. With respect to the failure to waive penalties and interest on the 2006-2007 and 2008 Royalty Assessments, the Claimant explains that the Respondent breached Article 10.5 of the TPA: (i) on 21 July 2017 when the Appellate Court notified SMCV of its decision arbitrarily and unreasonably refusing to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments, and (ii) on 10 October 2017 when the Supreme Court notified SMCV of its decision arbitrarily and unreasonably refusing to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments.[529] The Claimant argues that the Contentious Administrative Courts were required to consider SMCV's entitlement to the waiver *de novo* and their arbitrary failure to do so resulted in "*self-standing*" breaches that occurred once those decisions were notified to SMCV.[530]

495. With respect to the failure to waive penalties and interest on the 2009, 2010-11, Q4 2011, 2012, 2013 Royalty Assessments and the Tax Assessments, the Claimant argues

---

[526] Claimant's Reply, ¶ 236; SMCV, Request for Access to Information dated 10 February 2021 (**CE-1092**); SMCV, Request for Access to Information dated 5 March 2021 (**CE-1094**); Email from the MEF Document Management and User Services Office to Adriana Lucia Chávez Álvarez dated 24 February 2021, 2:55 PM PET (**CE-1093**); Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva dated 22 March 2013, 4:02 PM PET (**CE-648**); Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia dated 21 May 2013, 10:47 AM PET (**CE-651**); Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 22 May 2013 8:58 AM PET (**CE-652**); Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 21 May 2013, 10:05 AM PET (**CE-650**); Email from Licette Isabel Zúñiga Dulanto to Zoraida Alicia Olano Silva dated 22 May 2013, 9:55 AM PET (**CE-653**); Email from Luis Gabriel Cayo Quispe to Zoraida Alicia Olano Silva and Licette Isabel Zuñiga Dulanto dated 24 May 2013, 8:31 AM PET (**CE-654**); Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto dated 24 May 2013, 10:23 AM PET (**CE-655**).
[527] Claimant's Reply, ¶ 237; Claimant's Rejoinder, ¶¶ 39 *et seq.*
[528] Claimant's Reply, ¶ 238.
[529] Claimant's Rejoinder, ¶ 43.
[530] Claimant's Reply, ¶ 239.

that Peru's breaches for failure to waive penalties and interest on the remaining Assessments occurred when each Assessment of penalties and interest became final and enforceable. The Claimant states that all of the Assessments, including the assessments of penalties and interest, were distinct Government actions that became final and enforceable pursuant to the applicable administrative process. The Claimant submits that no obligation to pay existed before the Assessments became final and enforceable, nor was there any knowledge or existence of a loss before this time.[531]

496. Finally, the Claimant states that the Parties agree that Freeport's claims for breach of Article 10.5 of the TPA based on Peru's failure to reimburse SMCV for Q4 2012 to Q4 2013 GEM payments are timely because Peru's denial of SMCV's GEM reimbursement request occurred on 22 March 2019.[532]

3. The Non-Disputing Party's position

497. The NDP submits that because the claimant bears the burden of proof with respect to the factual elements necessary to establish jurisdiction under Chapter Ten of the TPA, including with respect to Article 10.18.1, a claimant must prove the necessary and relevant facts to establish that each of its claims falls within the three-year limitations period.[533]

498. In addition, according to the NDP, the limitations period has been described as a "*clear and rigid*" requirement that is not subject to any "*suspension*, *prolongation*, *or other qualification*."[534] An investor first acquires knowledge of an alleged breach and loss under Article 10.18.1 of the TPA as of a particular "*date*." Such knowledge cannot first be acquired at multiple points in time or on a recurring basis and subsequent transgressions by a party arising from a continuing course of conduct do not renew the limitations period once an investor knows, or should have known, of the alleged breach and loss or damage incurred thereby.[535] Accordingly, where a "*series of similar and related actions by a respondent state*" is at issue, a claimant cannot evade the limitations period by basing its claim on "*the most recent transgression*" in that series.[536]

[531] Claimant's Reply, ¶ 240; Claimant's Rejoinder, ¶ 45.
[532] Claimant's Reply, ¶ 241; Claimant's Rejoinder, ¶ 46.
[533] Non-Disputing Party Submission, ¶ 8.
[534] Non-Disputing Party Submission, ¶ 9.
[535] Non-Disputing Party Submission, ¶ 9.
[536] Non-Disputing Party Submission, ¶ 10.

499. In addition, with respect to knowledge of "*incurred loss or damage,*" the NDP submits that under Article 10.18.1 of the TPA, a claimant may have knowledge of loss or damage even if the amount or extent of that loss or damage cannot be precisely quantified until some future date.[537]

500. For purposes of assessing what a claimant should have known, the NDP agrees with the reasoning of the *Grand River v. United States* tribunal, which held that "*a fact is imputed to [sic] person if by exercise of reasonable care or diligence, the person would have known of that fact*."[538] The NDP further agrees that it is appropriate to "*consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal*."[539] Relying on the findings of the *Berkowitz v. Costa Rica* tribunal, the NDP submits that "[t]*he 'should have first acquired knowledge' test* […] *is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known*."[540]

4. The Tribunal's analysis

501. Article 10.18.1 of the TPA sets a time limit for claims to be brought to investor-state arbitration under Articles 10.16.1(a) and 10.16.1(b). Specifically, Article 10.18.1 of the TPA provides:

> *No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.*[541]

502. Based on the wording of Article 10.18.1 of the TPA, the Tribunal's task is to (i) identify the cut-off date for the three-year limitations period, (ii) determine whether the Claimant knew or should have known of the alleged breach or breaches before that cut-off date, and (iii) determine whether the Claimant or SMCV knew or should have known that it had incurred loss or damage before that same date.

---

[537] Non-Disputing Party Submission, ¶ 11.
[538] Non-Disputing Party Submission, ¶ 12.
[539] Non-Disputing Party Submission, ¶ 12.
[540] Non-Disputing Party Submission, ¶ 12.
[541] TPA (**CA-10**), Article 10.18.1.

a) The cut-off date

503. With respect to the cut-off date, the Claimant's Notice of Arbitration was filed on 28 February 2020. The cut-off date is thus 28 February 2017. The Parties agree with this cut-off date.[542]

b) Knowledge of breach and loss

504. The Parties have distinguished the time-bar issue between the claims based on the alleged breaches of the 1998 Stability Agreement and those based on the alleged breaches of the TPA. The Tribunal will thus address each of these allegations in turn.

aa) Knowledge of breach and loss in relation to the 1998 Stability Agreement claims

505. The Claimant has submitted claims alleging breaches of the 1998 Stability Agreement for (i) the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments, (ii) the Income Tax Assessments for 2006 to 2013, (iii) the Additional Income Tax Assessments for 2007 to 2013, (iv) the General Sales Tax Assessments (including those on Non-Residents) for 2005 to 2011, (v) the Temporary Tax on Net Assets Assessments for 2009, 2010, 2011, and 2013, (vi) the Q4 2011-2012 and 2013 Special Mining Tax Assessments, and (vii) the 2013 Complementary Mining Pension Fund Assessments.[543] The Claimant does not submit claims for the Respondent's alleged breaches of the 1998 Stability Agreement arising from the 2006-2007 and 2008 Royalty Assessments "*because those claims fall outside the three-year prescription period*."[544]

506. Therefore, the question that arises is whether the Respondent's alleged breaches of the 1998 Stability Agreement constitute a single breach with a single limitation period as argued by the Respondent,[545] or 36 separate alleged breaches of the 1998 Stability Agreement and as many different limitation periods as argued by the Claimant.[546]

507. In this regard, the Tribunal finds that the different assessments allegedly breaching the 1998 Stability Agreement constitute separate measures and separate causes of action

[542] Respondent's Counter-Memorial, ¶ 412; Claimant's Reply, ¶ 211.
[543] Claimant's Memorial, ¶ 353.
[544] Claimant's Memorial, ¶ 355.
[545] Respondent's Rejoinder, ¶ 700.
[546] Claimant's Rejoinder, ¶ 28.

with distinct limitation periods. This is because should the Claimant's claims be founded, SUNAT's Assessments would each individually breach the 1998 Stability Agreement as instantaneous breaches rather than continuing breaches. This finding does not "*render the limitations provisions ineffective*" in the words of the *Grand River v. United States* tribunal because the Claimant is not permitted to bring forward claims for which the time-bar has elapsed, such as for example the 2006-2007 and 2008 Royalty Assessments.[547] Rather, the time bar remains effective for each and every breach for which knowledge and loss pre-date the entry into force of the Treaty.

508. The fact that SUNAT's Assessments were all based on the same legal instrument, the 1998 Stability Agreement, and adopted in light of the same legal provisions in the Mining Law and Regulations, does not alter the Tribunal's conclusion. As a matter of fact, and although it is not necessarily relevant for the purposes of interpretation of the TPA, the Tribunal notes that separate limitation periods applied for the challenge of SUNAT's Assessments under Peruvian law because such Assessments all constituted different causes of action.[548] Accordingly, although the 2006-2007 Royalty Assessments were also based on the 1998 Stability Agreement and in light of the same legal provisions in the Mining Law and Regulations as the subsequent SUNAT Assessments, the Tribunal cannot accept that knowledge of breach or loss was acquired only once and in relation to the 2006-2007 Royalty Assessments. Rather, the Tribunal finds that there are as many limitation periods as there are alleged breaches.

509. The Tribunal's second enquiry concerns knowledge of breach or loss. For the Claimant's claims to be time-barred, Article 10.18.1 of the TPA requires the Claimant to have actual or constructive knowledge of the alleged breach and that the Claimant or SMCV had knowledge that loss or damage was incurred prior to the cut-off date.[549] These requirements are cumulative. In this regard, the Tribunal agrees with the observation of the tribunal in *Corona Materials v. Dominican Republic* that "*knowledge of the breach in and of itself is insufficient to trigger the limitation period's running*."[550] This means that as long as either knowledge of breach or knowledge of loss post-date the cut-off date, the Claimant's claims would be timely.

---

[547] *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 81.
[548] Tax Code (**CA-14**), Articles 137(2), 146.
[549] TPA (**CA-10**), Article 10.18.1.
[550] *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**), ¶ 194.

510. In the case at hand, the Tribunal finds that by assessing knowledge of loss or damage (without the need of assessing knowledge of breach), the Claimant has shown to the satisfaction of the Tribunal that the Claimant's claims have been submitted within the limitations period.

511. The wording of the TPA clearly requires a claimant to have "*incurred loss or damage*" in the past tense. The Tribunal has taken note of the case law cited in support of the Parties' arguments, including *Grand River v. United States*, *Spence v. Costa Rica*, and *Mondev v. United States* according to which the limitation clause does not require full or precise knowledge of loss or damage.[551] However, in the Tribunal's view, this case does not hinge on the Claimant's or SMCV's full or precise knowledge of loss or damage but on the certainty that damage *has been incurred*. The Tribunal finds that no loss or damage was incurred until the disputed assessments became final. This is because until then, they could still be corrected at the administrative level. This finding does not contradict the findings in *Apotex v. United States* and *Mondev v. United States*, according to which a claimant cannot use a court decision or subsequent court proceeding to toll the limitation period.[552] Here, the Claimant did not use a court decision or subsequent court proceedings to toll the limitation period. The Claimant rather used all legitimate administrative means of review in Peru before it resorted to bringing a TPA claim. Deciding otherwise would result in claimants prematurely filing claims before investment arbitration tribunals under the TPA before any corrective domestic administrative review can take place.

bb) Knowledge of breach and loss in relation to the alleged TPA breaches

512. The Tribunal turns to knowledge of breach and loss in relation to the alleged TPA violations.

[551] *Grand River v. USA*, Decision on Jurisdiction (**RA-4**), ¶ 77; *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶ 213; *Mondev v. USA*, Award (**RA-6**), ¶ 87.
[552] *Mondev v. USA*, Award (**RA-6**), ¶ 87; *Apotex v. USA*, Award on Jurisdiction (**RA-7**), ¶ 331.

1. The Claimant's Article 10.5 claims based on the alleged breach of legitimate expectations, arbitrary actions, inconsistent and non-transparent actions, and lack of due process

513. First, the Claimant has alleged that the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments breached the Respondent's obligations under Article 10.5 of the TPA to refrain from frustrating the Claimant's and SMCV's legitimate expectations, engaging in arbitrary, inconsistent, and non-transparent actions, and violating SMCV's due process rights on the dates upon which each assessment became final and enforceable.[553]

514. The Tribunal has already found above that claims for breach of the 1998 Stability Agreement based on the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments were not time-barred. Accordingly, the Tribunal also rejects the Respondent's argument in relation to the time-bar as applied to the alleged TPA breaches for the same reasons.

2. The Claimant's Article 10.5 claims based on alleged due process violations

515. Second, the Claimant has alleged that there were due process violations in the 2006-2007 and 2008 Royalty Cases as well as in the 2009, 2010-2011, and Q4 2011 Royalty Cases.

516. The Tribunal notes that the Respondent does not dispute that the due process claims based on the 2009, 2010-2011 and Q4 2011 Royalty Cases are timely.[554]

517. However, the Parties disagree as to the timeliness of the claims based on the 2006-2007 and 2008 Royalty Cases. The Tribunal will thus turn to each of the Claimant's allegations in relation to the 2006-2007 and 2008 Royalty Cases in turn:

1) (*Due Process Claim 1*) The Claimant claims that the President of the Tax Tribunal, Ms. Olano, who should have no role in the decision making of the chambers of the Tax Tribunal, interfered to resolve SMCV's challenges by improperly tasking her assistant, Ms. Villanueva, with drafting the resolution in the 2008 Royalty Case.
2) (*Due Process Claim 2*) The Claimant claims that President Olano intervened in the resolution of the 2006-2007 Royalty Case by ensuring that the 2008 Royalty

[553] Claimant's Reply, ¶ 231.
[554] Respondent's Counter-Memorial, ¶ 454.

Case, which was filed nine months after the 2006-2007 Royalty Case, would "*proceed[] on a fast track*" and would be issued first.

3) (*Due Process Claim 3*) The Claimant argues that by adopting a nearly identical resolution to the 2008 Royalty Case in the 2006-2007 Royalty Case, Chamber 10 "*abdicated [its] duty to independently deliberate in the challenge to the 2006-2007 Royalty Assessments*."[555]

518. According to the Claimant, while SMCV received the decisions of the 2006-2007 and 2008 Royalty Cases in 2013, SMCV and the Claimant only became aware of the full extent of the alleged due process violations in 2021, as a result of a request for access to public information.[556] In contrast, the Respondent argues that the procedural irregularities appear on the face of the decisions, meaning that SMCV should have first known about them when it first received them.[557]

519. The Tribunal finds that the Claimant's Due Process Claims 1 and 2 are not time-barred. This is because, as the Claimant has argued, the evidence on which the Claimant relies to make its claims was only made available to SMCV through its freedom of information request in 2021.[558]

520. With respect to Due Process Claim 3, the Tribunal acknowledges that SMCV necessarily acquired knowledge of the fact that the resolutions in the 2006-2007 and 2008 Royalty Cases were "*nearly identical*" as soon as the decisions were rendered in 2013.[559] However, also in this regard, the Tribunal cannot exclude that the full evidence on which the Claimant relies to make its claim was only made available to SMCV through its freedom of information request in 2021. Accordingly, the Tribunal concludes that the Claimant's Due Process Claim 3 is not time-barred, either.

3. The Claimant's Article 10.5 claims based on the Respondent's alleged failure to waive penalties and interest

521. Third, the Claimant has alleged that the Respondent failed to waive penalties and interest in breach of Article 10.5 of the TPA.

522. Specifically, the Claimant makes three claims:

[555] Claimant's Memorial, ¶¶ 390-392; Claimant's Reply, ¶¶ 165-168.
[556] Claimant's Reply, ¶ 236.
[557] Respondent's Counter-Memorial, ¶ 453.
[558] Claimant's Memorial, ¶¶ 389 *et seq*.
[559] Claimant's Reply, ¶ 168.

1) (*Failure to Waive Claim 1*) The Claimant argues that the Respondent breached Article 10.5 of the TPA when the Supreme Court notified SMCV of its decision refusing to consider *de novo* SMCV's alleged entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments.
2) (*Failure to Waive Claim 2*) The Claimant argues that the Respondent breached Article 10.5 of the TPA when the Appellate Court notified SMCV of its decision refusing to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments.
3) (*Failure to Waive Claim 3*) The Claimant argues that the Respondent breached Article 10.5 of the TPA when each of the 2009, 2010-2011, Q4 2011, 2012 and 2013 assessments of penalties and interest on Royalty and Tax Assessments became final and enforceable.[560]

523. With respect to the Claimant's Failure to Waive Claims 1 and 2, the Tribunal notes the Respondent's submission that the Claimant's true complaint underlying its claims is SUNAT's imposition of penalties and interest against SMCV in the first place. The Tribunal disagrees with the Respondent's characterization of the Claimant's claim. The Claimant has framed its claims as claims made against judicial acts, which constitutes a different cause of action as a claim made against the SUNAT Assessments. The Supreme Court notified SMCV of its decision refusing to consider *de novo* SMCV's alleged entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments on 10 October 2017. The Appellate Court notified SMCV of its decision refusing to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments on 21 July 2017. Both dates post-date the cut-off date and the Claimant's Failure to Waive Claims 1 and 2 are accordingly not time-barred.

524. With respect to the Claimant's Failure to Waive Claim 3, the Tribunal equally rejects the Respondent's objection for the same reasons as held above (see above paras. 507 *et seq*.). This is because SMCV only acquired knowledge of loss or damage at the end of the administrative process, when the loss or damage was certain.

[560] Claimant's Reply, ¶¶ 238-240.

4. The Claimant's Article 10.5 claims based on the Respondent's alleged failure to reimburse GEM payments

525. With regard to the Claimant's claims for breach of Article 10.5 of the TPA based on the Respondent's alleged failure to reimburse SMCV for Q4 2011 to Q3 2012 GEM payments, the Parties agree to the timeliness.[561]

B. The Respondent's claim that the penalties and interest on assessed taxes fall outside the Tribunal's jurisdiction because they constitute "*taxation measures*" under Article 22.3.1 of the TPA

1. The Respondent's position

526. The Respondent argues that penalties and interest imposed on SMCV for its failure to pay taxes assessed in SUNAT's Tax Assessments constitute taxation measures, which are excluded from the scope of Article 10.5 of the TPA under Article 22.3.1 of the TPA.[562] Thus, the Tribunal may not exercise jurisdiction over the Claimant's claims related to those penalties and interest.

527. According to the Respondent, the TPA defines "*measure*" broadly, to include "*any law, regulation, procedure, requirement, or practice.*"[563] Had the parties to the TPA intended "*taxation measures*" to be limited solely to "*taxes*," as the Claimant suggests, Article 22.3.1 of the TPA would only have carved-out "*taxes*" from the investment chapter rather than "*taxation measures*."[564]

528. In support of its position, the Respondent submits that previous tribunals have also adopted a broad interpretation of "*taxation measures*" and that such term should be interpreted as including more than just the taxes themselves. For example, the *Canfor v. United States* tribunal interpreted "*taxation measures*" in NAFTA's Article 2103.1 (which is identical to TPA's Article 22.3.1), as being "*broader than 'law'.*"[565] The *Link Trading v. Moldova* tribunal considered the term "*taxation*" under the applicable treaty

[561] Claimant's Reply, ¶ 266; Claimant's Rejoinder, ¶ 46; Respondent's Rejoinder, ¶ 769.
[562] Respondent's Counter-Memorial, ¶¶ 446, 456-458, 490, fn. 904; Respondent's Rejoinder, ¶¶ 770 *et seq.*; Respondent's Comments on the NDP Submission, ¶¶ 5, 30 *et seq*.; Respondent's Post-Hearing Brief, ¶¶ 285 *et seq*.
[563] Respondent's Rejoinder, ¶ 772; TPA (**CA-10**), Article 1.3.
[564] Respondent's Rejoinder, ¶ 775.
[565] Respondent's Rejoinder, ¶ 772, referring to: *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question dated 6 June 2006 (**RA-9**), ¶ 258.

"*broad enough to cover customs duties and other forms of raising revenue that are within the State's power*."[566]

529. The Respondent further argues that the United States' interpretation of the TPA is consistent with its interpretation of the TPA.[567] According to the Respondent, it is clear that penalties and interest imposed because of a taxpayer's failure to pay its taxes are "*taxation measures*" because the imposition of penalties and interest (i) constitutes a measure for the enforcement of taxes, (ii) is a practice related to taxation, and (iii) is a measure related to taxation. SUNAT's refusal to waive these penalties and interest constitutes likewise a practice or procedure related to taxation. That refusal therefore also qualifies as a taxation measure under Article 22.3.1 of the TPA.[568]

530. The Respondent notes that the Claimant agrees that the Tribunal should "*look to Peruvian law to determine whether a Government measure constitutes 'taxation.'*"[569] In this respect, the Respondent submits that Peruvian Laws No. 30506 and 30230 recognize that the application of penalties and interest are taxation measures, as they are part of the government's administration of taxes. Specifically, Peruvian Law No. 30506 provides that the regulation of tax-related penalties and interest is a part of the Executive Branch's powers and duties in administering taxes,[570] while Law No. 30230 provides that the procedures in the determination of tax debts subject to adjustment (due to inflation) includes the assessment of the corresponding interest.[571] Also according to the Respondent's tax experts, penalties and interest related to tax assessments are considered "*tax debt*" under Peruvian law, and therefore any measure related to the assessment (calculation), extinction and reprograming of tax-related penalties and interest is a taxation measure.[572]

---

[566] Respondent's Rejoinder, ¶ 772, referring to: *Link Trading v. Department for Customs Control of Republic of Moldova*, Award on Jurisdiction dated 16 February 2001 (**RA-101**), p. 9; Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts) (**RA-102**), p. 458.
[567] Respondent's Comments on the NDP Submission, ¶ 31.
[568] Respondent's Comments on the NDP Submission, ¶ 32.
[569] Respondent's Rejoinder, ¶ 773; Claimant's Reply, ¶ 272.
[570] Respondent's Rejoinder, ¶ 773; Law Delegating to the Executive Branch the Power to Legislate on Matters of Economic Reactivation and Formalization, Citizen Security, Fight Against Corruption, Water and Sanitation and Reorganization of Petroperú S.A., Law No. 30506 dated 6 October 2016 (published on 9 October 2016) (**RE-327**), Article 2(1)(a)(5).
[571] Respondent's Rejoinder, ¶ 773; Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230 dated 12 July 2014 (**CA-209**), Articles 4.1-4.3.
[572] Respondent's Rejoinder, ¶ 774; Bravo-Picón II (**RER-8**), ¶¶ 258-260.

531. Finally, the Respondent comments on the Claimant's reliance on allegedly opposing case law, such as the *Nissan v. India* and *Murphy v. Ecuador (II)* cases, which in the Respondent's view is unjustified.[573]

2. The Claimant's position

532. The Claimant argues that Article 22.3.1 of the TPA does not apply to penalties and interest on the Tax Assessments.[574] The Claimant explains that Article 22.3.1 of the TPA applies only to measures that constitute "*taxation*," *i.e.,* measures that impose tax obligations. The Claimant states that the Respondent's objection is based on the fundamentally flawed premise that "*taxation measures*" encompasses more than just "*taxes*."[575]

533. The Claimant agrees that the Tribunal must look to Peruvian law to determine whether a Government measure constitutes "*taxation*" since this term is not defined in the TPA.[576] According to the Claimant, Peruvian law defines a tax as a "*monetary obligation, set out in law, which does not constitute a penalty for an unlawful action […] that must be paid by the person that is in the situation determined by the law*."[577] The Claimant lists three categories of obligations falling within that definition: (i) taxes (*impuestos*), which are "*monetary obligations triggered by a specific set of circumstances determined by the State […] based on the taxpayer's economic capacity*;" (ii) contributions, which are "*monetary obligations triggered by the benefits a taxpayer receives from public works or services*;" and (iii) fees, which are "*monetary obligations triggered by a public service the State provides the taxpayer or by a permit the State issues to the taxpayer*."[578]

534. Relying on decisions of the Constitutional Court and the Tax Tribunal, the Claimant argues that neither penalties nor interest on tax assessments constitute taxation under Peruvian law. Specifically, the Peruvian law definition of taxes expressly excludes penalties and, accordingly, penalties are not classified as one of the three categories of

---

[573] Respondent's Rejoinder, ¶ 776.
[574] Claimant's Reply, ¶¶ 271 *et seq.*; Claimant's Rejoinder, ¶¶ 77 *et seq.*; Claimant's Comments on the NDP Submission, ¶¶ 24 *et seq.*; Claimant's Post-Hearing Brief, ¶¶ 117 *et seq.*
[575] Claimant's Rejoinder, ¶ 78.
[576] Claimant's Reply, ¶ 272.
[577] Claimant's Reply, ¶ 272; Hernández II (**CER-8**), ¶ 132; Geraldo Ataliba, *Tax Incidence Hypothesis* (1987) (**CA-354**), ¶ 9.9; Constitutional Court Decision, Case No. 3303-2003-AA/TC dated 28 June 2004 (**CA-378**), p. 3; Tax Tribunal Resolution No. 889-5-2000 dated 27 October 2000 (**CA-365**), p. 4.
[578] Claimant's Reply, ¶ 272; Hernández II (**CER-8**), ¶ 133.

taxes in the Tax Code.[579] The Tax Tribunal also recognized that penalties and taxes are independent obligations arising from "*administrative acts of a different nature, intent, content, purpose and legal consequence*" and that, unlike taxes, penalties serve a punitive purpose.[580] The purpose of penalties is not to "*fund the provision of public goods and services and help redistribute wealth*" but "*to punish taxpayers that break tax regulations and deter future violations*."[581]

535. The Claimant submits that interest is also not a "*taxation measure,*" because (i) interest is not classified as one of the three categories of taxes of the Tax Code and is an obligation separate and independent from a tax assessment, and (ii) unlike taxes, the purpose of interest is to "*compensate the Government for the loss of the use of money as a result of the taxpayer's default*."[582]

536. In response to the argument made by the Respondent's experts that penalties and interest are taxation measures because they are identified as "*components of tax debt*" under the Tax Code, the Claimant and its taw law expert submit that the term "*tax debt*" encompasses a "*broad range*" of concepts that the Tax Code bundles together purely for purposes of procedural and administrative convenience because they are each administered by the Tax Administration and are subject to "*similar procedures for their administration, payment, collection, and challenge,*" even though they are not taxes.[583] The Claimant also notes that the Respondent does not deny that the decisions of the Tax Tribunal and the Constitutional Court clearly show that Peruvian law does not characterize penalties and interest as taxes and expressly excludes penalties from the definition of taxes.[584]

---

[579] Claimant's Reply, ¶ 273; Hernández II (**CER-8**), ¶¶ 132, 136; Constitutional Court Decision, Case No. 3303-2003-AA/TC dated 28 June 2004 (**CA-378**), p. 3; Tax Tribunal Resolution No. 889-5-2000 dated 27 October 2000 (**CA-365**), p. 4; Tax Tribunal Resolution No. 04170-1-2011 dated 16 March 2011 (**CA-394**), p. 4.
[580] Claimant's Reply, ¶ 273; Hernández II (**CER-8**), ¶¶ 136-137; Tax Tribunal Resolution No. 04170-1-2011 dated 16 March 2011 (**CA-394**), pp. 4-5.
[581] Claimant's Reply, ¶ 273; Hernández II (**CER-8**), ¶¶ 130, 135, 139; Ramón Valdés Costa, *Tax Lawcourse* dated 1996 (**CA-361**), p. 77.
[582] Claimant's Reply, ¶ 273, referring to: Hernández II (**CER-8**), ¶ 140; Peruvian Civil Code, Legislative Decree No. 295 dated 24 July 1984 (**CA-39**), Article 1242; Silvia Núñez Riva, *When to Pay Tax Moratory Interest?*, 43 LAW AND SOCIETY dated 2014 (**CA-402**), p. 231; Constitutional Court Decision, Case No. 02169-2016-PA/TC dated 19 April 2022 (**CA-429**), p. 11; Constitutional Court Decision, Case No. 2036-2021-PA/TC dated 7 December 2021 (**CA-428**), p. 26; Constitutional Court Decision, Case No. 05289-2016-PA/TC dated 11 November 2021 (**CA-427**), p. 19; Constitutional Court Decision, Case No. 04532-2013-PA/TC dated 16 August 2018 (**CE-189**), p. 7.
[583] Claimant's Rejoinder, ¶ 81; Hernández III (**CER-13**), ¶ 17.
[584] Claimant's Rejoinder, ¶ 81.

537. The Claimant further relies on the findings of other tribunals, such as in *Nissan v. India*, *Murphy v. Ecuador (II)*, and *Antaris v. Czech Republic* which interpreted tax exclusions in other treaties.[585] According to the Claimant, those tribunals confirmed that government measures, including penalties, do not qualify as "*taxation measures*" merely because they are connected to taxation measures.[586]

3. The Non-Disputing Party's position

538. The NDP submits that Article 22.3.1 of the TPA generally excludes taxation measures from the TPA's provisions.[587] Article 22.3 of the TPA includes, however, several exceptions to this general exclusion. Taxation measures are not subject to any Chapter Ten obligations, including those embodied in Article 10.5, that are not expressly identified as exceptions to the Article 22.3.1 general exclusion of taxation measures from the TPA.[588]

539. The NDP submits that Article 22.3.1 of the TPA applies to all "*taxation measures*." A "*measure*" is defined broadly in Article 1.3 to include "*any law, regulation, procedure, requirement or practice*." Any "*practice*" related to "*taxation*" is therefore addressed by Article 22.3.1. A "*practice*" in this context includes not only the application of, or failure to apply a tax, but also the enforcement or failure to enforce a tax.[589]

4. The Tribunal's analysis

540. The issue for the Tribunal to determine is whether Article 22.3.1 of the TPA bars the Claimant's TPA Article 10.5 claims for the Respondent's alleged failure to waive penalties and interest on the Tax Assessments. In what follows, the Tribunal sets out its analysis of this issue and reaches by majority the conclusion that the disputed penalties and interest on the Tax Assessments fall outside of the Tribunal's jurisdiction.

541. Article 22.3.1 of the TPA provides:

---

[585] Claimant's Rejoinder, ¶¶ 82-83, referring to: *Nissan v. India*, Decision on Jurisdiction (**CA-243**), ¶¶ 385-386; *Murphy Exploration & Production Company – International v. Republic of Ecuado*r, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award dated 6 May 2016 (**CA-279**), ¶¶ 168-169, 190-192; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award dated 2 May 2018 (**CA-445**), ¶ 242.
[586] Claimant's Rejoinder, ¶ 83, referring to: *Nissan v. India*, Decision on Jurisdiction (**CA-243**), ¶¶ 385, 386; *Murphy v. Ecuador*, Partial Final Award (**CA-279**), ¶¶ 168-169, 190-192; *Antaris v. Czech Republic*, Award (**CA-445**), ¶ 242.
[587] NDP Submission, ¶¶ 31 *et seq.*
[588] NDP Submission, ¶ 31.
[589] NDP Submission, ¶ 32.

Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.[590]

542. With regard to the "*[e]xcept as set out in this Article*" exemption, the Tribunal notes that Article 22.3 of the TPA provides for a number of exceptions to the carve-out of taxation measures from the scope of application of the TPA. However, Article 22.3 of the TPA does not carve out the obligations embodied in Article 10.5 of the TPA. Accordingly, none of the exceptions to the carve-out of taxation measures apply in this case.

543. As to the question of whether the imposition of penalties and interest on the Tax Assessments (or the failure to waive them) constitute "*taxation measures*" under the TPA, the Tribunal finds that SUNAT's imposition of penalties and interest on the Tax Assessments cannot be treated differently than SUNAT's failure to waive such penalties and interest for the purposes of the Tribunal's jurisdiction. Finding otherwise would lead to the situation in which claimants could still bring precluded "*taxation measures*" (e.g. a tax assessment) before tribunals under the TPA simply by arguing that the State has failed to waive them.

544. Turning to the notion of "*taxation measure*" under the TPA, the Tribunal notes that the term is not defined in the TPA. The Claimant argues that because the TPA does not define "*taxation measures*", the Tribunal "*must look to Peruvian law to determine whether a Government measure constitutes 'taxation.*"'[591] The Tribunal disagrees. The TPA is an international treaty and the meaning of "*taxation measure*" is, thus, a matter for treaty interpretation that is subject to the general principles of interpretation of the VCLT. This exercise is a matter of international law, although domestic law may play a role as a matter of fact. The fact that domestic law treats or does not treat certain measures as taxes or taxation measures is not dispositive of whether this constitutes a "*taxation measure*" under the Treaty. The Claimant's expert Mr. Hernández has opined on the issue of whether penalties and interest are taxes under Peruvian law but has specifically stated that he does "*not attempt to interpret this Treaty term as a matter of international law*."[592] The Tribunal accordingly considers his expert testimony to be inconclusive for the interpretation of the TPA.

[590] TPA (**CA-10**), Article 22.3.1.
[591] Claimant's Reply, ¶ 272.
[592] Hernández II (**CER-8**), ¶ 129.

545. The Tribunal turns to the ordinary meaning of "*taxation measure*" in the context of the TPA and in light of its object and purpose, in accordance with Article 31(1) of the VCLT.

546. Article 1.3 of the TPA broadly defines the term "*measure*" as "*any law, regulation, procedure, requirement or practice*."[593] Any law, regulation, procedure, requirement or practice related to "*taxation*" is addressed by Article 22.3.1 of the TPA.

547. Turning to the term "*taxation*", the Tribunal notes that the TPA refers to both "*taxes*" and "*taxation measures.*"[594] Those terms must accordingly refer to different concepts. Moreover, in the Tribunal's view, the word "*taxation*" refers to a broader notion than the term "*tax*". The Tribunal notes in this regard that the *Link Trading v. Moldova* tribunal considered the term "*taxation*" under the applicable treaty "*broad enough to cover customs duties and other forms of raising revenue that are within the State's power*."[595] Other investment tribunals also share the understanding that the term "*taxation measure*" is broad.[596]

548. The Tribunal is of the view that "*taxation measures*" include measures that are part of the regime for the imposition and enforcement of a tax. The Tribunal finds that the application of, or failure to apply a tax, as well as the enforcement or failure to enforce a tax constitute "*practice(s)*" related to "*taxation*." In this regard, the Tribunal notes that both the United States and Peru, *i.e.,* the Treaty Parties, have expressed agreement with this position in this proceeding.[597]

549. Article 22.3.4 of the TPA also provides useful context to the issue of whether tax enforcement measures, such as penalties and interest, constitute "*taxation measures*." Article 22.3.4 of the TPA sets out a number of exclusions to the taxation measures exception of Article 22.3.1 of the TPA. It specifically provides that a number of provisions of the Treaty relating to national treatment and most-favored nation treatment are excluded from the principle in Article 22.3.1 of the TPA and shall thus apply to taxation measures.[598] As an exception, Article 22.3.4(g), in turn, provides that this

[593] TPA (**CA-10**), Article 1.3.
[594] See for example: TPA (**CA-10**), Article 22.5.
[595] *Link-Trading v. Department for Customs Control of Republic of Moldova*, Award on Jurisdiction dated 16 February 2001 (**RA-101**), p. 9.
[596] *Canfor v. USA*, Decision on Preliminary Question (**RA-9**), ¶ 258 (in which the tribunal found that a "*'measure' is […] broader than 'law.'*").
[597] Respondent's Comments on the NDP Submission, ¶ 31; NDP Submission, ¶ 32.
[598] TPA (**CA-10**), Article 22.3.4.

exclusion shall not apply "*to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes […]*."[599] The Tribunal finds that this wording confirms that the Treaty parties did not intend the Treaty to apply to the enforcement of taxation measures.

550. Finally, the Tribunal turns to the object and purpose of the Treaty. The object and purpose of the Treaty is *inter alia* to "*promote regional economic integration*" between the TPA parties, "*establish clear and mutually advantageous rules governing their trade*", "*ensure a predictable legal and commercial framework for business and investment*", as well as "*preserve their ability to safeguard the public welfare*."[600] The purpose of Chapter Twenty-Two is to preserve the States' sovereign power in matters of legitimate regulatory interest to States. With respect to Article 22.3 of the TPA in particular, the Tribunal agrees with the *Murphy v. Ecuador* tribunal's finding, which considered that the purpose of the tax carve-out in the underlying treaty is to "*preserve the States' sovereignty in relation to their power to impose taxes in their territory*."[601] The *Murphy v. Ecuador* tribunal accordingly considered that "*it is necessary for the Tribunal to examine whether that measure comes within the State's domestic tax regime*."[602].

551. Adopting the same analysis in the case at hand, the Tribunal is of the view that the imposition of penalties and interest on tax assessments and the refusal to waive them fall under the Peruvian tax regime. While the Respondent's experts Mr. Bravo and Mr. Picón agree that penalties and interest are not taxes under Peruvian law, they testify that penalties and interest nevertheless constitute "*tax measures*":[603]

   – Law No. 30506 provides that the regulation of tax-related penalties and interest is a part of the Executive Branch's powers and duties in administering taxes;[604]

[599] TPA (**CA-10**), Article 22.3.4(g).
[600] TPA (**CA-10**), Preamble.
[601] *Murphy Exploration & Production Company – International v. The Republic of Ecuador,* PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 (**CA-279)**, ¶ 165.
[602] *Murphy Exploration & Production Company – International v. The Republic of Ecuador,* PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 (**CA-279)**, ¶ 166.
[603] Bravo-Picón II (**RER-8**), ¶¶ 255 *et seq.*
[604] Law Delegating to the Executive Branch the Power to Legislate on Matters of Economic Reactivation and Formalization, Citizen Security, Fight Against Corruption, Water and Sanitation and Reorganization of Petroperú S.A., Law No. 30506 dated 6 October 2016 (published on 9 October 2016) (**RE-327**), Article 2(1)(a)(5).

- Law No. 30230 provides that the procedure in the determination of tax debts subject to adjustment includes the assessment of the corresponding interest;[605]
- Article 28 of the Tax Code recognizes penalties and interest related to tax assessments as "*tax debt;*"[606]
- The Tax Tribunal recognized that a penalty assessment was to punish a "*conduct or omission that violates [a tax] law*;"[607]
- The Constitutional Court recognized that "*charging moratory interest on tax debts is aimed at encouraging its payment on time, as well as compensating the tax creditor for the delay on the collection of the debt*."[608]

552. Accordingly, the Tribunal concludes that the penalties and interest on the Tax Assessments (and SUNAT's failure to waive them) constitute measures that fall within the State's domestic tax regime.

553. Accordingly, the Tribunal concludes that the Claimant's claims based on Article 10.5 of the TPA for the Tax Assessments' penalties and interest assessed against SMCV are not within the jurisdiction of the Tribunal as they constitute "*taxation measures*" excluded by Article 22.3.1 of the TPA.

C. The Respondent's claim that the acts or facts upon which the Claimant bases its claim occurred before the entry into force of the TPA

1. The Respondent's position

554. The Respondent argues that the Claimant's claims are based on acts or facts that occurred before the TPA entered into force on 1 February 2009, and thus, the claims fall outside of the Tribunal's jurisdiction in accordance with Article 10.1.3 of the TPA.[609]

555. The Respondent submits that nothing in the TPA provides for the retroactive application of investment protections or the dispute resolution mechanisms in Chapter Ten.[610] Article 28 of the VCLT and Article 13 of the ILC Articles support the Respondent's argument that the Treaty does not apply retroactively.[611] The Respondent adds that in interpreting identical language in CAFTA, for example, the *Spence v. Costa Rica*

[605] Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230 dated 12 July 2014 (**CA-209**), Articles 4.1-4.3.
[606] Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Article 28.
[607] Tax Tribunal, Resolution No. 04170-1-2011 dated 16 March 2011 (**CA-394**), p. 4.
[608] Constitutional Court, Decision, Case No. 02169-2016-PA/TC dated 19 April 2022 (**CA-429**), ¶ 40.
[609] Respondent's Counter-Memorial, ¶¶ 469 *et seq*.; Respondent's Rejoinder, ¶¶ 778 *et seq*.; Respondent's Post-Hearing Brief, ¶¶ 288 *et seq*.
[610] Respondent's Counter-Memorial, ¶ 470.
[611] Respondent's Counter-Memorial, ¶¶ 470-471.

tribunal concluded that where the alleged conduct that gives rise to a claimant's claim is "*deeply and inseparably rooted*" in a respondent's "*pre-CAFTA entry into force conduct*," the tribunal has no jurisdiction to hear that claim.[612] The Respondent submits that this finding is consistent with international law precedents such as the *Phosphates in Morocco* case.[613]

556. The Respondent submits that, in this case, the acts which the Claimant complains about are deeply and inseparably rooted in an act that occurred before 1 February 2009.[614]

557. With respect to the alleged breaches of the 1998 Stability Agreement, the Respondent submits that such alleged breaches all stem from acts or facts that took place before the TPA entered into force.[615] The Respondent submits that the Claimant's allegations of breach are deeply and inseparably rooted in MINEM's interpretation of the 1998 Stability Agreement and Mining Law and Regulations, which was established (by the Claimant's own account) no later than June 2006 through the June 2006 Report, which was known to the Claimant no later than June 2008.[616] The June 2006 Report, which established that the Concentrator fell outside the scope of the 1998 Stability Agreement and therefore was subject to royalty and tax payments according to the non-stabilized regime, constitutes the genesis of the dispute.[617] The Respondent states that the Claimant insists that SUNAT, the Tax Tribunal, the Contentious Administrative Court, and the Supreme Court all relied on the June 2006 Report to reach their findings.[618] According to the Respondent, there can be no question that the Claimant's claims of alleged breaches of the 1998 Stability Agreement are, in the words of the *Spence v. Costa Rica* tribunal, "*deeply and inseparably rooted*" in SUNAT's and MINEM's interpretation of the Agreement and the underlying laws and regulations, expressed *inter alia* in the June 2006 Report.[619] The Respondent adds that the record even shows that MINEM's position taken in the June 2006 Report reflects the State's position on the scope of the Mining Law and Regulations and stabilization agreements in general

[612] Respondent's Counter-Memorial, ¶ 472; Respondent's Rejoinder, ¶ 779, referring to: *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶¶ 246, 298.
[613] Respondent's Rejoinder, ¶ 779, referring to: *Phosphates in Morocco*, 1938 P.C.I.J. (Ser. A/B) No. 74, Decision on Preliminary Objections dated 14 June 1938 (**RA-171**), pp. 23-24.
[614] Respondent's Rejoinder, ¶ 783.
[615] Respondent's Counter-Memorial, ¶¶ 475 *et seq.*
[616] Respondent's Comments on the NDP Submission, ¶ 35.
[617] Respondent's Rejoinder, ¶ 783.
[618] Respondent's Counter-Memorial, ¶¶ 477-478.
[619] Respondent's Counter-Memorial, ¶ 479.

(including the 1998 Stability Agreement) as held for many years before the issuance of that Report.[620] While the Respondent denies that SUNAT solely relied on the June 2006 Report in determining that the Assessments were due, the Respondent asserts that the heart of the Claimant's case is that the June 2006 Report was key to SUNAT's determinations.[621]

558. The Respondent disagrees with the Claimant's assertion that the TPA applies to "*measures adopted or maintained by a Party relating to*" a protected investor and investment, and that the relevant analysis under Article 10.1.3 of the TPA is only whether the measure alleged to constitute the breach predates the TPA's entry into force.[622] According to the Respondent, the Claimant's interpretation is incorrect, because it is inconsistent with (i) the broad wording of Article 10.1.3 of the TPA, (ii) relevant investment arbitration jurisprudence, including *Spence v. Costa Rica, Mondev v. United States*, *Eco Oro v. Colombia*, *Tecmed v. Mexico*, and *M.C.I. Power v. Ecuador*, and (iii) the intent of the TPA parties.[623]

559. With respect to the alleged breaches of Article 10.5 of the TPA, the Respondent submits that most of the Claimant's claims of breaches of the TPA are also deeply and inseparably rooted in acts or facts that occurred before 1 February 2009, and as such fall outside of the Tribunal's jurisdiction, with the sole exception of Claimant's TPA Article 10.5 claims based on alleged due process violations.[624]

560. With respect to the Claimant's Royalty Assessments claims based on the frustration of legitimate expectations, arbitrary action, and inconsistent and non-transparent action, the Respondent submits that by the Claimant's own account, the acts or facts that formed the basis of the Claimant's claims occurred well before the TPA's entry into force.[625] The Respondent argues that the Claimant (or SMCV) was or should have been aware of Peru's position regarding stabilization agreements and, in particular, the scope of the 1998 Stability Agreement even before June 2006.[626] According to the Respondent, whether it manifested in the June 2006 Report or even earlier, there is no question that the Respondent's interpretation of the 1998 Stability Agreement and the related

[620] Respondent's Counter-Memorial, ¶ 480.
[621] Respondent's Counter-Memorial, ¶ 477; Respondent's Rejoinder, ¶ 782.
[622] Respondent's Rejoinder, ¶ 784; Claimant's Reply, ¶ 265.
[623] Respondent's Rejoinder, ¶¶ 784 *et seq.*
[624] Respondent's Counter-Memorial, ¶¶ 483 *et seq.*
[625] Respondent's Counter-Memorial, ¶ 485.
[626] Respondent's Counter-Memorial, ¶ 486.

Peruvian laws and regulations is the basis of all of the breaches of Article 10.5 of the TPA that the Claimant alleges with respect to legitimate expectations, arbitrary actions, and inconsistency and non-transparency.[627]

561. With respect to the Claimant's Royalty Assessment claims based on due process violations, the Respondent concedes that these are the only TPA breach claims that do not pre-date the entry into force of the TPA.[628]

562. With respect to the Claimant's claims based on SUNAT's imposition of penalties and interest on Royalty and Tax Assessments, the Respondent argues that these claims are also rooted in acts or facts that occurred before the TPA entered into force.[629] According to the Respondent, by the Claimant's own account, such claims are also rooted in MINEM's June 2006 Report, which pre-dates the TPA's entry into force.[630] Specifically, the Respondent argues that SUNAT's assessments of these penalties and interest (and the Tax Tribunal's decisions to maintain those penalties and interest), like SUNAT's assessment of royalties and taxes, are based on the Peruvian government's interpretation of the scope of the 1998 Stability Agreement and the Mining Law and Regulations, and in particular, by the Claimant's own account, MINEM's interpretation contained in its June 2006 Report.[631]

563. Finally, with respect to the Claimant's claims based on the Respondent's refusal to refund GEM payments, the Respondent argues that such claims are also outside of the Tribunal's jurisdiction because such claims are also rooted in acts or facts that occurred before the TPA entered into force.[632] The Respondent argues that this claim is based on SUNAT's Royalty and Tax Assessments against SMCV, which were issued (according to the Claimant) based on MINEM's June 2006 Report, and (according to the Respondent) consistent with the Respondent's even earlier interpretation of the Mining Law and Regulations and the scope of the 1998 Stability Agreement.[633]

[627] Respondent's Counter-Memorial, ¶ 487.
[628] Respondent's Counter-Memorial, ¶ 488.
[629] Respondent's Counter-Memorial, ¶ 489.
[630] Respondent's Counter-Memorial, ¶ 491.
[631] Respondent's Rejoinder, ¶ 797.
[632] Respondent's Counter-Memorial, ¶ 492.
[633] Respondent's Counter-Memorial, ¶ 492.

2. The Claimant's position

564. The Claimant submits that the Tribunal has jurisdiction *ratione temporis* because its claims do not require a retroactive application of the TPA.[634] Specifically, all the acts and facts that the Claimant alleges constitute breaches of the 1998 Stability Agreement and the TPA occurred after the TPA entered into force.

565. The Claimant submits that contrary to the Respondent's argument, it does not allege that the June 2006 Report or any other acts or facts pre-dating 1 February 2009 constituted breaches of the 1998 Stability Agreement or Article 10.5 of the TPA. Rather, the acts and facts that the Claimant alleges constituted breaches are the final and enforceable Assessments, arbitrary decisions refusing to waive penalties and interest, due process violations in the Tax Tribunal proceedings, and arbitrary decisions denying SMCV's GEM reimbursement request, which all post-date 1 February 2009.[635]

566. The Claimant argues that the Respondent confuses the applicable legal principles.[636] According to the Claimant, the relevant analysis is whether any of the "*measures*," as defined in the TPA, that the Claimant alleges breached the 1998 Stability Agreement or Article 10.5 are an "*act or fact that took place or [a] situation that ceased to exist before the date of entry into force*."[637]

567. The Claimant argues that the acts that represent the basis of its claims occurred long after 1 February 2009.[638] Specifically, the Claimant alleges that (i) each final and enforceable Assessment breached the 1998 Stability Agreement on a number of dates after 1 February 2009, (ii) each final and enforceable Royalty Assessment breached Article 10.5 of the TPA on a number of dates after 1 February 2009, (iii) the arbitrary failure of the Supreme Court to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments and the arbitrary failure of the Appellate Court to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments breached Article 10.5 of the TPA on 21 July 2017 and 10 October 2017, respectively, when the courts notified SMCV of their decisions, (iv) each of the remaining arbitrary failures to waive penalties and interest

[634] Claimant's Reply, ¶¶ 263 *et seq.*; Claimant's Rejoinder, ¶¶ 70 *et seq*.; Claimant's Comments on the NDP Submission, ¶¶ 18 *et seq.*; Claimant's Post-Hearing Brief, ¶¶ 113 *et seq.*
[635] Claimant's Reply, ¶ 264.
[636] Claimant's Reply, ¶ 265.
[637] Claimant's Reply, ¶ 265.
[638] Claimant's Reply, ¶ 266; Claimant's Rejoinder, ¶ 72.

breached Article 10.5 of the TPA on a number of dates after 1 February 2009, and (v) the Respondent's arbitrary refusal to reimburse Q4 2011 to Q3 2012 GEM payments for activities related to the Concentrator breached Article 10.5 of the TPA on 22 March 2019 when SUNAT notified SMCV of its decision rejecting SMCV's reimbursement request.[639]

568. In the Claimant's view, the Respondent's interpretation of Article 10.1.3 of the TPA is inconsistent with the intent of the TPA parties, as demonstrated through the TPA's negotiation record.[640] The Parties adopted what became Article 10.1.3 of the TPA with the understanding that it "*would not apply to bar claims simply because the challenged measures related to acts or facts that gave rise to a dispute before the TPA entered into force so long as the challenged measures themselves occurred after the entry into force*."[641]

569. According to the Claimant, the Respondent's argument also fails because the June 2006 Report is expressly non-binding.[642] Moreover, according to the Claimant, the Respondent concedes that the non-retroactivity rule does not apply to "*Claimant's TPA Article 10.5 claims based on alleged due process violations*" but offers no explanation for why the June 2006 Report is the *sine qua non* for other breaches that are not based on the interpretation in the June 2006 Report.[643]

570. Finally, the Claimant submits that other investment tribunals have uniformly recognized that while acts or facts predating the TPA are relevant to Peru's breaches this does not make those breaches fall outside the Tribunal's temporal jurisdiction.[644]

571. The Claimant submits that the Tribunal can and should take into account the factual background against which the complained-of measures took place in assessing the

---

[639] Claimant's Reply, ¶ 266.
[640] Claimant's Reply, ¶ 267; Claimant's Rejoinder, ¶ 73; US-Andean FTA Draft dated 19 July 2004 (**CE-1062**), p. 2; MINCETUR, Round I Summary (Cartagena, 18-19 May 2004) (**CE-1060**), pp. 25-27; MINCETUR, Round II Summary (Atlanta, 14 to 18 June 2004) (**CE-1061**), pp. 23-25.
[641] Claimant's Reply, ¶ 267; Claimant's Rejoinder, ¶ 73; Herrera I (**CWS-12**), ¶ 35; Sampliner I (**CER-11**), ¶ 39.
[642] Claimant's Reply, ¶ 268; Claimant's Rejoinder, ¶ 74.
[643] Claimant's Reply, ¶ 268; Claimant's Rejoinder, ¶ 74.
[644] Claimant's Reply, ¶ 269, referring to: *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶¶ 217, 229, 240; *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum dated 9 September 2021 (**CA-285**), ¶ 360; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award dated 29 May 2003 (**CA-99**), ¶ 66; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award dated 31 July 2007 (**RA-11**), ¶ 84; *Mondev v. USA*, Award (**RA-6**), ¶ 70.

merits of the claims that those measures breached the 1998 Stability Agreement and the TPA.[645]

3. The Non-Disputing Party's position

572. The NDP submits that while a host State's conduct prior to the entry into force of an obligation may be relevant to determining whether the State subsequently breached that obligation, under the rule against retroactivity, there must exist "*conduct of the State after that date which is itself a breach*."[646] The NDP refers to the findings of the *Carrizosa v. Colombia* tribunal, which observed with respect to the identical provision of the United States-Colombia TPA, that "*unless the post-treaty conduct […] is itself capable of constituting a breach of the [treaty], independently from the question of (un)lawfulness of the pre-treaty conduct, claims arising out of such post-treaty conduct would also fall outside the Tribunal's jurisdiction*."[647] The NDP submits that this finding echoes the *Berkowitz v. Costa Rica* tribunal's holding under the Dominican Republic-Central America FTA that "*pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right. Pre-entry into force acts and facts cannot […] constitute a cause of action*."[648]

4. The Tribunal's analysis

573. It is undisputed between the Parties that the TPA does not apply to conduct that predates its entry into force on 1 February 2009.[649] This is based on the customary international law rule according to which a treaty does not bind contracting States in respect of acts or facts predating the entry into force of the treaty, unless it provides otherwise.[650]

574. In the case at hand, the TPA does not provide for a different rule. Article 10.1 of the TPA provides:

> *1. This Chapter applies to measures adopted or maintained by a Party […]. […]*

---

[645] Claimant's Reply, ¶ 269; Claimant's Rejoinder, ¶ 75, referring to: *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum (**CA-285**), ¶ 360.
[646] NDP Submission, ¶ 2.
[647] NDP Submission, ¶ 2.
[648] NDP Submission, ¶ 2.
[649] Respondent's Counter-Memorial, ¶ 470; Claimant's Reply, ¶ 263.
[650] Vienna Convention on the Law of Treaties dated 23 May 1969 (**CA-49**), Article 28; ILC Articles (**CA-82**), Article 13.

> 3. *For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.*[651]

575. The Parties are rather in dispute as to how the non-retroactivity rule should apply in this case. The Respondent's position is that the Claimant's allegations of breach are, in the words of the *Spence v. Costa Rica* tribunal, "*deeply and inseparably*" rooted in MINEM's interpretation of the 1998 Stability Agreement and Mining Law and Regulations, which was established by the Claimant's own account no later than June 2006 through the June 2006 Report.[652] Relying on the *M.C.I. Power v. Ecuador* tribunal's findings, the Respondent also contends that the dispute arose prior to the Treaty's entry into force and that prior disputes that continue after the entry into force of the Treaty are not covered by it.[653] The Respondent states that the dispute arose on 4 June 2008, when SMCV wrote to SUNAT indicating that it disagreed with SUNAT's audit letter of 30 May 2008.[654]

576. By contrast, the Claimant submits that it does not allege that the June 2006 Report or any other acts or facts pre-dating 1 February 2009 constituted breaches of the 1998 Stability Agreement or Article 10.5 of the TPA. Rather, the acts and facts that the Claimant alleges constituted breaches are SUNAT's Assessments, the alleged arbitrary decisions refusing to waive penalties and interest, the alleged due process violations in the Tax Tribunal proceedings, and the alleged arbitrary decision denying SMCV's GEM reimbursement request, which all post-date 1 February 2009.[655]

577. In the Tribunal's view, in applying the non-retroactivity rule, the relevant standard is whether the State's "*measures*" for which the Claimant brings claims occurred after the entry into force of the Treaty. In this regard, the Tribunal notes that both Parties refer to the findings of the *Tecmed v. Mexico* tribunal, which found that:

> *[C]onsideration of whether the Agreement is to be applied retroactively must first be determined in light of the claims of the Parties. The mandate of an*

[651] TPA (**CA-10**), Article 10.1.
[652] Respondent's Counter-Memorial, ¶¶ 472 *et seq.*
[653] Respondent's Rejoinder, ¶ 789, referring to: *M.C.I. v. Ecuador*, Award (**RA-11**), ¶ 66.
[654] SUNAT, Inductive Letter No. 108052004279 dated 30 May 2008 (**CE-577**); Letter from SMCV to SUNAT, Letter No. SMCV-AL-1346-2008 dated 4 June 2008 (**CE-578**), p. 1.
[655] Claimant's Reply, ¶¶ 264 *et seq*.

> *arbitration tribunal is subject to limitations, among them those arising out of disputed issues specifically referred to it by the Parties in their claims.*[656]

578. In this case, while the Claimant certainly refers to acts or facts pre-dating the entry into force of the Treaty, including the June 2006 Report, the Claimant only claims for State measures that occurred after its entry into force.[657] All of the measures framed in the Claimant's claims occurred after 1 February 2009 and, thus, do not lead to a retroactive application of the Treaty.

579. This conclusion does not prevent the Tribunal from otherwise considering any pre-Treaty conduct. As clarified by the commentary to the ILC Articles, pre-treaty conduct may carry relevance in a tribunal's determinations:

> *Nor does the principle of the intertemporal law mean that facts occurring prior to the entry into force of a particular obligation may not be taken into account where these are otherwise relevant.*[658]

580. This conclusion has been further supported by tribunals such as the *Mondev v. United States* tribunal, which found that:

> *[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.*[659]

581. The *Spence v. Costa Rica* tribunal also found:

> *CAFTA Article 10.1.3 does not preclude [the Tribunal] from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there*

---

[656] *Tecmed v. Mexico*, Award (**CA-99**), ¶ 56.

[657] The Claimant claims that (i) each final and enforceable Assessment breached the Stability Agreement on a number of dates after 1 February 2009 (identified in Table A of the Claimant's Memorial), (ii) each final and enforceable Royalty Assessment breached Article 10.5 of the TPA on a number of dates after 1 February 2009 (identified in Table A of the Claimant's Memorial), (iii) the arbitrary failure of the Supreme Court to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments and the arbitrary failure of the Appellate Court to consider *de novo* SMCV's entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments breached Article 10.5 of the TPA on 21 July 2017 and 10 October 2017, respectively, when the courts notified SMCV of their decisions, (iv) each of the remaining arbitrary failures to waive penalties and interest breached Article 10.5 of the TPA on a number of dates after 1 February 2009 (identified in Table B of the Claimant's Memorial), and (v) the Respondent's arbitrary refusal to reimburse Q4 2011 to Q3 2012 GEM payments for activities related to the Concentrator breached Article 10.5 of the TPA on 22 March 2019 when SUNAT notified SMCV of its decision rejecting SMCV's reimbursement request. See Claimant's Reply, ¶ 266.

[658] James Crawford, *The International Law Commission's Articles on State Responsibility* (2002) (excerpts) (**RA-26**), p. 134 (Article 13, comment 9).

[659] *Mondev v. USA*, Award (**RA-6**), ¶ 70.

was a post-entry into force breach" subject only to the limitation that "pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right.[660]

582. The *M.C.I. Power v. Ecuador* tribunal similarly held:

> *Acts or omissions prior to the entry into force of the BIT may be taken into account by the Tribunal in cases in which those acts or omissions are relevant as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached. The Tribunal, however, finds that it has no Competence to determine damages for acts that do not qualify as violations of the BIT as they occurred prior to its entry into force.*[661]

583. Accordingly, while the Tribunal has no competence over any alleged breaches of pre-Treaty measures, no such pre-Treaty measures have been claimed against by the Claimant. The Tribunal is not prevented from taking into consideration any acts or facts that pre-date the entry into force of the Treaty.

584. Against this background, the Tribunal finds that the Respondent's objection is unfounded.

D. The Respondent's claim that the Claimant's claims of alleged breaches of the TPA are outside of the Tribunal's jurisdiction because they have already been submitted to dispute settlement procedures in Peru

1. The Respondent's position

585. The Respondent argues that the Tribunal lacks jurisdiction over the Claimant's claims on behalf of SMCV of alleged breaches of the 1998 Stability Agreement because they have already been submitted for resolution before administrative tribunals and binding dispute settlement procedures in Peru.[662] According to the Respondent, Article 10.18.4 of the TPA bars the submission of such claims before the Tribunal. The Respondent further relies on the reasoning of several arbitral tribunals, including *M.C.I. Power v. Ecuador*, *Supervisión y Control v. Costa Rica*, *Pantechniki v. Albania*, and *H & H v.*

---

[660] *Spence v. Costa Rica*, Interim Award (**RA-2**), ¶ 217.
[661] *M.C.I. v. Ecuador*, Award (**RA-11**), ¶ 136.
[662] Respondent's Counter-Memorial, ¶¶ 494 *et seq.*; Respondent's Rejoinder, ¶¶ 801 *et seq.*; Respondent's Post-Hearing Brief, ¶¶ 292 *et seq.*

Egypt, which emphasized the irrevocability of a claimant's dispute settlement choice when interpreting a fork-in-the-road provision.[663]

586. The Respondent argues that on numerous occasions SMCV has definitively and irrevocably challenged before SUNAT's Claims Division and the Tax Tribunal (using the same legal basis as invoked in this case) the same SUNAT Royalty and Tax Assessments (and related measures, such as the penalties and interest assessed thereon) that the Claimant now alleges constitute breaches of the 1998 Stability Agreement on SMCV's behalf.[664] The Respondent further states that in all the challenges that SUNAT's Claims Division decided, it confirmed all the Assessments against SMCV, and that SMCV itself withdrew several challenges before a decision was rendered.[665] SMCV appealed most of SUNAT's decisions confirming those Assessments to the Tax Tribunal. The Respondent submits that the only claims that are left are those based on the 2013 Income Tax and Additional Income Tax Assessments, and the 2012 Temporary Tax on Net Assets Assessment, because SMCV did not challenge them before SUNAT's Claims Division or the Tax Tribunal.[666]

587. The Respondent states that SMCV's claims before SUNAT's Claims Division, and subsequently before the Tax Tribunal, are all part of the same administrative dispute settlement proceedings that resolve disputes over royalty and tax assessments, in the first and second instance.[667] The Respondent explains that the Tax Tribunal is an administrative tribunal whose decisions are final and binding under Peruvian law.[668] The Respondent adds that the Claimant's own words confirm its understanding that the Tax Tribunal is an administrative tribunal.[669] Similarly, the Respondent argues that SUNAT's Claims Division is an administrative body before which SUNAT's decisions can be challenged, and the resulting decisions are binding on the taxpayer and SUNAT (unless successfully appealed to the Tax Tribunal).[670] Even if the Tribunal were not to

---

[663] Respondent's Counter-Memorial, ¶¶ 495, referring to: *M.C.I. v. Ecuador*, Award (**RA-11**), ¶ 181; *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award dated 18 January 2017 (**CA-228**), ¶ 294; *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award dated 30 July 2009 (**RA-12**), ¶ 67; *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award dated 6 May 2014 (excerpts) (**RA-13**), ¶ 370.
[664] Respondent's Counter-Memorial, ¶¶ 496, 498, Annex A, pp. 1-10.
[665] Respondent's Counter-Memorial, ¶ 497; Respondent's Rejoinder, ¶ 805.
[666] Respondent's Counter-Memorial, ¶ 497.
[667] Respondent's Counter-Memorial, ¶ 500; Respondent's Rejoinder, ¶ 808.
[668] Respondent's Counter-Memorial, ¶¶ 501-502; Respondent's Rejoinder, ¶¶ 809, 818-821.
[669] Respondent's Rejoinder, ¶ 809.
[670] Respondent's Counter-Memorial, ¶ 503.

consider SUNAT's Claims Division to be an administrative "*tribunal*" as such, the Claims Division's administrative process to challenge SUNAT actions constitutes a "*binding dispute settlement procedure*" for purposes of the TPA's fork-in-the-road provision.[671] Alternatively, even if the Tribunal were to find that SUNAT's Claims Division and the Tax Tribunal do not constitute "*an administrative tribunal*" or a "*binding dispute settlement procedure,*" the Claimant's claims of alleged breaches of the 1998 Stability Agreement submitted in these proceedings would still fall outside the Tribunal's jurisdiction, because SMCV has submitted claims regarding the same alleged breaches to the Peruvian courts (*i.e.*, the Superior Court of Lima, and the Supreme Court) which unquestionably qualify as "*court[s] of the respondent*" under Article 10.18.4 of the TPA.[672]

588. The Respondent rejects the Claimant's reliance on Article 19.5.1 of the TPA with respect to the characterization of SUNAT's Claims Division and the Tax Tribunal. The Respondent argues that Article 19.5.1 of the TPA does not provide a definition of "*administrative tribunal*" and only discusses administrative tribunals, as one among a number of adjudicatory bodies, for a different purpose in the Treaty.[673] Moreover, the Respondent submits that contrary to the Claimant's contention, SUNAT's Claims Division and the Tax Tribunal review SUNAT's Assessments, which are final administrative actions.[674] In addition, the Respondent submits that even though SUNAT's Claims Division and the Tax Tribunal are structurally part of the MEF, they operate independently of the MEF, making them impartial and independent of the office or authority entrusted with administrative enforcement, as allegedly required by Article 19.5.1 of the TPA.[675]

589. The Respondent further submits that the Claimant is precluded from submitting its claims to arbitration because these claims rest on the same fundamental basis as SMCV's claims before SUNAT's Claims Division and the Tax Tribunal.[676] The Respondent relies on the fundamental-basis test which examines whether the bases of the claims are the same.[677] The Respondent states that under this test, claims are

[671] Respondent's Counter-Memorial, ¶ 503.
[672] Respondent's Rejoinder, ¶¶ 803-804, 849-851.
[673] Respondent's Rejoinder, ¶ 811.
[674] Respondent's Rejoinder, ¶ 812.
[675] Respondent's Rejoinder, ¶¶ 813-816.
[676] Respondent's Counter-Memorial, ¶¶ 505 *et seq.*; Respondent's Rejoinder, ¶¶ 825 *et seq.*
[677] Respondent's Counter-Memorial, ¶ 506; Respondent's Rejoinder, ¶ 826.

considered the same if the bases of the claims are the same, if, for example, deciding the claim that is submitted to arbitration would require the tribunal to reach and resolve the same underlying dispute at issue in the claim previously submitted to the other dispute resolution forum.[678] The Respondent submits that the fundamental-basis test is better suited than the so-called triple-identity test and that it has been favored by tribunals.[679] In any event, the triple-identity test would also be met here.[680]

590. The Respondent submits that Article 10.18.4(a) of the TPA does not require the application of the triple-identity test. Instead, Article 10.18.4(a) of the TPA focuses on the subject matter of the dispute. The Respondent argues that its interpretation of Article 10.18.4 of the TPA is consistent with the relevant investment arbitration jurisprudence,[681] the text, object, and purpose of the fork-in-the-road provision,[682] as well as the intent of the TPA parties.[683]

591. The Respondent concludes that the claims in these proceedings and those before SUNAT's Claims Division and the Tax Tribunal have the same fundamental basis because:

1) The claims are derived from the same factual basis, *i.e.,* they are complaints against SUNAT's Royalty and Tax Assessments;
2) The claims rest on the same legal basis, *i.e.,* the complaint that SUNAT's Royalty and Tax Assessments are contrary to the 1998 Stability Agreement;
3) A finding on the merits of SMCV's arbitration claims depends on resolving the scope of the 1998 Stability Agreement, which is the same dispute and the same legal question that underlay SMCV's claims before SUNAT's Claims Division and the Tax Tribunal.[684]

592. The Respondent argues that since these claims are in fact the same under the fundamental-basis test, this arbitration is an attempt at relitigating SMCV's claims which were brought before Peruvian domestic courts.[685]

[678] Respondent's Counter-Memorial, ¶ 506.
[679] Respondent's Counter-Memorial, ¶¶ 508-510.
[680] Respondent's Counter-Memorial, ¶ 507; Respondent's Rejoinder, ¶ 840.
[681] Respondent's Rejoinder, ¶¶ 832 *et seq.*
[682] Respondent's Rejoinder, ¶¶ 834 *et seq.*
[683] Respondent's Rejoinder, ¶¶ 841 *et seq.*
[684] Respondent's Counter-Memorial, ¶¶ 515-516; Respondent's Rejoinder, ¶¶ 827-830.
[685] Respondent's Counter-Memorial, ¶ 517.

2. The Claimant's position

593. The Claimant submits that Article 10.18.4 of the TPA does not apply because SMCV did not submit claims for breaches of the 1998 Stability Agreement to a Peruvian administrative tribunal or to any other binding dispute settlement procedure.[686] Rather, SMCV submitted administrative challenges to the validity of the majority of the Assessments to two agencies of the MEF, *i.e.,* SUNAT's Claims Division and the Tax Tribunal.[687]

594. The Claimant argues that the Respondent's interpretation of Article 10.18.4 of the TPA would lead to an absurd result of requiring investors to submit SUNAT royalty or tax assessments to international arbitration without having them reviewed first through the normal administrative process within the MEF.[688] The Claimant argues that Article 10.18.4 of the TPA does not apply unless SMCV previously submitted a "*claim*" for any of the "*the same alleged breach[es]*" of the 1998 Stability Agreement that Freeport submits in this case, noting that the Respondent itself concedes that SMCV never submitted claims for breaches of the 1998 Stability Agreement in any forum.[689] The Claimant further argues that the fundamental-basis-test proposed by the Respondent finds no support in the plain terms of the TPA, its negotiation history, or investment treaty authorities.

595. Specifically, the Claimant argues that the Respondent's argument based on the fundamental-basis-test is detached from the plain terms of Article 10.18.4 of the TPA. Contrasting Article 10.18.4 of the TPA with the waiver provision under Article 10.18.2, which refers to "*any proceeding with respect to any measure alleged to constitute a breach,*" shows that Article 10.18.4 is narrowly limited to previous claims for the "*same alleged breach*."[690] The Claimant states that if an investor was precluded from submitting to international arbitration a claim for breach of an investment agreement because it had previously submitted a claim with respect to the measure alleged to constitute the breach, it would be unnecessary to require the investor to waive its right to continue proceedings with respect to that measure. The existence of any such

[686] Claimant's Reply, ¶¶ 242 *et seq.*; Claimant's Rejoinder, ¶¶ 47 *et seq*.; Claimant's Post-Hearing Brief, ¶¶ 109 *et seq*.
[687] Claimant's Reply, ¶ 242.
[688] Claimant's Reply, ¶ 245; Claimant's Rejoinder, ¶ 50.
[689] Claimant's Reply, ¶ 246; Claimant's Rejoinder, ¶ 51.
[690] Claimant's Reply, ¶ 251; Claimant's Rejoinder, ¶ 56.

proceedings would preclude the investor from submitting the claim for breach of the investment agreement to international arbitration in the first place.[691] Moreover, the Claimant argues that Article 10.18.4 of the TPA must be read in a manner that is consistent with the object and purpose of the TPA, not the object and purpose of fork-in-the-road provisions in different treaties or in academic writings as the Respondent argues.[692] The Claimant also argues that the Respondent's interpretation is inconsistent with the intent of the TPA parties as evidenced by the negotiating history and the testimony of representatives of both the Peruvian and U.S. delegations.[693] In addition, according to the Claimant, investment tribunals, such as the *Corona v. Dominican Republic*, *Nissan v. India*, and *Kappes v. Guatemala* tribunals, have consistently rejected arguments attempting to expand fork-in-the-road provisions beyond their express terms to import a "*fundamental basis*," "*triple identity*," or "*same dispute*" standard.[694]

596. The Claimant argues that the Respondent's objection also fails because SUNAT's Claims Division and the Tax Tribunal do not qualify as "*administrative tribunals*" or "*binding dispute settlement procedures*" under Article 10.18.4 of the TPA.[695]

597. First, neither of these administrative agencies qualify as an "*administrative tribunal*" under Article 19.5.1 of the TPA.[696] Pursuant to that provision, an "*administrative tribunal*:" (i) must have the ability to review final administration actions, (ii) must be impartial, (iii) must be independent from the authority that enforces administrative decision, and (iv) must not have a substantial interest in the outcome of the administrative action.[697] Neither SUNAT's Claims Division nor the Tax Tribunal meet this definition, as they do not have the ability to review final administrative action and are not independent from the MEF, the authority entrusted with administrative enforcement of royalty and tax decisions. Article 148 of the Peruvian Constitution and Article 157 of the Tax Code entrust review of final royalty and tax decisions to the

[691] Claimant's Rejoinder, ¶ 56.
[692] Claimant's Rejoinder, ¶ 57.
[693] Claimant's Rejoinder, ¶ 58.
[694] Claimant's Reply, ¶ 253, referring to: *Corona Materials v. Dominican Republic*, Award on Preliminary Objections (**RA-3**), ¶¶ 267-269; *Nissan v. India*, Decision on Jurisdiction (**CA-243**), ¶¶ 61, 172-173, 211, 215; *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections dated 13 March 2020 (**CA-20**), ¶ 142.
[695] Claimant's Reply, ¶¶ 255 *et seq.*; Claimant's Rejoinder, ¶¶ 62 *et seq.*
[696] Claimant's Reply, ¶¶ 258 *et seq.*; Claimant's Rejoinder, ¶¶ 63 *et seq*.
[697] Claimant's Reply, ¶ 258.

contentious-administrative courts, which, unlike SUNAT and the Tax Tribunal, are part of the Peruvian judiciary.[698]

598. In addition, according to the Claimant, neither SUNAT's Claims Division nor the Tax Tribunal is competent to resolve claims for breach of an investment agreement meaning that they cannot provide the "*other binding dispute settlement procedures*" that Article 10.18.4 of the TPA contemplates.[699] Under Article 10.18.4 of the TPA, a claim is barred only if a claim for the same alleged breach of the investment agreement or investment authorization was submitted to an adjudicative body competent to resolve contract claims for breach of an investment agreement, a qualification that neither SUNAT's Claims Division nor the Tax Tribunal meet.[700] The Claimant submits that the term "*other binding dispute resolution procedures*" was only intended to encompass proceedings before bodies competent to resolve claims for breach of an investment agreement.[701] Under Peruvian law, contract claims can only be resolved by arbitration or through a judicial proceeding.[702]

3. The Non-Disputing Party's position

599. The NDP has not expressed its view on the interpretation of Article 10.18.4 of the TPA.

4. The Tribunal's analysis

600. Article 10.18.4 of the TPA provides:

> *(a) No claim may be submitted to arbitration:*
>
> *[…]*
>
> *(ii) for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C),*
>
> *if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.*

[698] Claimant's Reply, ¶¶ 258-260.
[699] Claimant's Reply, ¶¶ 256 *et seq.*; Claimant's Rejoinder, ¶¶ 63 *et seq.*
[700] Claimant's Reply, ¶ 256.
[701] Claimant's Reply, ¶ 257; Sampliner I (**CER-11**), ¶ 35; Herrera I (**CWS-12**), ¶ 29.
[702] Claimant's Reply, ¶ 257.

> *(b) For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.*[703]

601. The Tribunal notes that the Parties have extensively briefed the Tribunal on the irrevocability of the fork-in-the-road choice as set out in Article 10.18.4(b) of the TPA. However, the crucial issue for the Tribunal's determination is whether the Claimant or SMCV previously submitted the "*same alleged breach*" to an administrative tribunal or court of Peru or to any other binding dispute settlement.

602. The Respondent contends that Article 10.18.4 of the TPA is to be interpreted according to the "*fundamental-basis-test*" or, alternatively, the "*triple-identity test*." According to the Claimant, such tests find no support in the express terms of the TPA.

603. The Tribunal notes that the term "*same alleged breach*" is not defined in the TPA. The meaning of that notion is thus a matter for treaty interpretation that is subject to the general principles of interpretation of the VCLT.

604. The Tribunal first turns to the ordinary meaning of "*same alleged breach*" in the context of the TPA and in light of its object and purpose. The word "*same*" indicates that, for the fork-in-the-road provision of the TPA to operate, the claimant or the enterprise must have brought an identical claim for adjudication in the respondent State for an alleged breach of an investment agreement. The Tribunal finds that the TPA unequivocally bars only the successive submission of identical breaches of an investment agreement. This presupposes that there be identical claims for identical breaches of identical obligations, and not just similar or related claims, or claims which share a "*fundamental basis*" or "*identity*." In this regard, the Tribunal notes that the cases cited in support of the Respondent's "*fundamental-basis-test*" concerned treaties with a fork in the road clause in relation to a "*same dispute*."[704] Such treaty wording is different from the TPA, which narrowly applies to the "*same alleged breach*."

605. The Tribunal's interpretation is consistent with the context of the Treaty. Specifically, the wording of Article 10.18.4 of the TPA can be contrasted with the wording of the

[703] TPA (**CA-10**), Article 10.18.4.
[704] *Pantechniki v. Albania*, Award (**RA-12**), ¶ 67; *H&H Enterprises v. Egypt*, Award (**RA-13**), ¶¶ 362, 364; *Supervisión y Control v. Costa Rica*, Award (**CA-228**), ¶¶ 296, 310.

waiver provision in Article 10.18.2 of the TPA according to which claims under Article 10.16.1 (a) and (b) may only be submitted to arbitration if there has been a waiver of any right to initiate or continue "*any proceeding with respect to any measure alleged to constitute a breach*."[705] The wording of Article 10.18.2 is wider than the wording of Article 10.18.4. The Tribunal agrees with the Claimant that if Article 10.18.4 of the TPA were to apply to claims "*with respect to any measure alleged to constitute a breach*," the waiver requirement under Article 10.18.2 of the TPA would be rendered meaningless, as all claims "*with respect to any measure alleged to constitute a breach*" that the investor had previously submitted would be excluded from arbitration and there would be no need to waive the right to continue proceedings for those claims before submitting them to arbitration.[706]

606. In the Tribunal's view, for the fork-in-the-road provision to bar the Claimant's claims, SMCV or the Claimant must have previously submitted the same claims for breach of the 1998 Stability Agreement for adjudication in Peru. It is undisputed that the Claimant itself did not submit any claims for adjudication in Peru. The dispute in Peru rather concerned SMCV's challenges of the different Tax and Royalty Assessments imposed by SUNAT.

607. While the interpretation of the 1998 Stability Agreement was a key issue in the underlying proceedings before SUNAT's Claims Division and the Tax Tribunal, none of those proceedings concerned a claim for a breach of the 1998 Stability Agreement, *i.e.,* a claim that the Claimant is bringing forward in these proceedings. The fact that SUNAT's Claims Division, the Tax Tribunal, and Peruvian courts have interpreted the 1998 Stability Agreement does not prevent the Claimant from bringing its claims before this Tribunal. As correctly described by the Claimant's expert Dr. Bullard, SMCV did not seek a decision by the Peruvian courts holding the Respondent liable for breaches of the 1998 Stability Agreement and ordering payment of corresponding damages, nor did it make claims arising from the Respondent's breaches of the 1998 Stability Agreement governed by Peruvian civil law.[707]

608. Having concluded that SMCV did not submit claims for the "*same alleged breach*" for adjudication in Peru, the Tribunal is not required to resolve the issue of whether

[705] TPA (**CA-10**), Article 10.18.2.
[706] TPA (**CA-10**), Article 10.18.2.
[707] Bullard II (**CER-7**), ¶¶ 63-66.

SUNAT's Claims Division and the Tax Tribunal are "*administrative tribunals*" of Peru or whether the proceedings before SUNAT's Claims Division and the Tax Tribunal constituted "*binding dispute settlement procedures.*"

609. In light of the above considerations, the Tribunal rejects the Respondent's objection on the basis of Article 10.18.4 of the TPA.

E. The Respondent's claim that the Claimant may not submit claims for breaches of the 1998 Stability Agreement on behalf of SMCV because it has failed to prove that it relied on the 1998 Stability Agreement when it established or acquired its covered investments

1. The Respondent's position

610. The Respondent submits that the Claimant may not submit claims for breach of the 1998 Stability Agreement on behalf of SMCV pursuant to Article 10.16.1(b) because the Claimant has failed to demonstrate that it relied on the 1998 Stability Agreement when it established or acquired its covered investments.[708]

611. First, the Respondent argues that pursuant to Article 10.16.1(b) of the TPA, a claimant may submit "*on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly*," a claim for breach of an "*investment agreement*" only if two requirements are met: (1) the subject matter of the claim and the claimed damages must directly relate to the covered investment, and (2) the claimant must have relied on the investment agreement when it established or acquired the covered investment.[709] If a claimant fails to meet both of these conditions for claims alleging a breach of an investment agreement, then a tribunal may not exercise jurisdiction over those claims.[710] Both for the purpose of demonstrating that the 1998 Stability Agreement is an "*investment agreement*" under the TPA and for the purpose of bringing a claim for breach of that Agreement in these proceedings, the Claimant must show that it relied on the 1998 Stability Agreement when it established or acquired its covered investment, but the Claimant has failed to do so.[711]

612. Specifically, the Respondent contends that the TPA expressly requires a claimant's reliance on the investment agreement in a situation where a claimant is submitting a

[708] Respondent's Counter-Memorial, ¶¶ 519 *et seq.*; Respondent's Rejoinder, ¶¶ 854 *et seq.*; Respondent's Post-Hearing Brief, ¶ 297.
[709] Respondent's Counter-Memorial, ¶ 519; TPA (**CA-10**), Article 10.16.1(b).
[710] Respondent's Comments on the NDP Submission, ¶ 42.
[711] Respondent's Rejoinder, ¶ 856.

claim, on its own behalf or on behalf of an enterprise it owns or controls, for breach of an investment agreement.[712] By contrast, the TPA does not require such reliance in a situation where a claimant is submitting a claim, on its own behalf or on behalf of an enterprise it owns or controls, either of breach of an obligation under Section A of Chapter Ten of the TPA or of breach of an investment authorization.[713] According to the Respondent, such contrast confirms the deliberate intent of the contracting parties of the TPA to require a claimant's reliance specifically if a claimant is submitting a claim for breach of an investment agreement.[714] If a claimant fails to prove that it relied on an investment agreement when it established or acquired its covered investment, the claimant is barred from submitting a claim for breach of that investment agreement.[715]

613. The Respondent argues that the Claimant has failed to show that it relied on the 1998 Stability Agreement in establishing or acquiring a covered investment. The Respondent argues that the Claimant alleges reliance on the 1998 Stability Agreement by other parties, such as Phelps Dodge, Cyprus, and SMCV, but not on its own.[716] Moreover, those other parties' alleged reliance, even if proven, does not establish the Claimant's own reliance that is expressly required under Articles 10.16.1(b) and 10.28 of the TPA, since none of those parties is the Claimant in this arbitration.[717]

614. The Respondent argues that its interpretation of Article 10.16.1 of the TPA is consistent with (i) the text of Article 10.16.1, (ii) the construction of Article 10.28, and (iii) the intent of the TPA parties.[718]

615. Specifically, by its plain terms, Article 10.16.1 of the TPA provides that the reliance on an investment agreement must relate to the Claimant's (Freeport's) acquisition of its covered investments.[719] The Respondent argues that the Claimant tries to meet this requirement merely by declaring its own reliance, but it does so without providing evidence.[720] The Respondent argues that the evidence rather suggests that the Claimant likely did not rely on the 1998 Stability Agreement when it acquired its investments in

[712] Respondent's Rejoinder, ¶¶ 860 *et seq.*
[713] Respondent's Counter-Memorial, ¶ 521.
[714] Respondent's Counter-Memorial, ¶ 522.
[715] Respondent's Counter-Memorial, ¶¶ 522 *et seq*.
[716] Respondent's Counter-Memorial, ¶ 527.
[717] Respondent's Counter-Memorial, ¶ 529.
[718] Respondent's Rejoinder, ¶¶ 860 *et seq.*
[719] Respondent's Counter-Memorial, ¶ 529; Respondent's Rejoinder, ¶¶ 861 *et seq*.
[720] Respondent's Counter-Memorial, ¶ 526.

SMCV.[721] Among others, the Respondent refers to the Claimant's own statements and related news reports suggesting that the Claimant's acquisition of Phelps Dodge, through which the Claimant acquired 53.56% of SMCV, was specifically motivated by the Claimant's desire to expand the size of Freeport-McMoRan so that the Claimant could dominate the global mining industry.[722] Such public statements make no mention of the 1998 Stability Agreement nor of the Concentrator Project or other such plans. According to the Respondent, such evidence shows that it is far more likely that Freeport would have purchased Phelps Dodge and thereby acquired its investments in Peru regardless of whether the 1998 Stability Agreement existed or was potentially applicable to the Concentrator Project.[723] The Respondent also submits that the Claimant changed the description of its covered investments from SMCV, the "*Cerro Verde production unit*," and the "*Mining and Beneficiation Concessions*," in its Memorial to "*the Concentrator*" in its Reply.[724]

616. Moreover, the Respondent argues that there is no merit to the Claimant's argument that, based on the construction of Article 10.28 of the TPA, the reliance requirement under Article 10.16.1 of the TPA can be met by either the claimant or by the enterprise on whose behalf a claim of breach of that agreement is submitted.[725] The Respondent submits that if the Parties wanted the reliance requirement in Article 10.16.1 to be capable of being fulfilled by either the investor (for claims brought on its own behalf) or the investor's covered investment (for claims brought on behalf of the enterprise), then the Parties would have made that clear in Article 10.16.1, which they did not do.[726]

617. The Respondent adds that even if the Tribunal were to accept the Claimant's argument that Article 10.16.1(b)(i)(C) requires reliance only by the "*covered investment*", that

[721] Respondent's Counter-Memorial, ¶ 530.
[722] Respondent's Counter-Memorial, ¶¶ 530-534; Respondent's Rejoinder, ¶ 857, referring to: Andrew Ross Sorkin and Ian Austen, "Mining Firms to Merge to Make a New No. 1 – Business – International Herald Tribune," *The New York Times* dated 19 November 2006 (**RE-108**); "Freeport-McMoRan to Buy Phelps Dodge for $25.9B," *Reliable Plant*, *available at* https://www.reliableplant.com/Read/3474/freeportmcmoran-to-buy-phelps-dodge-for-$259b (**RE-109**); Steve James, "Freeport Acquires Phelps Dodge, Launches Offering," *Reuters* dated 19 March 2007 (**CE-563**); "Freeport-McMoRan Copper & Gold Inc. and Phelps Dodge Corp. Shareholders Approve Acquisition" dated 14 March 2007 (**RE-110**), *available at* https://investors.fcx.com/investors/news-releases/news-release-details/2007/FCX-and-Phelps-Dodge-Corp- Shareholders-Approve-Acquisition/default.aspx; Associated Press, "Freeport-McMoRan's Acquires Phelps Dodge, Becomes World's Largest Publicly-Traded Copper Company," *Fox News* dated 13 January 2015 (**RE-111**), *available at* https://www.foxnews.com/story/freeport-mcmorans-acquires-phelps-dodge-becomes-worlds-largest-publicly-traded-copper-company.
[723] Respondent's Rejoinder, ¶ 857.
[724] Respondent's Rejoinder, ¶ 865.
[725] Respondent's Rejoinder, ¶¶ 866 *et seq.*
[726] Respondent's Rejoinder, ¶ 867.

does not help the Claimant's case for several reasons.[727] When SMCV purportedly relied on the 1998 Stability Agreement when it invested in "*the Concentrator*" in October 2004, the TPA did not exist. Thus, SMCV was not (and could not be) a covered investment (at all) under the TPA, whether of Phelps Dodge or of Freeport. On the same basis, SMCV's investment in the Concentrator was not (and could not) be a covered investment under the TPA, because the TPA was not in force at the time the investment was made.[728] Moreover, neither SMCV nor the Concentrator were "*covered investments*" of Freeport under the TPA at the time SMCV made its investment in the Concentrator purportedly in reliance of the 1998 Stability Agreement.[729] The Respondent submits that any investments purportedly established or acquired in reliance on the 1998 Stability Agreement before March 2007 (*i.e.,* the date of Freeport's acquisition of Phelps Dodge), either by SMCV or Phelps Dodge, cannot be Freeport's "*covered investment*" under the TPA in a claim brought by Freeport as the covered investor. As the Concentrator was constructed before that date, it was not Freeport's "*covered investment*" for purposes of the TPA, and SMCV's purported reliance on the Agreement in constructing the Concentrator would not bring the Claimant's claim on behalf of SMCV regarding breaches of the 1998 Stability Agreement within the scope of Article 10.16.1 of the TPA.[730]

618. The Respondent submits that the ordinary meaning of Article 10.16.1 of the TPA is clear and reasonable and, thus, the reliance on the TPA's preparatory work by the Claimant is barred under the VCLT and in any event inconclusive.[731]

619. Even if the Tribunal were to decide that SMCV, instead of the Claimant, could somehow meet Article 10.16.1's reliance requirement, the Claimant has not proven that SMCV relied on the 1998 Stability Agreement when SMCV invested in the Concentrator.[732]

620. Furthermore, the Claimant cannot rely on its predecessor-in-interest's purported reliance on the 1998 Stability Agreement in making its investment in the Concentrator Project in order to satisfy the reliance requirement under Article 10.16.1 of the TPA, either.[733] The only fair reading of Article 10.16.1 of the TPA is to require a claimant's

[727] Respondent's Rejoinder, ¶ 868.
[728] Respondent's Rejoinder, ¶ 868.
[729] Respondent's Rejoinder, ¶ 869.
[730] Respondent's Rejoinder, ¶ 869.
[731] Respondent's Rejoinder, ¶¶ 872 *et seq.*
[732] Respondent's Rejoinder, ¶ 877 ; Respondent's Comments on the NDP Submission, ¶ 46.
[733] Respondent's Rejoinder, ¶¶ 878 *et seq.*

own reliance on the investment agreement. There is no suggestion in the text of the Treaty that a predecessor's reliance is an acceptable substitute.[734] Moreover, such a rule would be incompatible with the Treaty's scope, which provides protections to U.S. and Peruvian investors (only), and it is only by happenstance that the Claimant's predecessor-in-interest is a U.S. company.[735]

621. With respect to the Claimant's reliance on the *De Levi v. Peru* award,[736] the Respondent states that such reliance is not relevant to this case. According to the Respondent, that case discusses a party's ability to transfer a legal right, such as ownership, to a third party and says nothing about a predecessor's ability to transfer a historical fact or a behavior, *i.e.,* in this case, the predecessor's purported reliance on an agreement to make an investment.[737] And even if the Claimant could step in the shoes of Phelps Dodge's alleged reliance, the Claimant would still not meet the reliance requirements under Article 10.16.1 of the TPA because when Phelps Dodge invested in the Concentrator from 2004 to 2006, the Concentrator was not (and could not be) a covered investment under the TPA, as the TPA did not enter into force until February 2009.[738] Additionally, the Concentrator cannot be a covered investment of Freeport under the TPA at the time when Phelps Dodge's purported reliance occurred, because Freeport did not acquire Phelps Dodge (through which it acquired SMCV) until March 2007, which is also before the TPA's entry into force.[739] In any event, the Claimant would still fail on factual grounds because the Claimant has not proven that Phelps Dodge actually did rely on the 1998 Stability Agreement when it decided to invest in the Concentrator.[740]

2. The Claimant's position

622. The Claimant argues that the 1998 Stability Agreement is an investment agreement upon which SMCV relied when establishing or acquiring the covered investment in the Concentrator and for which the Claimant may bring claims under Article 10.16.1(b) of the TPA.[741]

---

[734] Respondent's Rejoinder, ¶ 878.
[735] Respondent's Rejoinder, ¶ 878.
[736] Claimant's Reply, ¶ 285.
[737] Respondent's Rejoinder, ¶ 879.
[738] Respondent's Rejoinder, ¶¶ 869, 879.
[739] Respondent's Rejoinder, ¶ 879.
[740] Respondent's Rejoinder, ¶ 880.
[741] Claimant's Memorial, ¶¶ 290 *et seq.*; Claimant's Reply, ¶¶ 276 *et seq.*; Claimant's Rejoinder, ¶¶ 85 *et seq.*; Claimant's Comments on the NDP Submission, ¶¶ 29 *et seq.*; Claimant's Post-Hearing Brief, ¶¶ 122 *et seq.*

623. According to the Claimant, Article 10.28 of the TPA defines an investment agreement as an agreement on which either a claimant or an enterprise relied in establishing or acquiring a covered investment.[742] The Claimant contends that the 1998 Stability Agreement is an investment agreement under this provision.[743] This is because: (i) MINEM is a "*national authority of a Party*", (ii) Freeport's "*covered investment*" is SMCV, an "*enterprise*" that Freeport owns or controls, and (iii) the "*covered investment*" that SMCV established or acquired in reliance on the 1998 Stability Agreement is the Concentrator.[744]

624. The Claimant submits that Freeport, through its predecessors-in-interest, "*relied*" on the 1998 Stability Agreement when "*establishing or acquiring*" its covered investment in SMCV and its covered investment in the Cerro Verde Mining Unit, including the investment to construct the Concentrator.[745] The Claimant also submits that SMCV "*relied*" on the 1998 Stability Agreement when "*establishing or acquiring*" its covered investment in the Cerro Verde Mining Unit, including the investment to construct the Concentrator.[746] The Claimant argues that Article 10.16.1 of the TPA does not say that a claimant must demonstrate that it relied on an investment agreement to submit an Article 10.16.1(b)(i)(C) claim for breach of that agreement on behalf of an enterprise that the claimant owns or controls; rather, the Claimant must only show that SMCV relied on the 1998 Stability Agreement to submit a claim for breach of the 1998 Stability Agreement on behalf of SMCV under Article 10.16.1(b)(i)(C).[747] In any event, according to the Claimant, even if Article 10.16.1(b)(i)(C) required the reliance of the claimant, the Claimant would be entitled to invoke the reliance of its predecessor-in-interest, Phelps Dodge.[748] The Claimant argues that the only sensible reading of Article 10.16.1 of the TPA is that the claimant must show either (i) that the claimant relied on an investment agreement to bring claims for breach of that investment agreement on its own behalf under Article 10.16.1(a)(i)(C) or (ii) that the enterprise that the claimant owns or controls relied on an investment agreement to bring claims for breach of that investment agreement on behalf of that enterprise under Article 10.16.1(b)(i)(C).[749] The

[742] Claimant's Rejoinder, ¶ 86.
[743] Claimant's Reply, ¶ 276; Claimant's Memorial, ¶ 295.
[744] Claimant's Rejoinder, ¶ 88.
[745] Claimant's Notice of Arbitration, ¶¶ 4, 106; Claimant's Memorial, ¶ 297.
[746] Claimant's Memorial, ¶ 297; Claimant's Reply, ¶ 276; Claimant's Rejoinder, ¶ 98.
[747] Claimant's Reply, ¶ 276; Claimant's Rejoinder, ¶ 86.
[748] Claimant's Reply, ¶ 276.
[749] Claimant's Rejoinder, ¶ 87.

parallel mechanisms for investment agreement claims under Article 10.16.1(a)(i)(C) and Article 10.16.1(b)(i)(C) incorporate by reference and mirror the two types of investment agreements defined in Article 10.28; those to which a claimant is a party and those to which an enterprise is a party.[750] The final paragraph of Article 10.16.1 of the TPA applies to both Article 10.16.1(a)(i)(C) and Article 10.16.1(b)(i)(C) and provides that, to bring a claim for breach of the investment agreement, the subject matter of the claim and the claimed damages must directly relate to the covered investment (here, the Concentrator) "*that was established or acquired […] in reliance on the relevant investment agreement*."[751]

625. The Claimant further submits that the terms of the TPA are clear. Article 10.16.1 nowhere establishes an additional reliance requirement that is not reflected in Article 10.28. In particular, these terms do not require reliance by the claimant for a claim it brings on behalf of the enterprise—a requirement that does not exist in the definition of Article 10.28. Thus, to bring claims under Article 10.16.1(b), Freeport must show that the subject matter of the claim and the claimed damages directly relate to the Concentrator that SMCV established or acquired in reliance of the 1998 Stability Agreement.[752] According to the Claimant, the drafting history of Articles 10.16.1 and 10.28 of the TPA further confirms the Claimant's interpretation.[753] The Claimant submits that Articles 10.16.1 and 10.28 are identical to the investment agreement provisions that the U.S. team proposed during the TPA negotiations and intended to have the same effect as the identical provisions in the 2004 U.S. Model BIT.[754]

626. According to the Claimant, contrary to the Respondent's argument, there is no temporal limitation unique to Article 10.16.1(b)(i)(C) claims.[755] The Respondent's claim that SMCV and the Concentrator are not "*covered investments*" under the TPA because they were not Freeport's investments at the time the TPA entered into force was brought forward only in the Respondent's Reply on Jurisdiction.[756] Accordingly, it should be dismissed as untimely pursuant to ICSID Arbitration Rule 41.[757] In any event, no

[750] Claimant's Reply, ¶ 282.
[751] Claimant's Reply, ¶ 283.
[752] Claimant's Reply, ¶ 283.
[753] Claimant's Reply, ¶ 284; Claimant's Rejoinder, ¶ 93.
[754] Claimant's Reply, ¶ 284, referring to: Sampliner I (**CER-11**), ¶ 44; Herrera I (**CWS-12**), ¶ 38.
[755] Claimant's Rejoinder, ¶¶ 94 *et seq*.
[756] Claimant's Rejoinder, ¶ 94.
[757] Claimant's Rejoinder, ¶ 94.

provision of the TPA temporally limits investment agreement claims to those concerning an investment that the claimant or enterprise made in reliance on an investment agreement after the TPA entered into force. On the contrary, Article 1.3 of the TPA provides that "*covered investment means, with respect to a Party, an investment, as defined in Article 10.28 (Definitions), in its territory of an investor of another Party in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter*."[758] In addition, by adopting Article 10.28 of the TPA, the TPA parties intended to allow preexisting contracts to become investment agreements after the TPA entered into force in the same way they intended to allow preexisting investments to become covered investments.[759] That intent is reflected in the MEF's opinion on the TPA stating that Chapter 10 applies to "*existing investments as of the date of the entry into force*."[760]

627. With respect to reliance, the Claimant argues that Phelps Dodge and SMCV relied on the 1998 Stability Agreement in making the covered investment, although the Claimant is not required to show that Phelps Dodge relied on the 1998 Stability Agreement.[761] In response to the Respondent's argument that Phelps Dodge's reliance is not "*an acceptable substitute*" for Freeport's reliance, the Claimant submits that Phelps Dodge's reliance is compatible with the TPA.[762] Like Freeport, Phelps Dodge was a U.S. investor. In any event, nothing in the TPA or its negotiation history supports the limitation that the Respondent suggests.[763] Moreover, Phelps Dodge's reliance was a fact or behavior relevant to a legal right, *i.e.,* the right to submit investment agreement claims under the TPA.[764]

628. Specifically, the Claimant submits that Cyprus initially acquired SMCV in reliance on Peru's guarantees of stability, which pursuant to the terms of the Share Purchase Agreement and the Guaranty Agreement would be set out in, among others, future mining stability agreements.[765] The Claimant also refers to the witness testimonies of

[758] Claimant's Rejoinder, ¶ 95; TPA (**CA-10**), Article 1.3.
[759] Claimant's Rejoinder, ¶ 97.
[760] Claimant's Rejoinder, ¶ 97; MEF, Report No. 2006-EF/67, "Opinion on the Free Trade Agreement with the United States of America" dated 1 June 2006 (**RE-336**), p. 13 [Claimant's translation].
[761] Claimant's Memorial, ¶ 297; Claimant's Reply, ¶ 285; Claimant's Rejoinder, ¶¶ 98 *et seq.*
[762] Claimant's Rejoinder, ¶¶ 98-99.
[763] Claimant's Rejoinder, ¶ 99.
[764] Claimant's Rejoinder, ¶ 100.
[765] Claimant's Memorial, ¶ 297; Claimant's Rejoinder, ¶ 101; Share Purchase Agreement dated 17 March 1994 (**CE-4**), Article 3.1(g); Guarantee of the Republic of Peru in Favor of Cyprus Climax Metals Company dated 17 March 1994 (**CE-341**), Article 1.6.

Mr. Morán,[766] Mr. Davenport,[767] and Ms. Torreblanca,[768] which *inter alia* stress the importance of the 1998 Stability Agreement to Phelps Dodge and/or SMCV. The Claimant adds that the 2004 Feasibility Study and the September 2004 update demonstrate that SMCV relied on the 1998 Stability Agreement in making the Concentrator investment, as the Study and update both explicitly assumed that the 1998 Stability Agreement would apply to the Concentrator.[769] Moreover, the Claimant submits that SMCV's Board of Directors conditionally approved the Concentrator investment, "*depend[ing] on obtaining the required permits* [...] *necessary for the project*," including "*the approval of SMCV's request to expand the Beneficiation Concession*," which the Board understood would result in the 1998 Stability Agreement covering the Concentrator by operation of law.[770]

629. Finally, the Claimant argues that the "*subject matter of the claim[s] and the claimed damages*" "*directly relate*" to Freeport's covered investments in SMCV and the Cerro Verde Mining Unit made in reliance on the 1998 Stability Agreement.[771] The Claimant submits that the subject matter of Freeport's claims is Peru's breaches of the 1998 Stability Agreement arising from its novel interpretation restricting stability guarantees to the Feasibility Study's investment program instead of granting them to SMCV for all investments in the Cerro Verde Mining Unit.[772]

3. The Non-Disputing Party's position

630. The NDP argues that each claim submitted by an investor must fall within either Article 10.16.1(a) or Article 10.16.1(b) and is limited to the type of loss or damage available under the Article invoked.[773] Article 10.16.1(a) permits an investor to present a claim for loss or damage incurred by the investor itself, while Article 10.16.1(b) permits a

[766] Claimant's Memorial, ¶ 297; Claimant's Rejoinder, ¶ 101; Morán I (**CWS-8**), ¶¶ 14, 29.
[767] Claimant's Memorial, ¶ 297; Claimant's Rejoinder, ¶ 101; Davenport I (**CWS-5**), ¶¶ 30, 40.
[768] Claimant's Memorial, ¶ 297; Claimant's Rejoinder, ¶ 101; Torreblanca I (**CWS-11**), ¶ 27.
[769] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. IV, pp. 14-16; Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update dated September 2004 (**CE-459**), p. 48.
[770] SMCV, Board of Directors Meeting Minutes dated 11 October 2004 (**CE-470**), p. 1, ¶ 1; Phelps Dodge 2004 10-K report (**CE-901**), p. 5; Torreblanca I (**CWS-11**), ¶ 27; Davenport I (**CWS-5**), ¶ 40; Davenport II (**CWS-16**), ¶ 17; Morán I (**CWS-8**), ¶¶ 26-29.
[771] Claimant's Memorial, ¶ 299.
[772] Claimant's Memorial, ¶ 299.
[773] NDP Submission, ¶¶ 3 *et seq.*

claimant to present a claim on behalf of an enterprise of the other Party that it owns or controls for loss or damage incurred by that enterprise.

631. The NDP submits that Article 10.16.1 of the TPA imposes an additional condition on a claimant's claim of breach of an investment agreement, regardless of whether the claim is direct under Article 10.16.1(a) or on behalf of an enterprise under Article 10.16.1(b). For claims of breach of an investment agreement, a claimant must show a direct relation between the claim and the covered investment that was established or acquired in reliance on the relevant investment agreement. The TPA forecloses recovery for injuries that fall outside the scope of Article 10.16.1 of the TPA, including where the covered investment that is the subject of the claim was not established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.[774]

4. The Tribunal's analysis

632. Article 10.16.1(b) of the TPA provides in relevant part:

> *1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*
>
> *[...]*
>
> *(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> *(B) an investment authorization, or*
>
> *(C) an investment agreement;*
>
> *and*
>
> *(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,*
>
> *provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment*

[774] NDP Submission, ¶ 6.

> *that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.*[775]

633. This provision sets forth a number of requirements that need to be met for a claim to be admissible. The Parties are in dispute as to two of the requirements of Article 10.16.1(b) of the TPA. Specifically, the Parties disagree on whether the 1998 Stability Agreement qualifies as an "*investment agreement*" under the TPA and whether the Claimant is required to have relied on the 1998 Stability Agreement when the covered investment was established or acquired, or whether it suffices that SMCV or, alternatively, Phelps Dodge relied on the 1998 Stability Agreement. The Tribunal will address each of these issues in turn.

634. The Tribunal first turns to the issue of whether the 1998 Stability Agreement is an "*investment agreement*" for purposes of the TPA. The Tribunal notes that Article 10.28 of the TPA defines "*investment agreement*" as

> *a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.*[776]

635. This definition requires (1) a written agreement, (2) between a national authority (3) and a covered investment or investor of another party, (4) on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself.

636. With regard to the first requirement, it is undisputed that the 1998 Stability Agreement is a written agreement.

637. With regard to the second requirement, this is also fulfilled as the 1998 Stability Agreement was concluded on the Respondent's side by MINEM, which is a national authority.[777]

638. Turning to the third requirement, MINEM's counterparty to the 1998 Stability Agreement was SMCV. Article 1.3 of the TPA defines "*covered investment*" as an investment in the territory of a party of "*an investor of another [p]arty in existence as*

[775] TPA (**CA-10**), Article 10.16.1(b).
[776] TPA (**CA-10**), Article 10.28.
[777] 1998 Stability Agreement (**CE-12**), p. 1.

of the date of entry into force of this Agreement or established, acquired, or expanded thereafter."[778] Article 10.28 of the TPA further includes "*enterprise*" in its non-limitative list of investments covered by the TPA.[779] SMCV is thus a covered investment because it is an enterprise that the Claimant owns or controls.[780]

639. With regard to the fourth requirement, the Tribunal finds that SMCV relied on the 1998 Stability Agreement when "*establishing or acquiring*" the Concentrator. First, the Tribunal accepts the Claimant's contention that the "*covered investment*" established or acquired in reliance on the 1998 Stability Agreement is the Concentrator. In this regard, the Tribunal finds that there is tangible evidence that SMCV invested in the Concentrator on the premise that it could benefit from guarantees of the 1998 Stability Agreement. In particular, there is ample evidence demonstrating that SMCV invested in the Concentrator on the basis of the profit reinvestment guarantee of the 1998 Stability Agreement. For example, in a letter to MINEM in July 2003, Ms. Torreblanca explained that SMCV's decision to build the Concentrator "*was directly related*" to its right to reinvest non-distributed profits back into the project.[781] The Tribunal disagrees with the Respondent's argument that SMCV and the Concentrator are not "*covered investments*" because the TPA had not yet entered into force at the time the investment was made. The plain wording of the definition of a "*covered investment*" under the TPA contradicts the Respondent's argument and shows that an investment could have already been in existence at the date of entry into force of the TPA. There is thus no basis to consider that there is a temporal limitation to investments covered by the TPA unique to Article 10.16.1(b)(i)(C) claims.

640. The Tribunal turns to the second issue of whether the Claimant is required to have relied on the 1998 Stability Agreement when the covered investment was established or acquired, or whether it suffices that SMCV or, alternatively, Phelps Dodge relied on the 1998 Stability Agreement.

641. The Tribunal does not find anything in the wording of Article 10.16.1(b) of the TPA which would suggest that the Claimant is required to have relied on the investment agreement when the covered investment was established or acquired. In the Tribunal's

[778] TPA (**CA-10**), Article 1.3.
[779] TPA (**CA-10**), Article 10.28.
[780] Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A., Corporate Organizational Chart dated 21 February 2020 (**CE-265**).
[781] SMCV, Petition No. 1418719 to MINEM dated 3 July 2003 (**CE-394**).

view, should the TPA have required specifically the claimant's reliance, it would have expressly provided so by qualifying the reliance as such.

642. Rather, in the Tribunal's view, Article 10.16.1(b) of the TPA leaves open the question of whose reliance is required. This finding is in line with the definition of "*investment agreement*" in Article 10.28 of the TPA, which, as held above, defines the term as

> *a written agreement between a national authority of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.*

643. In the Tribunal's view, the TPA clearly sets out that an investment agreement for the purposes of the TPA is an agreement, on which either the covered investment *or* the investor relies in establishing or acquiring a covered investment. Reliance for the purposes of Article 10.28 or 10.16.1(b) can thus either be established through the investor or the investment. In this case and as explained above, it is the covered investment, *i.e.,* SMCV, which relied on the 1998 Stability Agreement when making its investment in the Concentrator.

644. The Tribunal accordingly also rejects the Respondent's objection based on Article 10.16.1(b) of the TPA as unfounded.

V. MERITS

645. The Tribunal now turns to the question of the merits of the dispute.

646. The Parties are in dispute as to two key issues:

- Did the Respondent breach the 1998 Stability Agreement?
- Did the Respondent breach Article 10.5 of the TPA?

647. In what follows, the Tribunal will set out its analysis of these two issues and reaches by majority the conclusion that Peru has neither breached the 1998 Stability Agreement nor Article 10.5 of the TPA.

A. The Claimant's claim that the Respondent breached the 1998 Stability Agreement

1. The Claimant's position

648. The Claimant brings claims on the basis of the 1998 Stability Agreement arguing that the 1998 Stability Agreement is an "*investment agreement*" for which the Claimant may bring claims under Article 10.16 of the TPA.[782]

a) The Respondent's denial of stability guarantees on the basis of a novel interpretation of the 1998 Stability Agreement contrary to the Mining Law and Regulations

649. The Claimant argues that the Respondent breached the 1998 Stability Agreement each time it denied stability guarantees to SMCV on the basis of its novel interpretation of the 1998 Stability Agreement, *i.e.,* an interpretation based on Mr. Isasi's June 2006 Report.[783]

650. In the Claimant's view, under the plain text of the Mining Law and Regulations in force until 2014, stability guarantees applied to the entire mining unit or concession(s) in which the investor made its qualifying minimum investment without distinguishing whether the investments were included in the investment program in the feasibility study, different processing methods were used within the mining unit, or otherwise.[784] In particular, the Claimant submits that the plain text of both the Mining Law (notably Articles 72, 80, 82, 83, and 84)[785] and the Regulations[786] (notably Articles 1, 2, 18, 22, and 25) made this clear.

651. According to the Claimant, the Mining Law's drafters confirm that its provisions were intended to convey stability guarantees to the entire mining unit or concession in which an investor made its qualifying minimum investment. In this regard, Ms. Chappuis, who co-drafted the provisions in L.D. 708 which became Title Nine of the Mining Law, testifies that under the Mining Law, stability agreements cover "*all investments*" that a mining activity titleholder makes in its concession or "*mining unit*."[787] Ms. Vega, who

[782] Claimant's Memorial, ¶¶ 289 *et seq.*; Claimant's Reply, ¶¶ 104 *et seq.*; Claimant's Post-Hearing Brief, ¶¶ 8 *et seq*.
[783] Claimant's Memorial, ¶¶ 300 *et seq*.
[784] Claimant's Memorial, ¶¶ 301 *et seq*.
[785] Mining Law (**CA-1**).
[786] Mining Regulations (**CA-2**).
[787] Chappuis I (**CWS-3**), ¶¶ 45-46.

consolidated L.D. 708 into the Mining Law, explains that the Mining Law provisions "*alone and taken together, made clear that stability guarantees extended broadly to all investments that a mining company made within the concessions or unit covered by its stability agreement during the 10 or 15 years it is in force*."[788]

652. In addition, the Claimant submits that the Mining Law and Regulations also must be interpreted as having applied stability guarantees to all investments that a mining company makes within its mining unit because it is the only interpretation that is consistent with the Government's stated purpose of promoting private investment in the mining sector.[789] The Claimant argues that promoting private investment in mining was the Government's primary objective in adopting the stability incentives that L.D. 708 introduced into the Mining Law.[790] To accomplish this purpose, the Claimant argues that it is critical for stability guarantees to apply to the entire mining unit or concession, given the basic commercial realities of mining operations.[791] The Claimant's expert, Mr. Otto, explains that stability guarantees are particularly important in the mining industry given that "*[d]istinctive characteristics of mining—such as high capital costs, long payback periods, and fixed assets—make stability of the fiscal and administrative framework particularly important to a mining company's decision to invest*."[792] The Claimant also argues that the individuals involved in preparing the Mining Law specifically understood that to promote investment in mining resources, stability guarantees had to protect an investor's entire mining unit or concession.[793] Finally, according to the Claimant, international practice confirms that stability guarantees typically apply to entire mining units, since governments worldwide implement stability guarantees for the purpose of "*attract[ing] investment*."[794]

653. Furthermore, according to the Claimant, until it began adopting a restrictive interpretation of the scope of stability guarantees on the basis of Mr. Isasi's June 2006 Report, the Government had consistently interpreted the Mining Law and Regulations

[788] Vega I (**CER-5**), ¶ 34.
[789] Claimant's Memorial, ¶¶ 308 *et seq*.
[790] Claimant's Memorial, ¶ 309.
[791] Claimant's Memorial, ¶ 310.
[792] Otto I (**CER-4**), ¶ 17.
[793] Vega I (**CER-5**), ¶ 38; Chappuis I (**CWS-3**), ¶ 28.
[794] Otto I (**CER-4**), ¶¶ 15, 17-28, 36; Morán (**CWS-8**), ¶ 15.

as applying stability on the basis of an entire mining unit or concession, both in theory and in practice.[795] In particular, the Claimant contends that:

- Mr. Isasi, who in June 2006 authored the novel interpretation that formed the basis for SUNAT's Assessments, had in his April 2005 Report confirmed that stability guarantees applied on the basis of the concessions in which the qualifying minimum investment was made, not the investment itself.[796]
- MINEM's DGM and the Mining Council understood stability guarantees as applying to EAUs or concessions in their treatment of stabilized companies, as appears in the November 2001 Mining Council Resolution relating to the "*Parcoy*" mining unit, which confirmed that "*tax stability [is applicable to] the Parcoy EAU, which is where the investments of the Parcoy Project were made*."[797]
- Former MINEM officials confirmed that this was the Government's understanding before it adopted the novel interpretation under political pressure, as appears in Ms. Chappuis' and Mr. Flury's witness statements.[798]
- The Government's initial implementation of the Royalty Law confirms that stability guarantees applied to whole mining units or concessions.[799] The text of the Royalty Law and Regulations made this clear.[800]

654. The Claimant contends that the 1998 Stability Agreement required the Respondent to apply the stabilized regime to the entire Cerro Verde mining unit, made up of the Mining and Beneficiation Concessions.[801] In particular, the Claimant argues as follows:

- The Stability Agreement confirmed that stability guarantees applied to the Mining and Beneficiation Concession. As a matter of Peruvian law, a stability agreement must reflect the guarantees of the Mining Law, and therefore must be interpreted to be consistent with that framework, according to which stability was granted to the entire mining unit or concession.[802] Clauses 9 and 10 of the

[795] Claimant's Memorial, ¶¶ 313 *et seq*.
[796] MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶¶ 16-17.
[797] MINEM, Resolution No. 380-2001-EM-CM dated 16 November 2001 (**CE-377**), p. 1.
[798] Chappuis I (**CWS-3**), ¶ 28; Flury I (**CWS-7**), ¶¶ 33-38.
[799] Hernández I (**CER-3**), ¶ 81; "Minister of Economy of Peru Against Mining Royalties," *Agence France Presse* dated 30 May 2004 (**CE-439**); MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), p. 7; SUNAT Letter to SMCV dated 17 February 2005 (**CE-482**).
[800] Royalty Law No. 28258 dated 24 June 2004 (**CA-6**), Article 2; Mining Law (**CA-1**), Article 8; Royalty Law Regulations, Supreme Decree No. 157-2004-EF dated 15 November 2004 (**CA-7**), Articles 4, 7.1; Amendments to Royalty Law Regulations, Supreme Decree No. 018-2005-EF dated 28 January 2005 (**CA-116**), Article 6.
[801] Claimant's Memorial, ¶¶ 320 *et seq*.
[802] Mining Law (**CA-1**), Article 86; Peruvian Civil Code, Legislative Decree No. 295 dated 24 July 1984 (**CA-39**), Article 1357; 1998 Stability Agreement (**CE-12**), Clause 1.1, Clause 3, Exhibit I; Chappuis I (**CWS-3**), ¶¶ 26, 39; Vega I (**CER-5**), ¶¶ 31, 53, 59, 61; Bullard I (**CER-2**), ¶¶ 16, 21, 28, 31-32, 37; Model Stability Agreement, Supreme Decree No. 04-94-EM dated 3 February 1994 (**CE-778**).

1998 Stability Agreement, which reflected the stability guarantees set out in the Mining Law, confirmed that stability extended to all of SMCV's activities in the Cerro Verde Mining Unit.[803]

- The Stability Agreement guarantees benefits for the entirety of Cerro Verde's operations, including the Concentrator, because Cerro Verde operates as a single integrated mining unit made up of the Mining and the Beneficiation Concessions, both of which are explicitly covered by the 1998 Stability Agreement, as explained by Mr. Aquino.[804] Moreover, because SMCV operated as a single mining unit with integrated operations, MINEM specifically endorsed the Concentrator's inclusion in the Cerro Verde Mining Unit, and hence the 1998 Stability Agreement, when the DGM preliminarily approved the expansion of the Beneficiation Concession to include the Concentrator in October 2004.[805] According to the Claimant, the DGM's decision to grant SMCV's application to expand Cerro Verde's processing rights under the existing Beneficiation Concession, instead of under a new and separate beneficiation concession, leaves no doubt that the Concentrator, as part of the Cerro Verde Mining Unit, is covered by the 1998 Stability Agreement.[806] The Claimant adds that MINEM's inclusion of the Concentrator within the existing Beneficiation Concession was entirely in line with the Government's consistent recognition of Cerro Verde as a single mining unit since the 1970s, and with its clear recognition of the need to develop a concentrator as part of Cerro Verde's integrated production unit.[807] Finally, following the October 2004 provisional approval of the Beneficiation Concession expansion, the Government continued to confirm that SMCV's Concentrator was part of the Cerro Verde Mining Unit.[808]

---

[803] 1998 Stability Agreement (**CE-12**), Clauses 9.1, 9.2, 9.3, 9.4, 9.6.1, 10.2; Bullard (**CER-2**), ¶ 37.

[804] Claimant's Memorial, ¶ 327; Aquino I (**CWS-1**), Section II; Mining Law (**CA-1**), Article 82.

[805] MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM dated 26 October 2004 (**CE-476**).

[806] Chappuis I (**CWS-3**), ¶¶ 53-54; SMCV, Petition No. 1487157 dated 27 August 2004 (**CE-458**), p. 2; SMCV, Petition No. 1487019 to MINEM dated 27 August 2004 (**CE-457**); Torreblanca I (**CWS-11**), ¶¶ 25-27; MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM dated 26 October 2004 (**CE-476**); Vega I (**CER-5**), ¶¶ 66-68; Otto I (**CER-4**), ¶ 44.

[807] Claimant's Memorial, ¶ 329; Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú dated 1 February 1972 (**CE-290**), Vol. I, p. 3; Supreme Decree No. 027-76-EM/DGM dated 19 July 1976 (**CE-2**); Wright Engineers Ltd., Copper: From Oxides to Cathodes dated April 1978 (**CE-296**), p. 29; CEPRI, Minutes for SMCV dated 3 July 1996 (**CE-351**), p. 5; SMCV Public Deed dated 20 August 1993 (**CE-330**), Clause 1.1; Minero Perú, Minutes of Board Meeting No. 634 dated 22 June 1993 (**CE-329**), pp. 5-6; Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. dated 17 March 1994 (**CE-4**), Definitions; MINEM, Report No. 708-97-EM/DGM/OTN dated 30 December 1997 (**CE-356**); 1998 Stability Agreement (**CE-12**), Clause 1.4; Silva (**CWS-10**), ¶¶ 18-19.

[808] Claimant's Memorial, ¶ 330; MEF, Report No. 209-2004-EF/66.01 dated 3 December 2004 (**CE-22**); MEF, Communication No. 942-2004-EF/10 dated 3 December 2004 (**CE-21**); Chappuis I (**CWS-3**), ¶ 45; MINEM, 2009

– The Government's own conduct confirms that stability applied to the entire Cerro Verde mining unit.[809] In this regard, the Claimant contends that the Respondent's conduct prior to the Concentrator investment confirms that the Respondent understood that the Agreement would apply to the entirety of SMCV's Mining Unit.[810] Moreover, according to the Claimant, the 2006 Roundtable Discussions attended by SMCV, Arequipa commissioners, and Government officials—including Mr. Isasi and the Minister of Energy and Mines—assumed that SMCV would not pay any royalties, including for the Concentrator, because the 1998 Stability Agreement applied to the entire Cerro Verde Mining Unit.[811] Furthermore, the Claimant submits that the Government treated SMCV as fully stabilized with respect to the entire Cerro Verde Mining Unit during the preparation of the Voluntary Contribution and GEM programs.[812]

655. Against this background, the Claimant argues that the Respondent's interpretation of the 1998 Stability Agreement limiting its scope to the investment in the leaching facility is entirely unsupported.[813] According to the Claimant, the Respondent's *ex post* justification for its breaches of the 1998 Stability Agreement has no basis in the text of the Mining Law and Regulations.[814] In this regard, the Claimant submits that under the Mining Law and Regulations, the feasibility study served the purpose of demonstrating an investor's eligibility by virtue of its qualifying minimum investment program.[815] Ms. Vega and Ms. Chappuis confirm that the feasibility study played the important function of demonstrating an investor's eligibility for stability guarantees and the feasibility of the investment, but did not limit the guarantees' protective scope.[816]

Mining Investment Report (**CE-584**), p. 44; MINEM, Report on Mining Projects dated 2 October 2009 (**CE-593**); OSINERGMIN, Report No. 597-2009-OS-GFM dated 14 April 2009 (**CE-587**); OSINERGMIN, Report No. 902-2009-OS-GFM dated 3 June 2009 (**CE-591**); OSINERGMIN, Report No. 876-2009-OS-GFM dated 1 June 2009 (**CE-589**); OSINERGMIN, Report No. GFM 266-2009 dated 1 June 2009 (**CE-590**); OSINERGMIN, Report No. 1551-2009-OS-GFM dated 29 September 2009 (**CE-592**); SUNAT's profile for SMCV (**CE-826**).

[809] Claimant's Memorial, ¶¶ 331 *et seq*.

[810] Claimant's Memorial, ¶ 332; CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement dated 26 October 1993 (**CE-332**); Silva (**CWS-10**), ¶ 23; *Peru*, 320 MINING JOURNAL 1 dated 22 January 1993 (**CE-320**), pp. 11, 14-15.

[811] Claimant's Memorial, ¶ 333; "Advance Payment of Royalties Proposed", *La República* dated 15 June 2006 (**CE-533**); Torreblanca I (**CWS-11**), ¶ 53.

[812] Claimant's Memorial, ¶ 334; Castagnola (**CWS-2**), ¶ 44; Santa María I (**CWS-9**), ¶¶ 23, 45; Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 dated 28 February 2012 (**CE-64**); Torreblanca I (**CWS-11**), ¶ 84.

[813] Claimant's Memorial, ¶¶ 335 *et seq*.

[814] Claimant's Memorial, ¶¶ 335 *et seq*.

[815] Mining Law (**CA-1**), Articles 85, 101i; Vega I (**CER-5**), ¶¶ 33, 50(a); Mining Regulations (**CA-2**), Articles 18, 19.

[816] Claimant's Memorial, ¶ 338; Chappuis I (**CWS-3**), ¶¶ 22-24; Otto I (**CER-4**), ¶¶ 48-50; Vega I (**CER-5**), ¶¶ 50, 51, 53, 58.

Furthermore, the terms of the 1998 Stability Agreement confirmed that the qualifying investment program included in the feasibility study served the role of demonstrating that an investor was eligible for stability guarantees.[817] Finally, according to the Claimant, the fact that the Supreme Court stated in the 2008 Royalty Case that the investment program contained in the feasibility study limited the scope of the 1998 Stability Agreement does not affect this analysis.[818] The Claimant submits that the Court's position in that case was wrong and is not precedential on any subsequent cases. In any event, it is ultimately for the Tribunal to decide whether there has been a breach of the State's international law obligations under the umbrella clause.[819]

656. The Claimant further submits that to advance its novel and restrictive interpretation, the Respondent had to amend both the Mining Law and Regulations, confirming that the version in effect at the relevant time did not limit stability guarantees to the investment included in the feasibility study.[820] In this regard, according to the Claimant, the 2014 amendment to the Mining Law, which expressly introduced a provision limiting certain stability agreements to the feasibility study's investment program, demonstrates that the 1998 version of the law that applied to SMCV did not implicitly contain this limitation, since the amendment would have otherwise been unnecessary.[821] In addition, the Claimant submits that MINEM's December 2019 amendments to Article 22 of the Regulations similarly confirm that the previous version of the Regulations did not limit stability to the feasibility study's investment program, as it would have been unnecessary for MINEM to limit the scope of Article 22 in 2019 if the original text had already limited the stability guarantees to the investment program.[822]

657. The Claimant also argues that the Respondent's interpretation upends the basic purpose that the Mining Law's drafters sought to achieve in creating stability guarantees, *i.e.,* to offer investors a predictable tax and administrative framework.[823] According to the Claimant, by their very nature, mining units require continuing investments over time

[817] 1998 Stability Agreement (**CE-12**), Clauses 1.1, 1.2, 2, 3, and 4, Exhibit I; Bullard I (**CER-2**), ¶ 40.
[818] SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment dated 23 February 2016 (**CE-138**).
[819] Claimant's Memorial, ¶ 340.
[820] Claimant's Memorial, ¶¶ 341 *et seq.*
[821] Mining Law (**CA-1**), Article 83-B; Promoting Economic Reactivation, Law No. 30296 dated 31 December 2014 (**CE-680**); Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment dated 17 December 2014 (**CE-122**), pp. 24-25, ¶¶ 32-33; Vega I (**CER-5**), ¶ 52.
[822] Supreme Decree No. 021-2019-EM dated 28 December 2019 (**CA-246**), Article 22; Hernández (**CER-3**), ¶ 119; Vega I (**CER-5**), ¶ 47.
[823] Claimant's Memorial, ¶¶ 344 *et seq.*

and, thus, limiting stability guarantees to the investments in the feasibility study undermines the promotion of investment in mining resources.[824] In addition, there are many costs and assets within an integrated mining unit that cannot be allocated in any obvious and reasonable manner to a specific investment. As a result, applying separate stability regimes to different investments within the same integrated mining unit under the Respondent's interpretation would be administratively burdensome, and would require extensive regulatory guidance to implement in a non-arbitrary manner.[825] Furthermore, according to the Claimant, the Mining Law and Regulations were silent on how to allocate assets and costs between stabilized and non-stabilized investments within the same integrated mining unit, in contrast to allocating costs between different stabilized and non-stabilized concessions or mining units.[826] Finally, the Claimant argues that the Government's own attempts to implement its interpretation against SMCV make it clear that the stability regime was never intended to operate with multiple regimes within the same unit, and that doing so is extremely difficult, as illustrated for example by the Respondent's treatment of the TTNA and Income Tax.[827]

658. The Claimant further argues that the Respondent's argument that the Peruvian Supreme Court decision in the 2008 Royalty Case of 18 August 2017 limits the Tribunal's consideration of whether Peru breached the 1998 Stability Agreement—either as "*collateral estoppel*" or as a "*prudential matter*"—are misconceived and unsupported.[828] In this regard, the Claimant submits that it is not "*collaterally estopped*" from arguing that the 1998 Stability Agreement applied to the Concentrator. Referring *inter alia* to the *Caratube v. Kazakhstan* and *Amco v. Indonesia* tribunals, the Claimant submits that it is by no means settled that collateral estoppel is a general principle applicable in international arbitration proceedings.[829] Even assuming that collateral estoppel may apply in international arbitration proceedings as a general principle of law, the Claimant argues that there is no basis for its application based on prior decisions of domestic courts. The Claimant submits that both the *Apotex v. United States* and *RSM*

[824] Otto I (**CER-4**), ¶¶ 23, 34, and 50.
[825] Otto I (**CER-4**), ¶ 52; Choque I (**CWS-4**), ¶¶ 13, 15, 33, and 34; Aquino I (**CWS-1**), ¶ 57.
[826] Mining Regulations (**CA-2**), Article 22; Otto I (**CER-4**), ¶ 51; Choque I (**CWS-4**), ¶ 33; Hernández I (**CER-3**), ¶ 79.
[827] Claimant's Memorial, ¶ 348.
[828] Claimant's Reply, ¶¶ 105 *et seq.*
[829] Claimant's Reply, ¶ 107, referring to: *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award dated 27 September 2017 (**CA-414**), ¶ 459; *Amco Asia Corporation et al. v. Republic of Indonesia*, ICSID Case No. 81/1, Decision on Jurisdiction in Resubmitted Proceeding dated 10 May 1988 (**CA-355**), ¶¶ 30-32.

v. Grenada II cases referred to by the Respondent are inapposite because they either dealt with multiple international arbitration proceedings brought by the same claimant under the same treaty and raising the same claims or the preclusive effect of a prior international arbitration decision.[830] Furthermore, the 2006 ILA Report referred to by the Respondent addressing the law of *res judicata* in the context of international commercial arbitration, discusses collateral estoppel (or issue preclusion) only in the context of considering the impact of a prior international arbitral award on a subsequent international proceeding.[831] More generally, the Claimant argues that it is well-established that a domestic court decision does not have preclusive effect in international legal proceedings.[832] The Claimant also states that the Respondent's claim that Freeport is "*collaterally estopped*" from advancing its claims in the arbitration—and its alternative argument that the Tribunal should "*afford the Peruvian court decisions significant deference as a prudential matter*"—are an attempt to get around the fact that the Respondent cannot satisfy the Treaty's strict requirements for the narrow circumstances under which a claimant may be barred from raising certain claims that have already been litigated in a domestic proceeding under Article 10.18.4 of the TPA.[833] The Claimant also argues that the Respondent is mistaken when it argues that "*[a]bsent a denial of justice or due process violation […] [Claimant] is collaterally estopped from arguing that the 1998 Stability Agreement covers the Concentrator Project*" or alternatively that "*the tribunal should respect*" the domestic court decisions.[834]

659. As a matter of Peruvian law, the Claimant further submits that the Supreme Court's decision in the 2008 Royalty Case on the scope of the 1998 Stability Agreement is not binding, either as precedent or as *res judicata*.[835] In particular, the Claimant submits that:

---

[830] Claimant's Reply, ¶ 108, referring to: *Apotex Holdings Inc. and Apotex Inc. v. United States of America,* ICSID Case No. ARB(AF)/12/1, Award dated 25 August 2014 (**RA-18**), ¶ 7.23; *RSM Production Corporation and others v. Grenada II,* ICSID Case No. ARB/10/6, Award dated 10 December 2010 (**RA-19**), ¶¶ 1.2.1, 1.4.1-1.4.4, 2.3.1.
[831] ILA Final Recommendations (**RA-20**), p. 7.
[832] Claimant's Reply, ¶ 109, referring *inter alia* to: Filip de Ly and Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 ARB. INT'L (2013) (**CA-307**), p. 56; Ian Brownlie, *The Relation of Municipal and International Law,* PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2003) (**CA-306**), p. 50; Bin Cheng, *The Principle of Res Judicata, in* GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953) (**CA-293**), fn. 6.
[833] Claimant's Reply, ¶ 110.
[834] Claimant's Reply, ¶ 111; Respondent's Counter-Memorial, ¶ 541.
[835] Claimant's Reply, ¶¶ 112 *et seq.*

- The Respondent cannot demonstrate "*triple identity*," which is required for *res judicata* under Peruvian law. Prof. Morales agrees with Prof. Bullard that preclusion only applies if the claims involve the same parties (*personae*), the same object (*petitum*), and the same cause of action (*causa petendi*).[836]
- The Respondent agrees with the Claimant that the ruling of the Supreme Court in the 2008 Royalty Case has no precedential value in Peru.[837] Thus, according to the Claimant, if the Supreme Court's decision has no precedential value, it does not provide Peruvian courts, much less the Tribunal, with a "*definitive answer*" on the proper scope of the 1998 Stability Agreement.
- The record demonstrates that neither the Supreme Court, nor the Tax Tribunal, nor SUNAT accorded any binding effect to the Supreme Court decision in the 2008 Royalty Case, including in interpreting the scope of the 1998 Stability Agreement in subsequent proceedings. After the Supreme Court had rendered its decision in the 2008 Royalty Case, the Supreme Court heard oral argument in the 2006-07 Royalty Case. SUNAT and the Tax Tribunal did not seek dismissal on the grounds that the Supreme Court decision in the 2008 Royalty Case had *res judicata* or precedential effect.[838] Moreover, the three justices voting to dismiss SMCV's appeal of the 2006-2007 Royalty Assessments did not suggest that the Supreme Court decision in the 2008 Royalty Case was binding or otherwise dictated their votes, nor did the two justices voting to annul the decision of the Appellate Court. A total of 18 Tax Tribunal proceedings against SMCV arising out of the scope of the 1998 Stability Agreement remained pending after the Supreme Court rendered its decision in the 2008 Royalty Case.[839]

660. The Claimant concludes that as the Supreme Court's decision in the 2008 Royalty Case is incapable of having any binding effect, it also should not be accorded any weight by the Tribunal. The Claimant contends that unlike civil proceedings, the contentious administrative proceedings before the Supreme Court did not provide SMCV with an adequate evidentiary forum to make the case that the Claimant makes in this arbitration or that SMCV would have been able to make to support breach of contract claims in the civil courts. The Supreme Court did not have before it the evidence submitted in this arbitration including, among others: (i) the evidence of due process violations tainting

[836] Morales I (**RER-2**), ¶¶ 87-88; Bullard II (**CER-7**), ¶¶ 61, 65-70.
[837] Bullard II (**CER-7**), ¶ 71.
[838] Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) dated 20 November 2018 (**CE-739**).
[839] Claimant's Reply, ¶ 118.

the Tax Tribunal's resolutions under review; (ii) the fact and expert witness testimony concerning the Mining Law and Regulations; (iii) the full extent of the evidence concerning the Government's application of stability agreements to concessions and mining units; (iv) Mr. Isasi's April and September 2005 Reports; (v) the evidence of the political pressure on the Minister of Energy and Mines resulting in MINEM's volte-face; or (vi) expert witness testimony concerning the purpose of stability guarantees and their presumptive scope in international practice, among other matters. Moreover, less than one year after the Supreme Court's decision, the President of Peru recognized that the Supreme Court was part of a "*system for administering justice*" that had "*collapsed*" and needed sweeping anti-corruption reforms.[840]

b) The Respondent's breaches of the 1998 Stability Agreement

661. The Claimant argues that the Respondent breached the 1998 Stability Agreement each time SUNAT's Royalty and Tax Assessments applying the non-stabilized regime to the Concentrator became binding and enforceable against SMCV.[841] The Claimant states that the Respondent specifically breached (i) Clauses 9.4, 9.5, and 9.6, and the obligation to provide tax and administrative stability to SMCV;[842] (ii) Clause 10.1, and the obligation to exempt SMCV from the application of any new laws or regulations that "*directly or indirectly, denaturalize[d] the guarantees provided*" by the 1998 Stability Agreement;[843] and (iii) Clause 10.2, and the obligation to protect SMCV from "*any encumbrance or obligation that could represent reduction of its availability of cash*."[844]

662. According to the Claimant, each of the Respondent's breaches of the 1998 Stability Agreement arose as of the date that the relevant Assessment became final and enforceable against SMCV. According to the Claimant, under Peruvian law, such

[840] "Peru sets referendum to 'legitimize' reforms after scandal", *AFP* dated 29 July 2018 (**CE-1016**); "The Judiciary is perceived as the most corrupt in Peru" *Semana Económica* dated 29 October 2018 (**CE-1018**); "Leaked calls reveal systemic corruption in Peru's judiciary, sparking flurry of resignations", *Washington Post* dated 20 July 2018 (**CE-1015**); "Peru Judicial Branch declares three-month state of emergency", *Peru Reports* dated 16 July 2018 (**CE-1013**); "Corruption in the Judicial System Surfaces in Phone Taps", *Peruvian Times* dated 10 July 2018 (**CE-1012**); GAN Integrity, Peru Corruption Report dated September 2016 (**CE-1005**).
[841] Claimant's Memorial, ¶¶ 351 *et seq*.
[842] 1998 Stability Agreement (**CE-12**) Clauses 9.4, 9.5, 9.6.
[843] 1998 Stability Agreement (**CE-12**), Clause 10.1.
[844] 1998 Stability Agreement (**CE-12**), Clauses 10.2, 9.4, 13; MINEM, Report No. 708-97-EM/DGM/OTN dated 30 December 1997 (**CE-356**); Chappuis I (**CWS-3**), ¶ 52; "Peru: President Toledo Announces an Investment of US$850 Million in Cerro Verde", *Europa Press* dated 12 October 2004 (**CE-471**).

breaches could only occur through administrative acts (*actos administrativos*) that were "*final, definitive, and enforceable*," since prior to becoming final, definitive, and enforceable, there was no effect on SMCV's legal interests, no damage to SMCV, and the administrative authority could have reversed course at any time.[845] According to the Claimant's legal expert Dr. Bullard, "*[u]nder Peruvian law there is a breach of a contractual obligation when the debtor's conduct fails to deliver what it had promised,*" *and "in the case of stability agreements and the SUNAT assessments against SMCV, for the debtor's conduct to have failed to deliver what it had promised, the State must act or perform its conduct through final, definitive, and enforceable administrative acts*."[846] The Claimant submits that SUNAT's Assessments became final and enforceable on either (i) the business day after SMCV was served with the Tax Tribunal resolution, for the Assessments it challenged before the Tax Tribunal; (ii) the business day after SMCV's deadline for submitting a challenge before SUNAT or the Tax Tribunal expired, for the cases where SMCV did not file a challenge before the Tax Tribunal or a request for reconsideration before SUNAT; or (iii) the business day after SMCV was served with the SUNAT or Tax Tribunal resolution accepting SMCV's withdrawal, for the cases SMCV withdrew.[847]

663. The Claimant disputes the Respondent's expert Mr. Morales' conclusion that the breaches of the 1998 Stability Agreement occurred on the date they were notified to SMCV.[848] According to the Claimant, at the time of notification, the Respondent had not yet actually applied to SMCV a regime different than the one it promised under the terms of the 1998 Stability Agreement. At the time of notification, the Respondent's own administrative authority could still have corrected its initial Assessment through the normal administrative process. At that date, the Respondent also could not yet have applied the non-stabilized regime to SMCV by enforcing SUNAT's assessments. Further, the Claimant contends that contrary to Mr. Morales's suggestion, SMCV could not have filed a claim for breach of contract before Peruvian courts upon notification of the SUNAT Assessments. Rather, as Prof. Bullard explains, SMCV could only have brought a claim for breach of contract once it actually suffered a pecuniary loss—which

[845] Claimant's Memorial, ¶ 352; Bullard I (**CER-2**), ¶ 86.
[846] Bullard I (**CER-2**), ¶¶ 81-82.
[847] Hernández I (**CER-3**), ¶ 41.
[848] Claimant's Reply, ¶ 123; Morales I (**RER-2**), ¶¶ 98-103.

only occurred once the Assessments became final and enforceable and SMCV had an enforceable obligation to pay the Assessments.[849]

664. The Claimant argues that the Respondent also breached the 1998 Stability Agreement when it arbitrarily applied in certain Tax Assessments the non-stabilized regime to SMCV's entire mining unit, including to assets and activities that were stabilized even under Peru's interpretation.[850] In particular, the Claimant asserts the following:

- In the 2010 and 2011 Income Tax Assessments, SUNAT applied non-stabilized depreciation rates to certain assets without attributing them to the Concentrator.[851] In the 2012 and 2013 Income Tax Assessments, it did so to all the assets that SMCV started using as of 2007, including some of the same leaching facilities' assets it had treated as stabilized in previous fiscal years.[852]
- In the 2007-2013 Income Tax Assessments, SUNAT denied SMCV's income tax deductions for Profit-Sharing Obligation (**PTU**), expenses accrued in prior years, and recreational expenses, as well as deductions for payments that SMCV recorded using the classification system applicable under the 1998 Stability Agreement. SUNAT did so on a blanket basis without even attempting to identify which deductions related to the Concentrator.[853]
- Even though the Respondent never denied that the 1998 Stability Agreement applied to the investment in the leaching facilities, SUNAT assessed the following taxes from which SMCV was exempted by operation of the 1998 Stability Agreement against the entire Cerro Verde Mining Unit: (i) 2009-2013 TTNA, (ii) 2007-2013 AIT, and (iii) 2013 CMPF.[854]

665. As with the Respondent's other breaches of the 1998 Stability Agreement, the Claimant submits that these breaches occurred when the relevant Tax Assessment became final and enforceable.

666. While the Respondent concedes that SUNAT applied the non-stabilized regime to the leaching facilities in these assessments, the Claimant notes that the Respondent attempts to place the blame for its arbitrary conduct on SMCV, asserting that SMCV "*had to keep its accounts separate*" and it "*failed to do so*."[855]

[849] Bullard I (**CER-2**), ¶ 89; Bullard II (**CER-7**), ¶¶ 83-85.
[850] Claimant's Reply, ¶¶ 124 *et seq.*
[851] Claimant's Reply, ¶ 124; Choque I (**CWS-4**), ¶¶ 21-24; Spiller-Chavich I (**CER-1**), Table 54.
[852] Claimant's Reply, ¶ 124; Choque I (**CWS-4**), ¶¶ 21-24; Spiller-Chavich I (**CER-1**), Table 54.
[853] Claimant's Reply, ¶ 124; Choque I (**CWS-4**), ¶¶ 25-28; Spiller-Chavich I (**CER-1**), Table 54.
[854] Claimant's Reply, ¶ 124; Choque I (**CWS-4**), ¶¶ 29-32.
[855] Respondent's Counter-Memorial, ¶¶ 391, 395.

667. In this regard, the Claimant first submits that it was not required to keep separate accounts for the leaching facilities because (i) under Article 22 of the Regulations, only mining companies with multiple concessions or EAUs subject to different legal regimes were required to keep separate accounts;[856] and (ii) nothing in Article 22 required a mining company to keep separate accounts for individual investments within a concession.[857]

668. Second, the Claimant notes that the Respondent admits that Peruvian law provided no official guidance on how SMCV should have distinguished between activities within its concession relating to the leaching facilities or the Concentrator.[858] In this regard, the Claimant disputes the Respondent's contention that SMCV should have divided its accounting using an assortment of methods pulled from various unrelated strands of tax laws and regulations. Specifically, because the method used to divide SMCV's accounting was an integral part of the tax calculation, it had to be clearly and expressly established in the relevant tax laws and regulations.[859] In addition, the Respondent itself recognized that there was no regulatory framework governing accounting for different activities within the same concession when it issued the December 2019 amendments to Article 22 of the Regulations.[860] No such guidance existed at the time the 1998 Stability Agreement was in force.[861] Furthermore, each of the methods that the Respondent's experts propose would have created serious implementation issues according to the Claimant.[862]

669. Third, the Claimant avers that SMCV provided SUNAT with all its accounting information. Contrary to the Respondent's allegation that SMCV failed to provide information, SUNAT was not missing any of SMCV's accounting information; otherwise, it could not have issued any of the Royalty or SMT Assessments, which distinguished between the leaching facilities' and the Concentrator's activities.[863] The

[856] Mining Regulations (**CA-2**), Article 22.
[857] Hernández I (**CER-3**), ¶¶ 71-73; Hernández II (**CER-8**), ¶ 18; Otto I (**CER-4**), ¶ 40; Otto II (**CER-9**), ¶ 31; Choque II (**CWS-15**), ¶ 14.
[858] Claimant's Reply, ¶ 128.
[859] Claimant's Reply, ¶ 128 (a); Hernández II (**CER-8**), ¶ 17.
[860] Supreme Decree No. 021-2019-EM dated 28 December 2019 (**CA-246**), Article 22.
[861] Claimant's Reply, ¶ 128 (b).
[862] Claimant's Reply, ¶ 128 (c).
[863] Claimant's Reply, ¶ 129; Respondent's Counter-Memorial, ¶¶ 390, 394, 398.

Claimant submits that the Respondent fails to point to a single law or regulation that would have allowed SMCV to provide the information that SUNAT requested.[864]

2. The Respondent's position

670. The Respondent disputes the Claimant's claim on two grounds: first, the Claimant is barred by collateral estoppel from relitigating an issue that was decided under Peruvian law and is bound by the numerous adverse Peruvian court decisions (**a**); second, in any event, the Respondent did not breach the Stabilization Agreement (**b**).[865]

a) The Tribunal must respect the Peruvian court decisions

671. The Respondent submits that the Supreme Court and Superior Court analyzed the issues of Peruvian law that SMCV pled, and that the Claimant has now raised before this Tribunal and reached conclusions consistent with the Respondent's position in this arbitration. Those courts decided that, under Peruvian law, mining stabilization agreements only cover specific projects, and that, applying the same law, the 1998 Stability Agreement did not cover the Concentrator Project. Since under Peruvian law, the 1998 Stability Agreement did not cover the Concentrator, the Respondent's imposition of Royalty and Tax Assessments did not violate the 1998 Stability Agreement.[866] According to the Respondent, this is fatal to the Claimant's breach of contract claims because first, the Claimant is collaterally estopped from re-litigating the issue, and second, even if that were not the case, the Tribunal still must apply Peruvian law to determine the scope of the 1998 Stability Agreement, including the Peruvian Supreme Court's decision.[867]

672. The Respondent contends that the Claimant is collaterally estopped from arguing that the 1998 Stability Agreement covers the Concentrator. The issue of whether the Respondent violated its obligations under the 1998 Stability Agreement turns on the scope of that Agreement, which is a question of Peruvian law that Peruvian courts, including the Supreme Court of Peru, have already answered.[868] According to the Respondent, it is undisputed that the 1998 Stability Agreement is governed by Peruvian

[864] Claimant's Reply, ¶ 129.
[865] Respondent's Counter-Memorial, ¶¶ 537 *et seq.*; Respondent's Rejoinder, ¶¶ 883 *et seq.*; Respondent's Post-Hearing Brief, ¶¶ 28 *et seq.*, 300.
[866] Respondent's Rejoinder, ¶ 893.
[867] Respondent's Rejoinder, ¶ 894.
[868] Respondent's Counter-Memorial, ¶¶ 541 *et seq.*

law.[869] Absent a denial of justice or due process violation, SMCV and the Claimant proceeding on its behalf, is collaterally estopped from arguing that the 1998 Stability Agreement covers the Concentrator Project.

673. The Respondent submits that under the doctrine of collateral estoppel, "*a question may not be re-litigated if, in a prior proceeding: (a) it was put in issue; (b) the court or tribunal actually decided it; […] (c) the resolution of the question was necessary to resolving the claims before that court or tribunal*";[870] and (d) the current case involves the same parties or privies of those parties.[871] Referring to *Apotex v. United States*, the Respondent submits that international tribunals have also applied forms of issue estoppel.[872] According to the Respondent, all of the requirements for collateral estoppel are met with respect to the issue of whether the 1998 Stability Agreement covered the Concentrator.[873] The Respondent argues that collateral estoppel applies to the Peruvian Superior Court and Supreme Court determinations that the 1998 Stability Agreement does not cover the Concentrator Plant. Specifically, the Superior Court found that, under the Mining Law and Regulations, "*the contractual benefits arising from the Stability Agreement […] cover exclusively and inclusively the investment made in a specific mining concession, which allows to establish by logical inference that a future investment, subsequent to the date of conclusion of the contract, will not be covered by the benefits of the Stability Agreement signed before this latest investment*."[874] The Supreme Court affirmed this decision and concluded that the 1998 Stability Agreement was limited to the investment project detailed in the 1996 Feasibility Study, *i.e.,* the leaching facilities.[875]

674. With respect to the alleged non-preclusive effect of domestic court decisions, the Respondent explains based on *Helnan v. Egypt* that "*[w]hen […] a domestic tribunal has ruled on an issue of domestic law which subsequently has to be considered by an ICSID Tribunal, the ICSID Tribunal will have to take into account that the task of*

[869] Respondent's Rejoinder, ¶ 888.
[870] Respondent's Counter-Memorial, ¶ 542; Respondent's Rejoinder, ¶ 895, referring to: *RSM v. Grenada II*, Award (**RA-19**), ¶ 4.6.4.
[871] Respondent's Counter-Memorial, ¶ 542; Respondent's Rejoinder, ¶ 895.
[872] Respondent's Counter-Memorial, ¶ 542; Respondent's Rejoinder, ¶ 903, referring to: *Apotex Holdings v. USA*, Award (**RA-18**), ¶ 7.18; *RSM v. Grenada II*, Award (**RA-19**), ¶ 7.1.2.
[873] Respondent's Counter-Memorial, ¶ 546.
[874] Respondent's Counter-Memorial, ¶ 544; Appellate Court Decision No. 7650-2013 dated 29 January 2016 (**CE-137**), Ninth Ground.
[875] Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment dated 18 August 2017 (**CE-153**), pp. 26-27, 72.

applying and interpreting domestic law lies primarily with the courts of the host country."[876] In addition, the Respondent submits that if the investor chooses to raise the same domestic law claims, such as a breach of contract claim, in a domestic court, and it loses, then absent some serious deficiency in the domestic court's decision (such as a denial of justice), the international forum is not meant to be a second bite at the same apple.[877]

675. Second, even if collateral estoppel did not bar the Claimant from disputing the scope of the 1998 Stability Agreement, the Respondent submits that the Tribunal should nonetheless afford the Peruvian court decisions significant deference as a prudential matter.[878] In this regard, the Respondent avers that Article 10.16.1 of the TPA allows a claimant to bring into the treaty forum a contractual claim that would otherwise have to be brought in a domestic court or some other contractually agreed upon forum. According to the Respondent, this provision does not change the scope or content of the underlying contractual obligations, nor does it change the fact that the scope and content of such contractual obligations are governed by local, not international law.[879] Peruvian law governs the 1998 Stability Agreement and if the Tribunal were to consider the merits of the Claimant's claims that Peru breached the 1998 Stability Agreement, the Tribunal would need to consider that question under Peruvian law alone. Such question was finally answered by the Peruvian Supreme Court and the Tribunal should not substitute its opinion on this Peruvian law question for that of the Peruvian Supreme Court.[880]

676. The Respondent further argues that the Claimant's attempt to downplay the impact of the Peruvian courts' decisions is futile. The Claimant's contention that the Peruvian courts are wrong would only be relevant if the Supreme Court's decision was so

[876] Respondent's Rejoinder, ¶ 905, referring to: *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award dated 3 July 2008 (**RA-135**), ¶ 105; *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award dated 7 May 2021 (**RA-136**), ¶¶ 336-337.
[877] Respondent's Rejoinder, ¶ 907.
[878] Respondent's Counter-Memorial, ¶¶ 547 *et seq.*; Respondent's Rejoinder, ¶¶ 909 *et seq*.
[879] Respondent's Counter-Memorial, ¶ 547, referring to: *WNC Factoring Ltd v. Czech Republic*, PCA Case No. 2014-34, Award dated 22 February 2017 (**RA-21**), ¶ 335; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic dated 25 September 2007 (**RA-22**), ¶ 95(c).
[880] Respondent's Counter-Memorial, ¶¶ 548-549.

erroneous as to be "*clearly improper and discreditable,*" which is the standard for a denial of justice claim, *i.e.,* a claim that the Claimant does not raise.[881]

677. With respect to the Claimant's argument that the Supreme Court's decision in the 2008 Royalty Case is not precedential, the Respondent contends that while this is true to a certain extent under the Peruvian legal system, it is irrelevant for this arbitration's purposes. As the Respondent's expert Dr. Eguiguren explains, while the decision may not be precedential generally and *erga omnes*, it is binding on the parties to the dispute.[882] According to the Respondent, regardless of whether the Peruvian Supreme Court decision is binding in other, future Peruvian legal proceedings, it is still conclusive evidence of how the Peruvian Supreme Court "*would*" (*i.e.*, "*did*") interpret the scope of the 1998 Stability Agreement as a matter of Peruvian law and there are no other final decisions from any other Peruvian court that has reached the opposite conclusion.[883]

678. In addition, the Respondent notes that although, as a general matter, it is for the Tribunal to decide whether Respondent has breached its international law obligations, Article 10.16.1 of the TPA is not an umbrella clause and does not impose on the parties to the TPA a substantive obligation to observe the commitments in, *inter alia*, investment agreements and thereby convert domestic law breaches of contract into international law Treaty violations. Article 10.16.1 of the TPA merely allows a claimant to bring certain breach-of contract claims into the investor-state forum and there is, thus, no "*international law obligation[]*" implicated here.[884] Even if that were not the case, the Claimant's argument ignores the fact that the question of whether there was a breach of the 1998 Stability Agreement is governed by Peruvian law and has already been adjudicated at the highest level of the Peruvian judiciary. The Respondent refers to Professor Jan Paulsson, who confirms that "*[t]he general rule is that the final word as to the meaning of national law should be left with the national judiciary*."[885] The Respondent also refers to the *Soufraki v. United Arab Emirates* annulment committee, which explained that "*[a]n international tribunal's duty to apply [municipal] law is a*

[881] Respondent's Counter-Memorial, ¶ 549, referring to: *Mondev v. USA*, Award (**RA-6**), ¶ 127.
[882] Eguiguren I (**RER-1**), ¶¶ 99, 101.
[883] Respondent's Rejoinder, ¶ 915.
[884] Respondent's Counter-Memorial, ¶ 552; Claimant's Memorial, ¶ 340.
[885] Respondent's Rejoinder, ¶ 912; Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts) (**RA-25**), p. 73.

duty to endeavour to apply that law in good faith and in conformity with national jurisprudence and the prevailing interpretations given by the State's judicial authorities. A State's […] law consists of its legislative and administrative provisions as well as the binding interpretations of those provisions by its highest court."[886]

679. According to the Respondent, the Claimant is asking the Tribunal to answer a question of Peruvian law in direct conflict with the Peruvian Supreme Court's answer to the very same question for no other reason than the Peruvian Supreme Court's decision is bad for the Claimant's case.[887] If the Tribunal accepted the Claimant's request, the Tribunal would not be applying Peruvian law; it would instead be substituting its own view of what it believes Peruvian law should be.

b) The Respondent did not breach the 1998 Stability Agreement

680. The Respondent contends that, in any event, it did not breach the 1998 Stability Agreement. According to the Respondent, the stability guarantees apply to the specific investment project that is the subject of the 1998 Stability Agreement, *i.e.,* the Leaching Project, not to the entire concession(s).[888] The only plausible interpretation of the 1998 Stability Agreement confirms that it applies to the investment project defined in the feasibility study (*i.e.* the leaching plant) and does not extend to the Concentrator Project. The Respondent, therefore, did not violate the 1998 Stability Agreement by imposing the Tax and Royalty Assessments on the Concentrator Project.[889] This interpretation has been consistent as evidenced by:[890] (i) Mr. Isasi's April 2005 Report,[891] (ii) Minister Sánchez and Mr. Isasi's June 2005 presentation before the Energy and Mines Congressional Committee,[892] (iii) MINEM's September 2005 Report[893] and the October 2005 Letter,[894] (iv) MINEM's November 2005 Letter and Minister Sánchez's public

[886] Respondent's Rejoinder, ¶ 912; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki dated 5 June 2007 (**RA-140**), ¶ 96; *Víctor Pey Casado and Foundation "President Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile dated 18 December 2012 (**RA-141**), ¶ 68.
[887] Respondent's Rejoinder, ¶ 913.
[888] Respondent's Counter-Memorial, ¶¶ 555 *et seq.*; Respondent's Rejoinder, ¶¶ 886 *et seq.*
[889] Respondent's Rejoinder, ¶ 887.
[890] Respondent's Counter-Memorial, ¶¶ 557, 588.
[891] MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.
[892] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (**RE-29**).
[893] MINEM, Report No. 385-2005-MEM/OGJ dated 22 September 2005 (**CE-512**).
[894] MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**).

statements,[895] (v) Mr. Isasi's May 2006 presentation before the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee,[896] and (vi) MINEM's June 2006 Report.[897]

681. The Respondent submits that the Mining Law and Regulations provide that stability guarantees apply to the specific investment project only.[898] According to the Respondent, stabilization agreements are limited to specific investment projects that have been carefully assessed and defined at the time the stability agreement is signed. In this regard, the Respondent submits that the legal framework applicable to stabilization agreements shows that the benefits granted through these agreements are limited to the specific investment project for which the agreement was signed. In particular:

- Title Nine of the Mining Law documents the stabilization agreements' limited scope, and nothing in Title Nine of the Mining Law indicates that stabilization agreements grant benefits with respect to an entire Mining Unit, which is an administrative construct in order to group together mining concessions and other mining activities that share the same location.[899]
- Articles 79 and 83 of the Mining Law provide that mining companies are only entitled to benefit from a stabilization agreement if they commit to make an investment for a minimum amount of funds and over a required amount of time.[900] An "*investment program*" is a detailed description of the investment project that the mining company is going to make (including the schedule for the investment and the projected value of the investment to be made), which will be covered by the stabilization agreement.[901] In the case of 15-year stabilization agreements, investment programs are included within a technical-economic feasibility study which is submitted to and approved by MINEM and is required in order to sign the stabilization agreement.[902] Furthermore, the purpose of stability guarantees is to limit the risk to the investment project of changes to the legal regime and ensure that the investor's rate of return for that project is not affected by those changes. It is, thus, logical that the benefits

[895] MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**).
[896] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated May 2006 (**RE-3**).
[897] MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**).
[898] Respondent's Counter-Memorial, ¶¶ 559 *et seq*.
[899] Respondent's Counter-Memorial, ¶ 559; Polo I (**RWS-1**), ¶¶ 16, 29.
[900] Mining Law (**CA-1**), Articles 79, 83.
[901] Polo I (**RWS-1**), ¶¶ 21-25.
[902] Mining Law (**CA-1**), Article 85.

granted by stabilization agreements apply exclusively to the investment project for which the agreement is entered into.[903]

- Articles 79 (referring to 10-year stabilization agreements) and 83 (referring to 15-year stabilization agreements) of the Mining Law provide that "*[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made*."[904] Thus, the law specifically provides that the activities related to ("*in whose favor*") the investment project that was made (*i.e.,* the investment project that was detailed in an investment program submitted to and approved by MINEM) are the ones that receive benefits from the stabilization agreement.
- Other provisions in the Mining Law provide further evidence that the scope of the stabilization agreement is limited to the investment project described in the investment program.[905] For example, the Mining Law provides that stability benefits only start taking effect once the mining company has completed the investment—the investment that was detailed in the investment program. If it were the case that stability benefits would apply to any investment anywhere in the concession at any time, as the Claimant alleges, it would not be necessary to wait until the execution of a specific investment project to start applying the stability benefits.
- The 1993 Mining Regulations are consistent with the Mining Law. In particular, Article 22 echoes the language of Articles 79 and 83 of the Mining Law, which provide that the benefits of a stability contract "*shall apply exclusively to the activities of the mining company in whose favor the investment is made*."[906] Article 22 of the 1993 Regulation provides that stability guarantees "*shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units*."[907] Furthermore, Article 24 provides that the General Mining Directorate of MINEM must submit to the Office of the Vice Minister of Mines the Resolution that approved the feasibility study/investment plan, "*which will serve as the basis to determine the investments that are the subject matter of the agreement*."[908] The language in Article 24 is fatal to the Claimant's argument, because it provides that the investments detailed in the feasibility study—not any eventual and undefined investments done within a concession or so called "*mining unit*"—are the

[903] Polo I (**RWS-1**), ¶¶ 12-14; Tovar I (**RWS-3**), ¶ 62.
[904] Mining Law (**CA-1**), Articles 79, 83.
[905] Mining Law (**CA-1**), Articles 78, 82.
[906] Mining Law (**CA-1**), Articles 79, 83.
[907] Mining Regulations (**CA-2**), Article 22.
[908] Mining Regulations (**CA-2**), Article 24.

investments that are the "*subject matter*" of the agreement. Thus, all four articles limit the scope of stabilization agreements to the specific investment project.

682. The Respondent also submits that Mr. Polo proposed the key clause in dispute here regarding the scope of the stability guarantees and confirms that the Mining Law granted stability guarantees only to the specific investment project.[909] The Respondent also notes that the Claimant's witness, Ms. Chappuis, agrees that this was the case.[910] The Respondent further argues that Ms. Chappuis admits that the provision was intended to having a limiting effect when testifying that when drafting the provision "*we wanted to make clear that stability would benefit only the concession or mining unit that was the target of the investment, to the exclusion of other mining units or non-mining activities that were part of the conglomerate but did not receive the investment directly*."[911] Moreover, the Respondent contends that Mr. Polo's statement is also more convincing than Ms. Vega's understanding of the scope of the stability guarantees because while Ms. Vega drafted the 1992 TUO that consolidated L.D. 708 with L.D. 109, she did not determine the substance of either legislative decree.[912]

683. The Respondent adds that it consistently applied stability guarantees in the manner it now argues.[913] The Respondent submits that it did not change its interpretation of the Mining Law or the 1998 Stability Agreement, whether as a result of political pressure or for any other reason because there was no change. Rather, according to the Respondent, the June 2006 Report was entirely consistent with MINEM's interpretation as consistently expressed in various sources and on numerous occasions, for example: (i) Mr. Isasi's April 2005 Report, (ii) Minister Sánchez and Mr. Isasi's June 2005 presentation before the Energy and Mines Congressional Committee, (iii) the September 2005 Report and October 2005 Letter, (iv) the November 2005 Letter and Minister Sánchez's public statements, (v) Mr. Isasi's May 2006 presentation before the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee, and (vi) the June 2006 Report. In this regard, the Respondent notes that the April 2005 Report explicitly states that "*only the mining projects referred to in these agreements*

[909] Respondent's Counter-Memorial, ¶¶ 561 *et seq.*; Polo I (**RWS-1**), ¶¶ 16, 18-19.
[910] Respondent's Counter-Memorial, ¶ 565.
[911] Respondent's Counter-Memorial, ¶ 565; Chappuis I (**CWS-3**), ¶ 21.
[912] Respondent's Counter-Memorial, ¶ 567; Vega I (**CER-5**), ¶ 23.
[913] Respondent's Counter-Memorial, ¶¶ 568 *et seq.*

will be excluded from the royalty calculation basis."[914] In his May 2006 publicly-televised presentation to Congress, Mr. Isasi explained that "*[s]tability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession*."[915] In addition, (i) Mr. Isasi explains in his witness statement that his position has always been consistent,[916] (ii) nothing in the Mining Council's resolution regarding the Parcoy Project could be understood as confirming the Claimant's view that stability benefits provided in the 1998 Stability Agreement extended to all investments in Cerro Verde's Mining Unit, including SMCV's investment in the Concentrator Project, (iii) SUNAT's Mr. Cruz never confirmed SMCV's understanding of the scope of the 1998 Stability Agreement,[917] and (iv) the Respondent did not confirm Claimant's understanding of the scope of the 1998 Stability Agreement in the process of issuing the 2004 Royalty Law.

684. Moreover, the Respondent submits that stabilization agreements do not need to extend to an entire mining unit to achieve their intended purpose.[918] In particular, the Respondent submits in rebuttal of the Claimant's arguments:

- Although the Respondent concedes that its goal was to promote private investment in the mining sector, this fact does not say anything about the limits or parameters of the Respondent's actions taken to further that goal (*i.e.*, the scope of the stability guarantees).[919]
- The Respondent's international tax and mining expert Mr. Ralbovsky explains that the Claimant overstates the relative importance of stabilization agreements, or tax concerns generally, in an investor's decision of whether to invest.[920]
- Article 82 of the Mining Law does not state that stabilization agreements are intended to cover the entire mining unit in which an investment is made.[921].
- Contrary to the Claimant's view, whether or not it is typical in international practice for governments to provide stability guarantees to an entire mining unit is irrelevant to interpreting the Mining Laws and Regulations applicable in Peru

[914] Respondent's Counter-Memorial, ¶ 569; MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.
[915] Respondent's Counter-Memorial, ¶ 569; MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated May 2006 (**RE-3**), slide 8.
[916] Respondent's Counter-Memorial, ¶ 570; Isasi I (**RWS-2**), ¶¶ 13-14, 21, 55, 57.
[917] Respondent's Counter-Memorial, ¶ 570; Cruz I (**RWS-7**), ¶¶ 19-22.
[918] Respondent's Counter-Memorial, ¶¶ 572 *et seq.*
[919] Respondent's Counter-Memorial, ¶ 573.
[920] Respondent's Counter-Memorial, ¶¶ 575-576; Ralbovsky I (**RER-4**), ¶¶ 33-34.
[921] Respondent's Counter-Memorial, ¶¶ 577-579.

and, more significantly, the specific provisions in SMCV's Stability Agreement.[922]

685. Furthermore, the Respondent submits that the 1998 Stability Agreement expressly provides stability guarantees to the specific investment project identified in the 1996 Feasibility Study.[923] The Respondent argues that the language of the 1998 Stability Agreement clearly applies the stability guarantees to the specific investment project identified in the agreement. For example:[924]

- Clause 1 of the 1998 Stability Agreement provides the purpose (*i.e.,* to increase SMCV's production capacity of copper cathodes through the leaching of secondary sulfide ore) and defines the scope of the Agreement. Nothing in this text mentions a future investment in a concentrator plant to process primary sulfide ore (a different type of copper ore) to produce copper concentrate (a different product), which was the purpose of the investment made in 2004-2006 to build the Concentrator.
- Clause 2 of the Agreement provides that the General Mining Directorate of MINEM approved the 1996 Feasibility Study on 6 May 1996, via Resolution No. 155-96-EM/DGM.
- Clause 3 is not relevant to analyzing whether the Agreement covered the Concentrator Project.
- Clauses 4, 5, 6, 7, and 8 refer to the investment program that was included in the 1996 Feasibility Study and link the effects of the Agreement to the investment project that is outlined in that investment program (*i.e.* the Leaching Project).
- Clauses 9 and 10 are irrelevant to analyzing the scope of the 1998 Stability Agreement.[925]

686. Furthermore, the Respondent's course of conduct was clear and consistent. In this regard, the Respondent disputes the Claimant's reliance on an internal 1997 MINEM memorandum discussing how the 1994 Stabilization Agreement could co-exist with the 1998 Stability Agreement.[926] According to the Respondent, the Claimant insists that the memorandum explains that two tax regimes could not coexist within the same unit,

[922] Respondent's Counter-Memorial, ¶ 581.
[923] Respondent's Counter-Memorial, ¶¶ 582 *et seq.*
[924] Respondent's Counter-Memorial, ¶ 583; 1998 Stability Agreement dated 26 February 1998 (**CE-12**).
[925] *See* Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment) dated 18 August 2017 (**CE-153**), ¶ 37, p. 34.
[926] Respondent's Counter-Memorial, ¶ 586; Claimant's Memorial, ¶ 332(b); MINEM, Report No. 708-97-EM/DGM/OTN dated 30 December 1997 (**CE-356**).

while ignoring that MINEM, in a subsequent 1998 memorandum, abrogated both decision and reasoning in the 1997 memorandum.[927] MINEM explained in the 1998 memorandum that both stabilization agreements were able to coexist because each contract was intended to protect a "*different investment*."[928]

687. The Respondent also disputes the Claimant's reliance on the President of Peru "*applaud[ing]*" the investment in the Concentrator and confirming that Peru would "*fulfill [its] responsibility to maintain economic and legal stability*" as this does not prove anything.[929]

688. Moreover, the Respondent contends that the issue of whether Cerro Verde is an "*integrated mining unit*" is irrelevant because it is based on the faulty interpretation that the stability guarantees apply to the entirety of Cerro Verde.[930]

689. According to the Respondent, its interpretation of the scope of the 1998 Stability Agreement is entirely consistent with the text of the agreement and the relevant laws and regulations.[931] In this regard, the Respondent avers that the 1996 Feasibility Study is a critical part of the stability framework in that it defines the scope of the investment project and, in turn, sets the obligations and benefits under the 1998 Stability Agreement.[932] In this case, the 1996 Feasibility Study analyzed and outlined the investment only for the Leaching Project; it did not analyze or outline anything in relation to the Concentrator Project.[933] According to the Respondent, the 1996 Feasibility Study, the report by the General Mining Directorate analyzing the 1996 Feasibility Study, and the Resolution approving the study all confirm that the investment project for which SMCV sought to obtain the 1998 Stability Agreement was exclusively for the expansion of SMCV's leaching facilities to increase the processing of secondary sulfides and production of copper cathodes.[934]

[927] MINEM, Report No. 002-98-EM/OGAJ dated 6 January 1998 (**RE-23**).
[928] MINEM, Report No. 002-98-EM/OGAJ dated 6 January 1998 (**RE-23**), p. 2.
[929] Respondent's Counter-Memorial, ¶ 587; Claimant's Memorial, ¶ 332(d); "Peru: President Toledo Announces an Investment of US$850 Million in Cerro Verde," *Europa Press* dated 12 October 2004 (**CE-471**).
[930] Respondent's Counter-Memorial, ¶¶ 590-591; Claimant's Memorial, ¶¶ 326 *et seq*.
[931] Respondent's Counter-Memorial, ¶¶ 592 *et seq*.
[932] Respondent's Counter-Memorial, ¶¶ 592 *et seq*.
[933] Respondent's Rejoinder, ¶ 886.
[934] Respondent's Rejoinder, ¶ 886.

690. Furthermore, the Respondent's amendments to the Mining Law and Regulations do not prove that the Claimant's interpretation under the previous law and regulations was correct.[935]

691. By no means does the Respondent's interpretation of the scope of the 1998 Stability Agreement undermine the Mining Law's purpose of promoting investment.[936] In this regard, the Respondent recalls that it did not attempt to incentivize private investment at any cost.[937] The Respondent also refutes the Claimant's claim that "*there are many costs and assets within an integrated mining unit that cannot be allocated in any obvious and reasonable manner to a specific investment*" and, "*[a]s a result, applying separate stability regimes to different investments within the same integrated mining unit […] would be administratively burdensome*."[938] The Respondent submits that accounting practitioners and government authorities have identified several methods to differentiate those mining costs effectively.[939] The fact that, at that time, the Respondent left the choice up to the company as to how to separate its accounts in no way undermines the Respondent's interpretation of the scope of the stability guarantees.[940]

692. Finally, the Respondent's treatment of certain investments made between 1999 and 2002 in the same Leaching Project as stabilized is consistent with its interpretation that the stability guarantees apply to the investment project that is outlined in the 1996 Feasibility Study.[941]

3. The Non-Disputing Party's position

693. The NDP does not address the Claimant's claim based on the Respondent's alleged breach of the investment agreement, i.e. the 1998 Stability Agreement.

4. The Tribunal's analysis

694. In analyzing the Respondent's alleged breach of the 1998 Stability Agreement the Tribunal will, first, determine the scope of the 1998 Stability Agreement (**a**). Second,

[935] Respondent's Counter-Memorial, ¶¶ 601 *et seq*.; Mining Law (**CA-1**), Article 83-B.
[936] Respondent's Counter-Memorial, ¶¶ 606 *et seq*.
[937] Respondent's Counter-Memorial, ¶ 607; Ralbovsky I (**RER-4**), ¶ 44.
[938] Respondent's Counter-Memorial, ¶ 608; Claimant's Memorial, ¶ 346.
[939] Respondent's Counter-Memorial, ¶ 608; Ralbovsky I (**RER-4**), ¶¶ 85, 87-88.
[940] Respondent's Counter-Memorial, ¶ 610.
[941] Respondent's Counter-Memorial, ¶¶ 612 *et seq.*

the Tribunal will turn to the issue of whether the 1998 Stability Agreement was breached (**b**).

a) The scope of the 1998 Stability Agreement

(1) The applicable law governing the issue of the alleged breach of the 1998 Stability Agreement

695. As a preliminary matter, the Tribunal notes that Article 10.22 of the TPA deals with the governing law of disputes.[942] Article 10.22 of the TPA provides in relevant part:

> *[W]hen a claim is submitted under Article 10.16.1(a)(i)(B) or (C), or Article 10.16.1(b)(i)(B) or (C), the tribunal shall apply:*
>
> *(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or*
>
> *(b) if the rules of law have not been specified or otherwise agreed:*
>
> *(i) the law of the respondent, including its rules on the conflict of laws, and*
>
> *(ii) such rules of international law as may be applicable.*[943]

696. The Parties agree that the law governing the issue of whether the Respondent breached the 1998 Stability Agreement is a matter of Peruvian law.[944] Specifically, the Parties agree that the Mining Law and Regulations define the scope of stability guarantees.[945] Their respective interpretations of the Mining Law and Regulations guide their interpretation of the 1998 Stability Agreement. In what follows, the Tribunal will thus first address the Mining Law and Regulations before turning to the text of the 1998 Stability Agreement.

(2) The applicable legal framework governing stabilization agreements in Peru

697. According to the Claimant, under the plain text of the Mining Law and Regulations in force until 2014, stability guarantees applied to the entire mining unit or concession(s) in which the investor made its qualifying minimum investment without distinguishing

[942] TPA (**CA-10**), Article 10.22.
[943] TPA (**CA-10**), Article 10.22(2).
[944] Claimant's Memorial, ¶¶ 300 *et seq*.; Respondent's Counter-Memorial, ¶ 538.
[945] Claimant's Reply, ¶ 79; Respondent's Rejoinder, ¶ 97.

whether the investments were included in the investment program in the feasibility study, different processing methods were used within the mining unit, or otherwise.[946] The Claimant bases its view *inter alia* on Articles 82 and 83 of the Mining Law, Articles 2, 22 and 25 of the Mining Regulations, the 2014 and 2019 amendments to the law, as well as the confirmation by the alleged drafters of the Mining Law that stability guarantees apply to the entire mining unit or concession.[947]

698. In contrast, in the Tribunal's view, it does not follow from the plain text of the Mining Law and Regulations that stabilization agreements should apply to entire "*concessions*" or "*mining units*" as the Claimant argues. To the contrary, the Tribunal finds that nothing in the Mining Law and Regulations provide for such a reading. In this regard, the Tribunal notes that the term "*mining unit*" referred to by the Claimant is not defined in the Mining Law or Regulations, as acknowledged by the Claimant's expert Mr. Otto.[948] Moreover, to the extent that the Claimant argues that the term "*mining unit*" should be equated with "*Economic-Administrative Unit*", SMCV's Mining and Beneficiation Concessions have not been declared or qualified as an "*Economic-Administrative Unit*" by the DGM as required by the Mining Law, and the Tribunal is also not convinced that there existed a "*de facto*" Economic-Administrative Unit, as advanced by Ms. Torreblanca.[949] The Tribunal further notes that nothing in the Mining Law and Regulations explicitly sets out that stabilization agreements should apply to entire "*concessions.*"

699. Rather, the Tribunal is of the view that benefits granted through mining stabilization agreements are limited to a specific mining project set out in the investment program in the feasibility study, as evidenced by the Mining Law and Regulations. Such mining projects have to be of a certain minimal capacity (Article 82 of the Mining Law) and of a certain minimal investment value (Article 83 of the Mining Law), the details of which

[946] Claimant's Memorial, ¶¶ 301 *et seq*.
[947] Claimant's Memorial, ¶¶ 301 *et seq.*; Claimant's Reply, ¶¶ 34 *et seq*.
[948] Hearing Transcript, Day 7, p. 2094, lines 10-11.
[949] General Mining Law (**CA-1**), Article 44 ("[…] *The grouping of mining concessions constitutes an economic-administrative unit and requires approving resolution from the Directorate General of Mining*."); Article 82 ("[…] *For the purposes of the agreement referred to in the preceding paragraph, the term Economic-Administrative Unit means the set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that constitute a single production unit due to sharing supply, administration, and services, which in each case the Directorate General of Mining will qualify*."); Respondent's Counter-Memorial, ¶ 45; Claimant's Rejoinder, ¶ 47(d); Hearing Transcript, Day 2, p. 431 line 5 to p. 437 line 14.

are contained in a key document, *i.e.* the technical-economic feasibility study that has to be submitted to the DGM for approval (Article 85 of the Mining Law).

700. First, the Tribunal turns to Article 82 of the Mining Law, which grants mining companies the possibility to enter into 15-year stabilization agreements. Article 82 provides:

> *In order to promote investment and facilitate the financing of* ***mining projects*** *with an initial capacity of not less than 5,000 MT/day or expansions intended to reach a capacity of not less than 5,000 MT/day referring to one or more Economic-Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the execution of the investment or expansion, as the case may be, is accredited.*
>
> *For the purposes of the agreement referred to in the preceding paragraph, the term Economic-Administrative Unit means the set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that constitute a single production unit due to sharing supply, administration, and services, which in each case the Directorate General of Mining will qualify.*[950] (emphasis added)

701. The Tribunal agrees with the Respondent that the language of Article 82 of the Mining Law makes clear that stability guarantees are granted to specific "*mining projects*," be they new investment projects or expansion projects of existing operations, and not "*concessions*," "*EAUs*," or "*mining units*."[951] In the Tribunal's view, the reference to "*Economic-Administrative Unit*" and "*concessions*" in Article 82 merely means that stabilization guarantees are granted to mining projects that may be located within one or more mining concessions, as long as the project allows the mining company to produce at least 5,000 MT/day. In the absence of any clear wording to this effect, the references to "*Economic-Administrative Unit*" and "*concessions*" cannot thus be interpreted as meaning that substantive guarantees extend to an entire mining unit or concession(s) as the Claimant argues.

---

[950] General Mining Law (**CA-1**), Article 82.

[951] Such specific mining projects are also reflected in the Model Stabilization Agreement. A number of blanks were set out in Clause 1.1, in which the mining company wishing to enter into a stabilization agreement had to specify the name of the project, the concessions in which the project would be developed, and whether the project in relation to which the stabilization agreement had been requested was an "*operational startup*" or an "*investment*" (*i.e.*, an investment to expand operations). See Model Stability Agreement, Supreme Decree No. 04-94-EM dated 3 February 1994 (**CE-778**), Clause 1.1.

702. The Tribunal finds that this interpretation of Article 82 of the Mining Law is consistent with Article 22 of the Mining Regulations, which provides that "*[t]he contractual guarantees shall benefit the mining activity titleholder* ***exclusively*** *for the investments that it makes in the concessions or Economic-Administrative Units*."[952] (emphasis added)

703. The Tribunal finds that this provision, in particular through the use of the word "*exclusively,*" clearly limits the scope of stabilization agreements to a specific investment in a specific mining project, which has to be made within the concession or EAU. Again, the reference to concessions or EAUs in this provision only shows the location where investments are to be made. In this regard, Mr. Polo testified in his first witness statement that this "*provision could not be clearer: stability guarantees apply to the investment that the mining company makes in a specific project*."[953] In his second witness statement, Mr. Polo further indicated that "*the concessions and the EAUs are the places where the investments are made and nothing else*."[954]

704. The Tribunal notes that the Claimant also bases its interpretation on the scope of stability guarantees on Article 2 of the Mining Regulations, in particular on wording that was introduced in a reform in 2019. However, the wording in force in 2019 cannot form the basis for the interpretation of the version in force at the time when the 1998 Stability Agreement was signed.

705. Second, the Tribunal turns to Article 83 of the Mining Law on which the Claimant also relies to support its interpretation on the scope of stabilization agreements. Article 83 provides in relevant part:

> *Mining activity titleholders who submit* ***investment programs*** *of not less than the equivalent in local currency of US$20,000,000.00 for the start of any mining industry activities shall have the right to enter into the agreements referred to in the preceding article.*
>
> *In the case of investments in existing mining companies, an investment program of not less than the equivalent in local currency of US$50,000,000.00 will be required.*

[952] Mining Regulations (**CA-2**), Article 22.
[953] Polo I (**RWS-1**), ¶ 33.
[954] Polo II (**RWS-8**), ¶ 20.

> *As an exception, persons who make investments of not less than the equivalent in local currency of US$50,000,000.00 in State-owned companies that are subject to the privatization process pursuant to Legislative Decree No. 674 shall have the right to access these agreements.*
>
> ***The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made****. (emphasis added)*

706. This provision specifies that depending on the type of investment project to be stabilized (*i.e.,* an investment to initiate operations or to expand existing operations), the investment has to be of a certain minimum dollar value. In order to benefit from a mining stabilization agreement, mining companies thus have to submit "*investment programs,*" which are included within the technical-economic feasibility study submitted to and approved by MINEM as per the terms of Article 85 of the Mining Law. Crucially, Article 83 of the Mining Law foresees that "*[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made*."[955] The Tribunal finds that the only way to give effect to the term "*exclusively*" in Article 83 is to interpret the provision as meaning that not all activities of a mining company are subject to stability guarantees, rather only those in relation to the undertaken mining project set out in the investment program. As explained by Mr. Polo, Article 83 "*limit[s] the scope of stabilization agreements to the investment project contained in the investment program submitted by the mining titleholder and approved by MINEM*."[956]

707. The Claimant argues that an amendment to the Mining Law introduced in 2014 and creating Article 83-B would have been unnecessary if the original text of Article 83 had already limited the scope of 15-year stability agreements to the investments contained in the feasibility study.[957] However, the Tribunal is of the view that the relevant wording to be interpreted is the wording of Article 83 in force at the time the 1998 Stability Agreement was signed, to the exclusion of future amendments to the law. The Tribunal is also of the view that the law in force at the time of the conclusion of the 1998 Stability Agreement already provided that the scope of stabilization agreements was limited to what was foreseen in the feasibility study, as stated above (see above, paras. 699 *et seq.*).

[955] Mining Law (**CA-1**), Article 83.
[956] Polo II (**RWS-8**), ¶ 11.
[957] Claimant's Reply, ¶¶ 41 *et seq.*

The Tribunal notes that in the case at hand, MINEM approved the technical-economic feasibility study, noting that the objective of such study was "*the production of approximately 105 million pounds per year of copper cathodes in Cerro Verde's facilities.*"[958]

708. Hence, the Tribunal finds that the statement of reasons for the 2014 amendment to Article 83 clarifies what legal framework was in force before the amendment. The statement of reasons expressly states that: "*pursuant to the legal framework in force, it would not be possible to stabilize pre-existing assets or investments, nor those investments that do not appear in the Feasibility Study that is attached to the [stabilization agreements], which could be unattractive for the owners of the mining activity who wish to expand their investments, as they would have to undergo a whole new procedure to stabilize the expansion*."[959]

709. Third, the Tribunal turns to Article 25 of the Regulations, on which the Claimant also relies to support its interpretation. Article 25 of the Regulations provides:

> *Without prejudice to the Income and Corporate Assets Tax Returns which, according to the law, the mining activity titleholder must submit in cases of expansion of facilities or new investments that contractually enjoy the guarantee of legal stability, said titleholder must make available to the Tax Administration the annexes that demonstrate the application of the tax regime granted to the aforementioned expansions or new investments*.[960]

710. According to the Claimant, Article 25 of the Regulations makes clear that stability benefits extend to the entire mining unit or concession, rather than to a specific investment, because it acknowledges that a mining company could undertake "*expansion of facilities or new investments that contractually enjoy the guarantee of legal stability*."[961] However, the Tribunal finds that such provision only foresees that while expansions or new investments may in given circumstances benefit from stabilization guarantees, such guarantees are not automatically granted to a mining company by virtue of its location within a "*mining unit*" or "*concession*" as the Claimant argues. This is confirmed by the testimony of Mr. Polo, who stated that "*the reference to 'expansions or new investments' refers to investments made by pre-existing mining*

[958] MINEM, Directorial Resolution No. 158-96-EM/DGM dated 6 May 1996 (**RE-24**), p. 1.
[959] Executive Power, Statement of Reasons for Bill No. 3627/2013-PE dated 2014 (**RE-50**), pp. 9-10.
[960] Mining Regulations (**CA-2**), Article 25.
[961] Claimant's Memorial, ¶ 304(e); Mining Regulations (**CA-2**), Article 25.

companies (expansions) and companies that had not made an investment (new investments) and that allowed those companies to enter into 15-year stabilization agreements—if they met the minimum amounts required."[962] Rather, a mining company must submit "*the annexes that demonstrate the application of the tax regime granted to the […] expansions or new investments*."[963] In the case at hand, the Claimant has not demonstrated that it has done so.

711. Other provisions of the Mining Regulations further confirm the Tribunal's view that stability guarantees solely apply to a specific mining project and not to the entire mining unit or concession:

- The Mining Regulations provide that a mining titleholder must prepare a detailed feasibility study or investment plan in order to apply for a stabilization agreement. It follows from Article 18 of the Regulations that a mining company must submit a feasibility study to apply for stability benefits. Pursuant to Article 19 of the Regulations, such feasibility study must include a certain amount of mandatory information, including, a detailed description of, *inter alia*: (i) all the works to be performed, (ii) the term, execution schedule, and amount of the investment project, (iii) the minimum amount of production expected to be obtained from the investment, (iv) the projected sales volumes and prices for the final products produced from the investment, and (v) the profitability of the project. The Tribunal finds that if it were the case that the stabilization agreement applied automatically to any investment done within a concession or mining unit, then the State would not request detailed information only about the original investment project.
- The Mining Regulations further make clear that a stabilization agreement benefits the activities related to the investment project that is described in that feasibility study or investment plan. Article 24 provides that the DGM must submit to the Vice-Minister of Mines the resolution approving the feasibility study which will serve as the basis to determine "*the investments set out in the agreement*" (the Claimant's translation) or "*the investments that are the subject matter of the agreement*" (the Respondent's translation). Irrespective of which translation is to be preferred, the Tribunal finds that this provision makes clear that not any investments made within a "*concession*" or "*mining unit*" may benefit from stabilization. Rather, the feasibility study defines the investments that may benefit from stabilization.

[962] Polo II (**RWS-8**), ¶ 26.
[963] Mining Regulations (**CA-2**), Article 25.

712. The Tribunal turns to the testimony of Ms. Chappuis and Ms. Vega, who allegedly played a key role in the drafting of L.D. 708 and the Mining Law. At the Hearing, Ms. Chappuis asserted that she "*wrote, together with Mr. César Polo, all or most of the Articles in Legislative Decree 708, especially those having to do with the Tax Stability Agreements*."[964] Ms. Vega explained in her expert report that she "*prepared […] the Single Unified Text [which] became Peru's consolidated General Mining Law*."[965] Ms. Chappuis testifies that under the Mining Law, stability agreements cover "*all investments*" that a mining activity titleholder makes in its concession or "*mining unit*."[966] Ms. Vega explains that the Mining Law provisions "*alone and taken together, made clear that stability benefits extended broadly to all investments that a mining company made within the concessions or unit covered by its stability agreement during the 10 or 15 years it is in force*."[967]

713. The Tribunal finds that the testimonies of Ms. Chappuis and Ms. Vega are inconclusive and contradicted by both the testimony of Mr. Polo,[968] who was undisputedly one of the key drafters of L.D.708 and the Mining Law, as well as the plain text of the law.

714. Moreover, the Tribunal notes that at the Hearing, the Claimant's expert Mr. Otto testified that there was an international "*presumption that stability applies to all activities with[in] an integrated Mining Project*."[969] However, such alleged presumption is unsupported by conclusive documentary evidence and even if such an "*worldwide presumption*" existed, this does not change the Peruvian law.

715. The Tribunal finds that its interpretation of the Mining Laws and Regulations is not contrary to the Government's stated purpose of "*promot[ing] private investment*" in the mining sector. The Tribunal notes that the Claimant's expert Mr. Otto explained that stability guarantees are important in the mining industry given that "*[d]istinctive characteristics of mining—such as high capital costs, long payback periods, and fixed assets—make stability of the fiscal and administrative framework particularly important to a mining company's decision to invest*."[970] However, the Tribunal does not find limiting stability guarantees to specific mining projects to be contrary to the promotion

[964] Hearing Transcript, Day 3, p. 841, lines 13-15.
[965] Vega I (**CER-5**), ¶ 5.
[966] Chappuis I (**CWS-3**), ¶¶ 45-46.
[967] Vega I (**CER-5**), ¶ 34.
[968] Hearing Transcript, Day 4, p. 1230, line 21 to 1232, line 1.
[969] Hearing Transcript, Day 7, p. 2108, lines 5-16; Hearing Transcript, Day 7, p. 2121, line 21 to p. 2122, line 3.
[970] Otto I (**CER-4**), ¶ 17.

of private investment. Rather, as explained by Mr. Ralbovsky, "*[i]n the case of stability agreements in the mining sector like in the instant case, countries offer tax incentives to mining companies and thus give up important government revenue, in exchange for the investments that the mining companies will bring to the countries*."[971]

716. Finally, for the sake of completeness, the Tribunal addresses the Claimant's argument that there was allegedly an administrative practice to apply stability guarantees to entire concessions or mining units.[972] Contrary to the Claimant's argument, the Tribunal finds that the Claimant has not shown that there was a clear administrative past practice and understanding that all future investments made in a given concession would be covered by a stabilization agreement. In particular:

- The Claimant refers to alleged repeated references by SUNAT to "*mining units and concessions*" or "*production units*."[973] The Claimant also refers to a form letter sent in 2005 by Haraldo Cruz, SUNAT's Regional Intendent for Arequipa, to SMCV referring to it as a "*holder[] of [a] mining concession[]*" with instructions on how to submit certain information about its "*Production Unit(s).*" The Claimant alleges that this would have confirmed that the mining unit and concessions were the relevant item for purposes of stability.[974] However, the Tribunal finds that the exhibit referred to by the Claimant only shows that SUNAT sent form letters to holders of mining concessions, as these were the addressees of the Royalty Law. This did not entail that the Respondent viewed the "*concessions and mining units*" or "*production units*" as relevant factors in interpreting the 1998 Stability Agreement.
- The Claimant further refers to exchanges at the end of 2007 between SUNAT and MINEM.[975] The Tribunal does not find that these documents shed any light on MINEM's or SUNAT's interpretation of the 1998 Stability Agreement nor on the interpretation of the Royalty Law that would support the Claimant's position.
- The Claimant also refers to the Parcoy Mining Council Resolution of November 2001 to argue that other mining companies relied on the second paragraph of Clause 3 of the 1998 Stability Agreement to request the extension of their

[971] Ralbovsky I (**RER-4**), ¶ 36.
[972] Claimant's Memorial, ¶¶ 313 *et seq*.
[973] Claimant's Memorial, ¶ 318(a); Claimant's Reply, ¶ 69(a).
[974] SUNAT, Letter to SMCV dated 17 February 2005, (**CE-482**), p. 1.
[975] Claimant's Memorial, ¶ 318(b); Claimant's Reply, ¶ 69(d); SUNAT, Report No. 261-2007-SUNAT/2E0000 dated 20 November 2007 (**CE-568**); MINEM, Report No. 1169-2007-MEM-DGM dated 14 December 2007 (**CE-570**), pp. 1-2.

stability agreements to additional concessions and mining units.[976] As a threshold matter, the Tribunal notes that the Claimant has not asserted or otherwise proven that it relied on the interpretation of the Mining Council to found its expectation that the 1998 Stability Agreement was to be interpreted according to the Claimant's view. In any event, the Tribunal finds that the Resolution does not support the Claimant's interpretation of mining stabilization agreements. In that case, the mining company had requested the DGM to include "*other mining rights*" within the scope of an existing stabilized project.[977] As the Respondent submits, the question before the Mining Council was whether ore retrieved from additional mining sites not named in the agreement could be processed in the stabilized project and benefit from its stability guarantees,[978] which is a different question from the one at hand. The Tribunal finds that the 2001 Mining Council Resolution is not a request for the expansion of a stabilization agreement to a new and separate project. Accordingly, the 2001 Mining Council Resolution does not support the Claimant's interpretation of the 1998 Stability Agreement.

- The Claimant also refers to the Tintaya Resolution of January 2003 to submit that Tintaya's stability agreement in relation to its sulfides plant clearly covered the concession or mining unit.[979] However, the Tribunal finds that this Resolution only confirms that two different stability agreements could apply to the same mining company.
- Moreover, the Tribunal is convinced that there has been a practice of having mining concessions with both stabilized and non-stabilized projects, which contradicts the Claimant's position that stability guarantees should apply to entire mining concessions. Such examples include Tintaya,[980] Yanacocha[981] and Southern Peru.[982]

717. The Tribunal concludes that the Claimant has failed to demonstrate that under the Mining Laws and Regulations, stability guarantees applied to the entire mining unit or concession(s). Rather, as set out above, the Tribunal is convinced that the Mining Law

[976] Claimant's Reply, ¶ 84(c); MINEM, Resolution No. 380-2001-EM-CM dated 16 November 2001, (**CE-377**).
[977] MINEM, Resolution No. 380-2001-EM-CM dated 16 November 2001, (**CE-377**), p. 1.
[978] Respondent's Counter-Memorial, ¶ 135; Respondent's Rejoinder, ¶ 317; MINEM, Resolution No. 380-2001-EM-CM, dated 16 November 2001, (**CE-377**), p. 3.
[979] Claimant's Reply, ¶ 66; MINEM, Report No. 019-2003-EM-CM dated 20 January 2003 (**CE-882**).
[980] MINEM, Report No. 019-2003-EM-CM dated 20 January 2003 (**CE-882**).
[981] Minera Yanacocha S.A. - Proyecto Cerro Yanacocha Stabilization Agreement dated 16 September 1998 (**CE-919**); Compañía Minera Yanacocha S.A. - Proyecto Yanacocha-Carachugo Sur Stabilization Agreement dated 19 May 1994 (**CE-911**); Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L. - Project La Quinua Stabilization Agreement dated 25 July 2003 (**RE-189**).
[982] Southern Peru Copper Corporation Stabilization Agreement dated 12 July 1994 (**CE-912**).

and Regulations limit the scope of stability guarantees to specific mining projects set out in the investment program in the feasibility study.

(3) The 1998 Stability Agreement

718. Having analyzed the applicable legal framework governing stabilization agreements in Peru, the Tribunal now turns to the 1998 Stability Agreement concluded by SMCV and Peru in 1998.

719. With regard to the applicable rules of contract interpretation, the Parties and their respective experts agree that Peruvian legislation has not established a sequence of prioritization among contractual rules of interpretation, but that the starting point of such interpretation must be the literal text of the contract, followed by a systemic analysis of the contract as a whole, and a contextual interpretation of the contract.[983]

720. The Parties and their experts disagree as to whether the *contra proferentem* interpretation is relevant in the case at hand.[984]

721. The Tribunal will thus address the scope of the 1998 Stability Agreement on the basis of the agreed upon methods of contract interpretation, before determining whether it has to decide whether the *contra proferentem* rule is relevant in the case at hand.

722. The Tribunal takes note that the Appellate Court and Supreme Court of Peru have decided on the scope of the 1998 Stability Agreement in the 2008 Royalty Case and expressed their view on the Mining Law and Regulations.[985] However, these decisions only concern the 2008 Royalty Case and, as a matter of Peruvian law, do not serve as binding precedent, as ultimately agreed by both Parties' experts.[986] Accordingly, the Tribunal considers that these decisions have no preclusive effect on the Tribunal and the Tribunal itself has to interpret the scope of the 1998 Stability Agreement and to determine whether it was breached by Peru.

---

[983] Bullard I (**CER-2**), ¶ 23; Morales I (**RER-2**), ¶ 50.
[984] Bullard I (**CER-2**), ¶¶ 70 *et seq.*; Eguiguren I (**RER-1**), ¶¶ 46 *et seq.*; Morales I (RER-2), ¶¶ 39 *et seq.*
[985] Appellate Court Decision No. 7650-2013 dated 29 January 2016 (**CE-137**); Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment dated 18 August 2017 (**CE-153**).
[986] Bullard I (**CER-2**), ¶ 76; Bullard II (**CER-7**), ¶ 71; Eguiguren I (**RER-1**), ¶ 100; Morales I (**RER-2**), ¶ 86.

(4) The literal interpretation of the 1998 Stability Agreement

723. According to the Peruvian law rule of literal interpretation of the contract, the Tribunal must interpret the 1998 Stability Agreement "*according to what has been expressed*."[987] As a starting point, the Tribunal notes that nothing in the 1998 Stability Agreement expressly provides that the stability guarantees apply to all investments made within the Mining Concession and the Beneficiation Concession and no reference is made to a potential future investment in a concentrator. Rather, the Agreement exclusively refers to the "*leaching project*" of Cerro Verde. More particularly, Clauses 1, 3, and 4 of the 1998 Stability Agreement exclusively refer to the Leaching Project and do not reflect a common intent to extend stability benefits to any and all investments that SMCV could make within its concessions, as further set out below.

724. Clause 1 of the 1998 Stability Agreement sets out the relevant background of the investment. The Stability Agreement concerned a USD 237 million investment project to expand the production capacity of the leaching plant from 72 million pounds of copper cathodes per year to 105 million pounds, *i.e.,* "*[t]he leaching project of Cerro Verde*" as set out in Clause 1 of the 1998 Stability Agreement.[988]

725. Clause 1.1 specifically provides that SMCV requested a mining stabilization agreement "*in relation [to] the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3 […] 'The leaching project of Cerro Verde*.'"[989]

726. Clause 1.3 provides the objective of the feasibility study and describes the purpose of the Leaching Project. According to Clause 1.3, "*[t]he objective of the study is to evaluate the feasibility to extend the production capacity from 72,000,000 to 105,000,000 lbs. (48,000 MT) of Copper cathodes per year coming from the heap leaching of the copper mineral in the facilities of Cerro Verde with recovery of 65%, that will be installed with the necessary equipment to improve the leaching of the secondary sulfides using the last technology and at the same time increase the production*."[990] Furthermore, the 1996 Feasibility Study clearly sets out that the

[987] Peruvian Civil Code (**CA-39**), Article 168.
[988] 1998 Stability Agreement dated 26 February 1998 (**CE-12**), Clause 1.1.
[989] 1998 Stability Agreement dated 26 February 1998 (**CE-12**), Clause 1.1.
[990] 1998 Stability Agreement (**CE-12**), Clause 1.3.

investment to be made at Cerro Verde concerned "*[t]he Cerro Verde leaching project*."[991]

727. Such wording clearly delimits the stabilization guarantees to "*the investment*" set out in SMCV's request for a mining stabilization agreement to MINEM, as detailed in the Feasibility Study, and specifically refers to "*the leaching project of Cerro Verde*." Nothing in this wording shows that investments unrelated to "*the leaching project of Cerro Verde,*" such as the Concentrator, could benefit from the guarantees of the 1998 Stability Agreement.

728. The Tribunal finds the lack of express references to the Concentrator Project and the exclusive references to the Leaching Project in the 1998 Stability Agreement to be decisive. The Leaching Project is described with precision in Clause 1.3 and the Feasibility Study. The Concentrator Plant, which uses different ore, different processes, and produces different products than the Leaching plant does not fall under the ambit of the "*Leaching project*." Tellingly, the Claimant's own witness Mr. Davenport stated during the Hearing that the exclusive reference to the "*leaching project*" in Clause 1.1 was "*the elephant in the room*" for Phelps Dodge.[992] In addition, the Tribunal notes that when SMCV sought to refer to the Concentrator in its correspondence with MINEM, it specifically referred to the "*Primary Sulfide Project*"[993] and not the "*Leaching project*."

729. Nothing else follows from Clause 3 and Exhibit I to the Stability Agreement.

730. Clause 3 relates to "*mining rights*." Clause 3 specifically provides:

> *According to what is expressed in 1.1, the Leaching Project of Cerro Verde is circumscribed to the concessions, related in EXHIBIT I, with the corresponding areas.*
>
> *What is provided in the above paragraph does not prevent the owner from incorporating other mining rights to the Cerro Verde Leaching Project, after approval by the General Direction of Mining.*[994]

731. The first paragraph of this provision includes cross-references to Clause 1, reproduced above, and Exhibit I. Exhibit I provides as follows:

---

[991] Feasibility Study, Executive Summary dated 1996 (**CE-9**), pp. 2-3.
[992] Hearing Transcript, Day 3, p. 770, lines 12- 20.
[993] See for example: SMCV, Petition No. 3616468 to MINEM dated 28 January 2004 (**CE-421**), p. 3; MINEM, Report No. 841-2004-MEM/DGM/PDM dated 30 November 2004 (**CE-479**).
[994] 1998 Stability Agreement (**CE-12**), Clause 3.

With respect to the mining concession of Sociedad Minera Cerro Verde S.A. it is located in the district of Uchumayo, province and Department of Arequipa.

NAME	*EXTENSION HAS.*
Cerro Verde No. 1, No. 2 and No. 3 - CONCESSION OF BENEFICIATION	*7,455*

The beneficiation Plant with a capacity of 33,000 M/Day is located in the district of Uchumayo, Province and Department of Arequipa.

NAME	*EXTENSION HAS.*
'CERRO VERDE BENEFICIATION PLANT'	*463*[995]

732. Exhibit I of the 1998 Stability Agreement describes the location of the concession in which the Leaching Project will be carried out.

733. In the Tribunal's view, Clause 3, including its cross-references to Clause 1 and Exhibit I, cannot be interpreted to mean that any and all investments that SMCV made in the mining concession "*Cerro Verde No. 1, No. 2, and No. 3*" and the "*Cerro Verde Beneficiation Plant*" would be covered by the stability guarantees. No clause of the Agreement specifies that all investments that might be made within the concession shall be part of the "*Leaching Project*" covered by the stabilization guarantees. Rather, Clause 3 identifies the location of the concession, as evidenced by the word "*circumscribed*," which can only mean that the Leaching Project is geographically located within the limits of the concessions.

734. Moreover, the second paragraph of Clause 3 allowed SMCV to incorporate additional mining rights in relation "*to the Cerro Verde Leaching Project,*" as further elaborated in Clause 4. It does not define the scope of the 1998 Stability Agreement, as the Claimant argues. It also did not imply that SMCV could add new unrelated investments under the scope of the 1998 Stability Agreement or bring new mining rights within the Leaching Project without the DGM's approval.

735. Clause 4 of the 1998 Stability Agreement describes the plan of investments and the term of execution. In particular, it (i) provides that the Feasibility Study's investment plan,

[995] 1998 Stability Agreement (**CE-12**), Exhibit I.

which is annexed to the Agreement, must be duly approved in order to implement the Stabilility Agreement[996] (ii) describes the mechanism that SMCV must follow in order to request a modification or expansion of the investment plan so that the investments will be included in such plan,[997] (iii) includes a list of the "*works contained in the Investment plan*,"[998] and (iv) describes the expectation resulting from the investment plan, *i.e.,* that "*during the period of the contract an approximate additional production of 15,000 MT per year of copper cathodes*"[999] be added. Again, this wording, limiting the product to copper *cathodes*, only refers to the Leaching Project.

736. The fact that certain changes of the investment plan could be implemented "*provided the final object of the investment plan is not affected*"[1000] further proves that modifications of the investment plan had to be related to the initial object of the investment.

737. Thus, a literal interpretation of Clauses 1, 3, and 4 as well as Exhibit I confirms that while SMCV could expand the scope of the Leaching Project, it could not include a new investment project, such as the Concentrator, within the scope of the 1998 Stability Agreement.

(5) The systematic interpretation of the 1998 Stability Agreement

738. Under a systematic interpretation of the 1998 Stability Agreement, according to Peruvian law, the Tribunal must interpret the clauses of the Agreement "*by means of each other, attributing, in the case of doubts, the meaning that results from all of them as a whole*."[1001] The Parties' experts agree that the 1998 Stability Agreement is governed by the Mining Law and Regulations and, thus, the 1998 Stability Agreement must be interpreted according to what is provided for in this framework.[1002]

739. According to the Claimant and its expert Dr. Bullard, a systematic interpretation of the 1998 Stability Agreement's clauses, in particular Clauses 9 and 10, and the Mining Law

[996] 1998 Stability Agreement (**CE-12**), Clause 4.1.
[997] 1998 Stability Agreement (**CE-12**), Clause 4.2.
[998] 1998 Stability Agreement (**CE-12**), Clause 4.3.
[999] 1998 Stability Agreement (**CE-12**), Clause 4.4.
[1000] 1998 Stability Agreement (**CE-12**), Clause 4.2.
[1001] Peruvian Civil Code (**CA-39**), Article 169.
[1002] Bullard I (**CER-2**), ¶¶ 35 *et seq*; Morales I (**RER-2**), ¶¶ 59 *et seq.*

and Regulations confirms that the stability guarantees covered all investments that SMCV made in its concessions during the stabilized term.[1003]

740. The Tribunal disagrees.

741. First, the Tribunal notes that the Claimant's expert Dr. Bullard has expressed his opinion "*assum[ing] that the Mining Law and Regulations […] provided that stability guarantees applied to all the concessions or the entire mining unit in which the titleholder made the minimum investment required to be entitled to enter into a mining stability agreement*."[1004] However, this factual premise of Dr. Bullard's opinion is wrong, as set out above (cf. paras. 698 *et seq*.).

742. Second, neither Clause 9 nor 10 confirm the Claimant's understanding of the 1998 Stability Agreement:

- Clause 9 grants SMCV the guarantees of the 1998 Stability Agreement "*in accordance with articles 72, 80 and 84 of the [Mining Law] and article 14, 15, 16, 17 and 22 of the Regulations.*" As discussed above, the Mining Law and Regulations do not extend stability guarantees to entire mining units or concessions as the Claimant argues. Rather, they limit such guarantees to the specific investment project detailed in the feasibility study or investment plan, *i.e.,* in this case, the Leaching Project.
- Clause 10 regulates the effects of new legal provisions coming into effect after the date of approval of the Feasibility Study. It does not expand the 1998 Stability Agreement's scope.

743. Rather, the Tribunal finds that a systematic interpretation of the 1998 Stability Agreement leads likewise to the conclusion that only the Leaching Project was covered by the Stability Agreemeent:

744. First, the term of the 1998 Stability Agreement was tied to the execution of the mining project.[1005] In the Tribunal's view, if the effects of the 1998 Stability Agreement were to extend to unrelated projects such as the Concentrator, there would have been no need to wait until the completion of the investment to allow the effects of the 1998 Stability Agreement to commence.

[1003] Claimant's Memorial, ¶ 324; Bullard I (**CER-2**), ¶¶ 36 *et seq*.
[1004] Bullard I (**CER-2**), ¶ 16.
[1005] 1998 Stability Agreement (**CE-12**), Clauses 6.1, 7.1, 8.1.

745. Second, the 1998 Stability Agreement confirms that only the investments set out in the Feasibility Study could benefit from the stability guarantees.[1006] For example:

- Clauses 2 and 4 set out that the Feasibility Study is approved, in accordance with Article 85 of the Mining Law.
- Clause 5 describes the "*amount of the investment of the Cerro Verde leaching project*." Specifically, Clause 5.1 provides that the execution of the investment plan required an approximate investment of USD 237 million. The Tribunal agrees with the Respondent's expert that this implies that the totality of the investment was directed at all times to the Leaching Project and not to the Concentrator Project.[1007]
- Clause 7, which relates to the termination of the investment plan, again specifically refers to the "*leaching project of Cerro Verde*" and sets out a mechanism under which the agreement could be suspended if investments not provided for in the investment plan were carried out.

746. Hence, also according to a systematic interpretation of the 1998 Stability Agreement, the Tribunal is satisfied that the 1998 Stability Agreement's scope did not cover the Concentrator.

(6) The contextual interpretation of the 1998 Stability Agreement

747. Under a contextual interpretation of the 1998 Stability Agreement, the Tribunal must interpret the Agreement in accordance with the principle of good faith and the common intention of the parties.[1008] The Tribunal notes that the Parties and their experts disagree on the exact application of the contextual interpretation, and in particular as to whether a historic interpretation and an interpretation of the parties' own acts are to be applied.[1009] The Tribunal finds that it can leave this issue open because even under the Claimant's approach to contextual interpretation, which considers the acts of the parties prior and after the execution of the 1998 Stability Agreement as well as a functional interpretation of the Agreement, the Tribunal has no doubt that the Concentrator was not covered by the 1998 Stability Agreement.

[1006] 1998 Stability Agreement (**CE-12**), Clauses 2, 3, 4, 5, 6, 7, 8.
[1007] Morales I (**RER-2**), ¶ 64; Morales II (**RER-7**), ¶ 53.
[1008] Peruvian Civil Code (**CA-39**), Articles 168, 1362.
[1009] Bullard II (**CER-7**), ¶¶ 39 *et seq.*; Morales I (**RER-2**), ¶¶ 70 *et seq.*

(6.1) The Parties' actions prior to the conclusion of the 1998 Stability Agreement

748. The starting point of the Tribunal's analysis is to assess the Parties' actions prior to the conclusion of the 1998 Stability Agreement.

749. In 1979, Minero Peru built a pilot concentrator plant with a capacity of 100 MT/D.[1010] The potential for development of Cerro Verde's primary sulfides was therefore clearly considered as early as 1979.

750. In 1994, under the Share Purchase Agreement between Minero Peru and Cyprus, Cyprus committed to the construction of a concentrator at Cerro Verde. The construction of a concentrator was thus clearly still envisaged in 1994.

751. In June 1996, ICF Kaiser assessed the feasibility of a concentrator in the 1996 Mill Feasibility Study.[1011] The 1996 Mill Feasibility Study concluded that, "*[a]lthough the project ha[d] improved significantly since the earlier 1995 Study, the pretax discounted cash flow [would] still not support the required investment*" due to, *inter alia*, the lack of economical options for power and water.

752. In September 1996, the President of Cyprus sent a letter to the General Manager of Minero Peru advising that it was "*not [...] economically prudent to at this time make investments for the engineering and construction of a mill to process the Cerro Verde sulphide ores*."[1012] Accordingly, Cyprus exercised its right to reduce its investment commitment under the Share Purchase Agreement.

753. The 1996 Feasibility Study, which served as the basis for the 1998 Stability Agreement, outlined the features of SMCV's investment and was clearly limited to the Leaching Project. The 1996 Feasibility Study states:

[1010] Morgan Grenfell & Co. Ltd., Cerro Verde Copper Mine: Information Memorandum dated April 1993 (**CE-321**), p. 1.1.
[1011] ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project dated 1 June 1996 (**CE-350**).
[1012] Letter from Cyprus Climax Metals Co. to Empresa Minera del Perú S.A. dated 16 September 1996 (**CE-11**), p. 2.

1.1 Scope of Feasibility Study

The feasibility study covers the Cerro Verde leaching project, from geological study through cathode production and sales. The study describes all operations, including those that form part of the leach process and its support facilities […].

1.2 Objective of the Study

The objective of the study is to evaluate the feasibility of producing 105 million (MM) lb./year (48,000 mtpy) of cathode copper from the heap leaching of copper ore at the Cerro Verde facilities […].

1.3 Basis of the Study

The study is based on test data results and operating experience obtained to date from leaching secondary sulfide ore at Cerro Verde, as well as from operating experience in the other unit processes at Cerro Verde.[1013]

754. SMCV's application to MINEM to enter into a 15-year stabilization agreement made reference to the 1996 Feasibility Study. The application noted that the "*project […] is intended to expand the production capacity from 72,000,000 to 105,000,000 pounds (48,000 metric tons) of copper cathodes per year with a total investment of US$ 240,247,000.*"[1014]

755. The report that supported MINEM's approval of the investment project likewise stated:

> *The objective of the Study is to evaluate the feasibility of producing 105 million pounds per year of copper cathodes in Cerro Verde's facilities, considering the results of the experimental tests and operating experience with leaching secondary sulfides in Cerro Verde, [it] will expand the processing capacity of Cerro Verde by installing the necessary equipment to improve the leaching process using the latest technology.*[1015]

756. The resolution that approved the Feasibility Study provided:

> *[t]hat [SMCV] has submitted a Feasibility Study to the General Mining Directorate [whose] objective is the production of approximately 105 million pounds per year of copper cathodes in Cerro Verde's facilities […].*

[1013] Feasibility Study, Executive Summary dated 1996 (**CE-9**), pp. 2-3.
[1014] Stabilization Agreement Request dated 25 January 1996 (**CE-7**), p. 2.
[1015] MINEM, Report No. 033-96-EM-DGM-DFM/DFAE dated 27 March 1996 (**RE-25**), at "Objective."

> *Article 1. Approve the Feasibility Study submitted by [SMCV] in the amount of approximately US $237,517,000, which is part of this Resolution as an annex […].*
>
> *Article 3. Submit to the Office of the Vice Minister of Mines the information regarding the Feasibility Study that is approved in this Resolution in order to sign the corresponding Tax Stability Agreement, with [SMCV], which shall communicate to the General Mining Directorate the completion of the execution of the investments committed in the Feasibility Study.*[1016]

757. The 1996 Feasibility Study, the report by the DGM analyzing the study, and the MINEM resolution approving the study all evidence that the investment project was for the purposes of expanding SMCV's leaching facilities to increase the production of copper cathodes. They did not set out anything in relation to the Concentrator, which at the time of the conclusion of the 1998 Stability Agreement had already been considered but determined to be uneconomical.[1017]

758. In 1997, the pilot concentrator was even dismantled.

759. The Tribunal, therefore, finds that nothing in this course of events allowed SMCV to consider that the future Concentrator would be covered by the 1998 Stability Agreement.

(6.2) The Parties' actions following the conclusion of the 1998 Stability Agreement

760. In assessing the Parties' actions after the conclusion of the 1998 Stability Agreement, the Tribunal notes that the Claimant alleges that MINEM officials explicitly confirmed that, because the Concentrator would be part of SMCV's integrated mining unit, SMCV could expand its existing Beneficiation Concession to include the Concentrator and that doing so would ensure that the Concentrator would be entitled to stability guarantees.[1018]

761. However, the Tribunal only finds evidence that contradicts the Claimant's position. Save for Ms. Chappuis' alleged confirmation that the Concentrator would be covered by the 1998 Stability Agreement through the extension of the Beneficiation

[1016] MINEM, Directorial Resolution No. 158-96-EM/DGM dated 6 May 1996 (**RE-24**), pp. 1-2.
[1017] Letter from Cyprus Climax Metals Co. to Empresa Minera del Perú S.A. dated 16 September 1996 (**CE-11**), p. 2; Claimant's Reply, ¶ 87(d).
[1018] Claimant's Reply, ¶ 89.

Concession,[1019] which the Tribunal finds to be unproven and based on inconsistent testimony, there are only circumstances that clearly refute a common intent that the Concentrator would be covered by the 1998 Stability Agreement.

(6.2.1) Ms. Chappuis' alleged confirmation that the Concentrator was covered by the 1998 Stability Agreement through the extension of the Beneficiation Concession

762. The Claimant's claim that MINEM officials allegedly confirmed that the 1998 Stability Agreement would cover the Concentrator is based on the testimonial evidence of three witnesses, Ms. Chappuis, Ms. Torreblanca, and Mr. Davenport.

763. Ms. Chappuis, who was the Director-General of MINEM, allegedly confirmed to SMCV representatives during meetings that the extension of the Beneficiation Concession would allow the Concentrator to be covered by the 1998 Stability Agreement. She states in her witness statement:

> *I recall that I repeated to the representatives of SMCV that the scope of stability guarantees under the Mining Law and the Regulations was clear, and that the Stability Agreement would apply to any investment that SMCV made in its mining unit throughout the Agreement's effective term.*[1020]

764. She further testifies:

> *In my opinion as Director General of Mining, SMCV just needed to ask MINEM to expand the geographical area and installed capacity of its beneficiation concession to include the concentrator's operations. As I mentioned, Clause 3 of the Agreement was clear in that the same 'is circumscribed to the concessions, related in EXHIBIT I,' which in turn expressly included SMCV's mining and beneficiation concessions. Vice-Minister Polo had a different view […].*[1021]

765. Ms. Torreblanca, who was the Legal and Environmental Director of SMCV at the time of the alleged meetings with Ms. Chappuis, also testifies that Ms. Chappuis confirmed that an extension of the Beneficiation Concession would allow the Concentrator to be covered by the 1998 Stability Agreement. She states in her witness statement:

> *[W]e naturally wanted the Government to confirm that it would respect SMCV's stability guarantees and not impose royalties during the term of the Stability Agreement. I recall that I asked them whether the Government would be willing*

[1019] Chappuis I (**CWS-3**), ¶¶ 52-53.
[1020] Chappuis I (**CWS-3**), ¶ 52.
[1021] Chappuis I (**CWS-3**), ¶ 53.

to give us a written guarantee or amend the Stability Agreement so that it made express reference to the Concentrator and to the fact that we would not pay royalties until December 2013. Their response was generally the same: that we did not have to worry because the Agreement would protect any investment that SMCV made in its Mining Concession and Beneficiation Concession during the term of the Agreement.

I recall that Director Chappuis was particularly clear about this: she told us that, in accordance with the Mining Law and the Regulations, the Stability Agreement applied to the entirety of the Cerro Verde Mining Unit (i.e., the Mining and Beneficiation Concessions), and thus we merely had to expand the Beneficiation Concession to include the Concentrator.[1022]

766. Ms. Torreblanca further testifies:

Director Chappuis explained that, since the new Concentrator investment would form part of SMCV's existing integrated mining unit, it would be covered by the existing Stability Agreement. She told us that there was no need for an amendment to the Stability Agreement to include an additional beneficiation concession. Rather, since the investment in the Concentrator would be made within SMCV's existing Mining Unit, SMCV could simply apply for the expansion of the existing Beneficiation Concession that was already covered by the Stability Agreement.

In light of the DGM's confirmation that the Concentrator would be covered by the Stability Agreement if it was included in the existing Beneficiation Concession, SMCV no longer saw the need to press for additional written guarantees.[1023]

767. Ms. Torreblanca testified during the Hearing that the DGM provided oral confirmations to SMCV in both 2003 and 2004 that the Concentrator would be stabilized.[1024] This testimony is inconsistent with Ms. Chappuis' testimony during the *SMM Cerro Verde* hearing, in which she stated that such confirmation was provided at one meeting only.[1025] This being said, the Tribunal turns to each of the alleged meetings. With respect to the alleged confirmation in 2003, Ms. Torreblanca testified in the Hearing that the written record on the oral confirmations was no longer available to her.[1026] With respect

[1022] Torreblanca I (**CWS-11**), ¶¶ 24-25.
[1023] Torreblanca II (**CWS-21**), ¶¶ 16-17.
[1024] Hearing Transcript, Day 2, p. 559, line 19 to p. 560, line 6.
[1025] *SMM Cerro Verde Netherlands B.V. v. Republic of Peru*, ICSID Case No. ARB/20/14, Transcript, Hearing on Jurisdiction and Merits, Day 3 (**CE-1135**), p. 871, lines 3-17.
[1026] Hearing Transcript, Day 2, p. 560, line 21 to p. 561, line 8.

to the alleged confirmation in 2004, Ms. Torreblanca testified in the Hearing that this was reported back to Mr. Davenport in an email.[1027] However, the Claimant has not submitted any written evidence in relation to the alleged confirmations in 2003 and 2004. Ms. Torreblanca affirmed during the Hearing that "*[a]ll [of SMCV's] emails were erased*" in 2014 due to "*changes in the system*."[1028] In the event that such emails had existed, the Tribunal finds it unconvincing that SMCV would (i) not have safeguarded such evidence, and (ii) not have made use of such emails in any proceedings before their alleged deletion in 2014 in light of the fact that the alleged conversation concerned a USD 800 million investment and the question of whether this investment would be stabilized.

768. Moreover, when asked by the Tribunal whether he had received explicit confirmation from MINEM that the extension of the Beneficiation Concession would shield the Concentrator from the Royalty Law, Mr. Davenport, the President and General Manager of SMCV, stated that "*it was implied*."[1029] Mr. Davenport's own testimony thus contradicts the Claimant's argument that an explicit confirmation was given by the Respondent as to coverage of the Concentrator in the scope of the 1998 Stability Agreement.

769. Furthermore, Mr. Davenport answered a question of the President during the Hearing on how he internally reported to Phelps Dodge. His answer also evidences the total lack of documentation of this alleged assurance by Ms. Chappuis that the Concentrator would be stabilized:

> *[THE WITNESS:] How I communicated that to Phelps Dodge, I don't remember. I probably either sent them an email or called them or they were there. They knew that that's what our direction was. So, I don't remember specific--I mean, I don't remember going out and saying: 'Hey, let's go out and have a few beers. We just succeeded in this.' I don't remember that part, but I'm sure I communicated in some manner with them.*
>
> *PRESIDENT HANEFELD: So, you cannot refer us to any written documents and how, so to say, this understanding within the company was shared and celebrated?*

[1027] Hearing Transcript, Day 2, p. 524, line 13 to p. 527, line 12.
[1028] Hearing Transcript, Day 2, p. 528, lines 3-10.
[1029] Hearing Transcript, Day 3, p. 810, line 21 to p. 811, line 4.

> *THE WITNESS: Well, I guess the written document is, you know, mostly, I guess, these presentations that said we met with--we're doing an addendum, we've met with MINEM, and they said: 'Well, you can do that, but here's a better path to do it than the expansion.'*
>
> *Whether there was a written document--I didn't see it in the materials that I reviewed. I don't remember that, other than the presentations I made.*[1030]

770. The Tribunal finds it unconvincing that after months of alleged meetings with MINEM officials seeking confirmation that the Concentrator would be covered by the 1998 Stability Agreement, neither Mr. Davenport nor Ms. Torreblanca would have kept internal records capturing MINEM's alleged assurances that the Concentrator would be covered by the 1998 Stability Agreement.

771. In any event, even if such meetings would have occurred and Ms. Chappuis would have shared her opinion that the extension of the Beneficiation Concession would allow the Concentrator to benefit from the guarantees of the 1998 Stability Agreement, the Tribunal finds that this does not constitute a sufficient basis for SMCV and its shareholders to rely on Ms. Chappuis' opinion. This is because (i) Ms. Chappuis' opinion was clearly contradicted by documents of higher MINEM officials, which she as well as SMCV and Phelps Dodge were aware of, and (ii) Ms. Chappuis did not have the authority to bind the DGM in relation to the modification of stability agreements. Ms. Chappuis' opinion could thus not have had the legal effect that the Claimant seeks to establish in these proceedings.

772. In the Hearing, Ms. Chappuis expressly confirmed that she knew that "*Vice-Minister Polo had a different view*" as to whether the extension of the Beneficiation Concession could cover new investments.[1031] Moreover, while she testified that all lawyers in her team agreed that the inclusion of the Concentrator in an expanded Beneficiation Concession meant that the Concentrator was stabilized,[1032] she also admitted that there were no minutes or any other type of evidence recording this alleged assurance from MINEM.[1033]

[1030] Hearing Transcript, Day 3, p. 831, line 7 to p. 832, line 7.
[1031] Chappuis I (**CWS-3**), ¶ 53.
[1032] Hearing Transcript, Day 4, p. 1032, line 10 to p. 1033, line 5.
[1033] Hearing Transcript, Day 4, p. 1025, line 16 to p. 1026, line 3.

773. Ms. Chappuis' alleged assurance that the Concentrator would be stabilized is rather clearly contradicted by other evidence. For example, by:

- Mr. Polo's declaration at the Mining Royalties Forum on 11 March 2004, where he explained that:

  Stabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project], or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to stabiliz[e] for that investment, for that development, not for the whole company.[1034]

- Mr. Davenport's testimony during the Hearing that he was aware that Mr. Polo did not agree with Ms. Chappuis' understanding of the scope of the 1998 Stability Agreement.[1035]

774. This in itself is sufficient to conclude that SMCV could not rely on any alleged confirmations by Ms. Chappuis that the extension of the Beneficiation Concession would enable the Concentrator to come under the scope of the 1998 Stability Agreement.

775. In addition, former MINEM officials testified at the Hearing that, under MINEM's regulations and procedures, the expansion of a beneficiation concession does not change the scope of mining stabilization agreements. In this regard, Mr. Tovar, who was the person responsible at MINEM for authorizing the expansion of SMCV's Beneficiation Concession in 2004, confirmed that the application and procedure to expand a beneficiation concession was an independent procedure, unrelated to the 1998 Stability Agreement's scope.[1036]

776. Mr. Isasi, MINEM's former legal director, confirmed that the approval to expand a beneficiation concession did not have the effect of amending a stabilization agreement.[1037] In addition, Mr. Isasi testified that a modification of a stabilization agreement required his approval as the head of MINEM's legal department as well as

[1034] Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic dated 11 March 2004 (excerpts) (**RE-185**), at timestamps 00:09:37 - 00:10:03.
[1035] Hearing Transcript, Day 3, p. 784, line 9 to p. 785, line 22.
[1036] Hearing Transcript, Day 5, p. 1449, line 19 to p. 1450, line 9.
[1037] Hearing Transcript, Day 4, p. 1201, line 20 to p. 1202, line 9.

the approval and signature of the Minister,[1038] neither of which SMCV sought or obtained.

777. Similarly, Mr. Polo made clear during his testimony that the conclusion, amendment or extension of a stability agreement is an exceptional act which requires the Minister's or the Vice-Minister's approval.[1039] Specifically, he testified that the DGM cannot amend stabilization agreements and that an official like Ms. Chappuis could not act beyond the powers granted to her by law, and, thus, could not change the 1998 Stability Agreement, *i.e.*, an agreement that higher ranking officials had approved.

(6.2.2) The evidential record of events following the conclusion of the 1998 Stability Agreement confirms that the Concentrator was not covered by the 1998 Stability Agreement

778. While the Tribunal has found no evidence in writing of any alleged confirmations by Ms. Chappuis that the USD 800 million investment in the Concentrator would be stabilized, the Tribunal has, however, found a considerable amount of documentary evidence confirming the Parties' joint understanding that the 1998 Stability Agreement did not cover the Concentrator.

779. In March 2001, Minero Peru and Phelps Dodge entered into the Settlement Agreement pursuant to which Phelps Dodge committed to continue evaluating the building of a concentrator plant.[1040] As confirmed by the Claimant's witness, Ms. Torreblanca, the Settlement Agreement did not set out any obligation to construct a concentrator plant.[1041] Accordingly, and contrary to the Claimant's argument,[1042] with the conclusion of the Settlement Agreement, Phelps Dodge and Minero Peru relinquished the obligation of the Share Purchase Agreement to construct a "*grinding and conventional copper/molybdenum flotation circuit.*"[1043] In its Reply, the Claimant even recognizes that "*at the time SMCV signed the Stability Agreement, it had not yet determined whether the Concentrator would ultimately be economically and financially feasible*."[1044]

[1038] Hearing Transcript, Day 4, p. 1202, lines 2-9.
[1039] Hearing Transcript, Day 5, p. 1305, lines 4-20; p. 1332, line 1 to p. 1333, line 8.
[1040] Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. dated 30 March 2001 (**CE-17**).
[1041] Hearing Transcript, Day 2, p. 517, lines 7-20.
[1042] Claimant's Post-Hearing Brief, ¶ 62.
[1043] Share Purchase Agreement dated 17 March 1994 (**CE-4**), Article 3.1(f)-(g); Appendix (G).
[1044] Claimant's Reply, ¶ 87(d).

780. In 2002, SUNAT issued a report in which it noted that "*Tax Stability [Agreements] entered into pursuant to Title Nine of the TUO of the General Mining Law only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an Administrative-Economic Unit*."[1045] This phrasing likewise left no doubt that only the leaching activities at Cerro Verde were covered by the 1998 Stability Agreement and that the profits of a future Concentrator, if any, would, on the contrary, not be covered by the Agreement.

781. SMCV was indisputably also aware of the 2002 SUNAT Report. An internal SMCV presentation prepared in August 2004 expressly referred to this 2002 SUNAT Report.[1046]

782. In 2002, SMCV conducted the 2002 Pre-Feasibility Study for the Concentrator and specifically assessed the stability agreements in force at Cerro Verde, including the 1998 Stability Agreement.[1047] The 2002 Pre-Feasibility Study shows that certain recommendations concerning the 1998 Stability Agreement were made.[1048] The only major recommendation related to the 1998 Stability Agreement was to "*[i]mmediately negotiate with the government to ensure the* ***reinvestment of profit tax credit*** *outlined in the existing stability agreement between [Cerro Verde] and the Peruvian government*" (emphasis added).[1049] Also, the index of appendices to the 2002 Pre-Feasibility Study shows that SMCV clearly distinguished between the concept of reinvestment of profits and other guarantees under the 1998 Stability Agreement. The study contains both an "*Appendix D*" concerning the "*Reinvestment of Profits Law*" as well as an "*Appendix E*" concerning the "*Review of Stability Agreement by Rodrigo, Elías & Medrano.*"[1050]

783. Ms. Torreblanca and Mr. Davenport confirmed during the Hearing that SMCV consulted with external counsel regarding the scope of the 1998 Stability Agreement

[1045] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002 (**RE-26**), p. 3.
[1046] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 39.
[1047] 2002 Pre-Feasibility Study (**CE-928**), pp. 58 *et seq*.; SMCV, Primary Sulfide Preliminary Pre-Feasibility Study, Volumes II and III, December 2002 (excerpts) dated December 2002 (**RE-351**).
[1048] 2002 Pre-Feasibility Study (**CE-928**), pp. 61 *et seq.*
[1049] 2002 Pre-Feasibility Study (**CE-928**), p. 7.
[1050] SMCV, Primary Sulfide Preliminary Pre-Feasibility Study, Volumes II and III, December 2002 (excerpts) dated December 2002 (**RE-351**), p. xi.

when preparing the 2002 Pre-Feasibility Study.[1051] This legal advice, which the Claimant's counsel confirmed that it concerned the scope of the 1998 Stability Agreement,[1052] has however been heavily redacted in the 2002 Pre-Feasibility Study. In light of these redactions, the Tribunal is not able to assess whether such advice was supportive of the Claimant's position. The Tribunal considers it likely that the Claimant would have disclosed the document in full had the advice been favorable to its position in these proceedings.

784. In addition, Mr. Davenport testified during the Hearing that he was "*sure*" that a sensitivity analysis assuming that the Concentrator was not stabilized under the 1998 Stability Agreement was conducted.[1053] This contradicts Ms. Torreblanca's testimony that "*[t]here was no uncertainty*" regarding the stabilization of the Concentrator.[1054] The Claimant also states in its Post-Hearing Brief that the 2002 Pre-Feasibility Study "*clearly applied the non-stabilized tax regime, as it is titled 'Peru Current system' and appears under the heading 'Tax Regime,' immediately after the 'CV Estabilization' assumption that SMCV used in the base case*."[1055] The Tribunal concludes therefrom that the risk that the stabilized regime would not apply to Cerro Verde's primary sulfides was duly taken into consideration by SMCV and Phelps Dodge when making their investment decision to build the Concentrator.

785. In July 2003, Ms. Torreblanca notably wrote to Ms. Chappuis and only requested confirmation that SMCV would be entitled to apply the profit reinvestment benefit as a result of the 1998 Stability Agreement.[1056] Ms. Torreblanca explained that SMCV's decision to build a concentrator was "*directly related*" to its right to reinvest non-distributed profits back into the project and recognized that the 1998 Stability Agreement only referred to the "*Leaching Project rather than to the Cerro Verde Project*."[1057] Ms. Torreblanca *inter alia* noted:

> *Given that the executed stability agreement makes reference therein to the Leaching Project rather than to the Cerro Verde Project, which also includes the Primary Sulfides Project, we request clarification that the Investment*

[1051] Hearing Transcript, Day 2, p. 620, lines 10-17; Hearing Transcript, Day 3, p. 838, lines 1-8.
[1052] Hearing Transcript, Day 2, p. 618, lines 1-5.
[1053] Hearing Transcript, Day 3, p. 835, line 14 to p. 838, line 8.
[1054] Hearing Transcript, Day 2, p. 619, lines 16-21.
[1055] Claimant's Post-Hearing Brief, ¶ 64(b).
[1056] SMCV, Petition No. 1418719 to MINEM dated 3 July 2003 (**CE-394**).
[1057] SMCV, Petition No. 1418719 to MINEM dated 3 July 2003 (**CE-394**).

> *Program using Non-Distributed Profits to be submitted would be approved regardless of the fact that it is not confined to the Leaching Project.*
>
> *In order to complete this aspect related to reinvesting profits in the Feasibility Study, we would like to ask for your opinion on this matter, to be able to specify that the reinvestment of profits stabilized for Cerro Verde, regulated by Executive Decree 024-93-EM, Regulation of the Promotion of Mining Investment, and Executive Decree 07-94-EM, Regulation of the Procedure for Submitting, Approving, and Executing Investment Programs using Non-Distributed Profits, is applicable to the Primary Sulfides Project, even though the stability agreement does not mention this project. This is requested because this agreement stabilizes the profit-reinvestment regime for the mining titleholder rather than for the project that gave rise to its signing.*[1058]

786. Ms. Torreblanca eventually even submitted a formal request to MINEM on behalf of SMCV for permission to reinvest profits to construct "*a concentrator to process the primary sulfide ore*" in the Cerro Verde Mining Unit on 28 January 2004.[1059] In contrast, the Tribunal has not been presented with a similar request for clarification and a corresponding response by MINEM in relation to the issue of whether the 1998 Stability Agreement covered the Concentrator.

787. On 8 September 2003, the DGM replied to SMCV in a report written by a MINEM attorney and engineer and approved by Ms. Chappuis. The report stated:

> *About the question whether the stabilized regime would be applicable to the company, the prohibition contained in Article 8 of Supreme Decree No. 027-98-EF points out that* ***the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement****.*[1060] (emphasis added)

788. The Tribunal finds that this response is unambiguous in affirming that the stabilized regime only applied to the Cerro Verde Leaching Project.

789. On the same day, in another MINEM Report, the DGM responded to SMCV's request concerning the reinvestment of profits by stating that "*[t]he Project for the Primary Sulfide Exploitation could be eligible for this benefit, there being no requirement that the agreement giving rise to the benefit should have previously contemplated it as a*

[1058] SMCV, Petition No. 1418719 to MINEM dated 3 July 2003 (**CE-394**).
[1059] SMCV, Petition No. 3616468 to MINEM dated 28 January 2004 (**CE-421**).
[1060] MINEM, Report No. 509-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-398**), p. 1.

project."[1061] In the Claimant's view, this wording means that "*[t]he DGM recognized that the Concentrator would be part of SMCV's Mining Unit, which was covered by the Stability Agreement*."[1062] However, the Tribunal finds that nothing in the letter can be read as a recognition that the Concentrator would be covered by the 1998 Stability Agreement. Rather, the scope of the DGM's response was limited to the issue of the reinvestment of profits. The Tribunal comes to the same conclusion with respect to the MEF's opinion on the reinvestment of profits benefit.[1063]

790. On 27 August 2004, SMCV submitted a request to the DGM to expand the Beneficiation Concession to include the Concentrator.[1064]

791. On 26 October 2004, MINEM approved SMCV's request to expand the Beneficiation Concession.[1065] Neither SMCV's request to expand the Beneficiation Concession nor MINEM's approval of the expansion of the Beneficiation Concession mentions the 1998 Stability Agreement.

792. On 9 December 2004, the Minister of Energy and Mines gave final approval to SMCV's request to apply the profit reinvestment benefit to construct the Concentrator.[1066] It stated that the profits that would benefit from the profit-reinvestment program had to be "*exclusively generated by the 'Cerro Verde Leaching Project.* "'[1067] Again, the Tribunal finds that such clear language implies that the new investment in the Concentrator was not covered by the 1998 Stability Agreement.

793. Mr. Davenport testified at the Hearing that SMCV wrote twice to MINEM seeking confirmation that the profit reinvestment benefit would be granted to SMCV "*because it's important*."[1068] However, the Tribunal has not been confronted with any documents evidencing any explicit request for confirmation by SMCV that the Concentrator would fall under the scope of the 1998 Stability Agreement. The Claimant's expert, Mr. Bullard, confirmed during the Hearing that he might have advised his client to request such confirmation.[1069] When questioned on this issue, Ms. Torreblanca and

[1061] MINEM, Report No. 510-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-399**), p. 2.
[1062] Claimant's Reply, ¶ 96(c).
[1063] Ministry of Economy and Finance, Informe No. 209-2004-EF/66.01 dated 3 December 2004 (**CE-22**).
[1064] SMCV, Petition No. 1487019 to MINEM dated 27 August 2004 (**CE-457**).
[1065] MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM dated 26 October 2004 (**CE-476**).
[1066] MEF, Ministerial Resolution No. 510-2004-MEM/DM dated 9 December 2004 (**CE-23**).
[1067] MEF, Ministerial Resolution No. 510-2004-MEM/DM dated 9 December 2004 (**CE-23**), Article 1.
[1068] Hearing Transcript, Day 3, p. 772, line 15 to p. 774, line 12.
[1069] Hearing Transcript, Day 8, p. 2372, lines 3-9.

Mr. Davenport confirmed during the Hearing that SMCV initially sought explicit written assurances from MINEM that the Concentrator would be covered by the 1998 Stability Agreement.[1070] However, Ms. Chappuis explained that when SMCV asked whether to submit a request in writing, she told them "*I think not*."[1071] In the Tribunal's view, Ms. Chappuis' answer could evidence that Ms. Chappuis knew that MINEM would not be able to positively answer SMCV's request. Her response is, in any event, puzzling in light of the extensive correspondence in relation to the reinvestment of profits benefit and the extension of the Beneficiation Concession.

794. The Tribunal further notes that SMCV and Phelps Dodge were doubtful as to the scope of the 1998 Stability Agreement and the Respondent was consistent in considering the Concentrator not covered by the 1998 Stability Agreement.

795. As recalled above, Mr. Davenport specifically confirmed during the Hearing:

> *We approached them and said: "We would like to get confirmation that the Concentrator--please put it in writing--that the Concentrator will be stabilized."*[1072]

796. This, at the minimum, shows that SMCV had doubts as to the exact scope of the 1998 Stability Agreement.

797. Moreover, Mr. Davenport confirmed at the Hearing that SMCV made presentations to MINEM in 2004 asking for an amendment to the 1998 Stability Agreement to include the Concentrator.[1073] In a presentation dated July 2004, SMCV *inter alia* noted that there was a "*need for certainty*" with respect to the envisioned investment in the Concentrator. The presentation referred to a "*requested addendum*" to the 1998 Stability Agreement to provide for such certainty.[1074] In another presentation dated August 2004, SMCV likewise requested that an *addendum* be included in the Annex I of the 1998 Stability Agreement to cover the "*Beneficiation Concession: Primary Sulfides Concentrator*."[1075] The presentation stated "*SMCV requires certainty today with regard*

[1070] Hearing Transcript, Day 2, p. 557, lines 2-14; Hearing Transcript, Day 3, p. 778, line 17 to p. 779, line 4.
[1071] *SMM Cerro Verde Netherlands B.V. v. Republic of Peru*, ICSID Case No. ARB/20/14, Transcript, Hearing on Jurisdiction and the Merits, Day 4 (**CE-1136**), p. 946, lines 16-22. See also: Chappuis I (**CWS-3**), ¶¶ 51-52.
[1072] Hearing Transcript, Day 2, p. 557, lines 2-14.
[1073] Hearing Transcript, Day 3, p. 830, line 21 to p. 831, line 6; Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future" dated July 2004 (**CE-450**), slide 45; SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 11.
[1074] Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future" dated July 2004 (**CE-450**), slide 45.
[1075] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 11.

to clarity in the Agreement to make an investment decision of more than US$800 million."[1076] The presentation also referred to the 2002 SUNAT Report,[1077] which had clarified that stabilization agreements "*only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements*."[1078]

798. On 25 August 2004, a draft Phelps Dodge presentation titled "*PDMC Growth Projects Cerro Verde Sulfide Update*" prepared for the October 2004 Board Meeting was shared by email by a senior Phelps Dodge official.[1079] The draft presentation noted among others that "*the Mines Ministry has proposed a process to include sulfide plant in the facility covered by the existing stability agreement*" and that this would "*shield the sulfide operation from the royalty*."[1080] The presentation further states that the project economics "*assume[d] success [in] including [the] sulfide project in [the] existing stability agreement*."[1081] Again, the Tribunal has not been presented with evidence showing said allegedly proposed process of a modification of the 1998 Stability Agreement. Moreover, the fact that the presentation explains that it "*[a]ssumes success*"[1082] in including the Concentrator in the 1998 Stability Agreement's scope means that there was at least a recognized potential for failure of such a negotiation with MINEM.

799. An *aide-mémoire* prepared in advance of the PDAC conference in Toronto in March 2005 specifically records the Respondent's understanding that mining stability agreements are granted to "*specific mining projects*" and that "*for purposes of enforcing the guarantees agreed to by the Peruvian State, for mining royalties, it is the mining companies' responsibility to inform the entity tasked with managing and collecting the*

[1076] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 47 (emphasis omitted).
[1077] SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 39.
[1078] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002 (**RE-26**), p. 3.
[1079] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**).
[1080] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 6.
[1081] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 9.
[1082] Email from Dennis Bartlett to Timothy Snider, H. (Red) Conger, and Lowell Shonk, "CV Sulfide Board Update" (Attaching Draft Presentation "PDMC Growth Projects, Cerro Verde Sulfide Update") dated 25 August 2004 (**RE-324**), slide 9.

royalty about the mining projects and concessions that would be covered by such guarantees."[1083]

800. In April 2005, Mr. Isasi made clear in a report that "*[t]he stability granted by the Agreements on Guarantees and Measures to Promote Investment guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. […] Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis*."[1084]

801. In June 2005, the Minister of Energy and Mines and Mr. Isasi made a publicly televised presentation before the Energy and Mines Congressional Committee explaining the relationship between the Royalty Law and mining stabilization agreements. The Minister stated that "*[t]hen, who pays royalties? All mining titleholders pay royalties, but not for all of their projects.*"[1085] Mr. Isasi clarified that *"the obliged subject is a mining company but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects*."[1086] Again, this shows the Respondent's consistent interpretation of the scope of stabilization agreements.

802. In September 2005, a press article reported about the Concentrator and noted that the Minister of Energy and Mines issued a press release stating that "*the expansion is not covered by the tax stability agreement signed on February 13, 1998, for the current operation of the Cerro Verde plant for Solvent Extraction and Electro-Winning (SX-EW) of oxides*."[1087] The article also reported about "*Phelps Dodge [arguing] that the stability agreement underlying its current operations should probably also cover its expansion project of USD 850M.*"[1088] In the Tribunal's view, this article further

[1083] Email from César Zegarra to Oswaldo Tovar and César Polo, "*Aide Memoire*" (with attachment) dated 8 March 2005 (**RE-5**) (emphasis omitted).
[1084] MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.
[1085] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (**RE-29**) (excerpts), p. 26.
[1086] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (excerpts) (**RE-29**), p. 29.
[1087] "Minister: Cerro Verde Expansion Subject to Royalty," *Business News Americas* dated 20 September 2005 (**CE-511**).
[1088] "Minister: Cerro Verde Expansion Subject to Royalty," *Business News Americas* dated 20 September 2005 (**CE-511**).

evidences that SMCV and/or Phelps Dodge were aware of the potential for discrepancy of views on the scope of the 1998 Stability Agreement.

803. Moreover, the Tribunal notes that the November 2005 Letter sent by the Minister of Energy and Mines to Congressman Diez Canseco in response to his request for information regarding MINEM's position on SMCV's royalty payments, made clear that the Concentrator would be subject to royalties once it commenced operations.[1089] The Minister stated that:

> *In the first place, it is necessary to distinguish the legal treatment of the 'Cerro Verde Leaching' project, which is covered by an Agreement on Guarantees and Measures to Promote Investment, from that applicable to the new Primary Sulfide Project in which the profits from that old Leaching project will be reinvested. The Primary Sulfide project does not enjoy protection under any Guarantee or Stability agreement.*
>
> *[…]*
>
> *This new Sulfide Project has not been the subject of a new Agreement on Guarantees and Measures to Promote Investment in the mining business, so that it will have to pay the applicable royalties when it goes on line. If the company fails to honor this obligation, the National Superintendence of Tax Administration (SUNAT) must exercise the applicable administrative powers to make its collection effective.*
>
> *Additionally, it should be noted that it is not correct to claim that the profit reinvestment benefit applied to the Primary Sulfide Project (Cerro Verde 2). This project is the recipient of the profits from the Cerro Verde Leaching Project (Cerro Verde 1); these profits enjoy the benefit of reinvestment free of income tax by virtue of the Agreement on Guarantees and Measures to Promote Investment dated February 13, 1998.*[1090]

804. Even though this letter may not have been available to SMCV or Phelps Dodge in November 2005, the relevant excerpt of MINEM's letter was ultimately reproduced in a draft legislative bill in 2006.[1091] In the Tribunal's view, SMCV could not have ignored this draft bill, which directly addressed the company's situation as it sought to repeal the ministerial resolution that had approved SMCV's reinvestment of profits.[1092]

[1089] MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**), p. 1.
[1090] MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**), pp. 1-3.
[1091] Congress, Draft Bill No. 14792/2005-CR (**CE-536**), p. 9.
[1092] MEF, Ministerial Resolution No. 510-2004-MEM/DM dated 9 December 2004 (**CE-23**).

805. In 2005, Phelps Dodge also expressly stated in its SEC filings that there was uncertainty as to the inclusion of the Concentrator under the scope of the 1998 Stability Agreement. In particular, when it issued its annual SEC 10K report for 2004, Phelps Dodge stated in relation to the Royalty Law that "*it is not clear what, if any, effect the new royalty law will have on the operations at Cerro Verde*."[1093] Moreover, SMCV's financial statement for 2005 and 2006 further express that the tax administration would have the power to review and correct the income tax determined by SMCV. The financial statement also reported that "*[s]ince there may be differences in the interpretation by the tax administration of the regulations applicable to the Company, it is not possible to anticipate to date whether additional tax liabilities will occur*."[1094]

806. During the 2006 Roundtable Discussions, which SMCV attended, it was further made clear that while the reinvestment of profits approval "*stemming from the leaching project in the new primary sulfides project […] is in accordance with the law,*"[1095] "*any profits generated by the sulfides project may not be reinvested with a tax benefit*."[1096] It was also clarified that the Cerro Verde Leaching Project was not subject to the Royalty Law,[1097] but that:

> *Cerro Verde's primary sulfide project is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract.*
>
> *It is a new project that does not benefit from tax, exchange rate and administrative stability.*
>
> *In consequence, the sulfides project will pay royalties when it enters into production.*[1098]

807. In June 2006, Mr. Isasi issued the June 2006 Report, in which he concluded that the 1998 Stability Agreement "*deals only with the 'Cerro Verde Leaching Project*'" and

[1093] Phelps Dodge, SEC Form 10-K for 2004 dated 7 March 2005 (**CE-901**), p. 80.
[1094] SMCV, Financial Statements 2005-2006 dated 9 February 2007 (**CE-561**), p. 30.
[1095] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 7.
[1096] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 9.
[1097] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 11.
[1098] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 15.

"*cannot be extended to the entire company or to other non-stabilized projects*," and SMCV was thus required to pay royalties for the Concentrator.[1099]

808. Finally, once the Concentrator was built in 2007, the MINEM resolutions of early 2007 confirm that the Beneficiation Concession had been expanded but they do not even refer to the 1998 Stability Agreement.[1100]

809. All of these events, both individually and taken together, show that SMCV and Phelps Dodge had, at the minimum, doubts as to the scope of the 1998 Stability Agreement, if not actual knowledge of its limited scope, and that the Respondent consistently interpreted the 1998 Stability Agreement as only covering the mining project set out therein, *i.e.,* the Leaching Project. SMCV's and Phelps Dodge's doubts could have led SMCV to seek assurances from MINEM in writing or clarifications with SUNAT, such as a binding opinion, for example through the Mining Council. However, as testified by Ms. Torreblanca, such a formal, institutional enquiry was not made before SUNAT as SMCV "*didn't see the need*" to do so.[1101]

(7) The functional interpretation of the 1998 Stability Agreement

810. Under a functional interpretation of a contract under Peruvian law, expressions "*that have various meanings must be understood in the one most appropriate for the nature and the purpose of the act*."[1102] The Tribunal is not convinced that the terms of the 1998 Stability Agreement have "*various meanings*" and that the functional interpretation is thus even relevant.

811. In any event, the Tribunal has already found that the "*nature and purpose"* of the 1998 Stability Agreement is to grant stability benefits in relation to the Leaching Project, which consists in "*extend[ing] the production capacity from 72,000,000 to 105,000,000 lbs. (48,000 MT) of Copper cathodes per year coming from the heap leaching of the copper mineral in the facilities of Cerro Verde with recovery of 65%, that will be*

[1099] MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**), Section I, ¶¶ 5.2-5.3, Section III, ¶¶ 4.3-4.5.
[1100] MINEM, Directorial Resolution No. 056-2007-MEM/DGM dated 26 February 2007 (**CE-28**); MINEM, Report No. 165-2007-MINEM-DGM/PDM dated 19 February 2007 (**CE-562**), p. 21; MINEM, Directorial Resolution No. 081-2007-MEM/DGM dated 11 April 2007 (**CE-564**).
[1101] Hearing Transcript, Day 2, p. 628, line 12 to p. 630, line 12.
[1102] Peruvian Civil Code (**CA-39**), Article 170.

installed with the necessary equipment to improve the leaching of the secondary sulfides using the last technology and at the same time increase the production."[1103]

812. Accordingly, a functional interpretation of the 1998 Stability Agreement also confirms that the proceeds of the Concentrator were not covered by the 1998 Stability Agreement.

(8) Conclusion on the scope of the 1998 Stability Agreement

813. The Tribunal finds that it has conclusively established under the applicable rules of contract interpretation that the 1998 Stability Agreement did not extend to the entire Mining and Beneficiation Concessions. Rather, the stabilization guarantees only extended to the Leaching Project, which was the subject matter of the Feasibility Study and was the subject matter of the 1998 Stability Agreement. In light of this unequivocal interpretation under the literal, systematic, contextual, and functional rules of contract interpretation, the Tribunal does not need to decide whether the *contra proferentem* method of interpretation is applicable.

814. Based on all of the above, the Tribunal likewise concludes that the guarantees of the 1998 Stability Agreement only extended to the Cerro Verde Leaching Project and that the extension of the Beneficiation Concession did not extend the scope of the 1998 Stability Agreement to the Concentrator.

b) The issue of whether the Respondent breached the 1998 Stability Agreement

815. Having clarified the scope of the 1998 Stability Agreement, the Tribunal turns to the issue of whether the Respondent breached the 1998 Stability Agreement.

816. The Claimant submits that the Respondent breached Clauses 9.4, 9.5, 9.6, 10.1, and 10.2 of the 1998 Stability Agreement when its Royalty and Tax Assessments applying the non-stabilized regime to the Concentrator became final and enforceable.[1104] However, the Tribunal has determined that the Concentrator did not benefit from the guarantees of the 1998 Stability Agreement. Thus, none of the disputed Royalty and Tax Assessments applying the non-stabilized regime to the Concentrator constituted violations of the 1998 Stability Agreement.

[1103] 1998 Stability Agreement (**CE-12**), Clause 1.3.
[1104] Claimant's Reply, ¶¶ 120 *et seq.*

817. The Claimant also submits that the Respondent breached Clauses 9.4, 9.5, 9.6, 10.1, and 10.2 of the 1998 Stability Agreement when certain of its Tax Assessments applying the non-stabilized regime to the Leaching facilities became final and enforceable.[1105] In particular, the Claimant submits:[1106]

- In the 2010 and 2011 Income Tax Assessments, SUNAT applied non-stabilized depreciation rates to certain assets without attributing them to the Concentrator and—in the 2012 and 2013 Income Tax Assessments—to all the assets that SMCV started using as of 2007, including some of the same Leaching facilities' assets it had treated as stabilized in previous fiscal years.
- In the 2007-2013 Income Tax Assessments, SUNAT denied SMCV's income tax deductions for PTU, expenses accrued in prior years, and recreational expenses, as well as deductions for payments that SMCV recorded using the classification system applicable under the 1998 Stability Agreement.
- SUNAT assessed the following taxes from which SMCV was exempted by operation of the 1998 Stability Agreement against the entire Cerro Verde Mining Unit: 2009-2013 TTNA, 2007-2013 AIT, and 2013 CMPF.

818. It is undisputed between the Parties that such assessments were imposed on the stabilized leaching activities of Cerro Verde.

819. The Respondent avers that these assessments were properly assessed against SMCV because SMCV failed to distinguish its stabilized activities from its non-stabilized ones. In the Respondent's view, under Article 22 of the Mining Regulations, SMCV had the obligation to keep separate accounts or to provide sufficient information to SUNAT to distinguish which of SMCV's assets and activities were related to the Leaching Project.[1107] The Claimant disagrees that it was obliged to keep separate accounts for its different investments within the same concession.[1108]

820. The key issue for the Tribunal to determine is whether SMCV was required to keep separate accounts for its Leaching and Concentrator activities or whether it would have been the obligation of SUNAT to distinguish between the stabilized and non-stabilized operations on its own account.

[1105] Claimant's Memorial, ¶ 351.
[1106] Claimant's Reply, ¶ 124.
[1107] Respondent's Rejoinder, ¶¶ 662 *et seq.*
[1108] Claimant's Reply, ¶¶ 127 *et seq.*

821. As a preliminary matter, the Tribunal notes that under Articles 87.5 and 87.6 of the Peruvian Tax Code, the onus is on the taxpayer to provide SUNAT with the required information to assess taxes.[1109]

822. Furthermore, the Mining Regulations establish obligations for mining companies. In particular, Article 22 of the Mining Regulations provides:

> *The contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.*
>
> *To determine the results of its operations, a mining activity titleholder that has other concessions or Economic-Administrative Units shall keep independent accounts and reflect them in separate earnings statements.*
>
> *Expenses that are not directly identifiable in each concession or Economic-Administrative Unit shall be distributed among them in proportion to the net sales of the mining substances extracted from them.*[1110]

823. Article 25 of the Mining Regulations provides:

> *Without prejudice to the Income and Corporate Assets Tax Returns which, according to the law, the mining activity titleholder must submit in cases of expansion of facilities or new investments that contractually enjoy the guarantee of legal stability, said titleholder must make available to the Tax Administration the annexes that demonstrate the application of the tax regime granted to the aforementioned expansions or new investments.*[1111]

824. In the Tribunal's view, these two articles of the Mining Regulations read together leave no doubt that (i) mining companies with stabilized and unstabilized activities have the obligation to keep separate accounts, and (ii) they are required to have available, for the tax authority, documents that demonstrate the application of the stabilized regime to the specific investment for which the stabilization agreement was approved.

825. The Claimant does not dispute that it did not keep separate accounts.[1112] The Claimant also failed to show that SMCV made documents available to SUNAT which would have demonstrated the application of the stabilized regime specifically to assets or proceeds

[1109] Peruvian Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Articles 87.5, 87.6.
[1110] Mining Regulations (**CA-2**), Article 22.
[1111] Mining Regulations (**CA-2**), Article 25.
[1112] Claimant's Reply, ¶¶ 127(b), 129(c).

of the Leaching Project. Even when requested by SUNAT to provide relevant information,[1113] SMCV failed to do so.[1114]

826. The Claimant argues that Peruvian law did not provide relevant guidance for SMCV to accurately separate its accounts. The Claimant's expert argues that "*[e]very material aspect of a tax—including how it must be calculated—must be clearly and expressly defined in law*."[1115] However, the Tribunal does not find this argument to be convincing. First, as testified by the Respondent's expert, there are "*various methods and criteria […] used to separate accounts*" in Peru, which SMCV could have used. Second, the Tribunal finds that had SMCV had doubts as to the proper method of separating accounts, it could have expressed this to SUNAT, for example in its replies to SUNAT's requests. The Tribunal has not been presented with evidence that SMCV did so.

827. Moreover, the Tribunal notes that Article 22 of the Mining Regulation provides that "*[e]xpenses that are not directly identifiable in each concession or Economic-Administrative Unit shall be distributed among them in proportion to the net sales of the mining substances extracted from them*." However, the Claimant has not asserted let alone proven to the Tribunal's satisfaction that this obliges SUNAT to assess certain taxes also only in proportion to the net sales of the mining substances extracted. In this

[1113] SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400 dated 30 March 2012 (**CE-69**), p. 126; SUNAT, Request for Information No. 0522110000184 dated 14 March 2011 (**RE-285**), p. 3; SUNAT, Report on Results of Request for Information Request No. 0522110000184 dated 6 May 2011 (excerpts) (**RE-286**), p. 29; SUNAT, Request for Information No. 0522110000346 dated 6 May 2011 (**RE-287**); SUNAT, Report on Results of Request for Information No. 0522110000346 dated 24 May 2011 (**RE-288**); SUNAT, Request for Information No. 0522110000870 dated 20 September 2011 (**RE-289**); SUNAT, Report on Results of Request for Information No. 0522110000870 dated 5 October 2011 (**RE-290**), p. 12; SUNAT, Request for Information No. 0522110000940 dated 5 October 2011 (**RE-291**); SUNAT, Report on Results of Request for Information No. 0522110000940 dated 5 October 2012 (**RE-292**); SUNAT Resolution No. 0550140001907 dated 30 May 2014 (notified to SMCV on 10 June 2014) (**CE-109**), p. 177; SUNAT, Request for Information No. 0522120000345 dated 4 April 2012 (**RE-293**), p. 3; SUNAT, Request for Information No. 0522120000347 dated 4 April 2012 (**RE-294**), p. 3; SUNAT, Report on Results of Request for Information No. 0522120000345 dated 19 March 2013 (**RE-295**), p. 16; SUNAT, Report on Results of Request for Information No. 0522120000347 dated 19 March 2013 (**RE-296**), p. 16; SUNAT, Request for Information No. 0522130000409 dated 19 March 2013 (**RE-297**); SUNAT, Request for Information No. 0522130000411 dated 19 March 2013 (**RE-298**); SUNAT, Report on Results of Request for Information No. 0522130000409 dated 23 December 2013 (**RE-299**); SUNAT, Report on Results of Request for Information No. 0522130000411 dated 23 June 2014 (**RE-300**); SUNAT, Request for Information No. 0522120000346 dated 4 April 2012 (**RE-301**), p. 3; SUNAT, Report on Results of Request for Information No. 0522120000346 dated 19 March 2013 (**RE-302**), p. 16; SUNAT, Request for Information No. 0522130000408 dated 19 March 2013 (**RE-303**); SUNAT, Report on Results of Request for Information No. 0522130000408 dated 15 September 2014 (**RE-304**).

[1114] See for example: Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax Assessment) dated 22 August 2018 (**CE-191**), p. 33; Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax Assessment) dated 22 August 2018 (notified to SMCV on 19 November 2018) (**CE-192**), p. 48.

[1115] Hernández II (**CER-8**), ¶ 17.

regard, the Tribunal notes the following exchange between the President of the Tribunal and Dr. Picón during the Hearing:

> *PRESIDENT HANEFELD: But Claimant made the argument that SUNAT should have divided somehow, then, between leaching and Concentrator. And so, is it then on SUNAT to apply some sort of a split to the best of its estimate, or is there no legal basis for this and this does not happen in practice?*
>
> *THE WITNESS: (Mr. Picón) Both in practice and in the Regulation of the Agreements, if a company has a number of tax regimes--and, in this case, the Agreements allow for this--the Company is obligated to show why is it that it's not applying the general regime.*
>
> *So, SUNAT is going to say: 'How have you calculated Project A, B, or C?' And SUNAT is going to say: 'I'm going [to] review this.' Of course the Tax Authorities are not going to do the accounting for the Company.*[1116]

828. SMCV having failed to provide separate accounts, the Tribunal concludes that SUNAT did not inappropriately assess taxes on SMCV concerning the Leaching Project.

829. Accordingly, the Tribunal concludes that none of the disputed Tax and Royalty Assessments breached the 1998 Stability Agreement.

B. The Claimant's claim that the Respondent breached Article 10.5 of the TPA

830. The second major issue to be determined in this Award concerns the Claimant's claim that the Respondent breached Article 10.5 of the TPA. The Parties' allegations with respect to this claim overlap in major parts with their allegations with respect to the alleged violation of the 1998 Stability Agreement. The Tribunal will, thus, refer to its above findings where relevant to avoid repetition.

831. The Claimant claims that the Respondent violated Article 10.5 of the TPA:

- each time the Royalty Assessments became final and enforceable against SMCV (**1**);
- each time it failed to waive the assessment of penalties and interest against SMCV (**2**);
- each time it failed to reimburse SMCV for its GEM overpayments (**3**).

832. In what follows, the Tribunal will assess each of these claims in turn.

[1116] Hearing Transcript, Day 9, p. 2696, line 21 to p. 2697, line 15.

1. The Claimant's claim that the Respondent violated Article 10.5 of the TPA each time the Royalty Assessments became enforceable against SMCV

833. The Claimant raises four issues in relation to the Royalty Assessments:

- Whether the Respondent frustrated Freeport's and SMCV's legitimate expectations (**a**);
- Whether the Respondent's actions were arbitrary and based on political calculations (**b**);
- Whether the Respondent's actions were inconsistent and non-transparent, (**c**); and
- Whether the Tax Tribunal committed serious due process violations (**d**).

a) The Claimant's claim that the Respondent frustrated Freeport's and SMCV's legitimate expectations

(1) The Claimant's position

834. The Claimant claims that the Respondent breached Article 10.5 of the TPA because the Respondent frustrated the Claimant's and SMCV's legitimate expectations.[1117]

835. With respect to the applicable standard for legitimate expectations under the TPA, the Claimant submits that tribunals have repeatedly acknowledged that the minimum standard of treatment is an evolving concept, and that its obligation to provide fair and equitable treatment is today "*not materially different*" from the treaty-based "*fair and equitable treatment*" standard as it has been interpreted by international investment tribunals.[1118] The Claimant avers that there is no dispute that Article 10.5 of the TPA incorporates by reference obligations under customary international law and does not create an autonomous treaty-based standard.[1119] The Claimant's position is that the content of the customary international law minimum standard of fair and equitable treatment is, today, largely co-extensive with the "*core components*" of fair and equitable treatment that tribunals have repeatedly recognized when interpreting

[1117] Claimant's Memorial, ¶¶ 368 *et seq.*; Claimant's Reply, ¶¶ 145 *et seq.*; Claimant's Comments on the NDP Submission, ¶¶ 35 *et seq.*, 55.
[1118] Claimant's Memorial, ¶ 361, referring to: *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hixmrylrti A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award dated 29 July 2008 (**CA-237**), ¶ 611; *Murphy v. Ecuador*, Partial Final Award (**CA-279**), ¶ 208; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012 (**CA-276**), ¶ 218.
[1119] Claimant's Reply, ¶ 133, referring to: *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004 (**CA-269**), ¶ 98.

autonomous, treaty-based fair and equitable treatment provisions.[1120] The Claimant refutes the Respondent's reliance on *Neer v. Mexico* and notes that the Respondent's interpretation of the minimum standard of treatment as conduct that amounts "*to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*"[1121] has been rejected by tribunals interpreting investment treaties that incorporate the customary international law minimum standard of treatment.[1122]

836. According to the Claimant, tribunals have repeatedly concluded that the minimum standard of fair and equitable treatment encompasses several interrelated obligations, including obligations (i) to honor the investor's legitimate expectations, (ii) of non-arbitrariness and reasonableness, (iii) to act with reasonable consistency and transparency, and (iv) to act with procedural propriety and due process.[1123] In this regard, the Claimant submits that contrary to the Respondent's contention, a claimant may demonstrate the content of that standard by relying on prior arbitral decisions as an "*efficient manner*" of showing "*what it believes to be the law*."[1124]

837. With respect to the content of the FET standard, the Claimant submits that there is a "*consensus*" in arbitral jurisprudence that the "*core components of FET*" include "*protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency*."[1125] The Claimant submits that legitimate expectations are a core component of FET and

---

[1120] Claimant's Reply, ¶ 133, referring to: *Waste Management v. Mexico*, Award (**CA-269**), ¶ 98.
[1121] Claimant's Reply, ¶ 134; Respondent's Counter-Memorial, ¶¶ 625-626.
[1122] Claimant's Reply, ¶¶ 132, 134; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009) (**CA-391**), pp. 236-238; Jan Paulsson and Georgios Petrochilos, *Neer-ly Misled?*, 22 ICSID REV. – FOREIGN INV. L.J. (2007) (**CA-383**), pp. 242, 247, 257; *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award dated 9 January 2003 (**RA-53**), ¶ 179; *Mondev v. USA*, Award (**RA-6**), ¶ 116; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award dated 26 January 2006 (**RA-35**), ¶ 194; *Glamis Gold, Ltd. v. United States of America,* UNCITRAL, Award dated 8 June 2009 (**RA-30**), ¶ 22; *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award dated 20 September 2021 (**CA-286**), ¶¶ 253-258; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award dated 27 September 2016 (**CA-280**), ¶ 352; *Clayton v. Canada*, Award on Jurisdiction and Liability (**CA-278**), ¶¶ 434-438; *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum (**CA-285**), ¶¶ 700, 744; *RDC v. Guatemala*, Award (**CA-276**), ¶¶ 212, 218.
[1123] Claimant's Memorial, ¶ 361, referring to: *Waste Management v. Mexico*, Award (**CA-269**), ¶ 98; *RDC v. Guatemala*, Award (**CA-276**), ¶ 219.
[1124] *RDC v. Guatemala*, Award (**CA-276**), ¶ 217; *Glamis Gold v. USA*, Award (**RA-30**), ¶ 605; *Cargill, Incorporated v. Mexico,* ICSID Case No. ARB(AF)/05/2, Award dated 18 September 2009 (**RA-29**), ¶¶ 277-278.
[1125] Claimant's Reply, ¶ 137, referring to: *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award dated 13 December 2017 (**CA-234**), ¶ 336.

accordingly, that a State's repudiation of the general legal framework or specific representations on which the investor reasonably relied is relevant to assessing whether there has been a breach of the fair and equitable treatment obligation, as found, among others, by the *Murphy v. Ecuador*, *Clayton/Bilcon v. Canada*, *Abengoa v. Mexico*, and *Eco Oro v. Colombia* tribunals.[1126] The Claimant submits that while there are different dimensions of the obligation of fair and equitable treatment that forms part of the minimum standard of treatment, this obligation is not defined by a single definitive test; rather, the Tribunal's task is to assess whether, viewed comprehensively, the Government's conduct violated the Treaty standard for each claimed breach.[1127]

838. The Claimant submits that the Respondent frustrated Freeport and SMCV's legitimate expectations by repudiating its obligations under the 1998 Stability Agreement.[1128] The Claimant brings its Article 10.5 claims both on its own behalf (under Article 10.16.1(a) of the TPA) and on behalf of SMCV (under Article 10.16.1(b) of the TPA).[1129] The Claimant submits that it is the successor-in-interest to Phelps Dodge following its acquisition of that entity in March 2007, according to which the Claimant obtained complete ownership of Phelps Dodge's investments and all rights and interests relating thereto.[1130] The Claimant avers that the Respondent has provided no explanation as to why this corporate restructuring should render its conduct prior to the Concentrator investment irrelevant to the question of whether the Respondent breached Article 10.5 of the TPA. To the contrary, tribunals have concluded that outside of the context of nationality-shopping, which is not at issue here, corporate restructurings subsequent to an investment do not affect the content of the underlying substantive claims.[1131]

839. The Claimant avers that SMCV and Freeport's predecessor, Phelps Dodge, invested in the Concentrator in reliance on the stability guarantees set forth in the 1998 Stability

---

[1126] Claimant's Memorial, ¶ 362, referring to: *Murphy v. Ecuador*, Partial Final Award (**CA-279**), ¶¶ 206-207; *Clayton v. Canada*, Award on Jurisdiction and Liability (**CA-278**), ¶ 589; *Abengoa, S.A. et al. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award dated 18 April 2013 (**CA-277**), ¶ 642; *Waste Management v. Mexico*, Award (**CA-269**), ¶ 98.
[1127] Claimant's Memorial, ¶ 366.
[1128] Claimant's Memorial, ¶¶ 368 *et seq.*
[1129] Claimant's Reply, ¶ 146.
[1130] Claimant's Memorial, ¶¶ 156-158; Claimant's Reply, ¶ 146; Freeport-McMoRan Copper & Gold Inc., Annual Report 2006 dated 15 March 2007 (**CE-902**), p. 25; Freeport-McMoRan Copper & Gold Inc., Annual Report 2007 dated 17 March 2008 (**CE-903**), p. 5; SEC Filing, Freeport Completes Acquisition of Phelps Dodge Corp. dated 19 March 2007 (**CE-29**).
[1131] Claimant's Reply, ¶ 146, referring to: *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award dated 26 February 2014 (**CA-404**), ¶ 145.

Agreement, which they understood would apply to the Concentrator based on the existing legal framework and specific assurances given by Peruvian officials.[1132]

840. The Claimant submits that Peru's existing legal framework made clear that the Mining Law's stability guarantees were granted to the entire mining unit or concession(s), such that all investments within a stabilized concession or mining unit would be entitled to stability guarantees. Accordingly, SMCV and Phelps Dodge reasonably understood that the specific guarantees of stability that Peru granted to the Cerro Verde Mining Unit, both the Mining and Beneficiation Concessions, applied by virtue of the 1998 Stability Agreement to all investments made within the Cerro Verde Mining Unit, including the Concentrator. The Claimant submits that it was "*objectively reasonable*" for Phelps Dodge and SMCV to maintain the expectation that Peru would apply stability guarantees to SMCV's entire mining unit, made up of the Mining and Beneficiation Concessions, just as it had done in all prior cases to that point.[1133]

841. According to the Claimant, Peruvian officials knew from the outset that SMCV understood that the Concentrator would be stabilized and officials frequently confirmed SMCV's understanding. For example:[1134]

- Ms. Chappuis testifies that, in discussions in 2004, she explicitly confirmed to representatives from SMCV and Phelps Dodge that the 1998 Stability Agreement would apply to the planned Concentrator.[1135] Mr. Tovar's attempts to discredit Ms. Chappuis's testimony by arguing that he was not present in the meetings where Ms. Chappuis made these confirmations is irrelevant given his ancillary role in the process compared to Ms. Chappuis.[1136] The Respondent's further attempt to discredit Ms. Chappuis' confirmations because they were "*oral*" is meritless because there is no basis for the Respondent's suggestion that a representation must be written in order for an investor to reasonably rely on it.[1137] Following Ms. Chappuis' explanation of the process to include the Concentrator within the existing Beneficiation Concession, SMCV applied for that expansion and obtained its approval in writing—exactly as Ms. Chappuis had described.[1138]

[1132] Claimant's Memorial, ¶ 368.
[1133] Claimant's Reply, ¶ 147.
[1134] Claimant's Memorial, ¶ 370.
[1135] Chappuis I (**CWS-3**), ¶¶ 52-53; Chappuis II (**CWS-14**), ¶¶ 37, 40.
[1136] Chappuis II (**CWS-14**), ¶ 41.
[1137] *Eco Oro v. Colombia*, Decision on Jurisdiction, Liability and Directions on Quantum (**CA-285**), ¶ 767.
[1138] Claimant's Reply, ¶ 147.

- The DGM approved the expansion of the Beneficiation Concession to include the Concentrator, instead of requiring SMCV to include it in a separate Beneficiation Concession and without any suggestion that the Concentrator would be subject to a separate legal regime.[1139] The expansion approval explicitly confirmed that the Concentrator fell within the Beneficiation Concession, which was already stabilized under the existing Stability Agreement.[1140] Phelps Dodge and SMCV viewed the DGM's approval as officially confirming their understanding that the Concentrator would fall under the scope of the 1998 Stability Agreement.[1141] Ms. Chappuis had specifically told SMCV and Phelps Dodge representatives that the approval of the expansion would provide confirmation that the Concentrator would benefit from the stabilized regime.[1142]
- In October 2004, around the same time the DGM expanded the Beneficiation Concession, Peru's President lauded the investment in the Concentrator, calling it a "*new conquest of an investment for Peru*" and confirming that Peru would "*fulfill our responsibility to maintain economic and legal stability*."[1143] President Toledo made his statement reaffirming Peru's commitment to legal stability one day after SMCV and Phelps Dodge's Boards of Directors conditionally approved the Concentrator investment, but before they actually proceeded with the investment.[1144] The construction of the Concentrator did not commence until December 2004, after SMCV received approval of the Beneficiation Concession, the reason why the prior approvals were "*conditional*."[1145] In any event, SMCV's and Phelps Dodge's expectation that Peru would honor the 1998 Stability Agreement and apply the stabilized regime to the Concentrator was "*objectively reasonable*."[1146]

842. According to the Claimant, SMCV and Freeport's predecessor, Phelps Dodge, invested in the Concentrator in reliance on the reasonable expectation that Peru would honor those guarantees. For example:[1147]

[1139] Claimant's Reply, ¶ 147; MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM dated 26 October 2004 (**CE-476**).
[1140] Claimant's Reply, ¶ 147.
[1141] Torreblanca I (**CWS-11**), ¶¶ 25-28.
[1142] Claimant's Reply, ¶ 147.
[1143] "Peru: President Toledo Announces an Investment of US$850 Million in Cerro Verde," *Europa Press* dated 12 October 2004 (**CE-471**).
[1144] Claimant's Reply, ¶ 147.
[1145] Claimant's Reply, ¶ 147.
[1146] Claimant's Reply, ¶ 147.
[1147] Claimant's Memorial, ¶ 371.

- Mr. Morán testifies that Phelps Dodge's Finance Committee relied on the 1998 Stability Agreement in recommending approval of the Concentrator investment to Phelps Dodge.[1148]
- Mr. Davenport testifies that the 1998 Stability Agreement was "*of paramount importance to Phelps Dodge*" in considering the Concentrator investment.[1149]
- Ms. Torreblanca testifies that SMCV's approval of the Concentrator investment was conditioned on, among others, "*approval of SMCV's request to expand the Beneficiation Concession*."[1150] She further testifies that SMCV understood MINEM's subsequent approval as "*confirm[ing] that the Stability Agreement would cover the Concentrator*."[1151]
- The 2004 Feasibility Study and its September 2004 update explicitly assumed that SMCV would be entitled to rely on the stabilized regime through 31 December 2013.[1152]

(2) The Respondent's position

843. The Respondent disputes the Claimant's claim according to which it would have breached Article 10.5 of the TPA because it frustrated the Claimant's and SMCV's legitimate expectations.[1153]

844. With respect to the applicable standard, the Respondent submits that the FET standard in Article 10.5 of the TPA is limited to the customary international law minimum standard of treatment and provides for far narrower protection than the Claimant seeks to invoke.[1154] The Respondent argues that Article 10.5 of the TPA does not provide the protections afforded by an autonomous FET standard. Rather, Article 10.5.2 of the TPA clearly states that "*[t]he concept[] of 'fair and equitable treatment' […] do[es] not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment], and do[es] not create additional substantive rights*." To adopt the Claimant's position that the FET standard in the TPA is the same as an autonomous FET standard would deprive both (i) the phrase "*in*

[1148] Morán I (**CWS-8**), ¶ 29.
[1149] Davenport I (**CWS-5**), ¶ 30.
[1150] Torreblanca I (**CWS-11**), ¶ 27.
[1151] Torreblanca I (**CWS-11**), ¶ 27.
[1152] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. IV, pp. 14-16; Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update dated September 2004 (**CE-459**), p. 46.
[1153] Respondent's Counter-Memorial, ¶¶ 668 *et seq.*; Respondent's Rejoinder, ¶¶ 971 *et seq.*; Respondent's Post-Hearing Brief, ¶ 301.
[1154] Respondent's Counter-Memorial, ¶¶ 617 *et seq.*; Respondent's Rejoinder, ¶¶ 921 *et seq.*

accordance with customary international law" in Article 10.5.1 and (ii) the entirety of Article 10.5.2 of the TPA, of their plain and ordinary meaning.[1155]

845. As a 2007 UNCTAD Report on Fair and Equitable Treatment explained, "*[t]he actual practice of application of FET clauses by arbitral tribunals has drawn a distinction solely between FET as an unqualified standard and the FET obligation linked to the minimum standard of treatment of aliens under customary international law*"—"*where the FET obligation is not expressly linked textually to the minimum standard of treatment of aliens, many tribunals have interpreted it as an autonomous, or selfstanding one*" and "*[i]nstead of deriving the content of the standard from its original source (customary international law), these tribunals chose to focus on the literal meaning of the provision itself*."[1156] The Respondent further relies, among others, on *Glamis Gold v. United States*, where the tribunal held "*that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard*", because it was dealing with a treaty that limited the FET protections to the MST, and it determined that arbitral decisions dealing with autonomous FET provisions did not provide guidance on that standard.[1157] The *Cargill v. Mexico* tribunal similarly dismissed as irrelevant arbitral decisions interpreting FET provisions with autonomous treaty language.[1158]

846. The Respondent notes that the Claimant cites to a number of cases that were not brought under treaties with FET provisions textually limited to the customary international law minimum standard of treatment (among others, *Biwater Gauff v. Tanzania*, *Duke Energy v. Ecuador*, *Occidental Exploration v. Ecuador*, *Electrabel v. Hungary*, *Rumeli Telekom v. Kazakhstan*, and *Murphy v. Ecuador*). According to the Respondent, other than *S.D. Myers v. Canada*, which was repudiated by the contracting parties to the instrument under which that case was brought, the Claimant has not pointed to any case in which a tribunal was tasked with applying an FET provision limited to the customary

[1155] Respondent's Counter-Memorial, ¶ 619; TPA (**CA-10**), Article 10.5.
[1156] Respondent's Counter-Memorial, ¶ 620; *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 2012 (**RA-31**), p. xiv.
[1157] Respondent's Counter-Memorial, ¶ 620, referring to: *Glamis Gold v. USA*, Award (**RA-30**), ¶ 611.
[1158] Respondent's Counter-Memorial, ¶ 620, referring to: *Cargill v. Mexico*, Award (**RA-29**), ¶ 278.

international law minimum standard of treatment and abandoned that duty by applying an autonomous FET standard.[1159]

847. According to the Respondent, FET provisions limited to the minimum standard of treatment are breached only by particularly egregious State conduct.[1160] Professor Borchard observed that the minimum standard sets an absolute floor of treatment, which ensures that States' treatment of aliens does not fall below "*a civilized standard*."[1161] As explained by the tribunal in *Neer v. Mexico*, for State action to breach this standard, the action should amount "*to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency*."[1162] The Respondent submits that the *Neer* standard has been relied on by tribunals to describe the full scope of a State's obligations to protect investors and their investments (for example the *Thunderbird v. Mexico*, *Glamis Gold v. United States*, *Cargill v. Mexico*, and *Al Tamimi v. Oman* tribunals).[1163]

848. Even if a tribunal were to consider that the customary international law minimum standard of treatment has evolved in some respects since *Neer*, claimants bringing FET claims under the customary international law minimum standard of treatment still have a very heavy burden.[1164] The *Thunderbird v. Mexico* tribunal, for instance, observed that:

> *Notwithstanding the evolution of customary law since decisions such as [the] Neer Claim in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the*

[1159] Respondent's Rejoinder, ¶ 930.
[1160] Respondent's Counter-Memorial, ¶¶ 624 *et seq.*
[1161] Respondent's Counter-Memorial, ¶ 625; Edwin Borchard, "The 'Minimum Standard' of the Treatment of Aliens," in 33 AM. SOC'Y INT'L. PROC. 51 (1939) (**RA-32**), p. 58.
[1162] Respondent's Counter-Memorial, ¶ 626; *L. F. H. Neer and Pauline Neer (USA) v. United Mexican States*, 4 RIAA 60 (1926) (**RA-34**), pp. 61-62.
[1163] Respondent's Counter-Memorial, ¶ 626, referring to: *Thunderbird v. Mexico*, Award (**RA-35**), ¶ 194; *Glamis Gold v. USA*, Award (**RA-30**), ¶¶ 614, 616; *Cargill v. Mexico*, Award (**RA-29**), ¶¶ 284, 286; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award dated 3 November 2015 (**RA-28**), ¶ 383.
[1164] Respondent's Counter-Memorial, ¶ 627.

given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.[1165]

849. Moreover, the Respondent submits that FET provisions limited to the minimum standard of treatment do not provide many of the protections that the Claimant seeks to invoke.[1166] The FET obligation under the TPA includes only those rules of treatment that have crystallized into customary international law.[1167] The Respondent argues that customary international law requires both State practice and *opinio juris*.[1168] Relevant State practice must be extensive and virtually uniform, and must also be accepted as law, with States performing the practice out of a sense of legal obligation. Both State practice and *opinio juris* must be demonstrably present in order "*to support a finding that a relevant rule of customary international law has emerged*."[1169] The Respondent submits that arbitral awards may contain helpful analysis of State practice and *opinio juris*, and can be considered for that purpose, but they cannot by themselves substitute for actual evidence of State practice and *opinio juris*.[1170] As the *Glamis Gold v. United States* tribunal noted, "*[a]rbitral awards […] do not constitute State practice and thus cannot create or prove customary international law*."[1171] Furthermore, the Respondent relies on Professor Hersch Lauterpacht's statement that "*[d]ecisions of international courts are not a source of international law*," nor are they *"direct evidence of the practice of States or of what States conceive to be the law*."[1172] The burden is on the party seeking to rely on the rule to establish its existence, which, here, is the Claimant. The Respondent avers that the Claimant has failed to meet this requirement.[1173] The Respondent argues that individual States may decide expressly by treaty to extend protections under the rubric of "*fair and equitable treatment*" beyond those required by customary international law. However, unless and until the extension of such protections represents both a widespread State practice and one that is taken out of a

[1165] Respondent's Counter-Memorial, ¶¶ 627-628, referring to: *Thunderbird v. Mexico*, Award (**RA-35**), ¶ 194; *Cargill v. Mexico*, Award (**RA-29**), ¶ 296.
[1166] Respondent's Counter-Memorial, ¶¶ 630 *et seq*.
[1167] Respondent's Counter-Memorial, ¶ 632; TPA (**CA-10**), Annex 10-A.
[1168] Respondent's Counter-Memorial, ¶ 633.
[1169] Respondent's Counter-Memorial, ¶ 633; Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission dated 22 May 2014 (**RA-38**), ¶¶ 22-23.
[1170] Respondent's Rejoinder, ¶ 937.
[1171] Respondent's Rejoinder, ¶ 936, referring to: *Glamis Gold v. USA*, Award (**RA-30**), ¶ 605.
[1172] Respondent's Rejoinder, ¶ 937; Hersch Lauterpacht, *The Development of International Law by the International Court* (1958) (excerpts) (**RA-167**), pp. 20-21.
[1173] Respondent's Counter-Memorial, ¶ 634.

sense of international legal obligation, any such protections are provided by those States independently and of their own volition.[1174]

850. The Respondent contends that except for denial of justice (which is explicitly provided for in the TPA), the Claimant has failed to prove that the FET elements on which it seeks to rely have crystalized into customary international law. Even if Article 10.5 of the TPA were read to provide the specific protections that the Claimant seeks to invoke, the applicable standards are still rigorous.[1175] According to the Respondent, the Claimant must establish that the Respondent's treatment of SMCV fell "*far below international standards*."[1176] Specifically, the Respondent disputes that legitimate expectations are protected under the customary international law standard. The Respondent submits that it is not aware of general and consistent State practice and *opinio juris* establishing an obligation under customary international law not to frustrate investors' legitimate expectations. The Claimant has therefore failed to prove that States have an obligation to avoid frustrating investors' legitimate expectations as a matter of customary international law. Even assuming that the Tribunal finds that the protection of legitimate expectations is provided for in Article 10.5's promise of FET (despite its limitation to the MST), the Claimant still must prove that (1) it held specified, objectively reasonable, and legitimate expectations about the treatment they would receive from Peru at the time it made the investment, (2) it made its investment in reliance of those legitimate expectations, and (3) the Respondent's subsequent actions frustrated those basic and legitimate expectations that led to the investment.[1177]

851. The Respondent argues that it did not frustrate the Claimant's legitimate expectations. According to the Respondent, the claim is fatally flawed, because it is based on other entities' expectations.[1178] Specifically, the Claimant is seeking to rely on the expectations that other entities supposedly held when they invested in the Concentrator years before the Claimant ever made its investment (and, years before the TPA was signed or entered into force). The Respondent avers that the Claimant has failed to explain why it has any right to rely on those other entities' alleged expectations and the

[1174] Respondent's Counter-Memorial, ¶ 635.
[1175] Respondent's Rejoinder, ¶¶ 941 *et seq.*
[1176] Respondent's Rejoinder, ¶¶ 941 *et seq.*, referring to: *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award dated 25 June 2001 (**RA-56**), ¶ 367; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Partial Award dated 13 November 2000 (**RA-33**), ¶ 263.
[1177] Respondent's Rejoinder, ¶ 946.
[1178] Respondent's Counter-Memorial, ¶ 670.

Tribunal should reject its attempt to do so.[1179] The Respondent further notes that the Claimant has not cited to a single case in which a tribunal found an FET breach based on the frustration of a third party's legitimate expectations.[1180]

852. Even if the Claimant could "*inherit*" the expectations of others, the Claimant's legitimate expectations claim must fail because any expectation that Phelps Dodge or SMCV had that the 1998 Stability Agreement would cover the Concentrator Project was not objectively reasonable.

853. In particular, SMCV and Phelps Dodge could not reasonably have relied upon the Mining Law and Regulations in forming their expectations. The Mining Law clearly provided that the stability guarantees are limited to the investment project outlined in the feasibility study and SMCV could not reasonably have relied upon the Mining Law in forming its expectations.[1181]

854. With respect to the Claimant's reference to a statement by the President of Peru "*laud[ing]*" the investment in the Concentrator and confirming that Peru would "*fulfill [its] responsibility to maintain economic and legal stability*," the Respondent notes that this statement came after SMCV's decision to invest in the Concentrator.[1182] The Respondent notes that the Claimant argues that the statement was issued only "*one day after SMCV and Phelps Dodge's Boards of Directors conditionally approved the Concentrator investment,*" but that this is still irrelevant as SMCV and Phelps Dodge did not rely on this statement to make their investment decision.[1183] For a legitimate expectations claim to succeed, a claimant must show, *inter alia*, that the investor relied on that expectation in making its investment, which imposes a temporal aspect on the analysis as the expectation must have been formed at (or before) the time that the investment is made. It would be logically impossible for an investor to rely upon statements in making an investment if those statements were made after the investor had made the investment. Accordingly, the Respondent concludes that the President's statements are irrelevant.

[1179] Respondent's Counter-Memorial, ¶ 670.
[1180] Respondent's Rejoinder, ¶ 973.
[1181] Respondent's Counter-Memorial, ¶ 671; Respondent's Rejoinder, ¶ 974.
[1182] Respondent's Counter-Memorial, ¶ 672; Claimant's Memorial, ¶ 370I; "Peru: President Toledo Announces an Investment of US$850 Million in Cerro Verde," *Europa Press* dated 12 October 2004 (**CE-471**).
[1183] Respondent's Rejoinder, ¶ 974; Claimant's Reply, ¶ 147(b).

855. With respect to the Claimant's reference to the DGM's approval of the expansion of the Beneficiation Concession to include the Concentrator, the Respondent avers that this decision had no bearing whatsoever on the scope of the stability guarantees under the 1998 Stability Agreement, which was limited to the Leaching Project as described in the feasibility study.[1184]

856. With respect to the Claimant's reference to statements allegedly made by Ms. Chappuis to SMCV officials, the Respondent avers that the Claimant does not point to any contemporaneous evidence that these statements were made.[1185] In fact, the contemporaneous evidence actually shows that, on 8 September 2003, the DGM sent a report to SMCV officially notifying it that "*the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company*."[1186] The witness statements referred to by the Claimant confirm that, at the relevant time, both SMCV officials and Ms. Chappuis knew that Mr. Polo, the Vice Minister of Mines, *i.e.*, Ms. Chappuis' boss, and the drafter of the relevant language of the Mining Law, and, therefore, MINEM, held the position that stability guarantees are limited to the investment project in the feasibility study and that the Concentrator Project would not be covered by the guarantees in the 1998 Stability Agreement.[1187] Mr. Polo and Mr. Tovar both confirm MINEM's position at that time.[1188]

857. The Respondent also argues that the Claimant ignores the following evidence that put (or, at a minimum, should have put) SMCV and Phelps Dodge on notice of MINEM's position prior to the decision to construct the Concentrator:[1189]

- On 23 September 2002, SUNAT issued a public report in response to an inquiry of a taxpayer that stated that "*Tax Stability Contracts entered into pursuant to Title Nine of the TUO of the General Mining Law only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an Administrative-Economic Unit*."[1190] According to the Respondent, SMCV's

[1184] Respondent's Counter-Memorial, ¶ 673; Respondent's Rejoinder, ¶ 974.
[1185] Respondent's Counter-Memorial, ¶ 674; Respondent's Rejoinder, ¶ 974.
[1186] Respondent's Rejoinder, ¶ 974; MINEM, Report No. 509-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-398**), p. 1, numeral 4.
[1187] Respondent's Counter-Memorial, ¶ 675.
[1188] Polo I (**RWS-1**), ¶ 38; Tovar I (**RWS-3**), ¶ 11.
[1189] Respondent's Rejoinder, ¶ 975.
[1190] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002 (**RE-26**), *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm.

own presentations that Claimant claims were shown to MINEM in 2004 prove that the company (and Phelps Dodge) was aware of the existence and content of this report.[1191]

- On 15 September 2003, DGM sent a report to SMCV stating: "*[a]bout the question whether the stabilized regime would be applicable to the company, the prohibition contained in Article 8 of Supreme Decree No. 027-98-EF points out that the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement*."[1192]
- On 11 March 2004, Mr. Polo stated during his presentation at the Royalties Forum that: "*[s]tabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project], or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to stabilization for that investment, for that development, not for the whole company*."[1193]

858. The Respondent concludes that the only evidence on the record is Ms. Chappuis' testimony. According to the Respondent, the Tribunal can conclude that no reasonable, objective person would rely on the informal, oral statement of a single official (even assuming Ms. Chappuis actually made those statements) when (1) the department's official position, contrary to the alleged statement, has already been made clear in a written letter to the person from the very official on whom the person is otherwise relying, (2) the person knows that the official's superior, and the official's agency, has directly contradicted that statement on numerous occasions, and (3) the person requested that the official put the statement in writing and the official declined.[1194]

(3) The Non-Disputing Party's position

859. The NDP submits that the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law

[1191] Respondent's Rejoinder, ¶ 975; SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement dated August 2004 (**CE-453**), slide 39.
[1192] MINEM, Report No. 509-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-398**), p. 1.
[1193] Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, dated 11 March 2004 (excerpts) (**RE-185**), at timestamps 00:09:36-00:10:03.
[1194] Respondent's Rejoinder, ¶ 977.

in specific contexts.[1195] Relying on *SD Myers v. Canada*, the NDP argues that the standard establishes a minimum "*floor below which treatment of foreign investors must not fall*."[1196]

860. The NDP contends that Annex 10-A to the TPA addresses the methodology for determining whether a customary international law rule covered by Article 10.5.1 of the TPA has crystalized.[1197] According to the NDP, the TPA parties agree that customary international law results from a general and consistent practice of State that they follow from a sense of legal obligation.[1198] Relying on the ICJ's decision in *Jurisdictional Immunities of the State (Germany v. Italy)* case, the NDP argues that examples of State practice include relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject.[1199]

861. The NDP submits that arbitral decisions interpreting "*autonomous*" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, cannot constitute evidence of the content of the customary international law standard required by Article 10.5.[1200] Moreover, decisions of international courts and arbitral tribunals interpreting FET as a concept of customary international law are not themselves instances of "*State practice*" for purposes of evidencing customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice. A formulation of a purported rule of customary international law based entirely on arbitral awards that lack an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5 of the TPA.[1201] The NDP submits that the burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[1202] Once a rule of customary international law has been established, a claimant must then show that the respondent

[1195] NDP submission, ¶ 14.
[1196] NDP submission, ¶ 14, referring to: *S.D. Myers v. Canada*, Partial Award (**RA-33**), ¶ 259.
[1197] NDP submission, ¶ 15.
[1198] NDP submission, ¶ 15.
[1199] NDP submission, ¶ 16, referring to: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99, Judgment dated 3 Februrary 2012, ¶¶ 99, 122.
[1200] NDP submission, ¶ 17.
[1201] NDP submission, ¶ 18.
[1202] NDP submission, ¶ 19.

State has engaged in conduct that violates that rule.[1203] According to the NDP, currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas.[1204]

862. The NDP states that the concept of legitimate expectations is not a component element of FET under customary international law and does not give rise to independent host State obligations.[1205] The NDP submits that it is aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations; instead, something more is required.[1206] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the minimum standard of treatment.[1207]

(4) The Tribunal's analysis

863. Article 10.5 of the TPA provides:

> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*
>
> *(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.*

[1203] NDP submission, ¶ 20.
[1204] NDP submission, ¶¶ 21, 28.
[1205] NDP submission, ¶ 28.
[1206] NDP submission, ¶ 29.
[1207] NDP submission, ¶ 29.

> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*[1208]

864. Annex 10-A of the TPA further provides:

> *The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 10.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.*[1209]

865. The Parties and the NDP disagree as to whether the customary international law minimum standard of treatment, which includes FET, comprises legitimate expectations. This issue is debated in both arbitral case law and academia.[1210] The Tribunal finds that it can leave this issue open as even under the standard advanced by the Claimant, the Claimant fails to meet the threshold of showing that its legitimate expectations were breached by the Respondent.

866. The Claimant submits that a breach of legitimate expectations consists in a State's failure to honor an investor's legitimate expectations by abrogating the legal framework on which the investor party reasonably relied when making an investment.[1211] The Claimant relies *inter alia* on *Murphy v. Ecuador* to argue that such legitimate expectations may derive from specific representations made to the investor, or may be "*based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor*."[1212]

867. In accordance with this authority, the Tribunal applies the following three prong test to determine whether the Claimant's claim is founded:

- Did the Respondent create expectations that were legitimate, *i.e.,* objectively reasonable?

[1208] TPA (**CA-10**), Article 10.5.
[1209] TPA (**CA-10**), Annex 10-A.
[1210] See *Waste Management v. Mexico*, Award (**CA-269**), ¶ 98; *Glamis Gold v. USA*, Award (**RA-30**), ¶¶ 614, 616; *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 2012 (**RA-31**), p. xiv.
[1211] Claimant's Memorial, ¶¶ 368 *et seq*.
[1212] Claimant's Memorial, ¶ 368, referring to: *Murphy v. Ecuador*, Partial Final Award (**CA-279**), ¶ 248.

- Did SMCV and Phelps Dodge rely on those legitimate expectations at the time the investment was made?
- Did the Respondent frustrate the Claimant's legitimate expectations?

868. Again, the Tribunal finds that, even under the standard advanced by the Claimant, the Claimant does not satisfy the standard of showing that the Respondent created legitimate expectations that SMCV and Phelps Dodge relied on at the time the investment was made, and that those were frustrated.

869. First, even assuming that a legal framework can form the basis for legitimate expectations, the existing legal framework prior to the investment in the Concentrator did not make clear that the Mining Law's stability guarantees were granted to the entire mining unit or concession(s). Rather, as stated above in paras. 698 *et seq*., the stability guarantees are granted to the specific mining project set out in the investment program in the feasibility study. Both the Mining Law and Regulations as well as the 1998 Stability Agreement make clear that stability guarantees only apply to investments set out in the investment program in the feasibility study. In the case of SMCV, the stability guarantees of the 1998 Stability Agreement only extended to the Leaching Project. As Mr. Davenport testified during the Hearing, the reference in the 1998 Stability Agreement to the Leaching Project was even "*the elephant in the room*" for Phelps Dodge.[1213] Accordingly, the Respondent could not have created expectations through its existing legal framework.

870. Second, the Tribunal is not convinced that the Respondent confirmed SMCV's understanding that the Concentrator would be covered by the 1998 Stability Agreement. As stated above (see above, paras. 762 *et seq.*), the Tribunal finds that the Claimant has not proven that Ms. Chappuis represented that the Concentrator would be covered by the 1998 Stability Agreement through the extension of the Beneficiation Concession. Moreover, even if Ms. Chappuis would have shared her opinion that the Concentrator was stabilized, the Claimant was aware that Ms. Chappuis was doing so outside of the realm of her powers and in contradiction to MINEM's official position. In any event, the extension of the Beneficiation Concession did not have the effect of extending the scope of the 1998 Stability Agreement and was necessary to construct the Concentrator, as confirmed by the Claimant's witnesses.[1214] Neither SMCV's request to expand the

[1213] Hearing Transcript, Day 3, p. 837 line 13 to p. 838, line 2.
[1214] Hearing Transcript, Day 2, p. 613, lines 10-18; Hearing Transcript, Day 3, p. 713, lines 12-21.

Beneficiation Concession nor MINEM's approval of the expansion even mention the 1998 Stability Agreement.[1215] Mr. Davenport was asked by the Tribunal whether MINEM expressly stated that the expansion of the beneficiation concession "*will shield the sulfide operation from the Royalty*,"[1216] to which he replied that this was "*implied.*"[1217] However, legitimate expectations are not formed by "*implied*" or subjective beliefs.

871. The fact that the President of Peru stated that Peru would "*fulfill [its] responsibility to maintain economic and legal stability*" also does not constitute a specific representation by the Respondent that the Concentrator would fall under the scope of the 1998 Stability Agreement. In any event, the Tribunal notes that such statement was made after the investment in the Concentrator and is, therefore, irrelevant in assessing legitimate expectations.

872. Furthermore, contrary to the Claimant's argument, the Tribunal does not find that SMCV's and Phelps Dodge's investment was made "*in reliance on the reasonable expectation that Peru would honor those guarantees*."[1218] Ms. Torreblanca and Mr. Davenport confirmed at the Hearing that one of the decisive factors in building the Concentrator was the reinvestment of profits benefit, which was granted by MINEM.[1219] By contrast, the stabilization of revenues from the Concentrator under the 1998 Stability Agreement was "*not the more weighty thing for the Shareholder at that time*" according to Ms. Torreblanca.[1220] This in itself is sufficient to conclude that there was no reliance by SMCV or Phelps Dodge on the 1998 Stability Agreement's coverage of the Concentrator. The Tribunal has considered, in particular, the following evidence:

- The decisiveness of the reinvestment of profits benefit is spelled out in the 2002 Pre-Feasibility Study, which Ms. Torreblanca testified to be a determinative document,[1221] as well as in the 2004 Feasibility Study.[1222] The 2002 Pre-Feasibility Study spells out that "*[t]he potential of the reinvestment of profit*

[1215] SMCV, Petition No. 1487019 to MINEM dated 27 August 2004 (**CE-457**); MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM dated 26 October 2004 (**CE-476**).
[1216] Hearing Transcript, Day 3, p. 810, line 21 to p. 811, line 2.
[1217] Hearing Transcript, Day 3, p. 811, lines 3-4.
[1218] Claimant's Memorial, ¶ 371.
[1219] Hearing Transcript, Day 2, p. 634, line 21 to p. 635, line 15; Hearing Transcript, Day 3, p. 733, line 10 to p. 735, line 18.
[1220] Hearing Transcript, Day 2, p. 635, line 4-15.
[1221] Hearing Transcript, Day 2, p. 614, lines 17-19.
[1222] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. I, p. 55.

option granted to Cerro Verde under the existing stability agreement could have a significant affect on the future cash flows and valuation of the sulfide project."[1223] The only major recommendation in relation to the 1998 Stability Agreement included in the "*recommendations*" section of the Study is to "*[i]mmediately negotiate with the government to ensure the reinvestment of profit tax credit outlined in the existing stability agreement between [Cerro Verde] and the Peruvian government*."[1224]

- By contrast, there are no recommendations made in relation to an amendment of the 1998 Stability Agreement to include the Concentrator. The Claimant further recognized that the 2002 Pre-Feasibility Study explicitly assumed that the 1998 Stability Agreement would not apply to the Concentrator.[1225] This shows that in 2002, there could have been no reliance by SMCV or Phelps Dodge on the inclusion of the Concentrator in the scope of the 1998 Stability Agreement. Moreover, as stated above (para. 783), the Claimant's witnesses recognized that legal advice concerning the scope of the 1998 Stability Agreement had been sought when preparing the 2002 Pre-Feasibility Study.[1226] However, such legal advice is redacted in the 2002 Pre-Feasibility Study and the Tribunal is, thus, unable to conclude but has considerable doubts that such advice was supportive of SMCV's and Phelps Dodge's interpretation of the 1998 Stability Agreement.
- The 2004 Feasibility Study and its update also recognize the reinvestment of profits benefit as part of its financial analysis and sensitivities.[1227]
- However, the Tribunal has not seen any evidence from the 2004 Feasibility Study that it addressed details regarding the scope of the 1998 Stability Agreement and whether the Concentrator would be covered by it. In fact, the 2004 Feasibility Study only assumed that the Concentrator would be covered by the 1998 Stability Agreement because Fluor was instructed to assume this in the Study.[1228] Fluor made clear in the 2004 Feasibility Study that "*[a]uditing from the standpoint of taxation or accounting is not within Fluor's scope of services*."[1229] Accordingly, while the Tribunal notes that the coverage of the Concentrator under the scope of the 1998 Stability Agreement was an

[1223] 2002 Pre-Feasibility Study (**CE-928**), p. 17.
[1224] 2002 Pre-Feasibility Study (**CE-928**), p. 7.
[1225] Claimant's Post-Hearing Brief, ¶ 64(b).
[1226] Hearing Transcript, Day 2, p. 620, lines 10-17; Hearing Transcript, Day 3, p. 838, lines 1-8.
[1227] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. I, p. 55; Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update dated September 2004 (**CE-459**), p. 46.
[1228] Hearing Transcript, Day 3, p. 732, lines 10-21.
[1229] Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project dated May 2004 (**CE-20**), Vol. IV, p. 14-1.

assumption made by SMCV and Phelps Dodge, such subjective assumptions are not sufficient to found legitimate expectations.

873. Finally, in light of the copper prices at the time of the investment, in the words of Mr. Rabolvsky, the Concentrator Project turned SMCV's USD 1.7 billion mining operation into a USD 10.7 billion operation.[1230] Accordingly, the Tribunal finds it likely that even if SMCV or Phelps Dodge had held the accurate belief that the Concentrator was not covered by the 1998 Stability Agreement, they would have nevertheless proceeded with the construction of the Concentrator given the financial incentive to do so. Notably, the Claimant even invested in 2012 in a second concentrator and, for this purpose, entered into the 2012 Stability Agreement,[1231] which stabilized its investment of USD 3.57 billion in the new concentrator.

874. In light of the above, the Tribunal concludes that even under the standard of Article 10.5 of the TPA argued by the Claimant, the Claimant has not proven that the Respondent created legitimate expectations that SMCV and Phelps Dodge relied on, and that those were breached. The Tribunal, thus, finds no violation of Article 10.5 of the TPA in this respect.

b) The Claimant's claim that the Respondent's actions were arbitrary and based on political calculations

(1) The Claimant's position

875. The Claimant claims that the Respondent breached Article 10.5 of the TPA because the Respondent's actions were arbitrary and based on political calculations.[1232]

876. With respect to the applicable standard, the Claimant submits that the FET standard includes protection against arbitrary conduct. Tribunals have confirmed that a government action is arbitrary if, among other factors, it is taken "*not based on legal standards but on excess of discretion, prejudice or personal preference*,"[1233] or based on political calculations, as found, for example, by the *Abengoa v. Mexico*, *Crystallex*

[1230] Hearing Transcript, Day 7, p. 2174, lines 11-19.
[1231] 2012 Stability Agreement (**CE-644**).
[1232] Claimant's Memorial, ¶¶ 373 *et seq.*; Claimant's Reply, ¶¶ 148 *et seq.*
[1233] Claimant's Memorial, ¶ 363, referring to: *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 April 2016 (**CA-222**), ¶ 578; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010 (**CA-163**), ¶¶ 262-263.

v. Venezuela, *Gold Reserve v. Venezuela*, *Eureko v. Poland*, and *RDC v. Guatemala* tribunals.[1234]

877. The Claimant argues that the Respondent's decisions against SMCV were a result of political pressure.[1235] According to the Claimant, after SMCV began the construction of the Concentrator, the Respondent arbitrarily changed its long-held position that stability guarantees apply to concessions or mining units to the more restrictive position that stability guarantees apply only to the initial investment set forth in the feasibility study submitted to access stability guarantees.[1236]

878. According to the Claimant, the Royalty Law discussions were politically charged, with stability agreements as a key point of contention.[1237] After increased commodity prices and mining profits led to a backlash against mining companies, members of Congress fought for the royalty, including by seeking to disregard existing stability agreements entirely. The Claimant refers to the following examples:[1238]

- In April-May 2004, Congressman Diez Canseco argued that existing stability agreements should be "*reviewed and renegotiated*" in relation to the proposed royalty, and another member of Congress proposed a draft royalty bill that explicitly applied to "*mining titleholders […] who have […] stability agreements*."[1239]
- After the Royalty Law was passed in June 2004, and the Government proposed additional amendments that would have softened its impact on the mining sector, members of Congress accused the Government of intentionally delaying the law's entry into force, calling it "*unreasonable and unacceptable*."[1240]
- In early 2005, members of Congress continued to argue that stability agreements did not protect mining companies from paying royalties,

[1234] Claimant's Memorial, ¶ 363, referring to: *Abengoa v. Mexico*, Award (**CA-277**), ¶¶ 646-651; *Crystallex v. Venezuela*, Award (**CA-222**), ¶¶ 589-599; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award dated 22 September 2014 (**CA-213**), ¶¶ 580, 590, 591; *Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005 (**CA-122**), ¶¶ 213, 221-233; *RDC v. Guatemala*, Award (**CA-276**), ¶¶ 234-235.
[1235] Claimant's Memorial, ¶¶ 373 *et seq.*; Claimant's Reply, ¶¶ 148 *et seq.*
[1236] Claimant's Reply, ¶ 148.
[1237] Claimant's Memorial, ¶ 374.
[1238] Claimant's Memorial, ¶ 374.
[1239] Claimant's Memorial, ¶ 374 (a); Javier Diez Canseco, Mining Royalties and the Need to Reform Mining Taxation: Who Is Opposed? dated April 2004 (**CE-429**); Congress, Draft Law 10636/2003-CR dated 21 May 2004 (**CE-438**).
[1240] Claimant's Memorial, ¶ 374 (b); "The Executive Asks for Mining Royalties Based on Prices," *La República* dated 4 September 2004 (**CE-464**); "Royalty Regulations Ready but on Hold," *Business News Americas* dated 2 September 2004 (**CE-461**); "The Difference Between Mining Royalty and Mining Canon," *La República* dated 18 August 2004 (**CE-456**).

characterizing them as "*fair compensation for the extraction of a non-renewable natural resource*."[1241]

- In August 2006, members of Congress proposed amending the Royalty Law so that companies with stability agreements would be obliged to pay royalties.[1242]

879. Furthermore, the Claimant submits that when the Government granted SMCV's profit reinvestment request in December 2004, SMCV became a target of criticism among members of Congress and politicians, which intensified after the Constitutional Court confirmed that companies with administrative stability protections like SMCV were exempt from the royalty.[1243] The Claimant refers to the following examples:[1244]

- In August 2005, Congressman Diez Canseco began publishing articles attacking SMCV for its alleged lack of fiscal contributions and sharply criticizing MINEM for conferring "*excessive and undue benefits*" on SMCV.[1245]
- In October 2005, spurred by Congressman Diez Canseco's request to investigate "*alleged irregularities*" relating to the reinvestment credit, Congress created a Working Group to "*investigate the alleged tax benefits received by [SMCV]*" and "*adopt the appropriate measures*."[1246]
- In 2006, local politicians from Arequipa publicly blamed SMCV for a shortfall in the regional budget and threatened protests if the Government did not force SMCV to pay mining royalties.[1247] Members of Congress further argued that even if legally exempt from royalty payments, SMCV had a "*moral obligation to share its profits with Arequipa's society*."[1248]
- In June 2006, Congressman Diez Canseco proposed a bill in Congress that would have retroactively revoked SMCV's profit reinvestment benefit, even

[1241] Claimant's Memorial, ¶ 374 (c); "Mining companies urged to comply with the payment of royalties to regions," *La República* dated 9 March 2005 (**CE-489**).
[1242] Claimant's Memorial, ¶ 374 (d); "The Government Agrees Not to Change the Mining Royalty Law," *Gestión* dated 10 August 2006 (**CE-546**).
[1243] Claimant's Memorial, ¶ 375.
[1244] Claimant's Memorial, ¶ 375.
[1245] Claimant's Memorial, ¶ 375 (a); Javier Diez Canseco, "Questions about Cerro Verde," *La República* dated 25 August 2005 (**CE-506**); Javier Diez Canseco, "Cerro Verde: Enough Abusing Peru!," *Voltaire* dated 6 October 2005 (**CE-517**).
[1246] Claimant's Memorial, ¶ 375 (b); Congress, Energy & Mines Commission of the Sixth Regular Session dated 5 October 2005 (**CE-516**), pp. 2-3; "Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works," *El Heraldo* dated 29 March 2006 (**CE-525**).
[1247] Claimant's Memorial, ¶ 375 (c); "Cerro Verde evades payment of taxes based on a law repealed in 2000," *La República* dated 19 June 2006 (**CE-535**).
[1248] Claimant's Memorial, ¶ 375 (c); "Congressional Commission glimpses a solution," *El Heraldo* dated 10 July 2006 (**CE-541**).

though by that point, SMCV's USD 850 million investment was nearly complete.[1249]

880. The Claimant submits that this backlash was frequently directed not only at SMCV, but at MINEM, SUNAT, and the MEF, and against specific Government officials.[1250] The Claimant refers to the following examples:[1251]

- In 2004, after then-Minister of Economy and Finance Pedro Pablo Kuczynski publicly opposed the royalty, the royalty's proponents accused him of being an "*advocate for multinational companies*" and of lobbying on behalf of "*private companies*."[1252]
- On 17 January 2005, Congressman Diez Canseco requested Minister Sánchez Mejía to provide him, with the "*greatest urgency*," information about the "*incentives*" that were granted for SMCV's investment in the Concentrator and the "*technical and legal basis and cost-benefit analysis*" supporting MINEM's approval.[1253]
- On 23 February 2005, Minister Sánchez Mejía responded to Congressman Diez Canseco, "*inform[ing]*" him that SMCV "*ha[d] signed with the Peruvian State*" a Stability Agreement "*valid until 2013*."[1254] He attached an aide memoire, which praised the Concentrator investment for "*allow[ing] an increase of more than 200% in [SMCV's] copper production*," engaging a "*large number of workers*" "*which will benefit the population of the area*," and generally creating a "*positive effect … in the economic activation of services, hotels, restaurants, transportation, communications, health, etc*."[1255]
- In early 2005, Congressman Diez Canseco published articles in the national press strongly criticizing the MEF and MINEM for what he viewed as failing to "*defend[] the State's income*," accusing them of being complicit with the mining lobby, and calling for "*sit-ins*" before the courts.[1256]

[1249] Claimant's Memorial, ¶ 375 (d); Congress, Draft Bill No. 14792/2005-CR dated 21 June 2006 (**CE-536**), pp. 2, 5.
[1250] Claimant's Memorial, ¶ 376.
[1251] Claimant's Memorial, ¶ 376; Claimant's Reply, ¶ 150.
[1252] Claimant's Memorial, ¶ 376 (a); "Minister of Economy of Peru Against Mining Royalties," *Agence France Presse* dated 30 May 2004 (**CE-439**).
[1253] Claimant's Reply, ¶ 150 (ii); Congressman Diez Canseco to Minister Sánchez Mejía, Communication No. 083-2005-JDC/CR dated 17 January 2005 (**CE-942**).
[1254] Claimant's Reply, ¶ 150 (iii); MINEM, Communication No. 272-2005-MEM/DM dated 23 February 2005 (**CE-943**), p. 1.
[1255] Claimant's Reply, ¶ 150 (iii); MINEM, Communication No. 272-2005-MEM/DM dated 23 February 2005 (**CE-943**), p. 2.
[1256] Claimant's Memorial, ¶ 376 (b); "Mining Royalties: Sleeping with the Enemy," *La República* dated 2 March 2005 (**CE-485**); "Mining companies appeal to the Courts to avoid paying royalties," *La República* dated 5 March 2005 (**CE-487**); "The offensive against mining royalties," *La República* dated 23 February 2005 (**CE-483**);

- On 1 April 2005, Peru's Constitutional Tribunal upheld the Mining Royalty Law, holding that the royalty was not a tax but constituted an "*administrative charge*."[1257]
- On 6 April 2005, Congressman Diez Canseco published an article in *La República* applauding the decision, and noting that "*the recognition that the mining royalty is NOT tax … means that it must be universally applied without being stymied or distorted by tax stability agreements signed behind Peruvians' backs*."[1258]
- On 14 April 2005, Mr. Isasi issued his Report in response to the Constitutional Tribunal's decision. Mr. Isasi's April 2005 Report confirmed that a mining company would be exempt from paying royalties for the "*mining concessions of which it is the titleholder*" if those concessions were "*part of a project set out in a stability agreement signed prior to the enactment of [the Royalty] Law.*" The Claimant argues that this makes clear that MINEM had not yet adopted the position that only specific investments within a concession were entitled to stability.[1259]
- On 22 April 2005, Minister Sánchez Mejía informed the press that he had sent MEF and SUNAT information on the "*mining companies that signed administrative guarantees with the State*." [1260] He also noted that MINEM and MEF intended to make a joint statement to resolve the "*state of uncertainty*" about which mining companies were exempt from royalty payments.[1261]
- On 29 April 2005, Mr. Polo sent an internal email to Mr. Isasi, copying other MINEM officials, in which he mentioned that MEF had organized a meeting with MINEM and SUNAT presumably to discuss a response to the decision by the Constitutional Tribunal.[1262] Mr. Polo attached a draft of a proposed joint news release by the two Ministries and SUNAT that he wanted to propose to Min. Sánchez Mejía. In the email, Mr. Polo asks Mr. Isasi to "*take the lead on the communication*." The Claimant submits that the Respondent did not produce

"Mining companies urged to comply with the payment of royalties to regions," *La República* dated 9 March 2005 (**CE-489**).

[1257] Claimant's Reply, ¶ 150 (vii); Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC dated 1 April 2005 (**CE-490**).

[1258] Claimant's Reply, ¶ 150 (viii); Javier Diez Canseco, "Mining Royalites: Peru Won," *La República* dated 6 April 2005 (**CE-491**), p. 1.

[1259] Claimant's Reply, ¶ 150 (ix); MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.

[1260] Claimant's Reply, ¶ 150 (x); "MEF and MEM Will Issue Analysis on Royalties Next Week," *El Peruano* dated 22 April 2005 (**CE-495**).

[1261] Claimant's Reply, ¶ 150 (x); "MEF and MEM Will Issue Analysis on Royalties Next Week," *El Peruano* dated 22 April 2005 (**CE-495**).

[1262] Claimant's Reply, ¶ 150 (xi); Email from César Polo to Felipe Isasi dated 29 April 2005, 8:41 PM PET (**CE-947**).

Mr. Isasi's response or any further communications regarding Mr. Polo's proposed draft and the joint draft news release does not appear to ever have been issued.[1263]

- On 6 May 2005, Minister of Economy and Finance Kuczynski announced that the Constitutional Tribunal's classification of the royalty as an "*economic consideration*" meant that it would still fall within the guarantee of "*administrative stability*" for companies like SMCV that had mining stability agreements.[1264]
- On 3 June 2005, Mr. Isasi emailed a draft "*final presentation*" to Minister Sánchez Mejía titled, "*Mining Royalties: Proposals for Modifying the Law and the Effects of the Judgement of the Constitutional Tribunal*," noting that the draft reflected the agreement of Mr. Isasi, Mr. Tovar, and another MINEM official.[1265] The presentation recognized that stability guarantees are granted to "*investors protected by a 'Contrato-Ley,'*" that "*Administrative Stability is granted to some investors*," and that "*Clause 9*" of the Model Stability Agreement guarantees benefits "*applicable to the investor*."[1266]
- On 8 June 2005, Minister Sánchez Mejía made his presentation on the effects of the judgment of the Constitutional Tribunal before the Energy and Mines Congressional Committee.[1267] According to the Claimant, Minister Sánchez Mejía acknowledged both the political push to enact a royalty scheme against mining profits, and that "*great expectations have been generated at a national level*" by the Royalty Law and that "*mining royalties had the majority support of almost 90 votes from all the political forces*."[1268] The Claimant submits that nothing in this presentation confirmed the Respondent's novel position that stability guarantees were limited to the investment program contained in the feasibility study.[1269] Instead, Minister Sánchez Mejía repeatedly confirmed that the royalty would be calculated based on concessions, and that companies

[1263] Claimant's Reply, ¶ 150 (xi); Email from César Polo to Felipe Isasi dated 29 April 2005, 8:41 PM PET (**CE-947**), p. 1; Procedural Order No. 2 dated 4 July 2022, Appendix 1, Request No. 5.
[1264] Claimant's Reply, ¶ 150 (xii); "Mining Royalties to be Defined over the Next Few Days," *Arequipa Al Día* dated 6 May 2005 (**CE-500**); Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC dated 1 April 2005 (**CE-490**).
[1265] Claimant's Reply, ¶ 150 (xiii); MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez dated 3 June 2005, 4:10 PM (**CE-948**).
[1266] Claimant's Reply, ¶ 150 (xiii); MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez dated 3 June 2005, 4:10 PM (**CE-948**), pp. 27, 31, 32.
[1267] Claimant's Reply, ¶ 150 (xiv); Meeting Minutes, Energy and Mines Congressional Committee dated 8 June 2005 (**RE-29**).
[1268] Claimant's Reply, ¶ 150 (xiv); Meeting Minutes, Energy and Mines Congressional Committee dated 8 June 2005 (**RE-29**), p. 24.
[1269] Claimant's Reply, ¶ 150 (xiv).

would be entitled to stability for the "*mining projects*" for which they had signed stability agreements.

- On 25 August 2005, Congressman Diez Canseco began publishing additional articles, this time targeting SMCV directly. For example, in another article in *La República* entitled "*Questions about Cerro Verde*," Congressman Diez Canseco stated that "*[t]here are too many questions that beg to be answered by the Ministry of Energy and Mines, the regional authorities and the company itself*" such as why SMCV was granted the reinvestment of profit benefit or why SMCV was exempted from royalty payments.[1270]
- On 15 September 2005, Congressman Oré requested Minister Sánchez Mejía to provide, among others, "*information relating to the legal stability agreement entered into with the mining company Phelps Dodge about the Cerro Verde mine*."[1271]
- On 16 September 2005, the press reported statements by Congressman Diez Canseco demanding that Minister Sánchez Mejía revoke SMCV's authorization to reinvest profits, and "*demand[] … that Cerro Verde comply with the payment of royalties*," threatening to file "*a compliance action or process*" or to "*denounce [Minister Sánchez Mejía] constitutionally*" if he failed to do so.[1272] Documents produced by Peru reveal that Congressman Diez Canseco also apparently sent a letter to Minister Sánchez Mejía reiterating these threats.[1273] However, the Claimant submits that the Respondent has failed to produce Congressman Diez Canseco's letter, despite the fact that it was responsive to the Claimant's document requests.[1274]
- On 19 September 2005, Congressman Diez Canseco made a motion to create a Congressional Committee to investigate "*possible irregularities*" relating to "*the granting of tax benefits*" to SMCV's Concentrator and reiterated his accusations.[1275] The motion sought to "*establish […] administrative and legal responsibilities*" for MINEM's "*questionable decision*" to grant the profit

[1270] Claimant's Reply, ¶ 150 (xv); Javier Diez Canseco, "Questions about Cerro Verde," *La República* dated 25 August 2005 (**CE-506**); Javier Diez Canseco, "Cerro Verde: Enough Abusing Peru!," *Voltaire* dated 6 October 2005 (**CE-517**).
[1271] Claimant's Reply, ¶ 150 (xvi); Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía dated 15 September 2005 (**CE-507**).
[1272] Claimant's Reply, ¶ 150 (xvii); "Minera Cerro Verde Under JDC's Magnifying Glass," *La República* dated 16 September 2005 (**CE-508**); "Congressman Diez Canseco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties," *El Heraldo* dated 16 September 2005 (**CE-509**), p. 2; Torreblanca I (**CWS-11**), ¶ 42.
[1273] Claimant's Reply, ¶ 150 (xvii); MINEM Report No. 1718-2005-MEM/DM dated 26 September 2005 (**CE-953**).
[1274] Claimant's Reply, ¶ 150 (xvii); Procedural Order No. 2 dated 4 July 2022, Appendix 1, Request No. 8.
[1275] Claimant's Reply, ¶ 150 (xviii); Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR dated 19 September 2005 (**CE-510**), p. 2.

reinvestment benefit to SMCV. Congressman Diez Canseco's motion was ultimately adopted by the Congressional Energy and Mines Commission, resulting in the creation of the Congressional Working Group to investigate Cerro Verde on 5 October 2005.[1276]

- On the same day, Mr. Isasi sent an email marked as "*high*" importance to several MINEM officials, including Mr. Tovar, in which he forwarded a presentation by Congressman Diez Canseco on "*Cerro Verde and its Implications for Arequipa*." In the presentation, the Congressman questioned the "*justification for granting Cerro Verde II […] a tax benefit that was repealed 4 years ago*" and the "*correct[ness]*" of "*the Central Government in Lima deciding on its own to grant Cerro Verde a tax privilege that affects the interests of Arequipa*."[1277] In the same email, Mr. Isasi attached for comments the draft of a presentation for Minister Sánchez Mejía to Congress.[1278] In the draft presentation, Mr. Isasi stated that the 1998 Stability Agreement "*only applied to the Leaching Project*" and for the first time took the position that "*the project of primary sulfides of Cerro Verde does not form part of the stabilized regime*" covered by the 1998 Stability Agreement, a position that directly contradicted MINEM's confirmation to SMCV a year earlier that the Concentrator would be entitled to stability guarantees if it formed part of the stabilized Beneficiation Concession.[1279] Mr. Isasi's draft slides also contradicted the view he himself had taken five months earlier in his April 2005 Report, in which he stated that "*mining concessions […] depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of [the Royalty] Law*" "*will be exempt or not from the payment of royalties*."[1280] The Claimant submits that the Respondent does not contend that Minister Sánchez Mejía actually gave this presentation before Congress and there is no evidence that he did.[1281]

[1276] Claimant's Reply, ¶ 150 (xviii); Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR dated 19 September 2005 (**CE-510**), p. 2; Congress, Energy & Mines Commission, Minutes of Sixth Regular Session dated 5 October 2005 (**CE-516**), p. 2.
[1277] Claimant's Reply, ¶ 150 (xix); Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jaime Chavez Riva dated 19 September 2005, 10:00 AM, Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa dated September 2005 (**CE-952**), slide 21.
[1278] Claimant's Reply, ¶ 150 (xx); Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jaime Chavez Riva dated 19 September 2005, 10:00 AM, Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa dated September 2005 (**CE-952**).
[1279] Claimant's Reply, ¶ 150 (xx); Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jaime Chavez Riva dated 19 September 2005, 10:00 AM, Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa dated September 2005 (**CE-952**), slides 27, 31.
[1280] Claimant's Reply, ¶ 150 (xx); MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.
[1281] Claimant's Reply, ¶ 150 (xx).

- On 20 September 2005, Minister Sánchez Mejía stated to the press that Cerro Verde would have to pay royalties related to the Concentrator, but he did not say why that would be the case.[1282] The Claimant submits that this was the first time MINEM made any such public statement.
- On 22 September 2005, Mr. Isasi sent Minister Sánchez Mejía his Report responding to Congressman Oré's request for information on SMCV's stability guarantees, which confirmed that SMCV's reinvestment benefit had been correctly approved.[1283]
- On 26 September 2005, Minister Sánchez Mejía wrote to Congressman Diez Canseco to respond to the Congressman's allegations of unconstitutional conduct against him.[1284] In his response, Minister Sánchez Mejía attempted to deflect the pressure by claiming that the Congressman's criticism was misdirected because MINEM was not "*the competent body*" for administering the Mining Royalty Law and encouraged Congressman Diez Canseco to direct his requests to MEF and SUNAT. The Claimant argues that the Minister's position was at odds with the position that the Respondent advances in this arbitration, *i.e.,* that MINEM was the relevant authority to determine whether companies were exempt from paying royalties due to stability agreements.
- On 30 September 2005, Minister Sánchez Mejía sent Congressman Diez Canseco copies of the "*technical file*" for the Concentrator, in response to a communication from the Congressman that the Claimant submits the Respondent has failed to produce.[1285]
- On 3 October 2005, Minister Sánchez Mejía responded to Congressman Oré's 15 September 2005 letter asserting without support that "*the Primary Sulfide Project will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of an Agreement for Promotion and Guarantee of Investment has not been applied for.*" In the Claimant's view, this contrasts to his previous claim that assessing the royalty issue fell outside MINEM's jurisdiction.[1286]

[1282] Claimant's Reply, ¶ 150 (xxi); "Minister: Cerro Verde Expansion Subject to Royalty," *Business News Americas* dated 20 September 2005 (**CE-511**).
[1283] Claimant's Reply, ¶ 150 (xxii); MINEM, Report No. 385-2005-MEM/OGJ dated 22 September 2005 (**CE-512**).
[1284] Claimant's Reply, ¶ 150 (xxiii); MINEM Report No. 1718-2005-MEM/DM dated 26 September 2005 (**CE-953**).
[1285] Claimant's Reply, ¶ 150 (xxiv); MINEM Report No. 1719-2005-MEM/DM dated 30 September 2005 (**CE-954**).
[1286] Claimant's Reply, ¶ 150 (xxv); Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía dated 15 September 2005 (**CE-507**); MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**).

- On 5 October 2005, the Congressional Working Group to investigate Cerro Verde was created, after the Committee on Energy and Mines considered and "*unanimously approved*" the motion to "*investigate the alleged tax benefits received by Sociedad Minera Cerro Verde*" and "*adopt the appropriate measures.*"[1287]
- On 24 October 2005, Minister Sánchez Mejía responded to a request from the Coordinator of the Working Group to investigate Cerro Verde, Congressman Olaechea, for a report on the "*tax benefits*" granted to SMCV for the Concentrator. In his response, Minister Sánchez Mejía stated that SMCV had not requested or been granted any benefits applicable to the Concentrator.[1288]
- On 31 October 2005, Congressman Diez Canseco rejected the Minister's assertion that MINEM was not "*competent*" to "*ensure the due collection of the Mining Royalty*."[1289] The Congressman stated that the Ministry had a "*political responsibility*" to "*guarantee*" royalty collections, and reiterated his request for information on the measures MINEM had taken to "*ensure the collection of mining royalties*," including for "*specific cases such as … Sociedad Minera Cerro Verde S.A.A*," demanding that MINEM respond with the "*utmost urgency*."[1290]
- On 8 November 2005, Minister Sánchez Mejía responded to the Congressman confirming that the Government would pursue royalty payments from SMCV.[1291]
- On 16 January 2006, Mr. Isasi sent an internal report to Minister Sánchez Mejía to address Congressman Diez Canseco's request for information on the measures MINEM had taken to "*ensure the collection of mining royalties*."[1292] The report noted that the DGM provided "*necessary technical support*" to SUNAT by providing a "*monthly*" "*list of mining titleholders and their respective production units*." The Claimant submits that the report said nothing about providing information relating to specific investment projects. On 15 February 2006, Minister Sánchez Mejía forwarded Mr. Isasi's report to Congressman Diez Canseco.[1293]

[1287] Claimant's Reply, ¶ 150 (xxvi); Congress, Energy & Mines Commission, Minutes of Sixth Regular Session dated 5 October 2005 (**CE-516**), pp. 2-3.
[1288] Claimant's Reply, ¶ 150 (xxvii); MINEM Report No. 1884-2005-MEM/DM dated 24 October 2005 (**CE-955**).
[1289] Communication No. 0491-2005-JDC/CR from Congressman Diez Canseco to Minister Sánchez Mejía dated 31 October 2005 (**CE-956**), p. 1.
[1290] Claimant's Reply, ¶ 150 (xxviii); Communication No. 0491-2005-JDC/CR from Congressman Diez Canseco to Minister Sánchez Mejía dated 31 October 2005 (**CE-956**), pp. 1-2; Congress, Energy & Mines Commission, Minutes of Sixth Regular Session dated 5 October 2005 (**CE-516**), p. 2.
[1291] Claimant's Reply, ¶ 150 (xxix); MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**), p. 1.
[1292] Claimant's Reply, ¶ 150 (xxx); MINEM, Report No. 015-2006-MEM/OGJ dated 16 January 2006 (**CE-957**).
[1293] Claimant's Reply, ¶ 150 (xxx); MINEM, Report No. 269-2006-MEM/DM dated 15 February 2006 (**CE-958**).

- On 24 April 2006, *La República* published an article on the political debates about requiring the "*big companies*," including "*Cerro Verde*" to pay royalties.[1294] The article displayed a graphic attributed to MINEM listing SMCV as a stabilized mining company that would not pay royalties until 2013. The article also quoted the President of the Congressional Energy and Mines Commission, Juan Valdivia, complaining about SUNAT's lack of "*political will*" to enforce the collection of royalties on companies with stability agreements, and noted that Mr. Valdivia planned to "*summon the head of SUNAT, Nahil Hirsh […] to explain the reason for her approach*."[1295] It further noted that despite political pressure, "*[MINEM] consider[ed] that the approach of the mining companies [was] correct, since stability agreements protect the company … from administrative modifications*," and quoted Mr. Tovar as acknowledging that this approach reflected its "*respect for the signed [stability] agreements*."[1296]
- On 3 May 2006, Mr. Isasi made a presentation to the Working Group of the Congressional Energy and Mines Committee, in which he laid out the same argument made in his June 2006 Report. The Energy and Mines Committee also discussed the royalty issue in its full session. According to the Claimant, the transcripts of that session reflect the significant pressure to collect royalties from stabilized companies, as MINEM officials faced questions from members of Congress about why ten mining companies with stability agreements identified by SUNAT were "*paying absolutely nothing*," demands that MINEM "*explain to us why these important companies do not pay mining royalties to our country, to our people*," and accusations that the Government was "*harming the nation*."[1297] The session also featured a presentation by Vice Minister of Mines Rómulo Mucho on behalf of Minister Sánchez Mejía.[1298] According to the Claimant, this presentation is largely similar to the "*final presentation*" that Mr. Isasi circulated for Minister Sánchez Mejía in June 2005, but key differences between the two slide decks demonstrate MINEM's development of

[1294] Claimant's Reply, ¶ 150 (xxxi); "SUNAT must impose assessments against the big companies that don't pay royalties," *La República* dated 24 April 2006 (**CE-1042**).
[1295] Claimant's Reply, ¶ 150 (xxxi); "SUNAT must impose assessments against the big companies that don't pay royalties," *La República* dated 24 April 2006 (**CE-1042**).
[1296] Claimant's Reply, ¶ 150 (xxxi); "SUNAT must impose assessments against the big companies that don't pay royalties," *La República* dated 24 April 2006 (**CE-1042**).
[1297] Claimant's Reply, ¶ 150 (xxxii)-(xxxiii); Congressional Energy and Mines Commission, Session Transcript dated 3 May 2006 (**CE-963**), p. 15.
[1298] Claimant's Reply, ¶ 150 (xxxiv); MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission on 3 May 2006, attached to email from Tovar Oswaldo to Chavez Riva Jaime dated 3 May 2006, 7:32 PM (**CE-962**); Transcripts of Congressional Session before the Energy and Mines Commission dated 3 May 2006 (**CE-963**), pp. 2-3.

its novel position over the course of that year to justify its objective of assessing royalties for the Concentrator in response to sustained pressure.[1299]

- In June 2006, 5,000 Arequipa residents and municipal and regional politicians protested at Cerro Verde against the profit reinvestment "*benefit[,] granted unlawfully by the Ministry of Energy and Mines*."[1300] During the protests, the mayor of Arequipa "*warned*" the central government, threatening "*an open-ended regional strike*" later that month if it failed to "*respon[d]*" to the political outcry over the "*loss of [...] tax revenue from Cerro Verde"* that *"the Peruvian State suffered*."[1301]
- On 16 June 2006, Mr. Isasi issued his report setting out the legal position that stability guarantees "*[are] granted to an investment project clearly delimited by the Feasibility Study and agreed to in the agreement*."[1302]
- On 20 July 2006, Dante Martínez Palacios, a local union leader in Arequipa, filed a complaint against SMCV through SUNAT's internal complaint procedure challenging SMCV's use of the reinvestment benefit.[1303] On 25 July 2006, Mr. Martinez Palacios filed additional submissions arguing that SUNAT had "*distort[ed] the regulations*" in granting SMCV's request to use the benefit, "*allowing undue enrichment*," and through "*cunning, distracted [popular] attention*" away from the issue, evading SUNAT's "*responsibility*" to "*defen[d] . . . the rights of the Peruvian people . . . who are the true owners of copper and other wealth and natural resources in our country*."[1304]
- On 12 November 2007, Mr. Martínez Palacios, filed another complaint before SUNAT alleging that SMCV "*fraudulent[ly]*" applied the profit reinvestment benefit to the Concentrator.[1305] Mr. Martínez subsequently laid out these charges in detail in press articles in January 2008.[1306]

[1299] Claimant's Reply, ¶ 150 (xxxiv); MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez dated 3 June 2005, 4:10 PM (**CE-948**); MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission on 3 May 2006, attached to email from Tovar Oswaldo to Chavez Riva Jaime dated 3 May 2006, 7:32 PM (**CE-962**).

[1300] Claimant's Reply, ¶ 150 (xxxv); "Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000," *La República* dated 19 June 2006 (**CE-535**), p. 1.

[1301] Claimant's Reply, ¶ 150 (xxxv); "Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000," *La República* dated 19 June 2006 (**CE-535**), p. 2.

[1302] Claimant's Reply, ¶ 150 (xxxvi); MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**), Section I, ¶ 5.2, Section III, ¶ 4.1.

[1303] Claimant's Reply, ¶ 152 (i); Dante Martínez, Complaint to SUNAT No. 016278 dated 25 July 2006 (**CE-1040**).

[1304] Claimant's Reply, ¶ 152 (i); Dante Martínez, Complaint to SUNAT No. 016278 dated 25 July 2006 (**CE-1040**).

[1305] Claimant's Reply, ¶ 152 (ii); Dante Martínez, Complaint to SUNAT dated 12 November 2007 (**CE-1041**); Dante Martínez, Superior Civil Court Complaint dated 28 April 2009 (**CE-588**); Torreblanca I (**CWS-11**), ¶¶ 64-65.

[1306] Claimant's Memorial, ¶ 376 (d); Dante Martínez, The Impunity and Hidden Truth of Sociedad Minera Cerro Verde – SMCV dated 7 January 2008 (**CE-572**), p. 1

- On 20 November 2007, SUNAT requested MINEM to provide it with a "*list of parties obligated to pay mining royalties*."[1307]
- On 29 January 2008, MINEM provided SUNAT with the "*information of entities that are obligated to pay mining royalties*" and enclosed, among other documents, Mr. Isasi's June 2006 Report setting forth MINEM's position on the scope of stability guarantees.[1308]
- In May 2008, SUNAT initiated an audit of SMCV.[1309] On 17 August 2009, SUNAT issued its first Royalty Assessments in which it relied on MINEM's conclusion that SMCV's Concentrator was not protected by the 1998 Stability Agreement.[1310]
- In April 2009, Mr. Martínez also filed claims against SUNAT before the Contentious Administrative Courts, accusing SUNAT of improperly exempting SMCV from tax and royalty payments and decrying SUNAT's "*systematic reluctance to comply with its duties to assess and collect taxes and royalties evaded by SMCV*."[1311]

881. With respect to the pressure exerted against Minister Sanchez Mejía, the Claimant contends that Mr. Isasi's June 2006 Report was the culmination of a year and a half of political pressure and threats targeted at MINEM from both national and local politicians, including formal inquiries, congressional investigations, civil unrest, and direct threats to commence a constitutional enforcement action against Minister Sanchez Mejía, that sought to increase the revenues SMCV paid to the State for its operations at Cerro Verde.[1312] With respect to the pressure faced by SUNAT and the MEF, the Claimant submits that there is no evidence that SUNAT applied stability guarantees only to specific "*investment projects*" before MINEM developed its novel position.[1313] On the contrary, according to the Claimant, the evidence clearly demonstrates that SUNAT applied stability guarantees to entire mining units or concessions. Notably, three years after issuing its first Royalty Assessment against SMCV, SUNAT advised taxpayers that stability guarantees applied to the

[1307] Claimant's Reply, ¶ 152 (iii); SUNAT Report No. 261-2007-SUNAT/2E0000 dated 20 November 2007 (**CE-568**), p. 1; Dante A. Martínez, "The Largest Tax Fraud in the History of Peru," *Con Nuestro Perú* dated 15 January 2011 (**CE-603**).
[1308] Claimant's Reply, ¶ 152 (iv).
[1309] Claimant's Reply, ¶ 152 (v); SUNAT, Inductive Letter No. 108052004279 dated 30 May 2008 (**CE-577**).
[1310] Claimant's Reply, ¶ 152 (v); SUNAT, 2006/07 Royalty Assessments dated 17 August 2009 (**CE-31**).
[1311] Claimant's Memorial, ¶ 376 (d); Dante A. Martínez, "The Largest Tax Fraud in the History of Peru," *Con Nuestro Perú* dated 15 January 2011 (**CE-603**).
[1312] Claimant's Reply, ¶ 151.
[1313] Claimant's Reply, ¶ 153.

"*concession[s] or economic administrative unit[s]*" covered by a stability agreement.[1314] According to the Claimant, neither the Respondent nor its witness Ms. Bedoya have anything to say about why SUNAT took action against SMCV only after MINEM sent SUNAT Mr. Isasi's June 2006 Report, noting that "*[t]his information is sent considering the implications that the [Stability Agreement] might have on the payment of Mining Royalties corresponding to the Primary Sulfides Project*."[1315]

882. The Claimant argues that although the Government initially defended stability guarantees,[1316] it ultimately reversed course and adopted its novel and restrictive interpretation of SMCV's Stability Agreement. According to the Claimant, the evidence demonstrates that this volte-face resulted from the intense domestic political pressure. The Claimant refers to the following examples:[1317]

- After Congressman Diez Canseco threatened to file a constitutional complaint against Minister Sánchez Mejía if he did not revoke SMCV's reinvestment benefit, Minister Sánchez Mejía made statements to the press asserting that the Concentrator would not be protected by SMCV's existing Stability Agreement. Several weeks later, Minister Sánchez Mejía sent a letter to Congressman Oré taking the position that SMCV would have to pay royalties for the Concentrator, without providing any legal support.[1318]
- Mr. Isasi's June 2006 Report, which according to the Claimant for the first time set out the novel and restrictive interpretation that "*stabilization is not … for a specific mining concession, but in relation to a specific project*," directly contradicted his earlier legal report from April 2005, which confirmed that it is the "*concessions*" that are "*part of a project subject to a stability agreement*" that would be exempt from the Royalty Law.[1319] According to the Claimant, Mr. Isasi offered no explanation for this reversal, which came after several months of intense public campaigning against SMCV and the Congressional Working Group. Mr. Isasi's June 2006 Report also aligned his opinion with that

[1314] Claimant's Reply, ¶ 153; SUNAT, Report No. 084-2012-SUNAT/4B0000 dated 13 February 2020 (**CE-883**), p. 3.
[1315] Claimant's Reply, ¶ 153; MINEM, Report No. 077-2008-MEM-DGM dated 29 January 2008 (**CE-573**).
[1316] Claimant's Memorial, ¶ 377; Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC dated 1 April 2005 (**CE-490**), ¶ 109; MINEM, Report No. 153-2005- MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 16; "Mining Royalties to Be Defined over the Next Few Days," *Arequipa Al Día* dated 6 May 2005 (**CE-500**); MEF, Evaluation of Royalty Application dated 11 March 2004 (**CE-19**), p. 10.
[1317] Claimant's Memorial, ¶ 377.
[1318] Claimant's Memorial, ¶ 377 (a); Minister: Cerro Verde Expansion Subject to Royalty, BUSINESS NEWS AMERICAS dated 20 September 2005 (**CE-511**); MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**).
[1319] Claimant's Memorial, ¶ 377 (b); MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**); MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.

taken by Minister Sánchez Mejía in his October and November 2005 letters responding to the intense political pressure from members of Congress.[1320]

- One month after Mr. Martínez filed his claims in 2007 alleging that SMCV had colluded with SUNAT to avoid royalty payments and demanding that SUNAT impose royalties on SMCV, SUNAT asked MINEM to provide a "*list of parties obligated to pay mining royalties from June 2004 to date*."[1321]
- In January 2008, after Mr. Martínez published a critical article highlighting his claims before SUNAT, MINEM provided SUNAT with, among others, Minister Sánchez Mejía's November 2005 letter and Mr. Isasi's June 2006 Report setting out his novel and restrictive interpretation of the 1998 Stability Agreement. The Claimant submits that as soon as SUNAT received these documents, it initiated an audit of SMCV and issued its first Assessments only months later, explicitly acknowledging that it had relied on MINEM's designation that SMCV owed royalties for the Concentrator.[1322]

883. The Claimant concludes by noting that even if MINEM adopted its novel and restrictive position on the scope of stability guarantees in 2005, or began to formulate that position, it still did so after it had provided SMCV with assurances to the contrary; after SMCV made its decision to invest in the Concentrator and started to construct the Concentrator and after the political campaign against SMCV's entitlement to stability guarantees for the Concentrator was already well under way. Furthermore, according to the Claimant, the Respondent has not pointed to a single example of Government entities advancing their "*consistent*" position prior to SMCV's decision to invest in the Concentrator and the commencement of its construction, to the exception of a SUNAT Report issued in 2002.[1323] The Claimant adds that contrary to the Respondent's contention, the evidence on the record confirms that as early as January 2005, Congressman Diez Canseco was demanding that Minister Sánchez Mejía answer to him regarding SMCV's stability

[1320] Claimant's Memorial, ¶ 377 (b); MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**); MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**).
[1321] Claimant's Memorial, ¶ 377 (c); SUNAT Report No. 261-2007-SUNAT/2E0000 dated 20 November 2007 (**CE-568**), p. 1; MINEM Report No. 1169-2007-MEM-DGM dated 14 December 2007 (**CE-570**).
[1322] Claimant's Memorial, ¶ 377 (d); MINEM Report No. 077-2008-MEM-DGM) dated 29 January 2008 (**CE-573**); SUNAT, Inductive Letter No. 108052004279 dated 30 May 2008 (**CE-577**); SUNAT, Fine Assessments Nos. 052-002-0003607 to 052-002-0003631, 2006/07 Royalty Assessment dated 17 August 2009 (**CE-31**); SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessment dated 31 March 2010 (**CE-38**), p. 25.
[1323] Claimant's Reply, ¶ 154 (a) and fn. 754.

guarantees, and by March 2005, was publishing incendiary articles in a Peruvian newspaper targeting MINEM, MEF, and SMCV.[1324]

884. According to the Claimant, the Respondent's politically-motivated and baseless *volte-face* in its application of the Mining Law and Regulations was an abrupt departure from the existing legal framework and the Government's prior practice, which had always been to apply *stability* guarantees to entire concessions or mining units.[1325] The Tax Tribunal's resolutions upholding SUNAT's Royalty Assessments on the basis of Peru's novel position likewise contradicted MINEM's prior confirmation that the Concentrator would be entitled to stability guarantees when it approved SMCV's request to expand the Beneficiation Concession. The Respondent's decisions to uphold the Royalty Assessments on the basis of this arbitrary, inconsistent conduct constituted violations of the Respondent's obligation of fair and equitable treatment.

(2) The Respondent's position

885. The Respondent denies that it breached its FET obligation under Article 10.5 of the TPA through arbitrary behavior.[1326]

886. With respect to the applicable standard, the Respondent submits that the customary international law minimum standard of treatment does not require that states refrain from acting in an arbitrary manner, but, rather, prohibits outrageous,[1327] "*grossly unfair*,"[1328] or "*egregious and shocking*" treatment.[1329] The Claimant must prove, at a minimum, that the measures it identifies did not serve "*any apparent legitimate purpose*," were "*not based on legal standards*," were "*taken for reasons that are different from those put forward by the decision maker*," or were "*taken in wilful disregard of due process*."[1330] A State's action is not arbitrary just because it is based on political considerations.[1331] Rather, the Claimant must prove that the measure

[1324] Claimant's Reply, ¶ 154 (b); "Mining Royalties: Sleeping with the Enemy," *La República* dated 2 March 2005 (**CE-485**).
[1325] Claimant's Reply, ¶ 155.
[1326] Respondent's Counter-Memorial, ¶¶ 677 *et seq*.; Respondent's Rejoinder, ¶¶ 979 *et seq.*
[1327] Respondent's Counter-Memorial, ¶ 634 (b), referring to: *Neer v. Mexico*, Award (**RA-34**), ¶¶ 4-5.
[1328] Respondent's Counter-Memorial, ¶ 634 (b), referring to: *Cargill v. Mexico*, Award (**RA-29**), ¶ 296.
[1329] Respondent's Counter-Memorial, ¶ 634 (b), referring to: *Glamis Gold v. USA*, Award (**RA-30**), ¶ 616.
[1330] Respondent's Rejoinder, ¶ 949, referring to: *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009 (**RA-62**), ¶ 303.
[1331] Respondent's Counter-Memorial, ¶¶ 654-655; Respondent's Rejoinder, ¶¶ 950-952.

evidences manifest impropriety and raises questions about the Respondent's adherence to "*the rule of law*" itself.[1332]

887. According to the Respondent, the Claimant's claim entirely depends on it proving (i) that the Respondent did in fact change its interpretation of the 1998 Stability Agreement, and (ii) that the Respondent made that change "*not based on legal standards*," but, instead, (iii) based "*on excess of discretion, prejudice or personal preference*."[1333]

888. The Respondent argues that its interpretation of stability agreements has been consistent and public from the outset.[1334] The Respondent submits that the Claimant has failed to prove that the Respondent changed its interpretation of the scope of the stability guarantees at all, let alone that it performed a *volte-face* due to political pressure. Even if a change by the Respondent could have been established in fact, the Claimant would still be very far from establishing that such a policy change would be grossly arbitrary in violation of Article 10.5 of the TPA.[1335]

889. The Respondent avers that the politics surrounding the enactment of the Royalty Law and the Government's decision to grant SMCV's profit reinvestment request in December 2004 discussed by the Claimant have no bearing on the allegation of the Claimant's claim with respect to the interpretation of the scope of stability agreements.[1336]

890. Furthermore, the Respondent submits that the Claimant identifies little evidence in support of its theory that the Respondent reversed course and adopted a novel and restrictive interpretation of the 1998 Stability Agreement. The Respondent argues that it has consistently and transparently interpreted the 1998 Stability Agreement (and the Mining Law and Mining Regulations) to cover only the investment project that was the basis for obtaining the Agreement (namely, the Leaching Project described in the feasibility study).[1337]

891. According to the Respondent, the Claimant's argument that the Respondent has been inconsistent is proven false by a number of facts:[1338]

[1332] Respondent's Counter-Memorial, ¶ 653.
[1333] Respondent's Rejoinder, ¶ 980.
[1334] Respondent's Counter-Memorial, ¶¶ 677 *et seq.*
[1335] Respondent's Counter-Memorial, ¶ 687.
[1336] Respondent's Counter-Memorial, ¶ 678.
[1337] Respondent's Counter-Memorial, ¶ 678; Respondent's Rejoinder, ¶ 980.
[1338] Respondent's Counter-Memorial, ¶ 680; Respondent's Rejoinder, ¶ 980.

- On 23 September 2002, SUNAT issued the 2002 SUNAT Report, which stated that "*Tax Stability Contracts entered into pursuant to Title Nine of the TUO of the General Mining Law only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an Administrative-Economic Unit*."[1339]
- The Respondent communicated its interpretation to SMCV as early as September 2003 as the DGM sent a report signed by Ms. Chappuis to SMCV stating: "*About the question whether the stabilized regime would be applicable to the company, the prohibition contained in Article 8 of Supreme Decree No. 027- 98-EF points out that the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement*."[1340]
- On 11 March 2004, Vice Minister Polo gave a presentation at the Royalty Conference, where he stated that: "*Stabilization agreements are not granted per company, that is important to clarify. A company can have [a] stabilization agreement for one project and not have it for another [project], or [can] have an old activity that does not have a stabilization agreement and a new one that does. That's how it is, it is not granted for the whole company. An investment above 20 million or above 50 is made, depending on the case, and it grants the right to stabilization for that investment, for that development, not for the whole company*."[1341]
- On 8 March 2005, Mr. Tovar met with Mr. Harry Conger of Phelps Dodge at a conference in Toronto, where Mr. Tovar told Mr. Conger that Cerro Verde would not pay royalties for the Leaching Project, but it would have to pay royalties for the Concentrator, because it was not covered by any stabilization agreement: "*it was clear that Cerro Verde would not pay royalties for the Leaching Project, but would pay royalties for the Primary Sulfide Concentrator, as this was not covered by any mining stabilization agreement*."[1342]
- On 14 April 2005, Mr. Isasi issued the April 2005 Report explaining that only investment projects are stabilized under stabilization agreements: "*Emphasis should be placed on this last aspect: The stability granted by the Agreements*

[1339] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm (**RE-26**), p. 3.
[1340] MINEM, Report No. 509-2003-MEM-DGM-TNO dated 8 September 2003 (**CE-398**), p. 1.
[1341] Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic dated 11 March 2004 (excerpts) (**RE-185**), at timestamps 00:09:36 - 00:10:03.
[1342] Tovar II (**RWS-10**), ¶ 88.

on Guarantees and Measures to Promote Investment guarantee[s] the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. If a mining titleholder has economic administrative units or mining concessions that are not part of the project subject to stability, the regulation establishes that such titleholder must keep the accounting of the project separately. Consequently, it is not the mining titleholder (individuals or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis."[1343]

- On 8 June 2005, Minister of Mines Glodomiro Sánchez and Mr. Isasi gave a presentation before the Energy and Mines Congressional Committee explaining the relationship between the Royalty Law and mining stabilization agreements, where the Minister indicated that "*[a]ll mining titleholders pay royalties, but not for all of their projects*."[1344] Mr. Isasi also clarified that "*it must not be confused who is the obliged subject, which is the company, . . . but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects*."[1345]
- Minister of Mines Glodomiro Sánchez sent a letter, dated 8 November 2005, to Congressman Diez Canseco, stating that: "*[i]n the first place, it is necessary to distinguish the legal treatment of the 'Cerro Verde Leaching' project, which is covered by an Agreement on Guarantees and Measures to Promote Investment, from that applicable to the new Primary Sulfide Project in which the profits from that old Leaching project will be reinvested. The Primary Sulfide project does not enjoy protection under any Guarantee or Stability agreement*."[1346]
- Mr. Isasi gave a presentation on 3 May 2006, before the Cerro Verde Working Group in Congress during which he explained that: "*Cerro Verde's primary sulfide project is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract. It*

[1343] MINEM, Report No. 153-2005-MEM/OGAJ dated 14 April 2005 (**CE-494**), ¶ 17.
[1344] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (excerpts) (**RE-29**), p. 26.
[1345] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (excerpts) (**RE-29**), p. 29.
[1346] MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**), ¶ 1.

is a new project that does not benefit from tax, exchange rate and administrative stability. In consequence, the sulfides project will pay royalties when it enters into production."[1347]

- MINEM officials gave presentation during the 23 June 2006 Roundtable Discussion held by Proinversión's Congressional Committee that SMCV representatives attended reiterating its position that the Concentrator Project was not covered by the 1998 Stability Agreement.[1348]

892. The Respondent submits that the Claimant has failed to show that Peruvian mining and tax authorities interpreted the 1998 Stability Agreement as they did because of any political pressure.[1349] The Respondent notes that political pressure could have existed for MINEM to interpret stabilization guarantees a certain way, and MINEM could have acted consistent with the wishes of those applying political pressure, but even that would not prove that MINEM interpreted the stabilization guarantees that way because of the pressure, particularly where Peru's interpretation is documented well before any alleged political pressure began sometime in 2005 or 2006.[1350] To the extent that, when it uses the term "*politically-motivated*," the Claimant means that the Respondent acted with prejudice against SMCV and specifically targeted it, the Claimant has failed to provide any evidence of such animus on the part of the Peruvian authorities. The Claimant has thus failed to show that any of MINEM's or SUNAT's conduct, whether a change or not, was improperly based "*on excess of discretion, prejudice or personal preference*."[1351] Finally, given that the Respondent's interpretation of the 1998 Stability Agreement is consistent with Peruvian law, it is "*based on legal standards*" and therefore cannot be labeled arbitrary.[1352]

(3) The Non-Disputing Party's position

893. The NDP has not provided an express position on the standard of arbitrariness and has, rather, focused its comments on denial of justice (see below, paras. 949 *et seq.*).

[1347] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated May 2006 (**RE-3**), slide 12.
[1348] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 15.
[1349] Respondent's Rejoinder, ¶ 984.
[1350] Respondent's Rejoinder, ¶ 984.
[1351] Respondent's Rejoinder, ¶ 985.
[1352] Respondent's Rejoinder, ¶ 986.

(4) The Tribunal's analysis

894. The Tribunal notes that the Parties generally agree on the standard of arbitrariness.[1353] In particular, the Parties agree that an action may be arbitrary if it is "*not based on legal standards but on discretion, prejudice or personal preference*."[1354] The Claimant also does not dispute the *ELSI* standard articulated by the Respondent, according to which arbitrariness is "*something opposed to the rule of law*" and requires "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[1355] The Tribunal will thus proceed to assess the Respondent's conduct on the basis of this standard.

895. The Parties, however, disagree as to whether conduct "*based on political calculations*" constitutes arbitrary action.[1356] The Tribunal finds the Claimant's argument according to which conduct "*based on political calculations*" constitutes arbitrary action to be unsupported. Policy decisions of States are, by essence, based on political considerations or "*calculations*" and these do not *per se* taint State conduct with arbitrariness. In any event, the Claimant has stated that the nuance made with the Respondent's articulated standard amounts to "*a distinction without a difference*."[1357]

896. The Claimant's claim based on arbitrariness is founded on the factual premise that the Respondent would have changed its interpretation of the 1998 Stability Agreement as a result of political pressure, after having assured SMCV that the stability guarantees applied to the Concentrator.[1358]

897. However, the Tribunal has already found that (i) the Respondent did not breach the 1998 Stability Agreement, (ii) the Respondent did not change its interpretation of the 1998 Stability Agreement, rather, its interpretation was both consistent and public, and (iii) the Claimant has failed to prove that the Respondent assured SMCV that the stability guarantees would apply to the Concentrator (see above, Section V.A.4.)

898. Accordingly, the Tribunal finds that there could have been no arbitrariness in the Respondent's conduct as such conduct was based on legal standards. Nothing in the

---

[1353] Claimant's Reply, ¶ 139; Respondent's Rejoinder, ¶¶ 951-952.
[1354] Claimant's Reply, ¶ 139 (a); Respondent's Rejoinder, ¶ 952, referring to: *EDF v. Romania*, Award (**RA-62**), ¶ 303.
[1355] Claimant's Reply, ¶¶ 139(b), 177; Respondent's Counter-Memorial, ¶ 721, citing *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989 (**RA-72**), ¶ 128.
[1356] Claimant's Memorial, ¶ 363; Respondent's Counter-Memorial, ¶¶ 654-655.
[1357] Claimant's Reply, ¶ 139 (a).
[1358] Claimant's Reply, ¶¶ 148 *et seq.*

Respondent's conduct conveyed "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety,*" in the words of the *ELSI* judgment.

899. The Tribunal notes that there was political pressure in Peru in relation to the mining royalty[1359] and in particular regarding SMCV's use of the profit reinvestment benefit.[1360] The Tribunal also notes that the profit reinvestment benefit granted to Cerro Verde caused a significant shortfall in revenue for the Peruvian State and the Arequipa region and even resulted in protests and strikes.[1361] However, the profit reinvestment benefit granted to SMCV, which was one of the decisive factors in building the

[1359] See *inter alia:* Royalty Law No. 28258 dated 24 June 2004 (**CA-6**); Congress, Draft Law No. 10876/2003 dated 24 June 2004 (**CE-446**), pp. 2-3; "Miners to Take Legal Action Against Royalty," *Business News Americas* dated 24 June 2004 (**CE-447**); Unconstitutionality Claim re: Mining Royalty Law, No. 48-2004-AI dated 24 November 2004 (**CE-478**); "Mining companies urged to comply with the payment of royalties to regions," *La República* dated 9 March 2005 (**CE-489**); Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC dated 1 April 2005 (**CE-490**); Javier Diez Canseco, "Mining Royalites: Peru Won," *La República* dated 6 April 2005 (**CE-491**); "MEF and MEM Will Issue Analysis on Royalties Next Week," *El Peruano* dated 22 April 2005 (**CE-495**); "Mining Royalties to Be Defined over the Next Few Days," *Arequipa Al Día* dated 6 May 2005 (**CE-500**); Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (**RE-29**); Audio of the Session of the Energy and Mines Congressional Committee dated 8 June 2005 (**RE-104**); Communication No. 0491-2005-JDC/CR from Congressman Diez Canseco to Minister Sánchez Mejía dated 31 October 2005 (**CE-956**); MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**); SMCV, Presentation Before the Congressional Working Group dated 31 January 2006 (**CE-523**); "Working Group Studies Destination of Cerro Verde Taxes to Districts of Arequipa and Solution to Development Works," *El Heraldo* dated 29 March 2006 (**CE-525**); "SUNAT must impose assessments against the big companies that don't pay royalties," *La República* dated 24 April 2006 (**CE-1042**); Audio of the Cerro Verde Working Group Before the Energy and Mines Congressional Committee dated 3 May 2006 (**RE-103**); MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission dated 3 May 2006 (**CE-962**); "Advance Payment of Royalties Proposed," *La República* dated 15 June 2006 (**CE-533**).

[1360] See *inter alia:* Congressman Diez Canseco to Minister Sánchez Mejía, Communication No. 083-2005-JDC/CR dated 17 January 2005 (**CE-942**); MINEM, Communication No. 272-2005-MEM/DM dated 23 February 2005 (**CE-943**); "The Offensive Against Mining Royalties," *La República* dated 23 February 2005 (**CE-483**); "Mining companies appeal to the Courts to avoid paying royalties," *La República* dated 5 March 2005 (**CE-487**); Javier Diez Canseco, "Questions About Cerro Verde," *La República* dated 25 August 2005 (**CE-506**); Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía dated 15 September 2005 (**CE-507**); "Minera Cerro Verde Under JDC's Magnifying Glass," *La República* dated 16 September 2005 (**CE-508**); **"**Congressman Diez Canseco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties," *El Heraldo* dated 16 September 2005 (**CE-509**); Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR dated 19 September 2005 (**CE-510**); "Minister: Cerro Verde Expansion Subject to Royalty," *Business News Americas* dated 20 September 2005 (**CE-511**); MINEM Report No. 1719-2005-MEM/DM dated 30 September 2005 (**CE-954**); MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**); Letter No. 0461-2005-JDC/CR dated 4 October 2005 (**RE-2**); MINEM Report No. 1884-2005-MEM/DM dated 24 October 2005 (**CE-955**); SMCV, Letter No. SMCV-AL-686-2006 dated 11 May 2006 (**CE-529**); "Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000," *La República* dated 19 June 2006 (**CE-535**); Congress, Draft Bill No. 14792/2005-CR dated 21 June 2006 (**CE-536**); Dante Martínez, Complaint to SUNAT No. 016278 dated 25 July 2006 (**CE-1040**).

[1361] See *inter alia*: "Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000," *La República* dated 19 June 2006 (**CE-535**); "Congressional Pro-Investment Commission Seeks Solution to Demand Regarding Payment of Taxes of the Cerro Verde Company," *El Heraldo* dated 23 June 2006 (**CE-538**); Congress, Pro-Investment Commission, Minutes of the Session dated 23 June 2006 (**CE-537**); "Roundtable Discussion Initiated to Resolve Cerro Verde Case," *El Correo* dated 26 June 2006 (**CE-539**).

Concentrator (see above, para. 872), was not revoked, but remained fully in force. In the Tribunal's view, this discredits the Claimant's argument according to which Peruvian authorities would have acted with prejudice against SMCV and without due regard to legal standards in connection to one of the most crucial aspects of the Claimant's decision to invest in the Concentrator. The Tribunal has also found no evidence that Peruvian authorities acted against SMCV as a result of any political pressure. Reference is made in this regard to the testimonies of Ms. Bedoya, Ms. Olano, and Mr. Sarmiento, who all confirmed that they had never been subject to any kind of political pressure or influence.[1362]

900. In light of these considerations, the Tribunal finds that the Claimant has not satisfied the standard of showing that the Respondent's actions were arbitrary. The Tribunal, thus, finds no violation of Article 10.5 of the TPA under this account.

c) The Claimant's claim that the Respondent's actions were inconsistent and non-transparent

(1) The Claimant's position

901. The Claimant claims that the Respondent breached Article 10.5 of the TPA because the Respondent's actions were inconsistent and non-transparent.[1363]

902. With respect to the applicable standard, the Claimant submits that tribunals have repeatedly confirmed that a State violates the minimum standard of fair and equitable treatment if it fails to act with reasonable consistency and transparency in the treatment of foreign investments, as found, among others, by the *Windstream v. Canada*, *Metalclad v. Mexico*, *Crystallex v. Venezuela*, *Gold Reserve v. Venezuela*, and *Deutsche Telekom v. India* tribunals.[1364] The Claimant submits that the Respondent did not owe an affirmative duty of full transparency independent from the fair and equitable treatment obligation; rather the Claimant argues that the Respondent's complete lack of transparency, in circumstances where the lack of transparency was misleading, is an

[1362] Hearing Transcript, Day 6, p. 1625, lines 1-13; Hearing Transcript, Day 7, p. 1962, lines 4-15; Hearing Transcript, Day 7, p. 2025, lines 1-6.
[1363] Claimant's Memorial, ¶¶ 378 *et seq.*; Claimant's Reply, ¶¶ 156 *et seq.*; Claimant's Comments on the NDP Submission, ¶ 55.
[1364] Claimant's Memorial, ¶ 364, referring to: *Windstream Energy v. Canada*, Award (**CA-280**), ¶¶ 376-380; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award dated 30 August 2000 (**CA-78**), ¶¶ 80, 85-90, 99; *Crystallex v. Venezuela*, Award (**CA-222**), ¶¶ 589-599; *Gold Reserve v. Venezuela*, Award (**CA-213**), ¶ 591; *Deutsche Telekom v. India*, Interim Award (**CA-234**), ¶¶ 361-362, 375-387.

important component of the Respondent's unfair and inequitable conduct resulting in its breaches of Article 10.5 of the TPA.[1365] According to the Claimant, transparency is a key component of the fair and equitable treatment obligation, particularly where a lack of transparency can reasonably be expected to mislead the investor, as is the case where, for example, government officials continue to act "*as if [a] project were on track and it was business as usual,*" when in fact decisions have already been made internally against the company.[1366] The Claimant submits that this is also consistent with Chapter 19 of the TPA, which expressly establishes general requirements of transparency on the treaty parties.[1367]

903. The Claimant contends that the Respondent acted inconsistently and non-transparently on whether it would impose royalties against the Concentrator.[1368] Specifically, the Respondent breached its obligations under Article 10.5 with respect to the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments because it acted with a total lack of consistency and transparency, including by reversing course and advancing the novel interpretation internally after SMCV invested in the Concentrator, and by withholding key information from SMCV even as it demanded and accepted additional contributions based on the premise that stability applied to the entire Cerro Verde mining unit.[1369] The Claimant submits that this constitutes exactly the type of conduct that tribunals have confirmed violates the fair and equitable treatment obligation, which includes the obligation to be "*transparent and consistent*."[1370]

904. The Claimant argues that Peruvian officials knew from the outset that SMCV understood that the Concentrator would be stabilized and officials frequently confirmed SMCV's understanding.[1371] However, when certain MINEM officials began advancing the novel interpretation that the 1998 Stability Agreement excluded the Concentrator, the Government withheld information from SMCV regarding the *volte-face* in its position, even though it had ample opportunity to share this information. Moreover, at the same time, the Government continued to confirm through its conduct SMCV's

[1365] Claimant's Reply, ¶ 140.
[1366] Claimant's Reply, ¶ 142, citing *Deutsche Telekom v. India*, Interim Award (**CA-234**), ¶¶ 375-387.
[1367] Claimant's Reply, ¶ 142; TPA (**CA-10**), Chapter 19.
[1368] Claimant's Memorial, ¶¶ 378 *et seq.*; Claimant's Reply, ¶¶ 156 *et seq*.
[1369] Claimant's Memorial, ¶ 380.
[1370] Claimant's Reply, ¶ 162.
[1371] Claimant's Memorial, ¶ 381.

understanding that the Concentrator was covered. The Claimant refers to the following examples:

- After Minister Sánchez Mejía responded to Congressman Diez Canseco's threats by issuing his 3 October and 8 November 2005 letters taking the position that the Concentrator was not stabilized, a position which had never previously been established in any Government document, MINEM did not share these documents with SMCV or otherwise inform SMCV that it intended to alter its position, even though Ms. Torreblanca was concurrently participating in extensive meetings with the Congressional Working Group relating to the stabilized reinvestment benefit.[1372] While Minister Sánchez Mejía made a general statement to the press that the Concentrator would not be stabilized around the same time, SMCV interpreted this as a clear response to the pressure directed at him from Congress and did not understand it to affect SMCV's legal rights.[1373]
- On 16 June 2006, Mr. Isasi issued the June 2006 Report articulating for the first time the novel interpretation that, under the Mining Law, stabilization guarantees were limited to the investment program set out in the feasibility study.[1374] The Government did not provide SMCV with a copy of the June 2006 Report or share the legal basis for Mr. Isasi's conclusions even though only a day earlier, the DGM announced publicly that the planned Roundtable Discussions with SMCV relating to Arequipa's alleged budget shortfall would not have major results because SMCV had a stability agreement, which the Government must honor "*because we are in a State governed by the rule of law and the Government is determined to attract investments, not scare them away*."[1375]
- One week after Mr. Isasi issued the June 2006 Report, both Minister Sánchez Mejía and Mr. Isasi participated in the Roundtable Discussions with SMCV to discuss a "*harmonious solution*" to the budget shortfall in Arequipa that allegedly resulted from SMCV's application of stability guarantees.[1376] Neither Minister Sánchez Mejía, Mr. Isasi, or any other Peruvian official mentioned

[1372] Claimant's Memorial, ¶ 381 (a); Torreblanca I (**CWS-11**), ¶ 53; MINEM, Report No. 1725-2005-MEM/DM dated 3 October 2005 (**CE-515**); MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**).
[1373] Claimant's Memorial, ¶ 381 (a); Torreblanca I (**CWS-11**), ¶ 40; **"**Minister: Expansion of Cerro Verde subject to royalty tax," *Business News Americas* dated 20 September 2005 (**CE-511**).
[1374] Claimant's Memorial, ¶ 381 (b); MINEM, Report No. 156-2006-MEM/OGJ dated 16 June 2006 (**CE-534**).
[1375] Claimant's Memorial, ¶ 381 (b); "Advance payment of royalties proposed," *La República* dated 15 June 2006 (**CE-533**); Torreblanca I (**CWS-11**), ¶ 51.
[1376] Claimant's Memorial, ¶ 381 (c); "Congressional Pro-Investment Commission seeks solution to demand payment of taxes from Cerro Verde," *El Heraldo* dated 23 June 2006 (**CE-538**); Torreblanca I (**CWS-11**), ¶¶ 53-54.

Mr. Isasi's June 2006 Report or suggested that SMCV would be paying royalties.[1377] Instead, the negotiations were based on the understanding that SMCV would not pay any royalties, including on concentrate sales, and that it should therefore make significant contributions to Arequipa.[1378]

- Government officials continued to express the view that SMCV was entitled to stability with respect to the Concentrator even after SUNAT had issued the initial Assessments, including when Ms. Torreblanca met with officials from the MEF regarding the 2006-2007 Royalty Assessments who advised her that SMCV had a "*strong argument*" and encouraged SMCV's efforts to challenge the assessment.[1379]

905. According to the Claimant, the Government also solicited additional contributions premised on the understanding that SMCV enjoyed stability for its entire mining unit, again demonstrating the Government's inconsistent conduct toward SMCV.[1380] The Claimant points to the following circumstances:

- SMCV voluntarily contributed USD 125 million to Arequipa following the 2006 Roundtable Discussions, which were premised on the understanding that SMCV would not pay any royalties during the term of the 1998 Stability Agreement.[1381]
- Despite these significant contributions, the Government requested that SMCV sign the Voluntary Contribution Agreement in January 2007. The Government then induced SMCV's significant contributions under that Agreement, ultimately amounting to USD 140 million, which were premised on the understanding that SMCV would not be subject to any royalty payments.[1382] The Government did not mention to SMCV that it would charge SMCV royalties.[1383]
- In 2011, before committing to make full GEM payments, Ms. Torreblanca asked MINEM's Director General of Mining for "*urgent confirmation*" that once it did so, SMCV would pay only GEM and not Royalties or SMT.[1384] Ms. Torreblanca also conveyed SMCV's understanding that the 1998 Stability Agreement applied to the entirety of the Mining and Beneficiation Concessions

[1377] Claimant's Memorial, ¶ 381 (c); Torreblanca I (**CWS-11**), ¶¶ 53-54.
[1378] Claimant's Memorial, ¶ 381 (c); Torreblanca I (**CWS-11**), ¶¶ 53-54.
[1379] Claimant's Memorial, ¶ 381 (d); Torreblanca I (**CWS-11**), ¶ 81.
[1380] Claimant's Memorial, ¶ 382; Claimant's Reply, ¶ 160.
[1381] Claimant's Memorial, ¶ 382 (a); Torreblanca I (**CWS-11**), ¶¶ 53-55.
[1382] Claimant's Memorial, ¶ 382 (b); SMCV, Voluntary Contribution Agreement dated 10 August 2007 (**CE-27**).
[1383] Claimant's Memorial, ¶ 382 (b); Torreblanca I (**CWS-11**), ¶¶ 60-62.
[1384] Claimant's Memorial, ¶ 382 (c); SMCV, Letter No. SMCV.VL&RG-1896-2011 dated 7 October 2011 (**CE-628**); Torreblanca I (**CWS-11**), ¶ 85.

through 31 December 2013.[1385] Ms. Torreblanca similarly wrote to the MEF asking it to confirm the Government's verbal assurances to SMCV that it would "*only have to pay the GEM and will pay neither the Special Mining Tax nor the Mining Royalty for the concessions included in the current [Stability] Agreement*."[1386] The Claimant submits that these officials stated that they were not competent to answer her questions.[1387] The Claimant argues that the Respondent does not contest that SMCV made millions of dollars in GEM payments following the Government's explicit confirmation that SMCV needed to make either GEM payments or royalty and SMT payments, but not both, a confirmation that the Government repudiated several years later after it had received all of SMCV's GEM payments.[1388]

906. The Claimant contends that the Respondent does not deny that (i) it withheld key documents from SMCV, (ii) after it began acting against SMCV as a result of political pressure, Government officials repeatedly declined to clarify their intentions regarding assessing royalty payments against SMCV when SMCV requested them to do so, and (iii) the Government did not object when SMCV stated its position that the stability guarantees also applied to its Concentrator investment, a position that was based on MINEM's own confirmation.[1389]

907. While the Respondent asserts that SMCV "*should have known*" that the Government intended to deny stability guarantees to the Concentrator, the Claimant submits that the relevant question is whether the Respondent's conduct lived up to its obligation of FET to be transparent to SMCV about its intentions.[1390] In this regard, the Claimant submits that the Government repeatedly failed to inform SMCV directly of its changed position on the scope of stability guarantees in the multiple meetings that SMCV held with Government officials and in the Government's correspondence with SMCV, and that the Government even continued to confirm SMCV's position during this time. In particular:

[1385] Claimant's Memorial, ¶ 382 (c); SMCV Letter No. SMCV.VL&RG-1896-2011 dated 7 October 2011 (**CE-628**); SMCV, Letter No. SMCV-VL&RG-1968-2011 dated 26 October 2011 (**CE-629**); Torreblanca I (**CWS-11**), ¶¶ 85-89.
[1386] Claimant's Memorial, ¶ 382 (c); SMCV, Letter No. SMCV-VL&RG-2217-2011 dated 5 December 2011 (**CE-631**); Torreblanca I (**CWS-11**), ¶¶ 85-89.
[1387] Claimant's Memorial, ¶ 382 (c); MINEM, Official Letter No. 1333-2011-MEM/DGM dated 28 December 2011 (**CE-632**); MEF Report No. 206-2011-EF/61.01 dated 14 October 2011 (**CE-629**), p. 2, II. Analysis, ¶¶ 2-3.
[1388] Claimant's Reply, ¶ 161.
[1389] Claimant's Reply, ¶ 157.
[1390] Claimant's Reply, ¶ 158.

- In March 2005, Ms. Torreblanca sent a letter to SUNAT in which she set out SMCV's understanding that the 1998 Stability Agreement applied to "*Cerro Verde*" in its entirety and that, as a result, SMCV would not be subject to royalties.[1391] Shortly after, she reiterated SMCV's understanding in a meeting with Mr. Haraldo Cruz, SUNAT's Regional Intendent for Arequipa.[1392] The Claimant submits that the Respondent's argument that SUNAT did not have the power to establish or interpret the scope of the 1998 Stability Agreement is directly contradicted by the Royalty Assessments that SUNAT started to issue four years later and by the Respondent's own witness, Ms. Bedoya. Even under the Respondent's alternative narrative that the Government, including SUNAT, "*from the outset*" interpreted stability guarantees as applying to specific investment projects, SUNAT's silence would violate any notions of transparency, as Mr. Cruz should have corrected Ms. Torreblanca's understanding. That he did not do so means either that he deliberately misled Ms. Torreblanca, or that SUNAT at the time still took the position that stability guarantees applied to concessions and mining units.
- Mr. Tovar alleges that during an 8 March 2005 meeting at a conference in Toronto, he told Phelps Dodge representatives that the Concentrator "*would have to pay royalties, because it was not stabilized*."[1393] However, Mr. Tovar's claim is contradicted by the two *aide-mémoires* on which Mr. Tovar relies in support of his assertion, by Ms. Torreblanca's testimony and by the presentation Mr. Conger of Phelps Dodge gave at the Conference the day after meeting Mr. Tovar.[1394]
- The Respondent also did not share Mr. Isasi's April 2005 Report with SMCV, despite the fact that the Respondent now argues that it represents a clear articulation of the Respondent's position. MINEM failed to disclose it to SMCV and also resisted disclosure under its own Transparency Law and before Peru's Transparency Tribunal.[1395] If the Respondent's position that Mr. Isasi's April 2005 Report supported its position were correct, then the Government's failure and resistance to share the April 2005 Report with SMCV would be further evidence of the Government's lack of transparency.[1396]

[1391] Claimant's Reply, ¶ 158 (a).
[1392] Claimant's Reply, ¶ 158 (a); SMCV, Letter No. SMCV-AL-279/2005 to SUNAT dated 4 March 2005 (**CE-486**); Torreblanca I (**CWS-11**), ¶ 32.
[1393] Claimant's Reply, ¶ 158 (b); Tovar I (**RWS-3**), ¶ 55.
[1394] Claimant's Reply, ¶ 158 (b).
[1395] Claimant's Reply, ¶ 158 (c); Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021- JUS/TTAIP dated 16 April 2021 (**CE-884**).
[1396] Claimant's Reply, ¶ 158 (c).

- The Respondent also does not contest that it failed to provide SMCV the two letters that Minister Sánchez Mejía wrote to Congressman Oré in October 2005 and to Congressman Diez Canseco in November 2005, in which he took the position that the Concentrator would not be entitled to stability guarantees.[1397] The Respondent does not contest that it failed to provide these documents to SMCV at the time, despite their clear relevance to SMCV. The Respondent only shared the November 2005 letter with SMCV two and a half years later, in June 2008.[1398]
- The Respondent concedes that it did not provide Mr. Isasi's June 2006 Report setting out the novel position that stability guarantees were limited to specific investment projects to SMCV at the time it was issued. Rather, MINEM provided SMCV with a copy of the report only two years later, in June 2008. The Respondent's witnesses testify that Mr. Isasi's June 2006 Report was the critical factor in the Government's ultimate determination that SMCV had to pay royalties for the Concentrator.[1399] The importance of Mr. Isasi's opinion to the Government's ultimate decisions against SMCV is likewise corroborated by contemporaneous evidence.[1400]
- Mr. Isasi does not contest that he never provided his report or discussed his position on the scope of stability guarantees under the Mining Law with SMCV before SMCV received a copy of the report in June 2008.[1401] This is despite the fact that only ten days after Mr. Isasi published the June 2006 Report, Mr. Isasi and other Government officials, such as Minister Sánchez Mejía, met with SMCV for the Roundtable Discussions.[1402]
- Mr. Isasi testifies that "*[he] do[es] not remember exactly what was discussed in each of [the Roundtable Discussion meetings]*,"[1403] while Mr. Tovar asserts that during one of these meetings in June 2006, MINEM gave a presentation that stated that "*stability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession*" and that "*the presentation was also clear that mining royalties did apply to the Concentrator Project*."[1404] The Claimant submits that Mr. Tovar's assertion is unsupported and contradicted by

[1397] Claimant's Reply, ¶ 158 (d).
[1398] Claimant's Reply, ¶ 158 (d); MINEM, Report No. 2004-2005-MEM/DM dated 8 November 2005 (**CE-519**).
[1399] Claimant's Reply, ¶ 158 (e); Tovar I (**RWS-3**), ¶ 64; Polo I (**RWS-1**), ¶ 39.
[1400] Claimant's Reply, ¶ 158 (e); MINEM, Report No. 077-2008-MEM-DGM dated 29 January 2008 (**CE-573**); SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments dated 31 March 2010 (**CE-38**), p. 34.
[1401] Claimant's Reply, ¶ 158 (f); Isasi I (**RWS-2**), ¶ 57.
[1402] Claimant's Reply, ¶ 158 (f).
[1403] Claimant's Reply, ¶ 158 (g); Isasi I (**RWS-2**), ¶ 65.
[1404] Claimant's Reply, ¶ 158 (g); Tovar I (**RWS-3**), ¶ 67.

the evidence. The presentation is undated, and there is no documentary evidence that would show it was presented in the Roundtable discussions.[1405] Mr. Tovar alleges it was made during "*the sessions in June 2006,*" *i.e.*, either the 23 June 2006 session or the 29 June 2006 session, but Mr. Tovar was only present for the 23 June 2006 session.[1406] The minutes of that session make clear that the issue of mining royalties was not discussed at that meeting, but rather, reserved for the later sessions; they note that the parties "*will discuss the applicability of mining royalties to investments in Cerro Verde II [i.e., the Concentrator]*."[1407] Contemporaneous press reports also confirm that following the first meeting, Arequipa leaders who had attended the meeting "*demanded that the Government order the payment of the mining royalties of Cerro Verde I and II,*" making clear that the Arequipa delegation came away from the meeting with the understanding that SMCV would pay no royalties.[1408] Ms. Torreblanca explains that she personally attended the 29 June session and no such presentation was made during that meeting.[1409] Further, she was briefed on the 23 June session by her colleagues that attended in person, who did not inform her of any presentation or statements by MINEM of the kind described by Mr. Tovar, as they would have done, given that those statements would have been a clear departure from MINEM's representations to SMCV up to that point and the very purpose of the Roundtable discussions was to obtain contributions from SMCV to compensate for its use of stability guarantees.[1410]

- The Respondent also does not dispute that Government officials continued to confirm that stability guarantees applied to concessions and mining units even after SUNAT issued its initial assessments against SMCV.[1411] Ms. Torreblanca explains that multiple officials she spoke to after receiving SUNAT's assessments and Mr. Isasi's June 2006 Report confirmed that SMCV's position regarding the scope of stability guarantees under the Mining Law and Regulations was correct. These officials include Marisol Guiulfo, the Vice-Minister of Economy, and Liliana Chipoco, MEF's General Director of Public Revenue Policy.[1412] Moreover, as late as 2012, long after SUNAT issued its first

[1405] Claimant's Reply, ¶ 158 (g); MINEM, "Profit Reinvestment and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**).
[1406] Claimant's Reply, ¶ 158 (g); Congress, Pro-Investment Commission, Minutes of the Session of 23 June 2006 (**CE-537**); Meeting Minutes, Proinversión Commission, Congress dated 29 June 2006 (**RE-51**).
[1407] Claimant's Reply, ¶ 158 (g); Congress, Pro-Investment Commission, Minutes of the Session of 23 June 2006 (**CE-537**).
[1408] Claimant's Reply, ¶ 158 (g); "Arequipa and Cerro Verde Authorities Seek Solutions," *El Heraldo* dated 28 June 2006 (**CE-540**), p. 2; Torreblanca I (**CWS-11**), ¶ 53.
[1409] Claimant's Reply, ¶ 158 (g); Torreblanca II (**CWS-21**), ¶ 34.
[1410] Claimant's Reply, ¶ 158 (g); Torreblanca II (**CWS-21**), ¶¶ 34-35.
[1411] Claimant's Reply, ¶ 158 (h).
[1412] Claimant's Reply, ¶ 158 (h); Torreblanca I (**CWS-11**), ¶ 81; Torreblanca II (**CWS-21**), ¶ 44.

Royalty Assessment against SMCV, SUNAT issued a report, authored by Ms. Chipoco, which repeatedly confirmed that "*mining-activity owners that have signed agreements on guarantees and measures to promote investment under the General Mining Law will enjoy a stabilized tax system applicable solely to the concession or economic-administrative unit for which said agreement has been signed*."[1413]

908. In response to the Respondent's argument that SMCV "*should have known*" the Respondent's position on the scope of stability guarantees because SMCV allegedly could have watched on the Congress's CCTV two presentations given by MINEM officials before a Congressional Committee and a Congressional Working Group in which they allegedly stated the Government's new position,[1414] the Claimant notes:

- The Respondent does not provide any evidence that these sessions were broadcast to the public when it asserts that they were "*transmitted via a closed circuit television system*."[1415] The Respondent has also failed to provide any evidence that the sessions of the Committee and the Working Group were open to the public. Moreover, SMCV did not receive any invitation to attend these meetings.[1416]
- The Claimant submits that it is incorrect that Minister Sánchez Mejía presented the Government's novel position at his June 2005 presentation.[1417] In addition, on the same day that Mr. Isasi spoke before the Congressional Working Group in May 2006, several other Government officials stated before the Energy and Mines Commission that the stability guarantees applied to concessions or mining units.[1418]

[1413] Claimant's Reply, ¶ 158 (h); SUNAT, Report No. 084-2012-SUNAT/4B0000 dated 13 September 2012 (**CE-883**).
[1414] Claimant's Reply, ¶ 159.
[1415] Claimant's Reply, ¶ 159 (a); Isasi I (**RWS-2**), ¶ 51.
[1416] Claimant's Reply, ¶ 159 (a).
[1417] Claimant's Reply, ¶ 159 (b); MINEM, 2006 Annual Mining Report dated August 2007 (**CE-968**); MINEM, 2007 Annual Mining Report dated February 2008 (**CE-970**); Felipe Isasi, Mining in Peru dated September 2008 (**CE-972**); Bravo-Picón I (**RER-3**), ¶ 42; ProInversion Manual dated 2016 (**CE-1004**); ProInversíon, Terms for International Public Contest No. PRI-80-2003, Las Bambas - Apurimac Department dated 24 August 2004 (**CE-939**); ProInversíon, Terms for International Public Contest, Minero Magistral dated September 2010 (**CE-980**); ProInversíon, Terms for International Public Contest, Yacimientos Cupriferos de Michiquillay dated January 2018 (**CE-1010**).
[1418] Claimant's Reply, ¶ 159 (b); Congressional Energy and Mines Commission, Session Transcript dated 3 May 2006 (**CE-963**).

(2) The Respondent's position

909. The Respondent argues that it did not breach its FET obligation under Article 10.5 of the TPA through inconsistent and non-transparent behavior.[1419]

910. With respect to the applicable standard, the Respondent submits that the Claimant has failed to prove that there is an independent obligation in customary international law for the State to be consistent and transparent.[1420] The tribunals in *Crystallex v. Venezuela*, *Gold Reserve v. Venezuela*, and *Deutsche Telekom v. India* cited to among others by the Claimant did not consider FET provisions limited to the MST. The paragraphs from *Windstream v. Canada* to which Claimant cites do not discuss consistency and transparency. In *Metalclad v. Mexico*, while the tribunal did both consider a FET provision limited to the MST and find a violation of said provision because of a lack of transparency, the Claimant fails to disclose that the reviewing court, in part, set aside the award because it rejected the tribunal's determination that there was a transparency obligation in Chapter 11 of NAFTA.[1421] In any event, the Respondent states that mere inconsistency or some lack of transparency, on their own, do not breach a FET obligation; much more is required to approach the level of gross arbitrariness or some other specific FET element.[1422] The Respondent submits that when tribunals consider the purported inconsistency of State conduct with respect to the FET standard, their analysis is often framed in terms of "*arbitrary*" or "*unjustifiable*" acts, which implies State conduct far more severe and reproachable than mere "*inconsistency*."[1423] Likewise, a high threshold must be met to establish a breach with respect to transparency. According to the Respondent, the transparency requirement "*cannot mean that [the State] has to act under complete disclosure of any aspect of its operation. It*

[1419] Respondent's Counter-Memorial, ¶¶ 688 *et seq*.; Respondent's Rejoinder, ¶¶ 988 *et seq*.; Respondent's Post-Hearing Brief, ¶ 250.
[1420] Respondent's Counter-Memorial, ¶ 634.
[1421] *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529, Supplementary Reasons for Judgment of the Honourable Mr. Justice Tysoe dated 31 October 2001 (**RA-46**), ¶¶ 70-72.
[1422] Respondent's Rejoinder, ¶ 955.
[1423] Respondent's Counter-Memorial, ¶ 658; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008 (**RA-57**), ¶ 602; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability (**CA-163**), ¶ 284; *Bosh International, Inc and B & P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award dated 25 October 2012 (**RA-77**), ¶ 212.

rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities."[1424]

911. In any event, the Respondent disputes that it acted with a lack of transparency in its dealings with SMCV.[1425] The Respondent's interpretation of the scope of the 1998 Stability Agreement has been consistent and public and the Claimant's claim must fail for this reason.[1426] According to the Respondent, the Claimant misconstrues (or ignores) key facts which, considered as a whole, show that the Respondent was more than sufficiently transparent with SMCV regarding the scope of the 1998 Stability Agreement.[1427]

912. According to the Respondent, it was transparent in one of the most open ways, *i.e.,* through its public, even televised, statements to key Committees of Peru's Congress.[1428] In addition to the June 2005 presentation to Congress, in May 2006, Legal Director Mr. Isasi appeared before the Energy and Mines Congressional Committee to explain the scope of mining stabilization agreements and, in particular, this time they also specifically discussed the scope of the 1998 Stability Agreement. Mr. Isasi explained why the reinvestment benefit did apply to SMCV's Leaching Project, but not to SMCV's Concentrator Project—namely, that the latter was a new and different project from the Leaching Project, which was the investment project that had actually been stabilized in 1998.

913. Specifically, the presentation stated that "[s]tability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession."[1429] Thus, SMCV and the Claimant were, or at the very least should have been, aware of the Respondent's position before the 2008 date the Claimant alleges in these proceedings. The Respondent adds that the Claimant admits that SMCV was aware of Minister Sánchez's public statements

[1424] Respondent's Counter-Memorial, ¶ 660, citing *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award dated 8 December 2016 (**RA-78**), ¶ 628.
[1425] Respondent's Counter-Memorial, ¶¶ 688 *et seq.*; Respondent's Rejoinder, ¶¶ 988 *et seq.*
[1426] Respondent's Counter-Memorial, ¶ 689.
[1427] Respondent's Rejoinder, ¶ 988.
[1428] Respondent's Counter-Memorial, ¶ 692.
[1429] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated May 2006 (**RE-3**), slides 8, 12.

to the press that the Concentrator would not be stabilized in or around November 2005.[1430]

914. According to the Respondent, there is also no basis for the Claimant's assertion that soliciting or accepting voluntary contributions and GEM payments was any kind of confirmation by the State that SMCV enjoyed stability for any investments in its entire mining unit (as opposed to just the investment project identified in the 1998 Stability Agreement).[1431] Neither those programs nor SMCV's participation in them changed the scope of the 1998 Stability Agreement, and Peru did nothing unfair or inconsistent in creating or growing the programs.

915. In relation to the Claimant's points made regarding alleged inquiries from Ms. Torreblanca to MINEM's Director General of Mining and to MEF, the Respondent submits that neither MINEM nor MEF affirmed Ms. Torreblanca's alleged understanding that providing voluntary contributions and making GEM payments meant that all mining investments of SMCV would be exempt from paying royalties.[1432]

916. According to the Respondent, any transparency obligation under Article 10.5 "cannot mean that it has to act under complete disclosure of any aspect of its operation."[1433] The question would be "*whether the State acted secretively to conceal its plans or announced those plans openly and with reasonable explanation and detail*."[1434]

917. The Respondent denies the Claimant's assertion that the Respondent "*withheld key documents from SMCV*". According to the Respondent, the documents relied upon by the Claimant (*i.e.,* the April 2005 Report, the June 2006 Report, and two letters that Minister Sánchez Mejía wrote to Congressman Oré in October 2005 and to Congressman Diez Canseco in November 2005) all show that the Respondent has been consistent in its interpretation of the 1998 Stability Agreement.[1435] In any event, the Respondent was under no obligation to disclose these particular documents to SMCV. The Respondent is not obligated to turn over every piece of paper it generates that has any bearing on SMCV's or the Claimant's investment. The Respondent's only

[1430] Respondent's Counter-Memorial, ¶ 693; Claimant's Memorial, ¶ 381 (a).
[1431] Respondent's Counter-Memorial, ¶ 694.
[1432] Respondent's Counter-Memorial, ¶ 695.
[1433] Respondent's Rejoinder, ¶ 989, citing *Urbaser v. Argentina*, Award (**RA-78**), ¶ 628.
[1434] Respondent's Rejoinder, ¶ 989, citing *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award dated 4 September 2020 (**RA-154**), ¶ 418.
[1435] Respondent's Rejoinder, ¶ 991.

obligation was to not hide its interpretation of the 1998 Stability Agreement. According to the Respondent, the evidence shows that the Respondent did not hide or withhold its interpretation of the 1998 Stability Agreement from SMCV or anyone else.[1436] In addition, the Respondent contends that the Claimant admitted in its Memorial that SMCV was aware of Minister Sánchez's public statements to the press that the Concentrator would not be stabilized in or around November 2005 and that "*[o]ne of [Ms. Chappuis'] colleagues, César Polo*," *i.e.*, her boss, took "*the position that the Concentrator would have to pay royalties*" (which the Claimant says SMCV disregarded on the grounds that it was supposedly "*politically motivated*"). These facts, including the Claimant's own admissions, are fatal to its transparency claim.[1437]

918. The events relied on by the Claimant do not support the Claimant's argument, either. Specifically:

- The Claimant relies on an 8 March 2005 meeting at a conference in Toronto. However, during that meeting, Mr. Tovar told Phelps Dodge representatives that SMCV would have to pay royalties on the Concentrator, because it was not stabilized. The Claimant, without any direct evidence, argues that Mr. Tovar's testimony is untrue.[1438]
- The Claimant also relies on a March 2005 letter from SMCV to SUNAT and claims that "*Peru and Mr. Cruz do not contest that SUNAT never responded to the letter and that Mr. Cruz did not contradict Ms. Torreblanca's explanation*."[1439] However, the Claimant's assertion is misleading because in February 2005, SUNAT's Regional Intendent for Arequipa, Mr. Haraldo Cruz, sent a letter to SMCV with instructions on how to declare and pay royalties,[1440] and, on March 4, 2005, SMCV asserted in response that it was not obliged to pay royalties, since it was exempted by the 1998 Stability Agreement.[1441] SMCV's Vice President Ms. Torreblanca met with Mr. Cruz to communicate SMCV's understanding of the 1998 Stability Agreement shortly thereafter.[1442] As Mr. Cruz explains in his witness statement, he did not confirm Ms. Torreblanca's interpretation regarding the scope of the 1998 Stability Agreement during that meeting.[1443] If SMCV wanted to confirm its

[1436] Respondent's Rejoinder, ¶ 992.
[1437] Respondent's Rejoinder, ¶ 993.
[1438] Respondent's Rejoinder, ¶ 995.
[1439] Claimant's Reply, ¶ 158 (a).
[1440] Letter from SUNAT to SMCV dated 17 February 2005 (**CE-482**).
[1441] Letter from SMCV to SUNAT, Letter No. SMCV-AL-279/2005 dated 4 March 2005 (**CE-486**).
[1442] Cruz II (**RWS-14**), ¶ 22.
[1443] Cruz II (**RWS-14**), ¶¶ 2, 22.

interpretation, it needed to make such a request in writing. It did not. In any case, the fact that Mr. Cruz did not confirm Ms. Torreblanca's interpretation of the 1998 Stability Agreement cannot be understood as an endorsement of Ms. Torreblanca's interpretation. The Government informed SMCV on numerous occasions that SMCV's Concentrator Plant was not covered by the Agreement.[1444]

- The Claimant also relies on the Roundtable Discussions, which took place on 23 June, 29 June, and 10 July 2006.[1445] As Mr. Tovar discusses in his witness statement, during the 23 June 2006 meeting, MINEM officials gave a presentation confirming that "*stability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or the Concession*."[1446] The Claimant without any direct evidence argues that this presentation did not happen, but those arguments are without merit (and, in fact, the presentation was handed out to meeting participants, including representatives of SMCV).[1447]

919. According to the Respondent, the Claimant cannot and does not point to any past arbitral decision that would support its position that a State can breach a transparency obligation where the State has publicly disclosed the information (even if not to the investor directly, which is not the case here). Even if that were not the case, the evidence shows that Peruvian officials did explicitly inform SMCV of the State's interpretation of the 1998 Stability Agreement on multiple occasions and the Claimant has admitted that SMCV was aware of the State's position. The Respondent submits that the evidence shows that the Respondent satisfied any reasonable obligation of transparency towards SMCV. MINEM officials (i) directly informed SMCV of its interpretation of the 1998 Stability Agreement and (ii) on multiple occasions, publicly stated the Respondent's interpretation, including before Congress. There was no information shortfall here, much less one that could come anywhere near constituting Treaty-breaching unfair or inequitable treatment.[1448]

[1444] Respondent's Rejoinder, ¶ 995. See also Table 1 at ¶ 305.
[1445] Proinversión Congressional Committee, Meeting Minutes dated 29 June 2006 (**RE-51**); "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay 13 Million," *El Heraldo* dated 10 July 2006 (**CE-541**).
[1446] Tovar I (**RWS-3**), ¶ 67; MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 15.
[1447] Respondent's Rejoinder, ¶ 995.
[1448] Respondent's Rejoinder, ¶¶ 996-997.

(3) The Non-Disputing Party's position

920. According to the NDP, the concept of "*transparency*" has not crystallized as a component of FET under customary international law giving rise to an independent host-State obligation.[1449] The NDP is aware of no general and consistent State practice and *opinio juris* establishing an obligation of host State transparency under the minimum standard of treatment.[1450]

(4) The Tribunal's analysis

921. The Tribunal notes that the Parties disagree on whether transparency is a separate component of the FET standard under customary international law. The NDP has also opined on the issue. The Tribunal is satisfied to leave this issue open as even under the Claimant's standard, the Tribunal does not find that the Respondent's conduct amounted to a breach of the FET standard.

922. The Claimant argues that a State violates the minimum standard of FET "*if it fails to act with reasonable consistency and transparency in the treatment of foreign investments*."[1451] According to the Claimant, the Tribunal should assess Peru's conduct as a whole under the FET standard.[1452] The Claimant submits that the Respondent completely lacked transparency, in circumstances were the lack of transparency was misleading, and that this breached the FET standard.[1453] The Tribunal, thus, proceeds on the basis of this standard.

923. The Tribunal finds that there was no complete lack of transparency, as the Claimant argues. The Tribunal reiterates its finding (i) that the Respondent did not breach the 1998 Stability Agreement, (ii) that the Respondent consistently interpreted the 1998 Stability Agreement, and (iii) that SMCV itself had doubts as to whether the Concentrator was covered by the 1998 Stability Agreement (see above, Section V.A.4.).

924. Crucially, the Tribunal does not find that the Respondent withheld its interpretation of the 1998 Stability Agreement from the Claimant and SMCV. The Tribunal does not find

[1449] NDP Submission, ¶ 30.
[1450] NDP Submission, ¶ 30.
[1451] Claimant's Memorial, ¶ 364.
[1452] Claimant's Reply, ¶ 140.
[1453] Claimant's Reply, ¶ 140.

that the evidence on the record suggests that the Government "*confirm[ed] through its conduct SMCV's understanding that the Concentrator was covered*."[1454]

925. The Tribunal is rather convinced that it was clear both before and after the investment that the Concentrator was not covered by the 1998 Stability Agreement. The Tribunal comes to this conclusion *inter alia* on the basis of the 2002 SUNAT Report,[1455] the DGM's letter to SMCV of September 2003,[1456] the June 2005 televised presentation before Congress,[1457] the publicly reported statement by the Minister of Energy and Mines that the expansion of primary sulfides in the Cerro Verde mine was subject to royalties in September 2005,[1458] Mr. Isasi's televised presentation before Congress in May 2006,[1459] and Congressman Diez Canseco's draft bill of June 2006, which referred to the Minister of Energy and Mines' November 2005 letter.[1460]

926. The Tribunal notes that SMCV could have sought assurances from MINEM in writing or clarifications from SUNAT regarding the scope of the 1998 Stability Agreement, but refrained from doing so.[1461]

927. The Tribunal also finds that the Roundtable Discussions during which MINEM made clear that the Concentrator "*will pay royalties when it enters into production*"[1462] do not document a lack of transparency. While the Parties dispute whether the MINEM presentation was actually held during the meeting on 23 June 2006, the Tribunal finds that the Claimant has not produced compelling evidence that this presentation was not made. Rather, the Claimant relies on the evidence of Ms. Torreblanca, who was not present during the meeting.[1463] By contrast, the Respondent has presented both an amicus brief by an attendee of the Roundtable Discussions, who states that the

[1454] Claimant's Memorial, ¶ 381.
[1455] SUNAT, Report No. 263-2002-SUNAT/K00000 dated 23 September 2002 (**RE-26**).
[1456] MINEM, Report No. 509-2003-MEM-DGM-TNO dated 5 September 2003 (**CE-398**).
[1457] Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes dated 8 June 2005 (excerpts) (**RE-29**).
[1458] "Minister: Cerro Verde Expansion Subject to Royalty," *Business News Americas* dated 20 September 2005 (**CE-511**).
[1459] Audio of the Cerro Verde Working Group Before the Energy and Mines Congressional Committee dated 3 May 2006 (**RE-103**).
[1460] Congress, Draft Bill No. 14792/2005-CR dated 21 June 2006 (**CE-536**), p. 9.
[1461] Hearing Transcript, Day 2, p. 628, line 12 to p. 630, line 12.
[1462] MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project" dated June 2006 (**RE-107**), slide 15.
[1463] Torreblanca II (**CWS-21**), ¶¶ 33 *et seq*.

presentation was made,[1464] as well as the testimony of Mr. Tovar.[1465] In any event, even if this presentation had not been given, the Tribunal finds that the case does not hinge on this evidence, as the presentation is only one further example among many demonstrating that there was no lack of transparency on the part of the Respondent.

928. Finally, with respect to the voluntary contributions that SMCV made, the Tribunal finds that the Claimant has not shown how it was induced into making such payments. In any event, the Respondent cannot be held liable for any errors in judgment committed by SMCV or the Claimant when it made its payments. Moreover, it is undisputed between the Parties that SUNAT reimbursed the relevant GEM amounts for Q4 2012 – Q4 2013 when it was requested to do so.[1466] It only denied the reimbursement of the GEM payment for Q4 2011 – Q3 2012 on the grounds that the claim for reimbursement was time-barred.

929. The Claimant has, thus, not shown to the Tribunal's satisfaction that the Respondent breached its FET obligations under the TPA under this account.

d) The Claimant's claim that the Tax Tribunal committed serious due process violations

(1) The Claimant's position

930. The Claimant claims that the Respondent breached Article 10.5 of the TPA because the Tax Tribunal committed serious due process violations.[1467]

931. With respect to the applicable standard, the Claimant submits that tribunals have confirmed that an absence of fair procedure or a finding of serious procedural shortcoming in administrative or judicial proceedings violates the minimum standard of treatment. According to the Claimant, due process forms an essential part of the obligation of FET, which is intended "*to ensure that the legal process governing the protected rights as a whole, including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights*."[1468] The Claimant refers in particular to *TECO v. Guatemala*, *OAO Tatneft v.*

[1464] FREDICON's Amicus in Dante Martínez's Complaint to SUNAT dated 21 May 2008 (**RE-233**), p. 3, Annex A-6.
[1465] Hearing Transcript, Day 6, p. 1601, line 1 to p. 1601, line 3; Tovar II (**RWS-10**), ¶ 104.
[1466] See for example: Claimant's Reply, ¶ 204; Respondent's Rejoinder, ¶ 1034.
[1467] Claimant's Memorial, ¶¶ 384 *et seq.*; Claimant's Reply, ¶¶ 163 *et seq.*
[1468] *OAO Tatneft v. Ukraine,* PCA Case No. 2008-08, Award dated 29 July 2014 (**CA-211**), ¶ 395.

Ukraine, *Dan Cake v. Hungary*, and *Lemire v. Ukraine*.[1469] According to the Claimant, a due process violation does not necessarily require the finding of a denial of justice.[1470] In any event, tribunals have repeatedly recognized that the cumulative effect of repeated procedural shortcomings, involving disregard for the individual circumstances of a particular case, flagrant violations of procedure or law, including those designed to ensure due process, and biased decision-makers, amounts to breaches of the fair and equitable treatment obligation to afford due process or constitutes a "*denial of justice*."[1471]

932. The Claimant argues that tribunals have repeatedly recognized that the due process violations involving the presence of a biased decision-maker, interference with a party's right to be heard, total disregard for the individual circumstances of a particular case, use of "*unjustified*" procedural obstacles to avoid hearing the merits, and excessive delays in proceedings, may give rise to breaches of the fair and equitable treatment obligation in the context of administrative action, and that these violations may further be exacerbated by defects in the "*general legal framework*."[1472]

933. The Claimant argues that the Tax Tribunal committed serious due process violations.[1473] In particular, the Claimant sustains that the Tax Tribunal committed procedural irregularities in the 2006-2007 and 2008 Royalty Cases, and in the 2009, 2010-2011 and Q4 2011 Royalty Cases.

- **The Claimant's claim that there were procedural irregularities in the 2006-2007 and 2008 Royalty Cases**

934. The Claimant argues that the Tax Tribunal President Ms. Olano unlawfully interfered to take control of SMCV's challenges to the 2006-2007 and 2008 Royalty

[1469] Claimant's Memorial, ¶ 365, referring to: *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award dated 19 December 2013 (**CA-202**), ¶¶ 682-683, 711; *OAO Tatneft v. Ukraine*, Award (**CA-211**), ¶¶ 265-268, 402; *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability dated 24 August 2015 (**CA-217**), ¶¶ 143-146; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability (**CA-163**), ¶¶ 293-296, 299, 309, 316, 343.
[1470] Claimant's Reply, ¶ 143.
[1471] Claimant's Reply, ¶ 143 (d), referring to: *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability (**CA-217**), ¶¶ 142-146; *OAO Tatneft v. Ukraine*, Award (**CA-211**), ¶¶ 395, 402-404; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012 (**CA-195**), ¶¶ 479-480, 487-491; *TECO v. Guatemala*, Award (**CA-202**), ¶¶ 458, 473, 682-683, 711.
[1472] Claimant's Memorial, ¶ 385, referring to: *Deutsche Bank v. Sri Lanka*, Award (**CA-195**), ¶¶ 479-480, 487-491; *Metalclad v. Mexico*, Award (**CA-78**), ¶¶ 92, 97-99; *OAO Tatneft v. Ukraine*, Award (**CA-211**), ¶¶ 402-404; *Dan Cake v. Hungary*, Decision on Jurisdiction and Liability (**CA-217**), ¶¶ 142, 145; *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2007- 02/AA277, Partial Award on the Merits dated 30 March 2010 (**CA-167**), ¶ 262; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability (**CA-163**), ¶ 315.
[1473] Claimant's Memorial, ¶¶ 384 *et seq.*; Claimant's Reply, ¶¶ 163 *et seq.*

Assessments.[1474] According to the Tax Tribunal's Rules of Procedure, the Tax Tribunal President is responsible for organizing and supervising the administrative and technical functions of the Tribunal, presiding over the Plenary Chamber, and is responsible for the Tax Tribunal budget. However, the Tax Tribunal President has no role in deliberating or resolving individual challenges. Instead, challenges must be decided, and the corresponding resolutions must be prepared, exclusively by the *vocales* and their support staff within the Chamber.[1475] Despite this limitation, evidence that SMCV first received in 2021 through freedom of information requests demonstrates that the President's Office directly interfered to resolve SMCV's challenges in the 2006-2007 and 2008 Royalty Cases in favor of the Government. Specifically, the evidence shows that President Olano improperly tasked her assistant with drafting the resolution in the 2008 Royalty Case and ensured that this resolution would be rendered before the resolution in the earlier-filed 2006-2007 Royalty case. The evidence also demonstrates that President Olano then pressured the *vocales* who were in charge of the 2006-2007 Royalty Case to copy-paste the 2008 Royalty Case resolution in the 2006-2007 Royalty Case.

935. According to the Claimant, contemporaneous internal communications confirm that President Olano charged her assistant Ms. Villanueva with drafting the resolution of the 2008 Royalty Case.[1476] The Claimant asserts that the Respondent concedes that Ms. Villanueva drafted the 2008 resolution at the behest of President Olano, but that the Respondent contends that this improper interference was a "*routine administrative act*."[1477] Second, following President Olano's intervention, the 2008 Royalty Case proceeded on a fast track, ensuring that Ms. Villanueva's resolution would be the first

[1474] Claimant's Memorial, ¶¶ 386 *et seq*.
[1475] MEF Internal Regulations, Ministerial Resolution No. 213-2020/EF/41 dated 24 July 2020 (**CA-250**), Article 23; *see also* Hernández I (**CER-3**), ¶¶ 186-187.
[1476] Claimant's Memorial, ¶ 390; Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva dated 22 March 2013, 4:02 PM PET (**CE-648**); SUNAT, Resolution No. 055-014-0001290 (2006-2007 Royalty Assessment) dated 31 March 2010 (notified to SMCV 22 April 2010) (**CE-38**); SUNAT, Resolution No. 055-014-0001394 (2008 Royalty Assessment) dated 31 January 2011 (notified to SMCV 17 February 2011) (**CE-46**); Oral Hearing Report Record No. 0286-2013-EF/TF, April 5, 2013 (2006/07 Royalty Case) (**CE-79**); Oral Hearing Report Record No. 0411-2013-EF/TF dated 2 May 2013 (2008 Royalty Case) (**CE-82**); Email from Úrsula Villanueva Arias to Gabriela Bedoya of SUNAT dated 24 April 2013, 2:37 PM PET (**CE-81**); Email from Gabriela Bedoya of SUNAT to Úrsula Villanueva Arias dated 24 April 2013, 2:55 PM PET (**CE-81**); Tax Tribunal Decision, No. 08252-1-2013 dated 21 May 2013 (**CE-83**), p. 24; Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia dated 21 May 2013, 10:47 AM PET (**CE-651**); Email from Úrsula Villanueva Arias to Licette Isabel Zuñiga Dulanto dated 29 December 2014, 5:00 PM PET (**CE-679**); Hernandez I (**CER-3**), ¶¶ 199-202; Estrada I (**CWS-6**), ¶¶ 25-26, 29-30, 33-35, 44, 48, 59.
[1477] Claimant's Reply, ¶ 166; Respondent's Counter-Memorial, ¶¶ 302-303,700, 705; Olano Silva I (**RWS-5**), ¶¶ 46-50.

issued, even though the 2006-2007 Royalty Case was the first-filed case and had been pending before the Tax Tribunal nine months longer than the 2008 Royalty Case.[1478] According to the Claimant, the Respondent's assertion that such course of events cannot be attributed to President Olano's interference is contradicted by contemporaneous emails.[1479] President Olano then seemingly imposed the flawed resolution in the 2008 Royalty Case on the *vocales* of Chamber 10, who issued a copy-pasted resolution in the 2006-2007 Royalty Case only nine days later.[1480] According to Articles 103 and 129 of the Tax Code and Article 6.1 of the Law of General Administrative Procedure, the Tax Tribunal Chambers are required to independently deliberate and decide each case individually on the basis of the facts and arguments before them.[1481] Although some informal consultation between Chambers is permissible this does not absolve *vocales* of their "*indispensable duty to deliberate among themselves*" and to decide each individual case "*impartially and independently*," as Prof. Hernández explains.[1482] The Claimant submits that contemporaneous internal emails further demonstrate that President Olano pressured Chamber 10 to adopt Ms. Villanueva's resolution.[1483]

- **The Claimant's claim that there were procedural irregularities in the 2009, 2010-2011 and Q4 2011 Royalty Cases**

936. With regard to the 2009, 2010-2011 and Q4 2011 Royalty Cases, the Claimant argues that the Tax Tribunal reassigned the 2010-2011 Royalty Case to a *vocal ponente* with a clear conflict of interest, Mr. Ninacondor, denying SMCV's right to an impartial

[1478] Estrada I (**CWS-6**), ¶ 23 (citing Law of General Administrative Procedure dated 25 January 2019 (**CA-18**), Article 66.1); Hernández I (**CER-3**), ¶¶ 188-189, 201-202; Record of Oral Hearing No. 0286-2013-EF/TF dated 9 April 2013 (**CE-79**); Notification of Oral Hearing No. 0411-2013-EF/TF dated 5 April 2013 (**CE-80**); SMCV, Challenge to Tax Tribunal, 2006/07 Royalty Assessments dated 12 May 2010 (**CE-40**); SMCV, Challenge to Tax Tribunal, 2008 Royalty Assessments dated 10 March 2011 (**CE-49**); Tax Tribunal Decision, No. 08252-1-2013 (2008 Royalty Case) dated 21 May 2013 (**CE-83**); Notification of Oral Hearing No. 0411-2013-EF/TF dated 9 April 2013 (**CE-80**); Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 22 May 2013, 8:58 AM PET (**CE-652**).

[1479] Claimant's Reply, ¶ 167.

[1480] Tax Tribunal Resolution No. 08997-10-2013 dated 30 May 2013 (**CE-88**); Tax Tribunal Resolution, No. 08252-1-2013 dated 21 May 2013 (**CE-83**).

[1481] Tax Code (**CA-14**), Articles 103, 129; Consolidated Uniform Text of the Law on General Administrative Procedure (**CA-18**), Article 6.1; Estrada I (**CWS-6**), ¶¶ 30-31; Hernandez I (**CER-3**), ¶ 190.

[1482] Hernández I (**CER-3**), ¶ 206.

[1483] Claimant's Reply, ¶ 167, referring to: Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 21 May 2013, 10:05 AM PET (**CE-650**); Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 22 May 2013, 8:58 AM PET (**CE-652**); Email from Licette Isabel Zúñiga Dulanto to Zoraida Alicia Olano Silva dated 22 May 2013, 9:55 AM PET (**CE-653**); Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zuñiga Dulanto dated 24 May 2013, 10:23 AM PET (**CE-655**); Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva dated 22 May 2013, 11:09 AM PET (**CE-992**).

decision-maker.[1484] The Claimant states that the Respondent concedes this, notwithstanding the fact that he had worked in the very SUNAT department that confirmed the 2010-2011 Royalty Assessments and made an entry of appearance for SUNAT before the Court of Appeal in the 2006-2007 Royalty Case.[1485]

937. According to the Claimant, when SMCV requested that Mr. Ninacondor recuse himself as the *vocal ponente* for the 2010-2011 Royalty Case due to his conflict of interest, President Olano and her staff disregarded the Tax Tribunal's Rules of Procedure to push through a decision that baselessly denied SMCV's request.[1486] The Claimant notes that the Respondent asserts that President Olano "*simply followed the normal procedure*" when she sent to the *vocales* in advance of the Plenary Session a draft resolution announcing that the Plenary Chamber had voted to reject SMCV's recusal request, despite the fact that the session had not yet met and the *vocales* not yet voted.[1487] The Claimant submits that President Olano's draft went far beyond simply framing the parties' arguments and relevant points for debate and included exactly how President Olano expected the *vocales* to vote.[1488]

938. According to the Claimant, with Mr. Ninacondor in place, Chamber 1 moved swiftly, holding its hearing in the 2010-2011 Royalty Case the same day Chamber 2 held its hearing in the 2009 Royalty Case, despite being filed five years later, and ultimately issuing its resolution only one week after Chamber 2.[1489] In each of these cases, the Tax Tribunal disregarded its duty to independently consider and decide individual cases on

[1484] Claimant's Memorial, ¶ 396; MEF, Supreme Resolution No. 013-2018-EF dated 3 May 2018 (**CE-177**), Article 1; Tax Tribunal, Decision No. 06575-1-2018, 2010/11 Royalty Case, dated 28 August 2018 (**CE-194**), p. 41; LinkedIn Profile of M. Victor Mejía Ninacondor, also *available at* https://pe.linkedin.com/in/m-victor-mejia-ninacondor-853b43109 (**CE-227**); Amendment to the Tax Code, Legislative Decree No. 1421 (**CA-238**); Hernández I (**CER-3**), ¶¶ 242, 248.
[1485] Claimant's Reply, ¶ 170.
[1486] Claimant's Memorial, ¶ 397; SMCV Submission Requesting Recusal of Judge Victor Mejía Ninacondor dated 20 June 2018 (**CE-180**), pp. 3-4; Tax Tribunal Rejection of SMCV's Request for Recusal, Minutes of Plenary Council Meeting No. 2018-19 dated 21 June 2018 (**CE-181**); Tax Tribunal, Plenary Chamber Order No. 2005-08 dated 11 April 2005 (**CA-120**), Section 3.1, p. 13; Email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 20 June 2018, 8:32 PM PET (**CE-713**); Acta de Sala Plena – Abstención vs MN Cerro Verde, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva dated 20 June 2018, 8:32 PM PET (**CE-714**); Email from Zoraida Alicia Olano Silva to the *vocales* dated 21 June 2018, 11:21 AM PET (**CE-717**); Email from Gabriela Márquez Pacheco to Zoraida Alicia Olano Silva dated 21 June 2018, 11:38 AM PET (**CE-719**); Email from Zoraida Alicia Olano Silva to Gabriela Patricia Marquez Pacheco dated 21 June 2018, 11:57 AM PET (**CE-720**); Tax Tribunal Rejection of SMCV's Request for Recusal, Minutes of Plenary Council Meeting No. 2018-19 dated 26 June 2018 (**CE-181**); Hernández I (**CER-3**), ¶¶ 232-235.
[1487] Claimant's Reply, ¶ 171.
[1488] Claimant's Reply, ¶ 171.
[1489] Claimant's Memorial, ¶ 397; Tax Tribunal Notice of Oral Hearing, No. 1170-2018-EF/TF dated 18 July 2018 (2010/11 Royalty Assessments) (**CE-185**); Tax Tribunal Notice of Oral Hearing, No. 1065-2018-EF/TF dated 6 July 2018 (2009 Royalty Assessments) (**CE-183**).

the basis of the facts before it, instead repeatedly copy-pasting significant parts of the flawed 2008 Royalty Case resolution and propagating its serious procedural defects. Specifically, both Chamber 2's resolution in the 2009 Royalty Case and Chamber 1's resolution in the 2010-2011 Royalty Case copied the sections of the resolution drafted by Ms. Villanueva in the 2008 Royalty Case that related to the novel interpretation of the Mining Law nearly verbatim.[1490] The Claimant submits that the Respondent's argument that "*considering prior resolutions […] is in no way an abdication of the duty to independently decide cases*" fails to account for the fact that the 2008 resolution was itself not "*independently*" decided, but drafted by Ms. Villanueva under the direction of President Olano.[1491] Moreover, the Respondent presents no evidence that the *vocales* in the latter cases, including the conflicted *vocal ponente* of the 2010-2011 Royalty Case, ever undertook such an independent deliberation.[1492]

939. After SMCV challenged the Q4 2011 Royalty Case, the case was assigned to Ms. Villanueva, who in the meantime had been promoted to vocal for Chamber 9 as *vocal ponente*.[1493] Ms. Villanueva adopted the novel interpretation limiting stability guarantees "*to a specific investment project that is clearly delimited in the Feasibility Study*" and ruled against SMCV so that SMCV was once again denied the opportunity to have its case properly heard and decided by an impartial decision-maker.[1494] The Claimant notes that the Respondent does not contest that, after the President's administrative assistant, Ms. Villanueva, was promoted to vocal, she was assigned to act as the *vocal ponente* of the Q4 2011 Royalty Case.[1495] In response to the Respondent's allegations to the contrary, the Claimant asserts that the Q4 2011 Royalty Case was not merely a case involving "*repeat parties*" and the same decision-maker in the normal course. Rather, Ms. Villanueva's role in the 2008 Royalty Case, as the President's assistant who drafted the 2008 resolution under the President's direction, was improper, and thus disqualified her from serving as vocal in the Q4 2011 Royalty

[1490] Tax Tribunal Decision No. 06141-2-2018 dated 15 August 2018 (2009 Royalty Case) (**CE-188**), pp. 8-33; Tax Tribunal Decision No. 08252-1-2013 dated 21 May 2013 (2008 Royalty Case) (**CE-83**), pp. 1-21; Tax Tribunal Decision No. 06575-1-2018 dated 28 August 2018 (2010/11 Royalty Case) (**CE-194**), pp. 15-40.
[1491] Claimant's Reply, ¶ 172.
[1492] Claimant's Reply, ¶ 172.
[1493] Tax Tribunal, Resolution No. 10574-9-2019 (Q4 2011 Royalty Case) dated 18 November 2019 (**CE-269**), p. 14.
[1494] Claimant's Memorial, ¶ 399; Tax Tribunal Resolution No. 10574-9-2019, Q4 2011 Royalty Case) dated 18 November 2019 (**CE-269**), p. 6. *Compare id.* with Tax Tribunal, Resolution No. 08252-1-2013 (2008 Royalty Case) dated 21 May 2013 (**CE-83**).
[1495] Claimant's Reply, ¶ 173.

Case. Ms. Villanueva's resolution in the Q4 2011 Royalty Case repeated the same legal argument that she had developed under the direction of President Olano in the 2008 Royalty Case. Contrary to the Respondent's argument, SMCV could not have requested the recusal of Ms. Villanueva in the Q4 2011 Royalty Case because SMCV did not become aware of Ms. Villanueva's role in the 2008 Royalty Case until well after the Tax Tribunal had issued its resolution in the Q4 2011 Royalty Case.[1496]

(2) The Respondent's position

940. The Respondent denies that it breached its FET obligation under Article 10.5 of the TPA through due process violations.[1497]

941. With respect to the applicable standard, the Respondent argues that the standard for denial of justice is high and occurs not where a State makes a mistake, but where a State fails to create and maintain a system of justice that assures that foreign investors do not face injustice and are not deprived of the right to correct an injustice.[1498] The Respondent notes that the Claimant does not appear to be claiming a substantive denial of justice and rather limits its claims to procedural denial of justice.[1499] The Respondent submits that when considering any claim based on acts of the judiciary, it is essential not to lose sight of the bedrock principle that international tribunals do not sit as courts of appeal to hear challenges to or to reverse a respondent state's domestic court's judgments.[1500] As the *RosInvestCo v. Russia* tribunal explained, "*Respondent can only be held liable for denial of justice […] if the Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be adopted in cases of major procedural errors such as lack of due process*."[1501] The Respondent also contends that a number of tribunals have observed that "*the standard of review of the State measure will also vary according to the nature of the decision-making process at issue:*

[1496] Claimant's Reply, ¶ 173; Torreblanca II (**CWS-21**), ¶ 48.
[1497] Respondent's Counter-Memorial, ¶¶ 697 *et seq.*; Respondent's Rejoinder, ¶¶ 998 *et seq.*; Respondent's Post-Hearing Brief, ¶¶ 251 *et seq.*
[1498] Respondent's Rejoinder, ¶ 960.
[1499] Respondent's Counter-Memorial, ¶ 663.
[1500] Respondent's Counter-Memorial, ¶ 664; *Mondev v. USA*, Award (**RA-6**), ¶ 126.
[1501] Respondent's Counter-Memorial, ¶ 664; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award dated 12 September 2010 (**RA-81**), ¶ 279.

administrative proceedings trigger less stringent due process obligations than judicial proceedings."[1502]

942. The Respondent argues that the Tax Tribunal did not commit due process violations.[1503] Specifically, the President of the Tax Tribunal, Ms. Olano, acted in accordance with her responsibilities as President when she distributed resources to the Chamber adjudicating the 2008 Royalty Case. In addition, the Chambers that decided the appeals against SUNAT's 2006-2007, 2009, and 2010 Royalty Assessments independently deliberated the issues before them prior to deciding the cases. Moreover, the Tax Tribunal did not violate SMCV's due process rights by allowing Mr. Ninacondor to participate as a vocal in the 2010-2011 Royalty Case. Finally, the Tax Tribunal acted reasonably in assigning Ms. Villanueva as *vocal ponente* in the Q4 2011 Royalty Case.

943. According to the Respondent, the Claimant has not established a Treaty breach and could not possibly establish one on any version of the events. The Respondent notes that the Claimant has not asserted a denial of justice claim before the Tribunal with respect to the Respondent's judicial decisions (whether of the first-instance Contentious Administrative Courts, the appellate Superior Courts, or the Supreme Court). The Claimant has expressed disagreement with the contents of certain of those decisions. However, the Claimant has not alleged that the Peruvian courts deprived SMCV of its due process rights in violation of the FET obligations under the Treaty; that claim is directed only to the Tax Tribunal. The Respondent argues that the Claimant has a high bar to prove that the Tax Tribunal acted in such an egregious manner as to constitute a denial of justice in breach of the Respondent's obligations under the TPA.[1504]

944. The Respondent claims that the Claimant attempts to construe normal, administrative activities as evidence of nefarious and biased conduct.[1505] Even if the Claimant's speculations were true, this still would be insufficient to meet the very high standard required for a finding of a denial of justice at the administrative level, where the alleged affected party could and did appeal the determinations in court (and where no

[1502] Respondent's Counter-Memorial, ¶ 666, referring to: *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award dated 21 June 2019 (**RA-84**), ¶ 870; *Thunderbird v. Mexico*, Award (**RA-35**), ¶ 200; *Philip Morris Brands Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award dated 8 July 2016 (**RA-76**), ¶ 569; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award dated 27 August 2019 (**CA-245**), ¶ 1319.
[1503] Respondent's Counter-Memorial, ¶¶ 697 *et seq.*; Respondent's Rejoinder, ¶¶ 998 *et seq.*
[1504] Respondent's Counter-Memorial, ¶ 699.
[1505] Respondent's Counter-Memorial, ¶ 700.

allegations have been made that the affected party has been denied justice in the domestic court proceedings). Thus, the alleged breaches of the Tax Tribunal's Rules of Procedure, even if they had occurred, would be insufficient to establish a Treaty breach.[1506]

945. Moreover, the Claimant's claim is also insufficient to amount to a breach of Peru's FET obligations, because the Claimant is complaining about who decided SMCV's 2008, 2006-2007, 2009 and 2010-2011 Royalty Cases, which is, at most, a complaint about independence and impartiality.[1507] The Respondent argues that the due process standard is less stringent with respect to administrative proceedings, particularly with respect to the independence of their adjudicators.[1508] The Respondent refers to the *Glencore v. Colombia* tribunal, which explained that "*in administrative proceedings, […] the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decisionmaker) is often the one who rules on appeal. Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review. The private individual must have an opportunity to have the case revisited, this time by an independent and impartial judge, with the guarantee of a formal adversarial procedure.*"[1509]

946. Moreover, the Respondent submits that SMCV both had and took full advantage of ample opportunities for judicial review of the Tax Tribunal's decisions.[1510] The Claimant has not identified a single case in which a tribunal found an FET violation because of a lack of independence on the part of administrative adjudicators. While the Claimant argues that *Glencore v. Colombia* is distinguishable because the administrative bodies in *Glencore* were operating in accordance with Colombian law while Mr. Ninacondor's failure to recuse was unlawful, the Respondent submits that Mr. Ninacondor was not required to be recused under Peruvian law.[1511] Even assuming *arguendo* that Mr. Ninacondor should have been recused under Peruvian law, that alone is nowhere near sufficient to constitute an FET breach. First, the Claimant's reading of

[1506] Respondent's Counter-Memorial, ¶ 701.
[1507] Respondent's Rejoinder, ¶ 1004.
[1508] Respondent's Rejoinder, ¶ 1005.
[1509] Respondent's Counter-Memorial, ¶ 702, referring to: *Glencore v. Colombia*, Award (**CA-245**), ¶ 1319; See also, *Thunderbird v. Mexico*, Award (**RA-35**), ¶¶ 200-201.
[1510] Respondent's Rejoinder, ¶ 1005.
[1511] Respondent's Rejoinder, ¶ 1006.

Glencore v. Colombia is incorrect; the tribunal did not focus on whether the administrative body was acting in perfect conformity with law, but, rather, the tribunal was making the general point that administrative conduct often involves officials acting as "*investigator, the accuser, and the adjudicator,*" exactly what the Claimant is incorrectly alleging Mr. Ninacondor did. Moreover, in addition to failing to show that Mr. Ninacondor actually did work on the 2010-2011 Royalty Case while at SUNAT, the Claimant has not shown or even alleged that Mr. Ninacondor had any bias against SMCV. According to the Respondent, this is important because the Claimant has a high bar to show a due process or procedural denial of justice claim. The Claimant must show more than a single mistake, which, in any case, the Respondent did not make; rather, it must show that the Respondent failed to create and maintain a system of justice that assures that foreign investors do not face injustice and are not deprived of the right to correct an injustice, which the Claimant has not shown.[1512]

- **The Respondent's position on the alleged procedural irregularities in the 2006-2007 and 2008 Royalty Cases**

947. The Respondent submits that there were no procedural irregularities in the 2006-2007 and 2008 Royalty Cases[1513] and that parts of the Claimant's argument is based on pure speculation.[1514] The evidence shows that President Olano appointed an experienced assistant (*asesora*) to assist Chamber 1 due to staffing shortages, that Ms. Villanueva read the file and gave it independent consideration as one would expect of any law clerk, and that the *vocales* in the respective Chambers considered and decided the cases before them and, at least to some degree, coordinated to ensure that the same taxpayer was treated consistently with respect to the same issue. The Claimant has failed to show any impropriety.[1515]

- **The Respondent's position on the alleged procedural irregularities in the 2009, 2010-2011 and Q4 2011 Royalty Cases**

948. The Respondent states that the Claimant also fails to support its claims with respect to the 2009, 2010-2011, and Q4 2011 Royalty Cases.[1516] According to the Respondent, the

[1512] Respondent's Rejoinder, ¶ 1007; Respondent's Counter-Memorial, ¶ 662; Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts) (**RA-25**), pp. 77, 84-87.
[1513] Respondent's Counter-Memorial, ¶¶ 702 *et seq*.
[1514] Respondent's Rejoinder, ¶ 1000.
[1515] Respondent's Rejoinder, ¶ 1001.
[1516] Respondent's Counter-Memorial, ¶¶ 711 *et seq.*

Claimant relies on unsupported speculation or mischaracterizations that (i) Mr. Ninacondor's work at SUNAT made him biased against SMCV, (ii) President Olano somehow forced otherwise unwilling Chambers to accept her draft Plenary Chamber resolution denying SMCV's request for Mr. Ninacondor's recusal notwithstanding the fact that Chamber 5 evidently felt free to dissent, and (iii) the respective *vocales* did not actually consider SMCV's 2009 and 2010-2011 Royalty challenges, which seemingly conflicts with the Claimant's concern that Mr. Ninacondor was involved in the 2010-2011 Royalty Case. The Respondent submits that it has difficulty articulating what the Claimant's concern might be with Ms. Villanueva working on the Q4 2011 Royalty Case.[1517]

(3) The Non-Disputing Party's position

949. According to the NDP, an area in which customary international law has crystallized to establish a minimum standard of treatment concerns the "*obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*," as expressly addressed in Article 10.5.2(a) of the TPA.[1518]

950. The NDP submits that denial of justice in its historical and customary sense denotes misconduct or inaction of the judicial branch of the government and involves some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.[1519] By constrast, the NDP submits that a domestic system of law that conforms to a reasonable standard of civilized justice and is fairly administered cannot give rise to a complaint by an alien under international law.[1520]

951. Relying on *Loewen v. United States*, the NDP argues that a denial of justice may occur in instances such as when the final act of a State's judiciary constitutes a notoriously unjust or egregious administration of justice which offends a sense of judicial propriety.[1521] The NDP submits that a denial of justice exists where there is, for example, an obstruction of access to courts, failure to provide those guarantees which

[1517] Respondent's Rejoinder, ¶ 1003.
[1518] NDP Submission, ¶ 21.
[1519] NDP Submission, ¶ 23, relying *inter alia* on Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1919), p. 330.
[1520] NDP Submission, ¶ 23.
[1521] NDP Submission, ¶ 24.

are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement.[1522] Corruption in judicial proceedings, discrimination or "*ill-will*" against aliens, and executive or legislative interference with the freedom of impartiality of the judicial process have also constituted instances of a denial of justice. At the same time, erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law. The evolution or development of "*new*" judge-made law that departs from previous jurisprudence within the confines of common law adjudication do not implicate a denial of justice either.[1523]

952. The high threshold required for judicial measures to rise to the level of a denial of justice in customary international law gives due regard to the principle of judicial independence, the particular nature of judicial action, and the unique status of the judiciary in both international and municipal legal systems. As a result, the actions of domestic courts are accorded a greater presumption of regularity under international law than are legislative or administrative acts. As a matter of customary international law, international tribunals will defer to domestic courts interpreting matters of domestic law unless there is a denial of justice.[1524]

953. In this regard, the NDP argues that it is well-established that international arbitral tribunals, such as those established by disputing parties under Chapter 10 of the TPA, are not empowered to be supranational courts of appeal on a court's application of domestic law. Thus, an investor's claim challenging judicial measures under Article 10.5.1 of the TPA is limited to a claim for denial of justice under the customary international law minimum standard of treatment. *A fortiori*, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law.[1525] Accordingly, judicial measures may form the basis of a claim under the customary international law minimum standard of treatment under Article 10.5.1 of the TPA only if they are final

[1522] NDP Submission, ¶ 24, relying *inter alia* on Harvard Research Draft, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, Article 9, 23 AM. J. INT'L L. SP. SUPP. 131, 134 (1929), 178.
[1523] NDP Submission, ¶ 24.
[1524] NDP Submission, ¶ 25.
[1525] NDP Submission, ¶ 26.

and it is proved that a denial of justice has occurred. Were it otherwise, it would be impossible to prevent Chapter 10 tribunals from becoming supranational appellate courts on matters of the application of substantive domestic law, which customary international law does not permit.[1526]

(4) The Tribunal's analysis

954. Article 10.5.2(a) of the TPA expressly provides that FET includes "*the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*."[1527]

955. The Parties disagree as to the applicable standard under Article 10.5 of the TPA, and in particular as to whether the minimum standard of treatment goes beyond the standard of denial of justice. The NDP has also expressed its position on the applicable standard. The Respondent has endorsed that willful disregard for due process is constitutive of arbitrariness and of a violation of FET.[1528] The Claimant argues that an "*absence of fair procedure*" or the finding of a "*serious procedural shortcoming in administrative or judicial proceedings*" are constitutive of a violation of the minimum standard of treatment.[1529] Moreover, the Claimant relies, among others, on the finding of the *OAO Tatneft v. Ukraine* tribunal, which found that the obligation of FET is intended "*to ensure that the legal process governing the protected rights as a whole, including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights*."[1530] In this line, a violation of due process requires the proof of serious procedural shortcomings that are manifestly unfair and unreasonable.[1531] The Tribunal finds that it may leave open the issue of which exact standard applies under the TPA. The Tribunal is satisfied that even under the standard advanced by the Claimant, the Claimant's allegations in relation to the purported due process violation are unsubstantiated.

[1526] NDP Submission, ¶ 27.
[1527] TPA (**CA-10**), Article 10.5.2(a).
[1528] Respondent's Counter-Memorial, ¶ 649.
[1529] Claimant's Memorial, ¶ 365.
[1530] *OAO Tatneft v. Ukraine,* Award (**CA-211**), ¶ 395.
[1531] *OAO Tatneft v. Ukraine,* Award (**CA-211**), ¶ 405.

956. The Tribunal will assess each of the Claimant's allegations against this standard in turn, first, with respect to the 2008 and 2006-2007 Royalty Cases (**i**), second, with respect to the 2009, 2010-2011 and Q4 2011 Royalty Cases (**ii**).

i. The Claimant's allegations with respect to the 2008 and 2006-2007 Royalty Cases

957. With regard to the 2008 and 2006-2007 Royalty Cases, the Claimant claims that the President of the Tax Tribunal, Ms. Olano, who should have no role in the decision making of the chambers of the Tax Tribunal, interfered to resolve SMCV's challenges by improperly tasking her assistant, Ms. Villanueva, with drafting the resolution in the 2008 Royalty Case. Specifically, the Claimant argues that the appointment of an assistant was not in the powers of the President of the Tax Tribunal, that such an assistant should not have drafted the resolution, and that the evidence shows that Ms. Olano took part in discussions of the merits of the case. The Claimant relies *inter alia* on the testimony of Mr. Estrada and email exchanges between President Olano and Ms. Villanueva as well as between Ms. Villanueva and a SUNAT official.[1532]

958. The Tribunal finds that the Claimant's submission is inconclusive. Mr. Estrada confirmed during the Hearing that he never worked on any of the cases involving SMCV during the years he worked at the Tax Tribunal.[1533] His subjective views as to what should constitute proper procedure before the Tax Tribunal are of no relevance. Moreover, while the email exchanges between Ms. Olano and Ms. Villanueva[1534] as well as the resolution itself, which bears Ms. Villanueva's initials,[1535] confirm that Ms. Villanueva worked on the 2008 Royalty Case, the Tribunal finds that this is not constitutive of a manifestly unfair or unreasonable procedural shortcoming, irrespective of whether her appointment was proper or not under the applicable rules before the Tax Tribunal. Crucially, the Claimant has not demonstrated that Ms. Villanueva's involvement in the case prohibited the *vocales* who actually adjudicated the 2008 Royalty Case from forming their own independent judgment of the case. Ms. Olano

[1532] Claimant's Memorial, ¶ 390; Claimant's Reply, ¶ 166.
[1533] Hearing Transcript, Day 4, p. 1053, line 17 to p. 1054, line 1.
[1534] Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva dated 22 March 2013, 4:02 PM PET (**CE-648**); Email from Úrsula Villanueva Arias to Gabriela Bedoya of SUNAT dated 24 April 2013, 2:37 PM PET (**CE-81**); Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia dated 21 May 2013, 10:47 AM PET (**CE-651**); Email from Úrsula Villanueva Arias to Licette Isabel Zuñiga Dulanto dated 29 December 2014, 5:00 PM PET (**CE-679**).
[1535] Tax Tribunal Decision, No. 08252-1-2013 (2008 Royalty Case) dated 21 May 2013 (**CE-83**).

testified at the Hearing that she "*never interfered with the resolution of the dispute, and I never guided [Ms. Villanueva] to make one decision, for that [r]esolution to be one way or the other, because it would be the 'vocal ponente,' the one making a decision*"[1536] and stated that "*as President, I do not decide on [r]esolutions [reviewed by] the [Tribunal's] Chambers*."[1537]

959. As far as the Claimant's claim that President Olano unduly intervened in the resolution of the 2006-2007 Royalty Case by ensuring that the 2008 Royalty Case, which was filed nine months after the 2006-2007 Royalty Case, would "*proceed[] on a fast track*" and would be issued first,[1538] the Claimant *inter alia* relies on Mr. Estrada's testimony that it is usual practice for first-filed challenges to be decided first. The Claimant further relies on an email by Mr. Moreano, the presiding *vocal* of Chamber 10 that was hearing the 2006-2007 Royalty Case, who voiced a complaint as to the lack of coordination between chambers after the 2008 Royalty Case resolution was issued.[1539]

960. The Tribunal finds that this claim has no merit. The Claimant has not demonstrated to the Tribunal's satisfaction that Ms. Olano acted improperly. Again, Ms. Olano testified that "*as President, I do not decide on [r]esolutions [reviewed by] the [Tribunal's] Chambers*."[1540] Furthermore, Mr. Sarmiento convincingly testified that before receiving the resolution that Chamber 1 prepared for the 2008 Royalty Case, Chamber 10 had in fact already listened to the parties and had a "*clear idea*" as to how they were going to decide the case.[1541] The Claimant has also not explained how the fact that a later filed case was decided before an earlier filed case would constitute a manifestly unfair or unreasonable procedural shortcoming.

961. As far as the Claimant argues that by adopting a nearly identical resolution to the 2008 Royalty Case in the 2006-2007 Royalty Case, Chamber 10 "*abdicated [its] duty to independently deliberate in the challenge to the 2006-2007 Royalty Assessments*,"[1542] the fact that the resolutions in the 2006-2007 and 2008 Royalty Cases were "*nearly identical*" is something that SMCV or the Claimant knew as early as 2013, when the decisions were rendered. The Claimant has not shown how the two resolutions being

[1536] Hearing Transcript, Day 7, p. 1884, lines 16-21.
[1537] Hearing Transcript, Day 7, p. 1895, lines 2-3.
[1538] Claimant's Memorial, ¶ 391.
[1539] Claimant's Memorial, ¶ 391.
[1540] Hearing Transcript, Day 7, p. 1895, lines 2-3.
[1541] Hearing Transcript, Day 7, p. 2003, line 20 to p. 2004, line 8.
[1542] Claimant's Reply, ¶ 168.

nearly identical constitutes a serious procedural shortcoming that is manifestly unfair and unreasonable, especially in light of the fact that the Claimant had the opportunity, and actually did file an appeal against the two resolutions in the Peruvian courts.

ii. The Claimant's allegations with respect to the 2009, 2010-2011 and Q4 2011 Royalty Cases

962. With respect to the 2009, 2010-2011 and Q4 2011 Royalty Cases, the Claimant claims that the Tax Tribunal reassigned the 2010-2011 Royalty Case to a *vocal ponente* with a clear conflict of interest, denying SMCV's right to an impartial decision-maker.[1543] Specifically, the Claimant argues that Mr. Ninacondor, who had previously worked at SUNAT in the same department that confirmed the 2010-2011 Royalty Assessments and represented SUNAT in SMCV's appeal of the 2006-2007 Royalty Assessments, should not have been appointed and should have recused himself. According to the Claimant, when SMCV requested that Mr. Ninacondor recuse himself as the *vocal ponente* for the 2010-2011 Royalty Case, President Olano and her staff disregarded the Tax Tribunal's Rules of Procedure to push through a decision that baselessly denied SMCV's request.[1544] Specifically, the Claimant submits that Ms. Olano should have convened the Plenary Chamber to deliberate and decide upon the request but, instead, sent the *vocales* a draft in advance of the session, which included "*how President Olano Silva expected [them] to vote.*"[1545]

963. The Tribunal finds that the Claimant's claim has no merit. Even under the assumption that Mr. Ninacondor's appointment and failure to recuse himself were improper under the applicable domestic law, the Claimant has failed to show how such impropriety would be constitutive of a violation of the FET standard. Even the Claimant's own expert does not argue that no deliberation took place, but that President Olano's treatment of the recusal request shows that "*the Plenary Chamber did not carry out a serious deliberative exercise*."[1546] The Claimant has failed to substantiate how the fact that a draft decision was circulated ahead of a deliberation would constitute a serious procedural shortcoming that is manifestly unfair and unreasonable.

[1543] Claimant's Memorial, ¶ 396.
[1544] Claimant's Memorial, ¶ 397.
[1545] Claimant's Reply, ¶ 171.
[1546] Hernandez I (**CER-3**), ¶ 235.

964. As far as the Claimant submits that Chamber 1 held a hearing in the 2010-2011 Royalty Case the same day that Chamber 2 held its hearing in the 2009 Royalty Case, despite being filed five years later, and issued its resolution one week after Chamber 2, and both copy-pasted significant parts of the 2008 Royalty Case resolution,[1547] the Tribunal finds that the Claimant's claim has likewise no merit. On the facts, the Claimant has failed to substantiate its allegation that the 2010-2011 and 2009 Royalty Cases were not decided independently. The fact that the 2010-2011 and 2009 Royalty Cases resolutions were similar to the 2008 Royalty Case resolution is not in itself evidence that Chambers 1 and 2 failed to consider the case independently. On the law, the Claimant has not substantiated how the fact that the resolutions were similar to the 2008 Royalty Case resolution would constitute a violation of FET.

965. Finally, as far as the Claimant submits that after SMCV challenged the Q4 2011 Royalty Case, the case was assigned to Ms. Villanueva, who in the meantime had been promoted to *vocal* for Chamber 9, as *vocal ponente* thereby denying SMCV the opportunity to have its case properly heard and decided by an impartial decision-maker,[1548] the Tribunal finds that the Claimant's claim has no merit, either. The Claimant has not brought forward any rule which should have barred Ms. Villanueva from acting as *vocal* for Chamber 9 in the Q4 2011 case. The Claimant's claim remains unsubstantiated.

966. Accordingly, none of the Claimant's claims based on due process violations are founded. The Tribunal, thus, finds no violation of Article 10.5 of the TPA under this account.

2. The Claimant's claim that the Respondent violated Article 10.5 of the TPA each time it arbitrarily and unreasonably failed to waive the assessments of penalties and interest against SMCV

a) The Claimant's position

967. The Claimant claims that the Respondent violated Article 10.5 of the TPA each time it failed to waive the penalties and interest assessments against SMCV for the Royalty and Tax Assessments.[1549]

[1547] Claimant's Memorial, ¶ 398.
[1548] Claimant's Memorial, ¶ 399.
[1549] Claimant's Memorial, ¶¶ 400 *et seq.*; Claimant's Reply, ¶¶ 175 *et seq.*; Claimant's Comments on the NDP Submission, ¶¶ 42 *et seq.*

968. These penalty and interest charges were unfair and inequitable, as SMCV's position that it was not required to pay royalties and taxes was reasonable in light of the clear provisions of the Mining Law and Regulations, the Government's previous position regarding the scope of stability guarantees, and the need of mining companies to make continuous investments. The penalties and interest were also disproportionate as their amount significantly exceeded the amount of principal assessed, amounting to 112% of the overall assessments for royalties and new taxes.[1550]

969. The Claimant argues that SMCV was entitled to a waiver of penalties and interest because there was, at a minimum, reasonable doubt as to the correct interpretation of the Mining Law and Regulations. The Claimant submits that Peruvian authorities had an obligation under Peruvian law and international principles of fairness and equity to waive the exorbitant penalties and interest on the Royalty and Tax Assessments.[1551] Article 170 of the Tax Code recognizes that it is unfair and inequitable to charge penalties and interest when non-payment results from lack of clarity in the relevant rule.[1552] SMCV reasonably believed that it did not owe royalty and tax payments based on a reasonable interpretation of the relevant laws and regulations, and should thus not be punished for nonpayment.[1553] According to the Claimant, where there is "*reasonable doubt*," the Government must (i) clarify the scope of the rule and (ii) waive penalties and interest, and this must be done irrespective of whether a party requests it.[1554] The Government cannot arbitrarily refuse to issue a clarification.[1555] If the Government could withhold the clarification at will, then it could arbitrarily deny taxpayers their right to a waiver of penalties and interest for reasonable doubt for no or any reason, contrary to the equitable purposes that Article 170 serves.[1556] Even if the Government had discretion to decide whether to issue a clarification, the Government should have issued the clarification to waive SMCV's penalties and interest because under the proportionality principle set out in the Law on General Administrative Procedure, the

[1550] Claimant's Memorial, ¶ 401.
[1551] Claimant's Reply, ¶ 175.
[1552] Claimant's Memorial, ¶ 403; Peruvian Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Article 170.
[1553] Claimant's Memorial, ¶ 403 (b).
[1554] Claimant's Memorial, ¶ 403 (c); Claimant's Reply, ¶¶ 185 *et seq.*
[1555] Claimant's Reply, ¶¶ 185 *et seq.*
[1556] Claimant's Reply, ¶ 187.

Government does not have absolute discretion but must make decisions proportional to the purpose sought to be achieved by the provision in question.[1557]

970. According to the Claimant, the court decision and opinions in SMCV's favor demonstrate that there was, at the very minimum, "*reasonable doubt*" as to the proper interpretation of the Mining Law and Regulations.[1558] Moreover, SMCV's interpretation was grounded in the plain text of the Mining Law and Regulations, and was consistent with commercial logic and comparative industry practice.[1559] In addition, in enacting the 2014 and 2019 amendments to the Mining Law and Regulations, the Government itself took the position that the prior versions of those provisions were ambiguous and imprecise.[1560] In addition, SMCV's interpretation was consistent with Government officials' conduct, both generally and toward SMCV.[1561]

971. The Claimant argues that in the 2006-2007 and 2008 Royalty Cases, the Tax Tribunal and Contentious Administrative Courts arbitrarily refused to consider the merits of SMCV's waiver request on the basis that SMCV had abandoned the issue by not first raising it during the initial challenge proceedings.[1562] However, under Peruvian law, a taxpayer cannot waive its right to a penalties and interest waiver by procedural default; rather, courts have a duty to consider the issue *sua sponte* and to grant or order a waiver whenever a taxpayer meets the conditions of Article 170.[1563] The Tax Tribunal provided only limited justifications for why SMCV had allegedly waived the argument, and failed to address altogether SMCV's argument that the Tax Tribunal was required to consider the waiver of penalties and interest *sua sponte*.[1564] Moreover the Contentious Administrative Courts arbitrarily accepted the Tax Tribunal's erroneous conclusion without any independent analysis.[1565] According to the Claimant, like in the *Lion Mexico* case, the Contentious Administrative Courts' repeated refusal to entertain the merits of SMCV's waiver request on dubious procedural grounds "*amount to an*

[1557] Claimant's Reply, ¶ 188; Juan Carlos Morón Urbina, Comments on the Law on General Administrative Procedure (Gaceta Jurídica, 10th ed. 2014) (**CA-341**), p. 74.
[1558] Claimant's Memorial, ¶ 405.
[1559] Claimant's Memorial, ¶ 406.
[1560] Claimant's Memorial, ¶ 407; Claimant's Reply, ¶ 183.
[1561] Claimant's Memorial, ¶ 408; Claimant's Reply, ¶¶ 181-182.
[1562] Claimant's Memorial, ¶ 409.
[1563] Claimant's Memorial, ¶ 410; Claimant's Reply, ¶¶ 189 *et seq.*
[1564] Claimant's Memorial, ¶ 410; Claimant's Reply, ¶¶ 189 *et seq.*
[1565] Claimant's Memorial, ¶ 411.

improper and egregious procedural conduct, which does not meet the basic internationally accepted standard of administration of justice and due process."[1566]

972. The Claimant further submits that the Tax Tribunal and SUNAT rejected SMCV's waiver requests for the 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments and Tax Assessments on arbitrary and pretextual grounds.[1567] For the 2009, 2010-2011, and 4Q 2011 Royalty Assessments, the Tax Tribunal took the position that there was no "*reasonable doubt*" because the dispute related to the scope of the 1998 Stability Agreement, and not to any ambiguity, imprecision or obscurity in the Mining Law.[1568] In SMCV's remaining challenges, the Tax Tribunal and SUNAT refused to engage with the evidence of "*reasonable doubt*," brushing aside on spurious grounds the many examples of Government statements, conduct, and court decisions adopting SMCV's interpretation.[1569] The Claimant submits that SUNAT was not only authorized but also obligated to issue a clarification confirming the application of Article 170 of the Tax Code in light of the existence of reasonable doubt.[1570]

973. According to the Claimant, the Respondent also compounded its own arbitrary and inequitable failure to waive the penalties and interest charges against SMCV because its excessive delays in rendering Assessments and in addressing SMCV's administrative challenges significantly increased the punitive interest charges, and because the Government arbitrarily refused to adjust the applicable interest rate following extensive Tax Tribunal delays, even though it was required to do so under Peruvian law.[1571] The Respondent's extensive and undue delays, *i.e.,* both SUNAT's delay in issuing the Assessments and the Tax Tribunal's delays in rendering its resolutions, led to a significant increase in the amounts of interest on both principal and penalties.[1572] The Respondent also arbitrarily applied the statutory interest rate of 14.6% instead of the much lower CPI rate for interest, around 2%, which Peruvian law required it to do when a challenge was pending before the Tax Tribunal for more than 12 months.[1573]

[1566] Claimant's Memorial, ¶ 412, referring to: *Lion Mexico v. Mexico*, Award (**CA-286**), ¶ 508.
[1567] Claimant's Memorial, ¶¶ 413 *et seq.;* Claimant's Reply, ¶¶ 193 *et seq.*
[1568] Claimant's Memorial, ¶ 414.
[1569] Claimant's Memorial, ¶ 415.
[1570] Claimant's Memorial, ¶ 416.
[1571] Claimant's Memorial, ¶¶ 417 *et seq*.; Claimant's Reply, ¶¶ 197 *et seq.*
[1572] Claimant's Memorial, ¶ 418.
[1573] Claimant's Memorial, ¶ 420; Hernández I (**CER-3**), ¶ IX.A.

b) The Respondent's position

974. The Respondent argues that it did not breach its FET obligation under Article 10.5 of the TPA in denying SMCV's requests to waive interest and penalties.[1574]

975. The Respondent submits that the Claimant's claim must fail because SUNAT, the Tax Tribunal, and the Peruvian courts all acted appropriately and in accordance with Peruvian law.[1575] Even if the Tribunal were to disagree with the merits of any of the decisions rejecting SMCV's requests to waive the interest and penalties, at a minimum, there is no basis to find that the decisions rise to the level of "*something opposed to the rule of law*" or an act that shocks a sense of judicial propriety. The Respondent argues that for certain of the Royalty Assessment cases, SMCV failed to timely raise the issue of penalties and interest and, when it belatedly tried to do so on appeal, the Peruvian courts rejected SMCV's attempt to enlarge the scope of the case on appeal. According to the Respondent, there is nothing arbitrary or unreasonable about those decisions. For the Royalty Assessment cases in which SMCV did timely object to the penalties and interest, SUNAT and the Tax Tribunal considered the merits of the Claimant's arguments, and, acting within their discretion, rejected the requests. The Respondent submits that even if the Claimant or the Tribunal disagrees with the merits of any decision, such disagreement is insufficient to find a breach of the FET provision.

976. The Respondent argues that the Claimant's basis for requesting the waiver of penalties and interest, *i.e.,* "*reasonable doubt*" under Article 170 of the Tax Code, is flawed. While the Respondent does not disagree that "*reasonable doubt*" can be a basis for seeking waiver of penalties and interest, it only applies in two specific situations:[1576]

- First, a taxpayer may seek a waiver of penalties and interest on the basis of "*reasonable doubt*" when there is an interpretation of a norm that has been changed as a result of a formal ruling that the prior interpretation was incorrect (e.g., SUNAT interpreted a rule one way but then issued a second, different ruling stating that the first interpretation was incorrect). This clarification must "*expressly provide that it is issued for purposes of Article 170 of the Tax Code*" and must be published in *El Peruano*.[1577] In this scenario of "*reasonable doubt,*"

[1574] Respondent's Counter-Memorial, ¶¶ 721 *et seq*.; Respondent's Rejoinder, ¶¶ 1008 *et seq.*
[1575] Respondent's Counter-Memorial, ¶ 721.
[1576] Respondent's Counter-Memorial, ¶ 724.
[1577] Bravo-Picón I (**RER-3**), ¶ 73.

the Tax Tribunal and the courts are required to waive interest and penalties. However, Article 170 does not impose an obligation of clarification.[1578]

- Second, "*reasonable doubt*" can apply when SUNAT has inconsistently applied a rule over the course of time (e.g., SUNAT simultaneously applies a rule one way with one taxpayer and another way with another taxpayer, notwithstanding the fact that the taxpayers are similarly situated).[1579]

977. The Respondent submits that the Claimant has not pointed to either (i) an official clarification published in El Peruano that clarified a provision on which SMCV relied in not paying its obligations or (ii) a series of SUNAT decisions that applied in a contrary manner a tax or royalty provision on which SMCV relied.[1580] SMCV's subjective beliefs that there existed a reasonable doubt as to the interpretation of the Mining Law and Regulations are irrelevant. Even if SMCV were permitted under Peruvian law to make a "*reasonable doubt*" argument in these circumstances, there was in any event no reasonable doubt about whether activities related to the SMCV's Concentrator Plant incurred royalties as the Mining Law and Regulations are clear in establishing that stability guarantees extend only to the investment project defined in the stability agreement and its feasibility study.[1581]

978. Moreover, the Claimant cannot accuse the Respondent of acting unfairly, unreasonably, or arbitrarily by not issuing a clarification, when the Respondent is not obligated to issue a clarification and when there exists no ambiguous law or regulation prompting a need for a clarification. In any case, the Respondent's non-issuance of a clarification cannot be said to be an act in opposition to the rule of law, nor one that "*shocks, or at least surprises, a sense of juridical propriety*" leading to a breach of the FET standard.[1582]

979. The Respondent submits that the Claimant cannot base its "*reasonable doubt*" on the fact that one case was decided in SMCV's favor and, in other instances, judges issued dissenting opinions. In any event, such decisions were all rendered after SMCV filed its tax returns for all of the fiscal years at issue.[1583] Moreover, contrary to the Claimant's argument, the 2014 and 2019 amendments to the Mining Law and Regulations are not

[1578] Respondent's Counter-Memorial, ¶ 725.
[1579] Bravo-Picón I (**RER-3**), ¶ 76.
[1580] Respondent's Counter-Memorial, ¶ 726.
[1581] Respondent's Counter-Memorial, ¶ 727.
[1582] Respondent's Rejoinder, ¶ 1025.
[1583] Respondent's Counter-Memorial, ¶ 728.

proof that reasonable doubt existed in earlier years.[1584] Peruvian officials have consistently held the position that the scope of the 1998 Stability Agreement was limited.[1585]

980. With respect to the 2006-2007 and 2008 Royalty Cases, the Respondent argues that the Tax Tribunal and the Contentious Administrative Courts did not arbitrarily refuse to consider the merits of the SMCV's waiver request. Specifically, while SMCV was obliged to raise its objections regarding the application of penalties and interest with the Tax Tribunal at the time it filed its appeals against SUNAT's Assessment(s) pursuant to Article 147 of the Peruvian Tax Code, it only did so after the Tax Tribunal had issued its decisions upholding SUNAT's Assessments for the 2006-2007 and 2008 Royalty Case. As a result, SMCV waived its right to challenge the portions of those Assessments in which SUNAT had applied penalties and interest for SMCV's failure to pay the royalties otherwise due.[1586]

981. The Respondent disputes that the Tax Tribunal had an obligation to consider the issue *sua sponte.* According to the Respondent, this would have only been the case had an official clarification been issued. However, no such clarification existed.[1587] Moreover, in response to the Claimant's argument that the first-instance Contentious Administrative Courts arbitrarily accepted the Tax Tribunal's erroneous conclusion, the Respondent submits that it cannot be arbitrary that a court of appeals would not consider an issue that was not properly raised before the court below. The Respondent cannot be faulted for SMCV's own failure to timely raise its claims.[1588] In any event, considering the merits of the Article 170 argument would have been futile because SMCV was not entitled to the waiver of penalties and interest.[1589]

982. With respect to the remaining waiver requests relating to other Royalty and Tax Assessments, the Respondent submits that the Tax Tribunal and SUNAT acted reasonably and consistently with Peruvian law in rejecting SMCV's waiver requests.[1590] The Respondent submits that the Claimant's arguments are meritless and stem from the Claimant's fundamental misunderstanding of how "*reasonable doubt*" operates under

[1584] Respondent's Counter-Memorial, ¶ 731.
[1585] Respondent's Counter-Memorial, ¶ 733.
[1586] Respondent's Counter-Memorial, ¶ 735.
[1587] Respondent's Counter-Memorial, ¶ 736.
[1588] Respondent's Counter-Memorial, ¶ 737.
[1589] Respondent's Counter-Memorial, ¶ 740.
[1590] Respondent's Rejoinder, ¶¶ 1017 *et seq*.

Article 170 of the Tax Code.[1591] According to the Respondent, the Tax Tribunal properly considered SMCV's arguments, applied the law, and correctly determined that the application of Article 170 was inappropriate.[1592]

983. The Respondent further argues that SMCV is responsible for the amount of interest and penalties.[1593] Specifically, SMCV did not pay its obligations for years even though if it had succeeded in its challenges to the various Royalty Assessments, SUNAT would have refunded those payments, with interest.[1594] SMCV could and should have mitigated penalties and interest by paying its obligations (or, later, its Assessments) and then requesting a refund or challenging the assessments before the applicable administrative and judicial authorities.[1595] Moreover, the Respondent submits that there was nothing nefarious about the delay before the Tax Tribunal.[1596] In any event, SMCV affirmatively chose to not pay the Royalty Assessments on activities related to the Concentrator Plant despite its knowledge that the government interpreted the 1998 Stability Agreement as only applying to the Leaching Project.[1597]

984. In relation to the allegedly wrong interest rate that was applied to SMCV for its 2009 and 2010-2011 Royalty Assessments, the Respondent submits that the mining royalty is regulated by the Mining Royalty Law and its accompanying regulations.[1598] The Mining Law and Regulations apply monthly interest equivalent to the default interest rate to unpaid mining royalties. SUNAT therefore applied the proper interest rate.[1599] Moreover, the Tax Tribunal appropriately denied SMCV's request to recalculate the interest rate for its 2009 and 2010-2011 Royalty Assessments because Peruvian law prohibits the Tax Tribunal from considering claims with respect to assessments for which the related collection proceedings have concluded. The requests were filed after the collection proceedings for the underlying Assessments had concluded. Thus, the Tax Tribunal was required to reject SMCV's request in accordance with Peruvian law.

[1591] Respondent's Counter-Memorial, ¶ 741.
[1592] Respondent's Counter-Memorial, ¶ 744.
[1593] Respondent's Counter-Memorial, ¶¶ 746 *et seq.*
[1594] Respondent's Counter-Memorial, ¶ 746.
[1595] Respondent's Rejoinder, ¶ 1032.
[1596] Respondent's Counter-Memorial, ¶ 747.
[1597] Respondent's Counter-Memorial, ¶ 748.
[1598] Respondent's Counter-Memorial, ¶ 749.
[1599] Respondent's Counter-Memorial, ¶ 750.

Contrary to the Claimant's allegation, the Tax Tribunal did not act unfairly or arbitrarily towards SMCV and the Respondent did not breach its FET obligations.[1600]

c) The Non-Disputing Party's position

985. The NDP has not provided an express position on the standard of arbitrariness and has, rather, focused its comments on denial of justice (see above, paras. 949 *et seq.*).

d) The Tribunal's analysis

986. The Tribunal has found that penalties and interest constitute "*taxation measures*" within the meaning of Article 22.3.1 of the TPA (see above, paras. 540 *et seq.*). The Tribunal has therefore no jurisdiction to decide on the merits of the Claimant's claim based on the Respondent's alleged violation of Article 10.5 of the TPA in relation to the Respondent's assessment of penalties and interest. During the Hearing, evidence was taken with regard to Article 170 of the Peruvian Tax Code and the waiver requirements. However, this was done without prejudice to the Tribunal's decision on jurisdiction.[1601]

3. The Claimant's claim that the Respondent violated Article 10.5 of the TPA when it arbitrarily and unreasonably refused to reimburse SMCV's GEM overpayments

a) The Claimant's position

987. The Claimant submits that the Respondent violated its obligation to accord FET when it refused to reimburse the GEM payments that SMCV made for the Concentrator during the periods of Q4 2011 to Q3 2012.[1602]

988. The Claimant submits that SMCV agreed to pay the highest amount of GEM on the understanding that it was not obliged to pay royalties, an understanding that the Government repeatedly encouraged in inducing SMCV's significant GEM payments.[1603] In particular, the Claimant contends that during discussions that the Mining Society had with the Government during the design of the GEM process in 2011, SMCV was characterized as a "*stabilized company*."[1604] The Claimant also argues that

[1600] Respondent's Rejoinder, ¶ 1029.
[1601] Hearing Transcript, Day 9, p. 2592, lines 6-9.
[1602] Claimant's Memorial, ¶¶ 421 *et seq*.; Claimant's Reply, ¶¶ 202 *et seq.*
[1603] Claimant's Memorial, ¶ 423.
[1604] Claimant's Memorial, ¶ 423 (a); Santa María I (**CWS-9**), ¶¶ 21-23, 38, 41, 45.

the Government did not inform SMCV that it planned to assess additional royalties against SMCV in the lead-up to SMCV's signing of the GEM Agreement, even when Ms. Torreblanca sought clarification on this specific point from the DGM, the MEF, and MINEM.[1605] Ms. Torreblanca also testifies that MEF and MINEM officials verbally confirmed to her that they agreed with SMCV's position, and with the proposition that mining companies "*could not be subject to both*."[1606] At no point did SUNAT, or any other part of the Government, inform SMCV that it should take into account royalty payments for the Concentrator in determining its GEM payments. The Claimant argues that it was only after SMCV negotiated the GEM Agreement and made GEM payments for two years that SUNAT began issuing Royalty Assessments again.[1607]

989. The Claimant argues that the Respondent's refusal to fully reimburse SMCV for its GEM overpayments was arbitrary and unsupported by Peruvian law.[1608] In this regard, the Claimant submits that in early 2012, SMCV agreed to pay GEM for its entire mining unit, including the Concentrator, after the Government confirmed that it would not impose both GEM and royalties and SMT on SMCV.[1609] The Government initially stopped issuing any further Royalty Assessments. However, after SMCV made GEM payments in excess of USD 100 million for its entire mining unit, SUNAT notified SMCV (i) on 18 January 2018, of the Q4 2011 Royalty Assessment and the Q4 2011-2012 SMT Assessments, and (ii) on 18 April 2018, of the 2012 Royalty Assessments, despite the fact that mining companies' GEM payments were made instead of royalty and SMT payments.[1610] In December 2018, SUNAT granted SMCV's reimbursement request for Q4 2012 to Q4 2013 GEM overpayments and repaid USD 76 million, including interest, recognizing that GEM and royalties were mutually exclusive under

[1605] Claimant's Memorial, ¶ 423 (a); Torreblanca I (**CWS-11**), ¶¶ 85-89; SMCV Letter No. SMCV.VL&RG-1896-2011 dated 7 October 2011 (**CE-628**); SMCV, Letter No. SMCV-VL&RG-1968-2011 dated 26 October 2011 (**CE-630**); SMCV, Letter No. SMCV-VL&RG-2217-2011 dated 5 December 2011 (**CE-631**).
[1606] Torreblanca I (**CWS-11**), ¶ 86.
[1607] Claimant's Memorial, ¶ 423.
[1608] Claimant's Memorial, ¶ 424.
[1609] Claimant's Reply, ¶ 202; Torreblanca I (**CWS-11**), ¶ 90; Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 dated 28 February 2012 (**CE-64**).
[1610] Claimant's Reply, ¶ 202, referring to: SUNAT Assessment No. 012-003-0092685, Q4 2011 Royalty Assessments dated 29 December 2017 (notified on 18 January 2018) (**CE-174**); SUNAT Assessments Nos. 012-003-0092658 and 012-003- 0092961 to 012-003-0092964 (SMT for 4Q 2011-2012) dated 29 December 2017 (notified on 18 January 2018) (**CE-700**); SUNAT Assessment No. 012-003-0094883, 2012 Royalty Assessments dated 28 March 2018 (notified on 18 April 2018) (**CE-176**); Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF dated 29 September 2011 (**CA-182**), Article 2(l); Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 dated 28 February 2012 (**CE-64**).

Peruvian law.[1611] In December 2018, SMCV then also requested under protest the reimbursement of the GEM overpayments for Q4 2011 to Q3 2012, a reimbursement to which it was entitled since Peru had charged GEM plus SMT and royalties plus penalties and interest for the same periods. The Claimant submits that SUNAT arbitrarily refused to reimburse SMCV's GEM overpayments on the ground that SMCV's reimbursement requests were time-barred even though they were not.[1612]

990. The Claimant argues that the five-year statute of limitations set out in the Civil Code, not the Tax Code, applies to GEM overpayments because the GEM is not a tax.[1613] It is a contractual obligation that stems from the GEM Agreement that SMCV concluded with the Government.[1614] Under Peruvian law, "*the provisions of the Civil Code apply to legal relationships and situations regulated by other laws*" unless those "*other laws*" expressly preempt the Civil Code. Here, the GEM Law does not provide a different statute of limitations applicable to SMCV's reimbursement requests based on the contractual nature of GEM. Thus, the statute of limitations set out in Article 1274 of the Civil Code applies, which provides that "*[t]he statute of limitations to recover what was unduly paid runs out five years after the payment has been made*."[1615]

991. The Claimant further submits that under the Civil Code, the statute of limitations does not begin to run until the date the party became aware that the payment was unduly imposed, which in SMCV's case, was not until 13 April 2016 at the very earliest, when SUNAT notified SMCV of the 2010-2011 Royalty Assessments. The five-year statute of limitations expired at the very earliest on 13 April 2021, and SMCV's reimbursement requests made on 28 December 2018 fell within the five-year period.[1616]

[1611] Claimant's Reply, ¶ 203; SUNAT, Resolution No. 012-180-0018113/SUNAT (GEM Q4 2012) dated 18 December 2018 (**CE-746**); SUNAT, Resolution No. 012-180-0018114/SUNAT, (GEM 2013) dated 18 December 2018 (**CE-747**).
[1612] SUNAT Resolution No. 012-180-0018640/SUNAT, GEM Q4 2011-Q3 2012 dated 4 March 2019 (**CE-218**); Bullard II (**CER-7**), ¶ V.
[1613] Claimant's Reply, ¶ 207 (a).
[1614] Claimant's Reply, ¶ 207 (a); Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 dated 28 February 2012 (**CE-64**).
[1615] Claimant's Reply, ¶ 207 (b); Peruvian Civil Code (**CA-39**), Article 1274.
[1616] Claimant's Reply, ¶ 208; SUNAT, Assessment Resolution Nos. 052-003-0014011 to 052-003-0014015, 052-003-0014020 to 052-003-0014022, 052-003-0014024, 052-003-0014026 to 052-003-0014028 (2010-2011 Royalty Assessments) dated 13 April 2016 (**CE-142A**) (notified to SMCV 13 April 2016); SUNAT, Assessment Resolution Nos. 052-003-0014016 to 052-003-0014019, 052-003-0014023, 052-003-0014025, 052-003-0014029 to 052-003-0014031 (2010-2011 Royalty Assessments) dated 13 April 2016 (**CE-142B**) (notified to SMCV 13 April 2016).

992. The Claimant submits that the Respondent's failure to reimburse SMCV's GEM payments was arbitrary, grossly unfair, non-transparent, and inequitable given that the Government had induced and accepted those very payments assuring SMCV that it did not have to pay both GEM and royalties.[1617]

b) The Respondent's position

993. The Respondent submits that it did not breach its FET obligations by refusing to refund certain of SMCV's GEM payments.[1618]

994. According to the Respondent, its actions were not arbitrary or unsupported by Peruvian law because SUNAT dutifully followed Peruvian law and approved SMCV's request for a refund that was made within the statute of limitations. SUNAT rejected only an SMCV request that was untimely, because it was filed outside the statute of limitations. Accordingly, the Respondent cannot be held liable for SMCV's failure to act in a timely manner.[1619]

995. Moreover, even if the Claimant disagrees with SUNAT's decision, this does not rise to an FET breach. Applying the standard set out in the *ELSI* judgment, the Respondent argues that there is no basis to find that a decision enforcing a statute of limitations that SMCV was or should have been aware of is "*opposed to the rule of law,*" is "*a wilful disregard of due process of law,*" or is "*an act which shocks, or at least surprises, a sense of judicial propriety*."[1620]

996. Specifically, the Respondent submits that the Claimant timely submitted its refund requests for its GEM contributions for the period Q4 2012 to Q4 2013 and SUNAT approved those refunds.[1621] However, the Claimant did not submit its refund request for GEM contributions for the period Q4 2011 to Q3 2012 until one year later, *i.e.,* on 28 December 2018. SUNAT denied those requests because the statute of limitations had expired. The Respondent contends that pursuant to Articles 43.3 and 44.5 of the Tax Code, a taxpayer has four years to request a refund for overpayment, counting from January 1st of the year after the payment was made. SMCV made the payments related

[1617] Claimant's Reply, ¶ 205.
[1618] Respondent's Counter-Memorial, ¶¶ 752 *et seq.*; Respondent's Rejoinder, ¶¶ 485 *et seq.*, and 1034 *et seq.*
[1619] Respondent's Counter-Memorial, ¶ 752.
[1620] Respondent's Counter-Memorial, ¶ 753, referring to: *ELSI*, Judgment (**RA-72**), ¶ 128.
[1621] Respondent's Counter-Memorial, ¶ 754.

to Q4 2011 to Q3 2012 in 2012. Accordingly, the statute of limitations to request any refunds started to run on 1 January 2013 and expired on 1 January 2017.[1622]

997. The Respondent argues that the Claimant's arguments are also in all other respects without merit:

- Contrary to the Claimant's argument, the Respondent submits that the Government did not repeatedly encourage SMCV's understanding or induce SMCV's GEM payments. In any event, the Claimant knew SUNAT's position, as SUNAT had been arguing it before the Tax Tribunal and various courts since 2010.[1623] Once the Superior Court issued its decision on appeal in January 2016 agreeing with SUNAT's position, SUNAT issued Royalty Assessments shortly thereafter, in April 2016. The Respondent submits that if SMCV had then issued its request for a refund for the Concentrator-related GEM payments, it would have been within the statute of limitations period for all of the GEM payments.[1624]
- The Respondent submits that while the Peruvian Treasury retained both the GEM payments and the Royalty Assessments, this is because SMCV did not exercise its rights.[1625] In any event, the Respondent acted consistently with Peruvian law. According to the Respondent, SUNAT would be acting in an arbitrary manner if it afforded SMCV special treatment and disregarded the law on its behalf, to the detriment of Peruvian taxpayers.[1626]
- The Respondent argues that it did not misinterpret the statute of limitations. According to the Respondent, the Claimant's rights under discussion here are specific rights under the Tax Code to seek refunds for overpayment of certain taxes (as specifically set out in Articles 43 and 44 of the Tax Code).[1627] The Respondent argues that the Claimant's unsupported interpretation according to which the statute of limitations should only start running once the taxpayer subjectively learns of his or her error would undermine the purpose of a statute of limitations, which is to provide certainty and finality.[1628]

998. The Respondent concludes that the Claimant knew as early as 2004, and certainly by 2005/2006, that the Respondent took the position that the Concentrator-related activities were not covered by the 1998 Stability Agreement. Moreover, SUNAT started issuing

[1622] Respondent's Counter-Memorial, ¶ 755. Tax Code (**CA-14**), Articles 43, 44.3.
[1623] Respondent's Counter-Memorial, ¶ 757.
[1624] Respondent's Counter-Memorial, ¶ 758.
[1625] Respondent's Counter-Memorial, ¶ 759.
[1626] Respondent's Counter-Memorial, ¶ 760.
[1627] Respondent's Counter-Memorial, ¶ 765.
[1628] Respondent's Counter-Memorial, ¶ 766.

assessments against SMCV on that basis in 2009, and SUNAT argued that position before the Tax Tribunal and various courts starting in 2010. Despite that, the Claimant chose not to account for the royalty payments it owed for the Concentrator-related activities in determining its GEM payments and not to request refunds for its GEM overpayments until December 2017 and December 2018. The Claimant also did not seek to obtain any interim protection of its refund rights during the pendency of the 2008 Royalty Assessment litigation. When the Claimant made a timely request for certain refunds, the Respondent granted it. However, when, a year later, SMCV made a second, untimely request, the Respondent rejected it. The Respondent argues that there was nothing unfair, unequitable, or arbitrary and nothing close to violative of the TPA about SUNAT's actions.[1629]

c) The Non-Disputing Party's position

999. The NDP has not provided an express position on the standard of arbitrariness and has, rather, focused its comments on denial of justice (see above, paras. 949 *et seq.*).

d) The Tribunal's analysis

1000. The Tribunal has already set out the applicable legal standard in relation to arbitrariness (see paras. 894 *et seq*.). As set out above, the Parties agree that an action may be arbitrary if it is "*not based on legal standards but on discretion, prejudice or personal preference*."[1630] Arbitrariness is also characterized as "*something opposed to the rule of law*" and requires "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[1631] The Tribunal will thus proceed to assess the Respondent's conduct on the basis of this standard.

1001. The Tribunal finds that nothing in the Respondent's conduct conveys arbitrariness. On the contrary, the Tribunal is of the view that the Respondent acted in line with the applicable domestic law.

1002. Specifically, with respect to the Claimant's argument that the Respondent allegedly induced and accepted the GEM payments assuring SMCV that it did not have to pay

[1629] Respondent's Counter-Memorial, ¶ 767.
[1630] Claimant's Memorial, ¶ 363, referring to: *Crystallex v. Venezuela*, Award (**CA-222**), ¶ 578; Respondent's Counter-Memorial, ¶ 648, referring to: *EDF v. Romania*, Award (**RA-62**), ¶ 303.
[1631] *ELSI*, Judgment (**RA-72**), ¶ 128.

both GEM and royalties, the Tribunal finds no convincing evidence that such an inducement took place. On the contrary, aside from the ample evidence indicating that the scope of the 1998 Stability Agreement was clear and that royalties were thus due for the Concentrator, SMCV was by all means aware of SUNAT's position regarding SMCV's liability for royalties at the latest when the 2006-2007 Royalty Assessments were imposed on SMCV in August 2009.[1632] SMCV entered into the GEM Agreement when it was already aware of the Respondent's position on the scope of the 1998 Stability Agreement, and thus, of its obligation to pay royalties in relation to the Concentrator. The fact that SMCV could challenge SUNAT's 2006-2007 Royalty Assessment or that SMCV or the Claimant's belief that royalties were not due does not change the fact that SUNAT held the position that royalties were due for the Concentrator. In any event, the Respondent cannot be held liable for any errors in judgment committed by SMCV or the Claimant when it entered into the GEM Agreement. Accordingly, the Tribunal concludes that the Claimant has not established that there was any arbitrary conduct on the Respondent's part.

1003. With regard to the issue of the reimbursement of the overpayments, the Tribunal notes that it is undisputed between the Parties that SMCV had the right to have the GEM overpayments reimbursed.[1633] Undisputably, only royalties or GEM payments were owed but not both at the same time. This is why SUNAT granted SMCV's reimbursement requests made on 28 December 2017 for the Q4 2012 to Q4 2013 GEM payments. SMCV then waited a full year to request the reimbursement of the Q4 2011 through Q3 2012 GEM payments.

1004. In the case at hand, SUNAT denied the refund requests made by SMCV on 28 December 2018 for the Q4 2011 through Q3 2012 GEM payments on the basis that the statute of limitations to submit such refund requests had expired.[1634] According to the Claimant, the Respondent did not apply the right statute of limitations and the Respondent's decision was, thus, arbitrary.

1005. The Tribunal finds that this argument lacks any merit as there was nothing arbitrary about the Respondent's enforcement of its statute of limitations. At most, it would

[1632] SUNAT, 2006/07 Royalty Assessments dated 17 August 2009 (**CE-31**), Annex No. 1.
[1633] Claimant's Reply, ¶ 204; Respondent's Rejoinder, ¶ 1034.
[1634] SUNAT Resolution No. 012-180-0018640/SUNAT dated 4 March 2019 (notified to SMCV on 22 March 2019) (**CE-218**).

constitute a misapplication of Peruvian law if the Claimant's position on the applicable limitation period were correct.

1006. The Tribunal is, however, not convinced that the Claimant's position on the applicable limitation period was even correct. With respect to the applicable statute of limitations, the Parties agree that GEM is a contractual obligation that stems from the GEM Agreement that SMCV concluded with the Government.[1635] The Tribunal further notes that, according to the Claimant, "*under Peruvian law, 'the provisions of the Civil Code apply to legal relationships and situations regulated by other laws' unless those 'other laws' expressly preempt the Civil Code*."[1636]

1007. The Tribunal finds that "*other laws*" indeed do preempt the application of the statute of limitations under the Civil Code. In particular, the Tribunal notes as follows:

- The Parties agree that the GEM Agreement is the contractual obligation to consider. They, thus, agree on the applicable legal framework for their obligations.
- The third and eighth clauses of the GEM Agreement set out the legal framework applicable to the GEM Agreement, *i.e.,* "*Law No. 29790 and the Regulations thereof*."[1637]
- In turn, Article 5 of Law 29790 makes clear that the provisions of Law 28969, which authorizes SUNAT to enforce rules to facilitate the administration of mining royalties, apply.[1638]
- Article 3(a)(ii) of Law 28969 *inter alia* specifies that Articles 43 and 44 from the First Book of the Tax Code is applicable.[1639]
- Article 43.3 of the Tax Code provides that "*[a]ctions aimed at requesting compensation or making compensation, as well as actions involving request for refunds, expire after four (4) years*."[1640]

1008. Accordingly, by virtue of the GEM Agreement, the applicable statute of limitations is 4 years, as set out in Article 43.3 of the Tax Code, and not the statute of limitations of 5 years provided for in the Civil Code.

[1635] Claimant's Reply, ¶ 207 (a); Respondent's Rejoinder, ¶ 511; Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 dated 28 February 2012 (**CE-64**).
[1636] Claimant's Reply, ¶ 207.
[1637] Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 dated 28 February 2012 (**CE-64**), Clause 3 and 8.
[1638] Establishing GEM Legal Framework, Law No. 29790 dated 28 September 2011 (**CA-181**), Article 5.
[1639] Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969 dated 25 January 2007 (**CA-8**), Article 3(a)(ii).
[1640] Peruvian Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Article 43.3.

1009. With respect to the starting point of this statute of limitations, in accordance with Article 44.5 of the Tax Code, the statute of limitations starts to run on 1 January "*following the date on which the payment that was undue or excessive was made or became such*."[1641]

1010. It is undisputed between the Parties that SMCV made the Q4 2011 to Q3 2012 GEM payments in 2012. In principle, the date on which the limitations period started to run was, thus, 1 January 2013 (and expired on 1 January 2017). The Tribunal notes that the Claimant's expert Mr. Bullard opines that "*SMCV could have only become aware that such payments were undue after SUNAT resumed issuing royalty assessments for the same periods for which SMCV made the GEM payments*."[1642] However, the Tribunal finds that SMCV knew that SUNAT considered SMCV to owe royalties as early as 2009, when the first royalty assessments were issued against SMCV. Accordingly, when SMCV made its GEM payments in 2012, it already knew that these payments were not due, should SUNAT continue to assesss royalties for the Concentrator as it had done in preceding time periods.

1011. The limitation period, thus, began to run on 1 January 2013 and expired on 1 January 2017. SMCV's reimbursement claims for the Q4 2011 to Q3 2012 GEM payments were made on 28 December 2018 and were thus, time-barred. Accordingly, SUNAT's denial of SMCV's reimbursement claims for Q4 2011 to Q3 2012 GEM does not amount to arbitrariness in the application of the law.

1012. The Claimant has, thus, not shown to the Tribunal's satisfaction that the Respondent breached its FET obligations under the TPA.

VI. QUANTUM

A. The Claimant's position

1013. The Claimant requests compensation due to the Respondent's breaches of the 1998 Stability Agreement and Article 10.5 of the TPA, submitting two alternative damage claims:[1643]

[1641] Peruvian Tax Code, Supreme Decree No. 133-2013-EF dated 22 June 2013 (**CA-14**), Article 44.5.
[1642] Bullard II (**CER-7**), ¶ 92.
[1643] Claimant's Memorial, ¶¶ 430 *et seq.*; Claimant's Reply, ¶¶ 287 *et seq*.; Claimant's Post-Hearing Brief, ¶¶ 128 *et seq.*; Spiller-Chavich I (**CER-1**); Spiller-Chavich II (**CER-6**).

- First, the Claimant claims that SMCV has suffered damages in the amount of at least USD 942.4 million as a result of the Respondent's breaches of the 1998 Stability Agreement and the TPA.[1644] The main claim is based on the premise that the 1998 Stability Agreement covers the entire mining unit.
- In the alternative, the Claimant puts forward a different claim, which rests on the premise that the 1998 Stability Agreement did not cover the entire mining unit. In that case, the Claimant calculates that SMCV has suffered at least USD 719.9 million in damages.[1645]

1014. After the Hearing, the Claimant introduced Exhibit CE-1143, which the Claimant submits reflects SMCV's payment of approximately USD 26 million in outstanding liabilities.[1646] The Claimant stated that, if so requested by the Tribunal, it would submit an updated damages model from its experts in light of this evidence.[1647]

1015. The Claimant submits that the Respondent's argument according to which there is a potential for duplication of the damages in this case and in the *SMM Cerro Verde* Arbitration is premature because the tribunal in the *SMM Cerro Verde* Arbitration has not yet rendered an award.[1648]

B. The Respondent's position

1016. The Respondent argues that the Claimant's damages claim is flawed and, in any event, inflated.[1649]

1017. The Respondent notes that the Claimant has calculated its damages assuming either that all of the Assessments, including penalties and interest (for its main claim) are deemed to violate the 1998 Stability Agreement and/or the TPA, or that, in its alternative claim, all of the penalties and interest and unrefunded GEM payments violate the TPA. However, the Tribunal would have to carefully consider separately the merits of each of the Claimant's claims of breach, which rest on different facts and legal theories for different challenged SUNAT Assessments. If the Tribunal were to find that the Respondent breached the 1998 Stability Agreement and/or the TPA only with respect

[1644] Claimant's Memorial, ¶¶ 436 *et seq*.
[1645] Claimant's Reply, ¶ 289.
[1646] Claimant's letter to the Tribunal dated 18 October 2023; Claimant's letter to the Tribunal dated 21 November 2023.
[1647] Claimant's letter to the Tribunal dated 18 October 2023.
[1648] Claimant's Reply, ¶ 318.
[1649] Respondent's Counter-Memorial, ¶¶ 769 *et seq.*; Respondent's Rejoinder, ¶¶ 1042 *et seq.*; Respondent's Post-Hearing Brief, ¶¶ 303 *et seq.*; Kunsmann I (**RER-5**); Kunsmann II (**RER-10**).

to certain Assessments or certain portions of certain Assessments, then the Claimant's damages would have to be limited to the amounts specifically linked to any such breaching Assessments.[1650]

1018. The Respondent emphasizes that the Claimant's damages are, in part, duplicative of those requested in the *SMM Cerro Verde* Arbitration. The Respondent notes that SMM Cerro Verde's request for 21% of SMCV's lost cash flows overlaps with the Claimant's claim for 100% of damages allegedly suffered by SMCV.[1651]

1019. In addition, the Respondent *inter alia* (i) objects to the inclusion of unpaid obligations in the Claimant's damages calculation, (ii) objects to SMCV's dividend distribution assumptions, (iii) objects to the application of cost of equity as the Claimant's pre-award interest rate and discount rate, (iv) argues that SMCV failed to mitigate its damages when it failed to pay its obligations and chose instead to accumulate penalties and interest, (v) objects to the Claimant's inclusion in its damages calculation of penalties and interest relating to tax assessments, which are excluded under the TPA, and (vi) makes corrections to SMCV's short term interest and short-term deposit interest. Combining these corrections for the Treaty claim, the Claimant's damages for its main claim are reduced from USD 942.4 million to USD 119 million and its damages for its alternative claim are reduced from USD 719.9 million to USD 69.3 million.[1652] Combining these corrections for the 1998 Stability Agreement claim, the Claimant's damages for its main claim are reduced from USD 942.4 million to USD 288.1 million and its damages for its alternative claim are reduced from USD 719.9 million to USD 163.5 million.[1653]

C. The Tribunal's analysis

1020. Having rejected the Claimant's claims in their entirety, the Tribunal equally rejects the Claimant's claim for compensation and interest.[1654]

[1650] Respondent's Counter-Memorial, ¶ 775; Respondent's Rejoinder, ¶ 1047.
[1651] Respondent's Rejoinder, ¶ 1049.
[1652] Respondent's Counter-Memorial, ¶¶ 774 *et seq*.; Respondent's Rejoinder, ¶¶ 1103-1107; Kunsman II (**RER-10**), ¶¶ 108 *et seq*.
[1653] Respondent's Rejoinder, ¶ 1106.
[1654] Thereby, the Tribunal also rejects the Claimant's request for declaratory relief and indemnification at ¶ 464(G) of the Claimant's Memorial and ¶ 319(H) of the Claimant's Reply, and as further specified in ¶ 446 of the Claimant's Memorial.

VII. COSTS

A. The Claimant's position

1021. The Claimant requests that the Tribunal order the Respondent to pay all the costs of the arbitration, as well as the Claimant's and SMCV's attorneys' fees and expenses.[1655] According to the Claimant, the principle of full reparation requires that the Claimant be compensated for the costs of the arbitration proceedings and its legal expenses.[1656] The Claimant submits that Article 10.26.1 of the TPA authorizes the Tribunal to award such costs and expenses and that Article 61(2) of the ICSID Convention grants the Tribunal discretion to assess costs.[1657] Relying on *Tenaris & Talta v. Venezuela*, the Claimant submits that tribunals have increasingly exercised their discretion to award the prevailing party its portion of the costs of the arbitration and the reasonable costs it incurs.[1658]

1022. In its Statement of Costs, the Claimant explains that it incurred USD 31,118,789.48 in (i) attorney's fees and administrative costs; (ii) witness fees and expenses; and (iii) expert fees and expenses. Of this amount, the Claimant estimates that 15.8% of its costs, *i.e.,* USD 4,917,740.55, relate to the Respondent's jurisdictional objections.[1659] The Claimant explains that the allocation of costs to jurisdiction is approximative due to the fact that the proceedings were not bifurcated, and that the allocation was made based on, among others, counsel's task-based tracking system, manual review of certain time entries, and the relative proportion of pages or paragraph numbers in submissions.[1660]

1023. In addition, the Claimant explains that it paid USD 1,025,000.00 in ICSID advance payments.

1024. The Claimant states that it incurred costs in professional services related to this arbitration, including preparation of written submissions, document review and production, preparation for and participation in the hearing, procedural matters, fact

[1655] Claimant's Memorial, ¶ 464; Claimant's Reply, ¶ 319; Claimant's Post-Hearing Brief, ¶ 133.
[1656] Claimant's Memorial, ¶ 463.
[1657] Claimant's Memorial, ¶ 463.
[1658] Claimant's Memorial, ¶ 463, referring to: *Tenaris S.A. & Talta –Trading y Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award dated 12 December 2016 (**CA-225**), ¶ 845.
[1659] Claimant's Statement of Costs, p. 1.
[1660] Claimant's Statement of Costs, p. 1.

development, communications, and other advice.[1661] All the figures in the Claimant's Statement of Costs are as of 31 January 2024 and all figures incurred in currencies other than USD have been converted to USD at the official exchange rate on the date of payment.[1662]

1025. In total, the Claimant submits that it incurred **USD 32,143,789.48** as follows:[1663]

1. Attorney's fees and administrative costs

Firm	Total hours	Total fees (USD)
Debevoise & Plimpton, New York		
Attorneys	16,620.10	18,790,070.50
Legal support staff	4,120.00	1,138,762.40
Rodrigo, Elías & Medrano, Lima		
Attorneys	13,245.75	3,321,831.28
Legal support staff	13.50	637.20
Total attorney's fees		**23,251,301.38**
Administrative costs[1664]		
Debevoise & Plimpton, New York, USA		894,760.09
Rodrigo, Elías & Medrano, Lima, Peru		31,656.84
Additional costs paid directly to vendors		2,550,167.79
Total administrative costs		**3,476,584.72**
Total attorney's fees and administrative costs		**26,727,886.10**

2. Witness fees and expenses

Witness name	Fees and expenses (USD)
Gianfranco Castagnola & Hugo Santa María (APOYO Consultoría)	23,541.00
María Chappuis Cardich	42,601.78
Randy Davenport	57,654.04
Leonel Estrada Gonzales	69,605.00
Hans Flury	43,557.36
Carlos Alberto Herrera Perret	84,339.64
Cristián Morán	112,749.44
Milagros Silva-Santisteban Concha	3,909.50
Total witness fees and expenses[1665]	**437,957.76**

[1661] Claimant's Statement of Costs, p. 1.
[1662] Claimant's Statement of Costs, fn. 1.
[1663] Claimant's Statement of Costs, pp. 1 *et seq*.
[1664] The Claimant submits that these costs include travel costs, duplicating costs, document preparation, messenger costs, graphics support, translations, telephone calls, legal research charges, document storage, and lawyer out-of-pocket expenses. See Claimant's Statement of Costs, fn. 2.
[1665] The Claimant submits that these costs include out-of-pocket expenses. See Claimant's Statement of Costs, fn. 3.

3. Expert fees and expenses

Expert name	Fees and expenses (USD)
Alfredo Bullard	320,591.68
Luis Hernández Berenguel	413,273.71
James M. Otto	226,610.10
Pablo T. Spiller & Carla Chavich (Compass Lexecon)	2,546,294.23
María del Carmen Vega	153,705.16
Gary Sampliner	292,470.74
Total expert fees and expenses[1666]	**3,952,945.62**

4. ICSID Advance Payments

Call for funds date	Amount (USD)
27 February 2020	25,000.00
7 April 2021	150,000.00
27 April 2022	250,000.00
17 April 2023	300,000.00
16 October 2023	300,000.00
Total arbitration costs	**1,025,000.00**

B. The Respondent's position

1026. The Respondent requests that the Tribunal award the Respondent the costs and fees, including attorneys' fees, that it has incurred in this arbitration.[1667]

1027. The Respondent states that it incurred costs in the analysis of the Claimant's Request for Arbitration and accompanying exhibits; the preparation for and participation in the First Session with the Tribunal; the analysis of the Claimant's Notice of Additional Claims and accompanying exhibits; the analysis of the Claimant's Memorial and accompanying exhibits; the preparation of the Respondent's Counter-Memorial and accompanying exhibits; the exchange of document production requests, objections to document requests, replies to objections, and production of documents; the analysis of the Claimant's Reply and accompanying exhibits; the preparation of the Respondent's Rejoinder and accompanying exhibits; the analysis of the Claimant's Rejoinder; the analysis of the United States' NDP submission; the preparation of the Respondent's

[1666] The Claimant submits that these costs include out-of-pocket expenses See Claimant's Statement of Costs, fn. 4.
[1667] Respondent's Counter-Memorial, ¶ 823; Respondent's Rejoinder, ¶ 1108; Respondent's Post-Hearing Brief, ¶ 310.

comments to the United States' NDP submission; the preparation for and participation in the Hearing; the review and correction of transcripts from the Hearing; the preparation of the Respondent's Post-Hearing Brief; the analysis of the Claimant's Post-Hearing Brief; the analysis of the Claimant's submission of additional exhibits; and the correspondence with the Tribunal and the Claimant regarding all of the foregoing.[1668]

1028. The Respondent states that all the figures in its Statement of Costs reflect fees and costs invoiced as of 30 January 2024.[1669]

1029. The Respondent submits that it incurred **USD 6,954,703.64** as follows:[1670]

1. Attorney's fees and administrative costs

Firm	Total hours	Total fees (USD)[1671]
Sidley Austin LLP, Washington D.C.	**7,160.60**	**4,719,002.00**
Attorneys	6,771.60	4,576,026.50
Legal support staff	389	142,975.50
Stanimir A. Alexandrov PLLC, Washington D.C.	360	**608,875.00**
Attorneys	360	608,875.00
Navarro & Pazos Abogados, Lima	985.25	**217,620.80**
Attorneys	795.41	198,634.12
Legal support staff	189.84	18,986.68
Total attorney's fees		**5,545,497.80**

2. Witness expenses

Witness name	Fees and expenses (USD)
Osvaldo Tovar	3,105.90
César Polo	4,078.70
Total witness expenses[1672]	**7,184.60**

3. Expert fees and expenses and supporting services

Expert name	Fees and expenses (USD)
Stephen F. Ralbovsky	88,614.76

[1668] Respondent's Statement of Costs, pp. 1-2.
[1669] Respondent's Statement of Costs, fn. 1.
[1670] Respondent's Statement of Costs, pp. 2 *et seq*.
[1671] The Respondent submits that the attorney's fees include both attorney's fees and administrative costs. See Respondent's Statement of Costs, fn. 2.
[1672] The Respondent submits that these costs only include out-of-pocket expenses and that no witness fees were incurred. See Respondent's Statement of Costs, fn. 3.

Jorge Antonio Bravo Cucci and Jorge Luis Picón Gonzales	49,721.14
Francisco Jose Eguiguren Praeli	50,082.63
Rómulo Martin Morales Hervias	22,094.74
AlixPartners Holdings LLP (Isabel Santos Kunsman)	191,507.97
Total expert fees and expenses[1673]	**402,021.24**

4. ICSID Advance Payments

Call for funds date	**Amount (USD)**
6 April 2021	150,000.00
27 April 2022	250,000.00
15 April 2023	300,000.00
21 September 2023	300,000.00
Total arbitration costs	**1,000,000.00**

C. The Tribunal's analysis

1030. The Tribunal turns to its decisions on costs and begins by setting out the applicable legal framework.

1031. Article 10.26.1 of the TPA provides in relevant part:

> *A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules*.[1674]

1032. Pursuant to Article 61(2) of the ICSID Convention, the Tribunal enjoys broad discretion to allocate costs. This provision sets out:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses* incurred *by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

1033. ICSID Arbitration Rule 28 provides:

> *(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:*

[1673] The Respondent submits that these costs include out-of-pocket expenses. See Respondent's Statement of Costs, fn. 4.
[1674] TPA (**CA-10**), Article 10.26.1.

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

1034. Furthermore, ICSID Arbitration Rule 47(1) provides in relevant part:

(1) The award shall be in writing and shall contain:

[…]

(j) any decision of the Tribunal regarding the cost of the proceeding.

1035. Finally, Section 23.2 of Procedural Order No. 1 provides:

In accordance with Arbitration Rule 28(2), promptly after the closure of the proceeding, each Party shall simultaneously submit to the Secretary of the Tribunal a factual statement of its costs reasonably incurred or borne by it in the proceeding. The scope and format of the statements of costs will be determined by the Tribunal at the conclusion of the hearing, upon consultation with the Parties.

1036. In accordance with Procedural Order No. 1 and as established during the Hearing,[1675] the Parties have each submitted a factual statement of their incurred costs in the form of an affidavit. Whereas both Parties seek to recover the entirety of the costs relating to the arbitration and the Claimant submits that tribunals have increasingly exercised their discretion to award the prevailing party its portion of the costs of the arbitration and the

[1675] Procedural Order No. 1, Section 23.2; Hearing Transcript, Day 9, p. 2563, lines 3-18; Hearing Transcript, Day 10, p. 3050, line 18 to p. 3051, line 7; p. 3054, lines 10-20; p. 3059, lines 12-15; p. 3060, line 8 to p. 3061, line 14.

reasonable costs incurred,[1676] the Respondent has not set out its position on the applicable legal principles on cost allocation.

1037. The Tribunal notes that the applicable legal framework does not set out how costs should be apportioned. Rather, the Tribunal has discretion in the apportionment of costs between the Parties.

1038. The practice of past investment tribunals on the apportionment of costs is not uniform.[1677] Investment tribunals constituted under the ICSID Convention have frequently assessed costs based on two general approaches.[1678] The first approach consists in the equal sharing of costs under which each party should bear its own costs and half of the costs of the arbitration.[1679] The second approach is the "*costs follow the event*" approach under which the unsuccessful party bears all the costs of the proceeding or under which costs are apportioned in accordance with the relative success and failure of the parties.[1680]

1039. In the case at hand, the Tribunal finds that the principle of equal sharing of the costs, according to which each party bears its own costs and half of the costs of the arbitration, should apply for three main reasons.

1040. First, the dispute raised multiple complex questions of fact and law on both jurisdiction and merits. It not only required the assessment of extensive submissions and evidence presented by the Parties, but also involved written and oral submissions by the United States as a Non-Disputing Party on issues of Treaty interpretation. The Tribunal would find it difficult to assess the Parties' relative success under a costs follow the event

[1676] Claimant's Memorial, ¶ 463, referring to: *Tenaris S.A. & Talta –Trading y Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award dated 12 December 2016 (**CA-225**), ¶ 845.
[1677] As noted by the following tribunals: *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Award dated 25 July 2007 (**CA-139**), ¶ 112; *Continental Casualty Co. v. Argentina*, ICSID Case No. ARB/03/9, Award dated 5 September 2008 (**CA-150**), ¶ 318; *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award dated 2 December 2019 (**RA-93**), ¶ 398.
[1678] See for example *Caratube Int'l Oil Co. v. Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award dated 27 September 2017 (**CA-414**), ¶ 1253; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award dated 4 September 2020 (**RA-154**), ¶ 494; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award dated 2 March 2015 (**RA-17**), ¶ 529.
[1679] See for example *Duke Energy International Peru Investments No. 1 Ltd. v. Peru*, ICSID Case No. ARB/03/28, Award dated 18 August 2008 (**CA-149**), ¶¶ 499-500.
[1680] See for example *Tenaris S.A. & Talta –Trading y Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Award dated 12 December 2016 (**CA-225**), ¶ 845.

approach in light of these multiple complex questions of fact and law on both jurisdiction and merits and the involvement of a Non-Disputing Party.

1041. Second, the Claimant and the Respondent have been partly successful and partly unsuccessful in their arguments before the Tribunal. The Respondent raised a number of objections to jurisdiction on which the Claimant prevailed in most part. Conversely, the Claimant raised a number of claims both under the Stability Agreement and the TPA on which the Respondent prevailed. Neither of the Parties' respective arguments were frivolous or manifestly unfounded. Rather, the Tribunal has considered that both Parties advanced serious cases and addressed the complex issues posed by the case in a professional and efficient manner. In the Tribunal's view, this mandates for an equal sharing of the costs.

1042. Third, noting that the Claimant incurred significantly higher costs than the Respondent, the Tribunal finds that the equal sharing of costs constitutes a balanced and predictable approach. Each Party bears the costs it deemed reasonable and appropriate for the presentation of its case.

1043. None of the Parties has brought forward circumstances mandating for a departure from the principle of equal sharing of costs.

1044. In light of the above, the Tribunal finds it appropriate to consider that each Party shall bear its own costs and half of the costs of the arbitration.

1045. The costs of the arbitration, including the fees and expenses of the Tribunal and the Tribunal's Assistant and ICSID's administrative fees and direct expenses amount to a total of USD 1,738,182.07 broken down as follows:

Arbitrators' fees and expenses	
Dr. Inka Hanefeld	272,420.75
Prof. Dr. Guido Tawil	366,924.01
Prof. Dr. Bernardo Cremades	409,252.49
Assistant's fees and expenses	
Charlotte Matthews	151,699.43
ICSID's administrative fees	220,000.00
Direct expenses	317,885.39
Total	**1,738,182.07**

1046. These costs have been paid out of the advances made by the Parties.[1681]

VIII. DISPOSITIF

1047. For all of the foregoing reasons, the Tribunal decides as follows:

a. **The Tribunal has jurisdiction over the Claimant's claims except for the Claimant's claims based on the disputed Tax Assessments' penalties and interest;**
b. **The Claimant's claims are rejected in their entirety;**
c. **Each Party shall bear its own costs and half of the arbitration costs;**
d. **All other claims and pleas for relief are rejected.**

[1681] The ICSID Secretariat will provide the Parties with a detailed Financial Statement. The balance in the case account will be refunded to the Parties proportionally to their contributions.

[Signed]

Prof. Dr. Guido S. Tawil
Arbitrator
Subject to the attached dissenting opinion

Date: 6 May 2024

Prof. Dr. Bernardo Cremades
Arbitrator

Date:

Dr. Inka Hanefeld
President of the Tribunal

Date:

[Signed]

Prof. Dr. Guido S. Tawil
Arbitrator
Subject to the attached dissenting opinion

Date:

Prof. Dr. Bernardo Cremades
Arbitrator

Date: 8 May 2024

Dr. Inka Hanefeld
President of the Tribunal

Date:

Prof. Dr. Guido S. Tawil
Arbitrator
Subject to the attached dissenting opinion

Date:

Prof. Dr. Bernardo Cremades
Arbitrator

Date:

[Signed]

Dr. Inka Hanefeld
President of the Tribunal

Date: 6 May 2024

Appendix I

Annex A to Respondent's Rejoinder on the Merits and Reply on Jurisdiction
ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
ROYALTIES													
2006-2007 Royalty	17/08/09[1]	18/08/09[2]	15/09/09[3]	31/03/10[4]	22/04/10[5]	30/05/13[6]	20/06/13[7]	23/07/13[8]	--	14/04/16[9]	12/07/17[10]	20/11/18[11] 10/07/2020[12] (withdrawal granted)	29/04/14 to 29/10/19[13]
2008 Royalty	01/06/10[14]	18/06/10[15]	15/07/10[16]	31/01/11[17]	17/02/11[18]	21/05/13[19]	20/06/13[20]	23/07/13[21]	--	17/12/14[22]	29/01/16[23]	18/08/17[24]	29/04/14 to 29/10/19[25]
2009 Royalty	27/06/11[26]	08/07/11[27]	09/08/11[28]	21/12/11[29]	26/12/11[30]	15/08/18[31]	28/09/18[32]	--	11/01/18[33]	--	--	--	30/04/19 to 09/08/21[34]
2010-2011 Royalty	13/04/16[35]	13/04/16[36]	11/05/16[37]	29/12/16[38]	01/03/17[39]	28/08/18[40]	18/09/18[41]	--	11/01/19[42]	--	--	--	30/04/19 to 09/08/21[43]
Q4 2011 Royalty	29/12/17[44]	18/01/18[45]	15/02/18[46]	12/10/18[47]	30/10/18[48]	18/11/19[49]	04/12/19[50]	--	--	--	--	--	26/12/19[51]
2012 Royalty	28/03/18[52]	18/04/18[53]	17/05/18[54]	11/01/19[55]	23/01/19[56]	--	--	--	--	--	--	--	28/08/19 to 13/08/21[57]
2013 Royalty	28/09/18[58]	10/10/18[59]	07/11/18[60]	28/05/19[61]	28/05/19[62]	--	--	--	--	--	--	--	30/01/20 to 13/08/21[63]

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
TAXES													
General Sales Tax ("GST")													
2005 GST	28/12/09[64]	30/12/09[65]	28/01/10[66]	25/10/10[67]	25/11/10[68]	22/08/18[69]	16/11/18[70]	--	--	--	--	--	--
2005 GST on Non-Residents	28/12/09[71]	30/12/09[72]	28/01/10[73]	30/09/10[74]	22/10/10[75]	27/02/20[76] (partial withdrawal filed)	--	--	--	--	--	--	01/03/21[77]
2006 GST	29/12/10[78]	30/12/10[79]	27/01/11[80]	27/07/11[81]	24/08/11[82]	22/08/18[83]	16/11/18[84]	--	--	--	--	--	26/12/18[85]
2006 GST on Non-Residents	29/12/10[86]	30/12/10[87]	27/01/11[88]	30/09/11[89]	28/10/11[90]	27/02/20[91] (partial withdrawal filed)	--	--	--	--	--	--	--
2007 GST and Additional Income Tax	27/12/11[92]	29/12/11[93]	26/01/12[94]	27/09/12[95]	12/10/12[96]	30/10/18[97]	20/11/18[98]	--	--	--	--	--	26/04/21[99]
2008 GST and Additional Income Tax	20/12/12[100]	27/12/12[101]	25/01/13[102]	24/10/13[103]	04/11/13[104]	27/02/20[105] (partial withdrawal filed)	--	--	--	--	--	--	--
2009 GST	27/12/13[106]	30/12/13[107]	28/01/14 and 22/07/14[108]	27/10/14[109]	14/11/14[110]	27/02/20[111] (partial withdrawal filed)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2009 GST (penalties)	27/12/13[112] 24/06/14[113] (additional penalties)	24/06/14[114]	28/01/14 and 22/07/14[115]	27/10/14[116]	14/11/14[117]	--	--	--	--	--	--	--	28/01/14[118]
2010 GST	24/06/14[119]	24/06/14[120]	22/07/14[121]	27/04/15[122]	09/06/15[123]	27/02/20[124] (partial withdrawal filed)	--	--	--	--	--	--	08/07/14[125]
2010 GST (penalties)	24/06/14[126] 24/06/14[127] (additional penalties)	24/06/14[128]	22/07/14[129]	27/04/15[130]	09/06/15[131]	--	--	--	--	--	--	--	--
2011 GST	29/09/17[132]	10/10/17[133]	08/11/17 and 15/11/17[134]	27/06/18[135]	18/07/18[136]	27/02/20[137] (partial withdrawal filed)	--	--	--	--	--	--	--
2011 GST (penalties)	29/09/17[138] 29/09/17[139] (additional penalties)	19/10/17 and 10/10/17 [140]	08/11/17 and 15/11/17[141]	27/06/18[142]	18/07/18[143]	27/02/20[144] (partial withdrawal filed)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
Income Tax													
2006 Income Tax	27/05/11[145]	03/06/11[146]	04/07/11[147]	30/03/12[148]	11/04/12[149]	22/08/18[150]	16/11/18[151]	--	--	--	--	--	26/12/18[152]
2006 Income Tax (penalties)	26/05/11[153] 26/05/11[154] (additional penalties)	03/06/11[155]	25/07/11[156]	30/03/12[157]	--	22/08/18[158]	--	--	--	--	--	--	--
2007 Income Tax	28/03/12[159]	11/04/12[160]	10/05/12[161]	25/01/13[162]	18/02/13[163]	22/08/18[164]	16/11/18[165]	--	--	--	--	--	--
2007 Income Tax (penalties)	28/03/12[166] 28/03/12[167] (additional penalties)	11/04/12[168]	10/05/12[169]	25/01/13[170]	18/02/13[171]	22/08/18[172]	19/11/18[173]	--	--	--	--	--	23/11/18[174]
2008 Income Tax	21/08/13[175]	02/09/13[176]	30/09/13[177]	30/05/14[178]	10/06/14[179]	27/02/20[180] (partial withdrawal filed)	--	--	--	--	--	--	--
2008 Income Tax (penalties)	21/08/13[181] 19/08/13[182] (additional penalties)	02/09/13[183]	30/09/13[184]	30/05/14[185]	10/06/14[186]	27/02/20[187] (partial withdrawal filed)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2009 Income Tax and Additional Income Tax	30/10/14[188] and 26/11/14[189]	30/10/14[190] and 27/11/14[191]	27/11/14[192] and 26/12/14[193]	23/06/15[194]	07/08/15[195]	27/02/20[196] (partial withdrawal filed)	--	--	--	--	--	--	--
2009 Income Tax (penalties)	30/10/14[197] 26/11/14[198] (additional penalties)	27/11/14[199]	27/11/14[200] and 26/12/14	23/06/15[201]	07/08/15[202]	27/02/20[203] (partial withdrawal filed)	--	--	--	--	--	--	--
2010 Income Tax and Additional Income Tax	13/02/15[204]	13/02/15[205]	13/03/15 and 23/03/15[206]	04/11/15[207]	06/11/15[208]	27/02/20[209] (partial withdrawal filed)	--	--	--	--	--	--	23/07/21[210]
2010 Income Tax (penalties)	13/02/15[211] 18/02/15[212] (additional penalties)	23/02/15[213]	13/03/15 and 23/03/15[214]	04/11/15[215]	06/11/15[216]	27/02/20[217] (partial withdrawal filed)	--	--	--	--	--	--	--
2011 Income Tax and Additional Income Tax	31/10/17[218]	15/11/17[219]	14/12/17[220]	10/08/18[221]	22/08/18[222]	27/02/20[223] (partial withdrawal filed)	--	--	--	--	--	--	20/01/21[224]

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2011 Income Tax (penalties)	31/10/17[225] 31/10/17[226] (additional penalties)	15/11/17[227]	14/12/17[228]	10/08/18[229]	22/08/18[230]	27/02/20[231] (partial withdrawal filed)	--	--	--	--	--	--	--
2012 Income Tax	26/11/19[232]	28/11/19[233]	26/12/19[234]	27/02/20[235] (partial withdrawal filed) 12/11/20[236] (partial withdrawal granted)	--	--	--	--	--	--	--	--	--
2012 Income Tax (penalties)	26/11/19[237] 26/11/19[238] (additional penalties)	28/11/19[239]	26/12/19[240]	27/02/20[241] (partial withdrawal filed)	--	--	--	--	--	--	--	--	--
2012 Additional Income Tax	26/11/19[242]	28/11/19[243]	26/12/19[244]	27/02/20[245] (full withdrawal filed)	--	--	--	--	--	--	--	--	07/10/20[246]
2013 Income Tax	28/12/20[247]	29/12/20[248]	--	--	--	--	--	--	--	--	--	--	20/01/21[249]

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2013 Income Tax (penalties)	28/12/20[250] 28/12/20[251] (additional penalties)	29/12/20[252]	--	--	--	--	--	--	--	--	--	--	20/01/21[253]
2013 Additional Income Tax	28/12/20[254]	29/12/20[255]	--	--	--	--	--	--	--	--	--	--	20/01/21[256]
Temporary Tax on Net Assets ("TTNA")													
2009 TTNA	27/12/13[257]	30/12/13[258]	28/01/14[259]	27/08/14[260]	15/09/14[261]	27/02/20[262] (full withdrawal filed) 27/02/20[263] (withdrawal granted)	--	--	--	--	--	--	--
2009 TTNA (penalties)	27/12/13[264]	30/12/13[265]	28/01/14[266]	27/08/14[267]	15/09/14[268]	27/02/20[269] (full withdrawal filed) 27/02/20[270] (withdrawal granted)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2010 TTNA	14/08/15[271]	14/08/15[272]	10/09/15[273]	29/02/16[274]	16/03/16[275]	27/02/20[276] (full withdrawal filed) 03/03/20[277] (withdrawal granted)	--	--	--	--	--	--	--
2010 TTNA (penalties)	14/08/15[278]	14/08/15[279]	10/09/15[280]	29/02/16[281]	16/03/16[282]	27/02/20[283] (full withdrawal filed)	--	--	--	--	--	--	--
2011 TTNA	27/07/16[284]	27/07/16[285]	25/08/16[286]	--	--	27/02/20[287] (full withdrawal filed)	--	--	--	--	--	--	--
2011 TTNA (penalties)	27/07/16[288]	27/07/16[289]	--[290]	--	--	27/02/20[291] (full withdrawal filed)	--	--	--	--	--	--	--
2012 TTNA	--	--	--	--	--	--	--	--	--	--	--	--	21/12/17[292]

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2013 TTNA	20/11/19[293]	20/11/19[294]	18/12/19[295] and 30/10/17[296]	13/05/20[297]	27/02/20[298] (full withdrawal filed) 13/05/20[299] (withdrawal granted)	--	--	--	--	--	--	--	19/02/19 to 20/12/19[300]
2013 TTNA (penalties)	26/09/17[301]	03/10/17[302]	30/10/17[303]	28/06/18[304]	19/07/18[305]	14/12/18[306]	04/01/19[307]	--	--	--	--	--	19/02/19[308]
Special Mining Tax ("SMT") and Complementary Mining Pension Fund ("CMPF")													
Q4 2011-2012 SMT	29/12/17[309]	18/01/18[310]	15/02/18[311]	12/10/18[312]	30/10/18[313]	20/06/19[314]	26/07/19[315]	--	--	--	--	--	27/02/20 to 25/06/20[316]
2013 SMT	28/09/18[317]	10/10/18[318]	07/11/18[319]	28/05/19[320]	28/05/19[321]	--	--	--	--	--	--	--	30/01/20 to 25/06/20[322]

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed *Recurso de Reclamación* with SUNAT	SUNAT issued *Resolución de Intendencia*	SUNAT *Resolución de Intendencia* notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2013 CMPF	20/12/19[323]	23/12/19[324]	22/01/20[325]	27/02/20[326] (full withdrawal filed) 13/05/20[327] (withdrawal granted)	--	--	--	--	--	--	--	--	--
***Gravamen Especial a la Minería* ("GEM") – Refund Requests by SMCV**													
Q4 2011 to Q3 2012	28/12/18[328] (SMCV refund requests)		04/03/19[329] (SUNAT denial of refund requests)		22/03/19[330] (SUNAT denial of refund requests notified to SMCV)		23/04/19[331] (SMCV filed *Recurso de Reclamación*)		31/07/19[332] (SUNAT denial of *Recurso de Reclamación*)			31/07/19[333] (SUNAT denial of *Recurso de Reclamación* notified to SMCV)	

[1] Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009).

[2] Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009).

[3] Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments (received by SUNAT on September 15, 2009).

[4] Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010.

[5] Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010).

[6] Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013.

[7] Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013 (notified to SMCV on June 20, 2013); *see also* Exhibit CE-89, Receipt Notice of the Resolutions 08252-1-2013 and 08997-10-2013, June 20, 2013, at p. 2 pdf.

[8] Exhibit RE-117, Acknowledgement of Notification of Tax Tribunal Resolution No. 20131011667 (11667-10-2013) to SMCV, July 23, 2013; *see also* Exhibit CE-91, Tax Tribunal Decision No. 11667-10-2013, July 15, 2013.

[9] Exhibit CE-98, SMCV Administrative Court Appeal of the Tax Tribunal's Decision, 2006/07 Royalty Assessment, September 27, 2013; Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016.

[10] Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016; *see also* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013, July 12, 2017.

[11] Exhibit CE-697, SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment), August 9, 2017; *see also* Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018; Exhibit CA-203, Single Unified Text of the Organic Law of the Judiciary, Arts. 141, 144 ("In the event of failure to achieve a majority vote . . . the Judge with the casting vote shall be called upon through the expedited procedure and a date and time shall be set for the hearing of the case by said Judge.").

[12] Exhibit CE-789, Supreme Court, Resolution Approving SMCV's Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment), October 7, 2020 (SMCV filed withdrawal before a final decision was issued).

[13] Exhibit CE-830, SMCV, Payment Receipt (2006-2008 Royalty Assessments).

[14] Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010 (notified to SMCV on June 18, 2010).

[15] Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010 (notified to SMCV on June 18, 2010).

[16] Exhibit CE-600, SMCV, Request for Reconsideration (2008 Royalty Assessment), July 15, 2010.

[17] Exhibit CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011 (notified to SMCV on February 17, 2011).

[18] Exhibit CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011 (notified to SMCV on February 17, 2011).

[19] Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013 (notified to SMCV on June 20, 2013); *see also* Exhibit CE-92, Tax Tribunal Decision No. 11669-1-2013, July 15, 2013.

[20] Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013 (notified to SMCV on June 20, 2013); *see also* Exhibit CE-89, Receipt Notice of the Resolutions 08252-1-2013 and 08997-10-2013, June 20, 2013, p. 1 of PDF.

[21] Exhibit RE-118, Acknowledgement of Notification of Tax Tribunal Resolution No. 2013111669 (11669-1-2013) to SMCV, July 23, 2013; *see also* Exhibit CE-92, Tax Tribunal Decision No. 11669-1-2013, July 15, 2013.

[22] Exhibit CE-97, SMCV Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments, September 18, 2013; *see also* Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014.

[23] Exhibit CE-137, Superior Court Decision No. 7650-2013, January 29, 2016.

[24] Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017.

[25] Exhibit CE-830, SMCV, Payment Receipt (2006-2008 Royalty Assessments).

[26] Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011 (notified to SMCV on July 8, 2011).

[27] Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011 (notified to SMCV on July 8, 2011).

[28] Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011.

[29] Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011).

[30] Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011).

[31] Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018.

[32] Exhibit RE-119, Record of Notification of Tax Tribunal Resolution No. 06141-2-2018 to SMCV, September 28, 2018.

[33] Exhibit CE-213, Tax Tribunal Decision No. 00019-Q-2019, January 4, 2018 (notified to SMCV on January 11, 2018); *see also* Claimant's Memorial at Annex A.

[34] Exhibit CE-831, SMCV, Payment Receipt (2009 Royalty Assessments).

[35] Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016 (notified to SMCV on April 13, 2016); *see also* Exhibit CE-688, SUNAT, Fine Resolution No. 052-002-0006603 to 052-002-0006645 (2010/11 Royalty Assessments), April 13, 2016.

[36] Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016 (notified to SMCV on April 13, 2016).

[37] Exhibit CE-146, SMCV Reconsideration Request of SUNAT, 2010/11 Royalty Assessments, May 11, 2016.

[38] Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016.

[39] Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016 (notified to SMCV on March 1, 2017).

[40] Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018, August 28, 2018.

[41] Exhibit RE-120, Record of Notification of Tax Tribunal Resolution No. 06575-1-2018 to SMCV, September 18, 2018.

[42] Exhibit CE-214, Tax Tribunal Decision No. 00036-Q-2019, January 7, 2019 (notified to SMCV on January 11, 2019); *see also* Claimant's Memorial at Annex A.

[43] Exhibit CE-832, SMCV, Payment Receipt (2010-2011 Royalty Assessments).

[44] Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017 (notified to SMCV on January 18, 2018); *see also* Exhibit CE-701, SUNAT, Fine Resolution No. 012-002-0031073 (Q4 2011 Royalty Assessment), December 29, 2017; Exhibit CE-702, SUNAT, Fine Resolution No. 012-002-0031074 (Q4 2011 Royalty Assessment), December 29, 2017.

[45] Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017 (notified to SMCV on January 18, 2018).

[46] Exhibit CE-175, SMCV Request for Reconsideration, 4Q 2011 Royalty Assessments, February 15, 2018.

[47] Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018).

[48] Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018).

[49] Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019, November 18, 2019.

[50] Exhibit RE-121, Record of Notification of Tax Tribunal Resolution No. 10574-9-2019 to SMCV, December 4, 2019.

[51] Exhibit CE-775, SMCV, Payment Receipt (Q4 2011 Royalty Assessment), December 26, 2019; *see also* Exhibit CE-776, SMCV, Payment Receipt No. 756189230 (Q4 2011 Royalty Penalty), December 26, 2019; Exhibit CE-777, SMCV, Payment Receipt No. 756189231, (Q4 2011 Royalty Penalty), December 26, 2019.

[52] Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018 (notified to SMCV on April 18, 2018).

[53] Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018 (notified to SMCV on April 18, 2018).

[54] Exhibit CE-178, SMCV Request for Reconsideration, 2012 Royalty Assessments, May 17, 2018.

[55] Exhibit CE-215, SUNAT Resolution No. 0150140014560, January 11, 2019 (notified to SMCV on January 23, 2019).

[56] Exhibit CE-215, SUNAT Resolution No. 0150140014560, January 11, 2019 (notified to SMCV on January 23, 2019).

[57] Exhibit CE-833, SMCV, Payment Receipt (2012 Royalty Assessments).

[58] Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018 (notified to SMCV on October 10, 2018).

[59] Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018 (notified to SMCV on October 10, 2018).

[60] Exhibit CE-203, SMCV Request for Reconsideration, 2013 Royalty Assessments, November 7, 2018.

[61] Exhibit CE-220, SUNAT Resolution No. 0150140014816, May 28, 2019.

[62] Exhibit RE-122, Record of Notification of SUNAT Resolution No. 0150140014816 to SMCV, May 28, 2019.

[63] Exhibit CE-834, SMCV, Payment Receipt (2013 Royalty Assessments).

[64] Exhibit CE-35, SUNAT Assessments No. 052-003-0005626 to No. 052-003-0005637, December 28, 2009; *see also* Exhibit CE-37, SUNAT Fine Resolutions No. 052-002-0003816 to No. 052-002-0003827, December 29, 2009.

[65] Exhibit RE-123, Acknowledgement of Notifications of SUNAT Resolutions No. 052-003-0005626 to 052-003-0005637 to SMCV, December 30, 2009; *see also* Exhibit RE-124, Acknowledgement of Notifications of SUNAT Fine Resolutions Nos. 052-002-0003816 to 052-002-0003827 to SMCV, December 30, 2009.

[66] *See* Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010 (first paragraph).

[67] Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010.

[68] Exhibit RE-125, Acknowledgement of Notification of SUNAT Intendence Resolution No. 055-014-0001369 to SMCV, November 25, 2010.

[69] Exhibit RE-173, Tax Tribunal Resolution No. 06365-2-2018, August 22, 2018.

[70] Exhibit RE-126, Record of Notification of Tax Tribunal Resolution No. 06365-2-2018 to SMCV, November 16, 2018.

[71] Exhibit CE-36, SUNAT Assessments No. 052-003-0005642 to 052-003-0005653, December 28, 2009.

[72] Exhibit RE-127, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0005642 to 052-003-0005653 to SMCV, December 30, 2009.

[73] *See* Exhibit CE-41, SUNAT Resolution No. 055-014-0001358, September 30, 2010 (notified to SMCV on October 22, 2010) (first paragraph).

[74] Exhibit CE-41, SUNAT Resolution No. 055-014-0001358, September 30, 2010 (notified to SMCV on October 22, 2010).

[75] Exhibit CE-41, SUNAT Resolution No. 055-014-0001358, September 30, 2010 (notified to SMCV on October 22, 2010).

[76] Exhibit CE-246, Partial Withdrawal, General Sales Tax on Non-Residents 2005, Docket No. 2382-2011, February 27, 2020.

[77] Exhibit CE-805, SMCV, Payment Receipt (GST NR Nov-Dec 2005), March 1, 2021.

[78] Exhibit CE-43, SUNAT Assessments No. 052-003-006737 to 052-003-006744 and No. 052-003-006777 to 052-003-006780, December 29, 2010; *see also* Exhibit CE-44, SUNAT Fine Resolutions No. 052-002-0004402 to No. 052-002-0004413, December 29, 2010.

[79] Exhibit RE-172, Notifications of SUNAT Assessment Resolutions Nos. 052-003-0006737 to 052-003-0006744 and 052-003-0006777 to 052-003-0006780 to SMCV, December 30, 2010; *see also* Exhibit RE-128, Acknowledgement of Notifications of SUNAT Fine Resolutions Nos. 052-002-0004402 to 052-002-0004413 to SMCV, December 30, 2010.

[80] *See* Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 (notified to SMCV August 24, 2011) (first paragraph).

[81] Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 (notified to SMCV August 24, 2011); *see also* Exhibit CE-744, SUNAT, Resolution No. 0150150001832 (GST 2006), December 17, 2018.

[82] Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 (notified to SMCV August 24, 2011).

[83] Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018, August 22, 2018.

[84] Exhibit RE-155, Record of Notification of Tax Tribunal Resolution No. 06366-2-2018 to SMCV, November 16, 2018.

[85] Exhibit CE-844, SMCV, Payment Receipt (GST 2006), December 26, 2018.

[86] Exhibit CE-206, SUNAT Assessments No. 052-003-0006753 to No. 052-003-0006764, December 29, 2010.

[87] Exhibit RE-156, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0006753 to 052-003-0006764 to SMCV, December 30, 2010.

[88] *See* Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011 (notified to SMCV on October 28, 2011) (first paragraph).

[89] Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011 (notified to SMCV on October 28, 2011).

[90] Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011 (notified to SMCV on October 28, 2011).

[91] Exhibit CE-247, Partial Withdrawal, General Sales Tax on Non-Residents 2006, Docket No. 1891-2012, February 27, 2020.

[92] Exhibit CE-60, SUNAT Assessments No. 052-003-0008024 to No. 052-003-0008035, December 27, 2011 (notified to SMCV on December 29, 2011); *see also* Exhibit CE-59, SUNAT Fine Resolution No. 052-002-0005053 to No. 052-002-0005064, December 27, 2011; Exhibit CE-61, SUNAT Assessments No. 052-003-0008036 to No. 052-003-0008046, December 27, 2011.

[93] Exhibit CE-60, SUNAT Assessments No. 052-003-0008024 to No. 052-003-0008035, December 27, 2011 (notified to SMCV on December 29, 2011).

[94] *See* Exhibit CE-72, SUNAT Resolution No. 055-014-0001662, September 27, 2012 (first paragraph).

[95] Exhibit CE-72, SUNAT Resolution No. 055-014-0001662, September 27, 2012.

[96] Exhibit RE-129, Acknowledgement of Notification of SUNAT Claim Resolution No. 055-014-0001662 to SMCV, October 12, 2012.

[97] Exhibit CE-202, Tax Tribunal Resolution No. 08470-2-2018, October 30, 2018.

[98] Exhibit RE-130, Record of Notification of Tax Tribunal Resolution No. 08470-2-2018 to SMCV, November 20, 2018.

[99] Exhibit CE-845, SMCV, Payment Receipt (GST 2007).

[100] Exhibit CE-75, SUNAT Assessments No. 052-003-0009549, No. 052-003-0009591 to No. 052-003-0009602, and 2012 SUNAT Assessment, Annex 2, December 20, 2012; *see also* Exhibit CE-74, SUNAT Fine Resolutions No. 052-002-0005664, No. 052-002-0005679, No. 052-002-0005680, No. 052-002-0005682 to No. 052-002-0005687, and No. 052-002-0005691 to No. 052-002-0005693, December 20, 2012; Exhibit CE-76, SUNAT Assessments No. 052-003-009550 to No. 052-003-009554, No. 052-003-009562 to No. 052-003-009564, No. 052-003-009580 to No. 052-003-009581, No. 052-003-009589, No. 052-003-009594, December 20, 2012.

[101] Exhibit RE-131, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0009549, 052-003-0009591 to 052-003-0009593, and 052-003-00099595 to 052-003-0009602 to SMCV, December 27, 2012; *see also* Exhibit RE-132, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0009550 to 052-003-09554, 052-003-0009562 to 052-003-0009564, 052-003-0009580, 052-003-0009581, 052-003-0009589, 052-003-0009594 to SMCV, December 27, 2012.

[102] *See* Exhibit CE-100, SUNAT Resolution No. 055-014-0001810, October 24, 2013 (notified to SMCV on November 4, 2013) (first paragraph).

[103] Exhibit CE-100, SUNAT Resolution No. 055-014-0001810, October 24, 2013 (notified to SMCV on November 4, 2013).

[104] Exhibit CE-100, SUNAT Resolution No. 055-014-0001810, October 24, 2013 (notified to SMCV on November 4, 2013).

[105] Exhibit CE-253, Partial Withdrawal, General Sales Tax 2008 and Additional Income Tax, Docket No. 4457-2014, February 27, 2020.

[106] Exhibit CE-102, SUNAT Assessments No. 052-003-0011235 to No. 052-003-0011245, December 27, 2013 (notified to SMCV on December 30, 2013).

[107] Exhibit CE-102, SUNAT Assessments No. 052-003-0011235 to No. 052-003-0011245, December 27, 2013 (notified to SMCV on December 30, 2013).

[108] *See* Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014 (first paragraph).

[109] Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014.

[110] Exhibit RE-133, Acknowledgement of Notification of SUNAT Claim Resolution No. 055-014-0001988 to SMCV, November 14, 2014.

[111] Exhibit CE-243, Partial Withdrawal, General Sales Tax 2009, Docket No. 2929-2015, February 27, 2020.

[112] Exhibit CE-105, SUNAT Fine Resolutions No. 052-002-0006017 to No. 052-002-0006027, December 27, 2013.

[113] Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014 (notified to SMCV on June 24, 2014).

[114] Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014 (notified to SMCV on June 24, 2014).

[115] *See* Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014 (first paragraph).

[116] Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014.

[117] *See* Claimant's Memorial at Annex A.

[118] Exhibit CE-669, SMCV, Payment Receipt (GST 2009), January 28, 2014.

[119] Exhibit CE-110, SUNAT Assessments No. 052-003-0011478 to No. 052-003-0011483, No. 052-003-0011485 to No. 052-003-0011490, and 2014 SUNAT Assessment, Annex 2, June 24, 2014 (notified to SMCV on June 24, 2014).

[120] Exhibit CE-110, SUNAT Assessments No. 052-003-0011478 to No. 052-003-0011483, No. 052-003-0011485 to No. 052-003-0011490, and 2014 SUNAT Assessment, Annex 2, June 24, 2014 (notified to SMCV on June 24, 2014).

[121] *See* Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (notified to SMCV on June 9, 2015) (first paragraph).

[122] Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (notified to SMCV on June 9, 2015).

[123] Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (notified to SMCV on June 9, 2015).

[124] Exhibit CE-244, Partial Withdrawal, General Sales Tax 2010, Docket No. 16744-2015, February 27, 2020.

[125] Exhibit CE-674, SMCV, Payment Receipt (GST 2010), July 8, 2014.

[126] Exhibit CE-111, SUNAT Fine Resolutions No. 052-002-0006087 to No. 052-002-0006089, and No. 052-002-0006092 to No. 052-002-0006100, June 24, 2014 (notified to SMCV on June 24, 2014).

[127] Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014 (notified to SMCV on June 24, 2014).

[128] Exhibit CE-111, SUNAT Fine Resolutions No. 052-002-0006087 to No. 052-002-0006089, and No. 052-002-0006092 to No. 052-002-0006100, June 24, 2014 (notified to SMCV on June 24, 2014); *see also* Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014 (notified to SMCV on June 24, 2014).

[129] *See* Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (notified to SMCV on June 9, 2015) (first paragraph).

[130] Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (notified to SMCV on June 9, 2015).

[131] Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).

[132] Exhibit RE-40, SUNAT, Assessments No. 012-003-0089360 to 012-003-0089371 (GST for 2011), September 29, 2017.

[133] Exhibit RE-214, SUNAT, Notifications of Assessments No. 012-003-0089360 to 012-003-0089371 (GST for 2011), September 29, 2017 (notified to SMCV on October 10, 2017).

[134] *See* Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018) (first paragraph).

[135] Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).

[136] Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).

[137] Exhibit CE-245, Partial Withdrawal, General Sales and Other Taxes 2011, Docket No. 13002-2018, February 27, 2020.

[138] Exhibit CE-155, Fine Resolutions No. 012-002-0030760 to No. 012-002-0030770, September 29, 2017 (notified to SMCV on October 19, 2017).

[139] Exhibit CE-154, Fine Resolution No. 012-002-0030759, September 29, 2017 (notified to SMCV on October 10, 2017).

[140] Exhibit CE-155, Fine Resolutions No. 012-002-0030760 to No. 012-002-0030770, September 29, 2017 (notified to SMCV on October 19, 2017); Exhibit CE-154, Fine Resolution No. 012-002-0030759, September 29, 2017 (notified to SMCV on October 10, 2017).

[141] *See* Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018) (first paragraph).

[142] Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).

[143] Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).

[144] Exhibit CE-245, Partial Withdrawal, General Sales and Other Taxes 2011, Docket No. 13002-2018, February 27, 2020.

[145] Exhibit CE-51, SUNAT Assessment No. 052-003-0007147, May 27, 2011 (notified to SMCV on June 3, 2011).

[146] Exhibit CE-51, SUNAT Assessment No. 052-003-0007147, May 27, 2011 (notified to SMCV on June 3, 2011).

[147] Exhibit CE-617, SMCV, Request for Reconsideration (Income Tax for 2006), July 4, 2011.

[148] Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0500, March 30, 2012; *see also* Exhibit CE-745, SUNAT, Resolution No. 0150150001833 (Income Tax for 2006), December 17, 2018.

[149] Exhibit RE-134, Acknowledgement of Notification of SUNAT Claim Resolution No. 055-014-0001556 to SMCV, April 11, 2012.

[150] Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018, August 22, 2018.

[151] Exhibit RE-135, Record of Notification of Tax Tribunal Resolution No. 06367-2-2018 to SMCV, November 16, 2018.

[152] Exhibit CE-849, SMCV, Payment Receipt (Income Tax for 2006), December 26, 2018.

[153] Exhibit CE-52, SUNAT Fine Resolution No. 052-002-0004617, May 26, 2011.

[154] Exhibit CE-50, SUNAT Fine Resolutions No. 052-002-0004614 and No. 052-002-0004616, May 26, 2011 (notified to SMCV on June 3, 2011).

[155] Exhibit CE-50, SUNAT Fine Resolutions No. 052-002-0004614 and No. 052-002-0004616, May 26, 2011 (notified to SMCV on June 3, 2011).

[156] Exhibit CE-617, SMCV, Request for Reconsideration (Income Tax for 2006), July 4, 2011. As Claimant indicated, "unless otherwise noted, SMCV challenged the "Additional Penalties" related to certain tax assessments in the same proceedings as the underlying assessments." *See* Claimant's Memorial at Annex A, n. 1.

[157] Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0500, March 30, 2012; *see also* Exhibit CE-745, SUNAT, Resolution No. 0150150001833 (Income Tax for 2006), December 17, 2018.

[158] Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018, August 22, 2018; *see also* Exhibit CE-750, SMCV, Contentious Administrative Court Claim (Income Tax 2006), February 15, 2019.

[159] Exhibit CE-66, SUNAT Assessment No. 052-003-0008345, March 28, 2012 (notified to SMCV on April 11, 2012).

[160] Exhibit CE-66, SUNAT Assessment No. 052-003-0008345, March 28, 2012 (notified to SMCV on April 11, 2012).

[161] *See* Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013), at p. 1.

[162] Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013).

[163] Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013).

[164] Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018, August 22, 2018.

[165] Exhibit RE-136, Record of Notification of Tax Tribunal Resolution No. 06369-2-2018 to SMCV, November 16, 2018.

[166] Exhibit CE-67, SUNAT Fine Resolution No. 052-002-0005166, March 28, 2012.

[167] Exhibit CE-68, SUNAT Fine Resolutions No. 052-002-0005167 and No. 052-002-0005168, March 28, 2012 (notified to SMCV on April 11, 2012).

[168] Exhibit CE-68, SUNAT Fine Resolutions No. 052-002-0005167 and No. 052-002-0005168, March 28, 2012 (notified to SMCV on April 11, 2012).

[169] *See* Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013), at p. 1.

[170] Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013).

[171] Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013).

[172] Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018, August 22, 2018 (notified to SMCV on November 19, 2018).

[173] Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018, August 22, 2018 (notified to SMCV on November 19, 2018); *see also* Claimant's Memorial at Annex A.

[174] Exhibit CE-861, SMCV Income Tax 2007 Additional Penalties Payment Receipts, November 23, 2018.

[175] Exhibit CE-95, SUNAT Assessment No. 052-003-0010790, August 21, 2013.

[176] Exhibit RE-137, Acknowledgement of Notification of SUNAT Fine Resolution No. 052-002-0005884 to SMCV, September 2, 2013.

[177] Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (first paragraph).

[178] Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014.

[179] Exhibit RE-138, Acknowledgement of Notification of SUNAT Claim Resolution No. 055-014-0001907 to SMCV, June 10, 2014.

[180] Exhibit CE-248, Partial Withdrawal, Income Tax 2008, Docket No. 2633-2016, February 27, 2020.

[181] Exhibit CE-94, SUNAT Fine Resolution No. 052-002-0005884, August 19, 2013.

[182] Exhibit CE-93, SUNAT, Fine Resolutions No. 052-002-0005882 and 052-002-0005883, August 19, 2013; *see also* Exhibit CE-661, SUNAT, Fine Resolution No. 052-002-0005881 to 052-002-0005883 (Income Tax 2010-2012), August 19, 2013.

[183] Exhibit RE-139, Acknowledgement of Notifications of SUNAT Fine Resolutions Nos. 052-002-0005882 and 052-002-0005883 to SMCV, September 2, 2013.

[184] Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014) (first paragraph).

[185] Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014).

[186] Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014); *see also* Claimant's Memorial at Annex A.

[187] Exhibit CE-248, Partial Withdrawal, Income Tax 2008, Docket No. 2633-2016, February 27, 2020.

[188] Exhibit CE-115, SUNAT Assessment No. 052-003-00011921, October 30, 2014 (notified to SMCV on October 30, 2014).

[189] Exhibit CE-121, SUNAT Assessments No. 052-003-0012000 to No. 052-003-0012002, No. 052-003-0012007 to No. 052-003-0012010, No. 052-003-0012013 to No. 052-003-0012016, and No. 052-003-0012018, November 26, 2014 (notified to SMCV on November 27, 2014).

[190] Exhibit CE-115, SUNAT Assessment No. 052-003-00011921, October 30, 2014 (notified to SMCV on October 30, 2014).

[191] Exhibit CE-121, SUNAT Assessments No. 052-003-0012000 to No. 052-003-0012002, No. 052-003-0012007 to No. 052-003-0012010, No. 052-003-0012013 to No. 052-003-0012016, and No. 052-003-0012018, November 26, 2014 (notified to SMCV on November 27, 2014).

[192] *See* Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015) (first paragraph).

[193] Exhibit CE-678, SMCV, Request for Reconsideration (Income Tax for 2009), December 26, 2014.

[194] Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015).

[195] Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015).

[196] Exhibit CE-249, Partial Withdrawal, Income Tax 2009, Docket No. 16697-2015, February 27, 2020.

[197] Exhibit CE-116, SUNAT Fine Resolution No. 052-002-006238, October 30, 2014.

[198] Exhibit CE-119, SUNAT Fine Resolution No. 052-002-0006260, November 26, 2014 (notified to SMCV on November 27, 2014); *see also* Exhibit CE-120, SUNAT Fine Resolution No. 052-002-0006267, November 26, 2014; Exhibit CE-118, SUNAT Fine Resolution No. 052-002-0006272, November 26, 2014.

[199] Exhibit CE-119, SUNAT Fine Resolution No. 052-002-0006260, November 26, 2014 (notified to SMCV on November 27, 2014).

[200] *See* Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015) (first paragraph).

[201] Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015).

[202] Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015).

[203] Exhibit CE-249, Partial Withdrawal, Income Tax 2009, Docket No. 16697-2015, February 27, 2020.

[204] Exhibit CE-123, SUNAT Assessment No. 052-003-0012411, February 13, 2015 (notified to SMCV on February 13, 2015); *see also* Exhibit CE-124, SUNAT Assessments No. 052-003-0012396, No. 052-003-0012400 to No. 052-003-0012403, No. 052-003-0012408 to No. 052-003-0012410, and No. 052-003-0012415 to No. 052-003-0012418, February 13, 2015.

[205] Exhibit CE-123, SUNAT Assessment No. 052-003-0012411, February 13, 2015 (notified to SMCV on February 13, 2015).

[206] *See* Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015) (first paragraph).

[207] Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015).

[208] Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015).

[209] Exhibit CE-250, Partial Withdrawal, Income Tax 2010, Docket No. 3201-2016, February 27, 2020.

[210] Exhibit CE-809, SMCV, Payment Receipt (AIT 2010), July 23, 2021.

[211] Exhibit CE-125, SUNAT Fine Resolution No. 052-002-0006347, February 13, 2015.

[212] Exhibit CE-126, SUNAT Fine Resolutions No. 052-002-0006355 and No. 052-002-0006356, February 18, 2015 (notified to SMCV on February 23, 2015); *see also* Exhibit CE-127, SUNAT Fine Resolution No. 052-002-0006357, February 18, 2015.

[213] Exhibit CE-126, SUNAT Fine Resolutions No. 052-002-0006355 and No. 052-002-0006356, February 18, 2015 (notified to SMCV on February 23, 2015).

[214] *See* Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015) (first paragraph).

[215] Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015).

[216] Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015).

[217] Exhibit CE-250, Partial Withdrawal, Income Tax 2010, Docket No. 3201-2016, February 27, 2020.

[218] Exhibit CE-157, SUNAT Assessment No. 012-003-0090355, October 31, 2017 (notified to SMCV on November 15, 2017); *see also* Exhibit CE-159, SUNAT Assessments No. 012-003-0090368 to No. 012-003-0090378, October 31, 2017.

[219] Exhibit CE-157, SUNAT Assessment No. 012-003-0090355, October 31, 2017 (notified to SMCV on November 15, 2017).

[220] Exhibit CE-698, SMCV, Request for Reconsideration (Income Tax for 2011), December 14, 2017.

[221] Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018 (notified to SMCV on August 22, 2018).

[222] Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018 (notified to SMCV on August 22, 2018).

[223] Exhibit CE-251, Partial Withdrawal, Income Tax 2011, Docket No. 13393-2018, February 27, 2020.

[224] Exhibit CE-862, SMCV 2011 Income Tax Payment Receipt Order 957156446, January 20, 2021.

[225] Exhibit CE-160, SUNAT Fine Resolutions No. 012-002-0030879 to No. 012-002-0030893, October 31, 2017.

[226] Exhibit CE-161, SUNAT Fine Resolutions No. 012-002-0030892 and No. 012-002-0030893, October 31, 2017.

[227] Exhibit CE-161, SUNAT Fine Resolutions No. 012-002-0030892 and No. 012-002-0030893, October 31, 2017; *see also* Exhibit CE-160, SUNAT Fine Resolutions No. 012-002-0030879 to No. 012-002-0030893, October 31, 2017 (notified to SMCV on November 15, 2017).

[228] Exhibit CE-698, SMCV, Request for Reconsideration (Income Tax for 2011), December 14, 2017.

[229] Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018 (notified to SMCV on August 22, 2018).

[230] Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018 (notified to SMCV on August 22, 2018).

[231] Exhibit CE-251, Partial Withdrawal, Income Tax 2011, Docket No. 13393-2018, February 27, 2020.

[232] Exhibit CE-232, SUNAT Assessment No. 012-003-0108051, November 26, 2019.

[233] Exhibit RE-140, Record of Notification of SUNAT Assessment Resolution No. 0120030108051 to SMCV, November 28, 2019.

[234] Exhibit CE-773, SMCV, Request for Reconsideration (Income Tax for 2012), December 26, 2019.

[235] Exhibit CE-252, Partial Withdrawal, Income Tax 2012, Docket No. 0150340017563, February 27, 2020.

[236] Exhibit CE-791, SUNAT, Resolution No. 0150140015674 (Income Tax for 2012), November 12, 2020.

[237] Exhibit CE-235, SUNAT Fine Resolution No. 012-002-0033157, November 26, 2019.

[238] Exhibit CE-233, SUNAT Fine Resolution No. 012-002-0033155, November 26, 2019; *see also* Exhibit CE-234, SUNAT Fine Resolution No. 012-002-0033156, November 26, 2019.

[239] Exhibit RE-142, Record of Notification of SUNAT Fine Resolution No. 012-002-0033155 to SMCV, November 28, 2019.

[240] Exhibit CE-773, SMCV, Request for Reconsideration (Income Tax for 2012), December 26, 2019.

[241] Exhibit CE-252, Partial Withdrawal, Income Tax 2012, Docket No. 0150340017563, February 27, 2020.

[242] Exhibit CE-231, SUNAT Assessment No. 012-003-0108050, November 26, 2019.

[243] Exhibit RE-143, Record of Notification of SUNAT Assessment Resolution No. 0120030108050 to SMCV, November 28, 2019.

[244] Exhibit CE-774, SMCV, Request for Reconsideration (AIT for 2012), December 26, 2019.

[245] Exhibit CE-259, Withdrawal, Additional Income Tax 2012, Docket No. 0150340017566, February 27, 2020.

[246] Exhibit CE-790, SMCV, Payment Under Protest Letter (AIT 2012), October 7, 2020; *see also* Exhibit CE-795, SMCV, Payment Receipt (AIT 2013), January 20, 2021.

[247] Exhibit CE-277, SUNAT Assessment No. 0120030113991 (Income Tax for 2013), December 28, 2020.

[248] Exhibit RE-144, Record of Notification of SUNAT Assessment Resolution No. 0120030113991 to SMCV, December 29, 2020; *see also* Exhibit RE-145, Record of Notification of SUNAT Fine Resolution No. 0120020034409 to SMCV, December 29, 2020.

[249] Exhibit CE-282, SMCV Payments Under Protest (Income Tax and AIT for 2013), February 5, 2021; *see also* Exhibit CE-796, SMCV, Payment Receipt No. 957149445, January 20, 2021; Exhibit CE-797, SMCV, Payment Receipt No. 957156446, January 20, 2021; Exhibit CE-798, SMCV, Payment Receipt (Income Tax for 2013), January 20, 2021; Exhibit CE-799, SMCV, Payment Receipt (Income Tax for 2013, Assessment No. 012-003-0113991), January 20, 2021.

[250] Exhibit CE-278, SUNAT Fine Resolution No. 0120020034409 (Income Tax for 2013), December 28, 2020; *see also* Exhibit CE-279, SUNAT Fine Resolution No. 0120020034411 (Income Tax for 2013), December 28, 2020; Exhibit CE-280, SUNAT Fine Resolution No. 0120020034412 (Income Tax for 2013), December 28, 2020.

[251] Exhibit CE-280, SUNAT Fine Resolution No. 0120020034412 (Income Tax for 2013), December 28, 2020.

[252] Exhibit RE-146, Record of Notification of SUNAT Fine Resolution No. 0120020034412 to SMCV, December 29, 2020.

[253] Exhibit CE-799, SMCV, Payment Receipt (Income Tax for 2013, Assessment No. 012-003-0113991), January 20, 2021; *see also* Exhibit CE-863, SMCV Income Tax 2013 Additional Penalties Payment Receipts, January 20, 2021.

[254] Exhibit CE-281, SUNAT Assessment No. 0120030114004 (AIT for 2013), December 28, 2020; *see also* Exhibit CE-854, SUNAT 2013 Income Tax Assessment, December 28, 2020.

[255] Exhibit RE-147, Record of Notification of SUNAT Assessment No. 0120030114004 to SMCV, December 29, 2020.

[256] Exhibit CE-795, SMCV, Payment Receipt (AIT 2013), January 20, 2021.

[257] Exhibit CE-103, SUNAT Assessment No. 052-003-0011208, December 27, 2013 (notified to SMCV on December 30, 2013).

[258] Exhibit CE-103, SUNAT Assessment No. 052-003-0011208, December 27, 2013 (notified to SMCV on December 30, 2013).

[259] *See* Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (first paragraph).

[260] Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (notified to SMCV on September 15, 2014).

[261] Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (notified to SMCV on September 15, 2014); *see also* Claimant's Memorial at Annex A.

[262] Exhibit CE-255, Withdrawal, Temporary Tax on Net Assets 2009, Docket No. 18065-2014, February 27, 2020; *see also* Exhibit CE-780, SMCV, Withdrawal of Appeal to Tax Tribunal (TTNA for 2009), February 25, 2020.

[263] Exhibit CE-875, Tax Tribunal, Resolution No. 02213-2-2020 (TTNA for 2009), February 27, 2020 (notified to SMCV on March 3, 2020).

[264] Exhibit CE-104, SUNAT Fine Resolution No. 052 002-0006004, December 27, 2013 (notified to SMCV on December 30, 2013).

[265] Exhibit CE-104, SUNAT Fine Resolution No. 052 002-0006004, December 27, 2013 (notified to SMCV on December 30, 2013).

[266] *See* Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (notified to SMCV on September 15, 2014) (first paragraph).

[267] Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (notified to SMCV on September 15, 2014).

[268] Exhibit RE-148, Acknowledgement of Notification of SUNAT Claim Resolution No. 055-014-0001946 to SMCV, September 15, 2014.

[269] Exhibit CE-255, Withdrawal, Temporary Tax on Net Assets 2009, Docket No. 18065-2014, February 27, 2020.

[270] Exhibit CE-875, Tax Tribunal, Resolution No. 02213-2-2020 (TTNA for 2009), February 27, 2020 (notified to SMCV on March 3, 2020); *see also* Claimant's Memorial at Annex A.

[271] Exhibit CE-132, SUNAT Assessment No. 052-003-0012908, August 14, 2015 (notified to SMCV on August 14, 2015).

[272] Exhibit CE-132, SUNAT Assessment No. 052-003-0012908, August 14, 2015 (notified to SMCV on August 14, 2015).

[273] *See* Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016) (first paragraph).

[274] Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016).

[275] Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016).

[276] Exhibit CE-256, Withdrawal, Temporary Tax on Net Assets 2010, Docket No. 5721-2016, February 27, 2020.

[277] Exhibit CE-877, SUNAT Fine Resolution No. 052-002-0006448, August 14, 2013 (notified to SMCV on August 14, 2015); *see also* Claimant's Memorial at Annex A.

[278] Exhibit CE-133, SUNAT Fine Resolution No. 052-002-0006448, August 14, 2013 (notified to SMCV on August 14, 2015).

[279] Exhibit CE-133, SUNAT Fine Resolution No. 052-002-0006448, August 14, 2013 (notified to SMCV on August 14, 2015).

[280] *See* Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016) (first paragraph).

[281] Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016).

[282] Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016).

[283] Exhibit CE-256, Withdrawal, Temporary Tax on Net Assets 2010, Docket No. 5721-2016, February 27, 2020.

[284] Exhibit CE-147, SUNAT Assessment No. 052-003-0014319, July 27, 2016 (notified to SMCV on July 27, 2016).

[285] Exhibit CE-147, SUNAT Assessment No. 052-003-0014319, July 27, 2016 (notified to SMCV on July 27, 2016).

[286] On August 25, 2016, SMCV appealed the 2011 TTNA Assessment and fine resolution before SUNAT (a copy of this appeal was not provided by Claimant in this arbitration). Pursuant to Art. 144 of the Tax Code, SMCV proceeded to appeal the Assessment and fine resolution directly before the Tax Tribunal (according to Art. 144 of the Tax Code, a taxpayer may deem its appeal with SUNAT dismissed and re-file the same appeal directly with the Tax Tribunal as long as nine (9) months have elapsed since the filing of the "reclamation" with SUNAT without a decision from the same tax authority. *See* Exhibit CE-695, SMCV, Appeal to Tax Tribunal (TTNA for 2011), June 27, 2017.

[287] Exhibit CE-257, Withdrawal, Temporary Tax on Net Assets 2011, Docket No. 8937-2017, February 27, 2020.

[288] Exhibit CE-148, Fine Resolution No. 052-002-0006693, July 27, 2016 (notified to SMCV on July 27, 2016).

[289] Exhibit CE-148, Fine Resolution No. 052-002-0006693, July 27, 2016 (notified to SMCV on July 27, 2016).

[290] On August 25, 2016, SMCV appealed the 2011 TTNA Assessment and fine resolution before SUNAT (a copy of this appeal was not provided by Claimant in this arbitration). Pursuant to Art. 144 of the Tax Code, SMCV proceeded to appeal the Assessment and fine resolution directly before the Tax Tribunal (according to Art. 144 of the Tax Code, a taxpayer may deem its appeal with SUNAT dismissed and re-file the same appeal directly with the Tax Tribunal as long as nine (9) months have elapsed since the filing of the "reclamation" with SUNAT without a decision from the same tax authority. *See* Exhibit CE-695, SMCV, Appeal to Tax Tribunal (TTNA for 2011), June 27, 2017.

[291] Exhibit CE-257, Withdrawal, Temporary Tax on Net Assets 2011, Docket No. 8937-2017, February 27, 2020.

[292] Exhibit CE-162, Tax Return for Temporary Taxes on Net Assets and Payment Receipt, December 21, 2017. SMCV voluntarily self-declared and paid 2012 TTNA amounts under protest in December 2017 "to avoid further penalties and Interest." (Claimant's Memorial at para. 283).

[293] Exhibit CE-230, Assessment Resolution No. 012-003-0107987, November 20, 2019.

[294] Exhibit RE-149, Record of Notification of SUNAT Assessment Resolution No. 0120030107987 to SMCV, November 20, 2019.

[295] Exhibit CE-236, Written Claim to SUNAT No. 0150340017533, December 15, 2019.

[296] *See* Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (first paragraph).

[297] Exhibit CE-879, SUNAT Resolution No. 0150140015385 (TTNA for 2013), May 13, 2020 (notified to SMCV May 14, 2020).

[298] Exhibit CE-258, Withdrawal, Temporary Tax on Net Assets 2013, Docket No. 0150340017533, February 27, 2020.

[299] Exhibit CE-879, SUNAT Resolution No. 0150140015385 (TTNA for 2013), May 13, 2020 (notified to SMCV May 14, 2020).

[300] Exhibit CE-865, SMCV 2013 TTNA Payment Receipt Order 756045257, December 20, 2019; *see also* Exhibit CE-772, SMCV, Payment Receipt (TTNA for 2013), December 20, 2019.

[301] Exhibit CE-156, Fine Resolution No. 011-002-0022011, September 26, 2017 (notified to SMCV on October 3, 2017).

[302] Exhibit CE-156, Fine Resolution No. 011-002-0022011, September 26, 2017 (notified to SMCV on October 3, 2017).

[303] Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (notified to SMCV on July 19, 2018) (first paragraph).

[304] Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (notified to SMCV on July 19, 2018).

[305] Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (notified to SMCV on July 19, 2018).

[306] Exhibit CE-743, Tax Tribunal, Resolution No. 10372-9-2018 (TTNA Fines for 2013), December 14, 2018.

[307] Exhibit RE-150, Record of Notification of Tax Tribunal Resolution No. 10372-9-2018 to SMCV, January 4, 2019.

[308] Exhibit CE-864, SMCV 2013 TTNA Penalty Payment Support, February 19, 2019.

[309] Exhibit CE-163, Exhibit CE-163, Assessment No. 012-003-0092658, December 29, 2017 (notified to SMCV on January 18, 2018); *see also* Exhibit CE-164, Assessment No. 012-003-0092961, December 29, 2017; Exhibit CE-165, Assessment No. 012-003-0092962, December 29, 2017; Exhibit CE-166, Assessment No. 012-003-0092963, December 29, 2017; Exhibit CE-167, Assessment No. 012-003-0092964, December 29, 2017.

[310] Exhibit CE-163, Exhibit CE-163, Assessment No. 012-003-0092658, December 29, 2017 (notified to SMCV on January 18, 2018).

[311] *See* Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018) (first paragraph).

[312] Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018).

[313] Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018).

[314] Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019, June 20, 2019.

[315] Exhibit RE-151, Record of Notification of Tax Tribunal Resolution No. 05634-4-2019 to SMCV, July 26, 2019.

[316] Exhibit CE-836, SMCV, Payment Receipt (SMT for Q4 2011-2012).

[317] Exhibit CE-196, Assessments No. 012-003-0099078 to No. 012-003-0099081, September 28, 2018 (notified to SMCV on October 10, 2018).

[318] Exhibit CE-196, Assessments No. 012-003-0099078 to No. 012-003-0099081, September 28, 2018 (notified to SMCV on October 10, 2018).

[319] *See* Exhibit CE-221, SUNAT Resolution No. 0150140014815, May 28, 2019 (first paragraph).

[320] Exhibit CE-221, SUNAT Resolution No. 0150140014815, May 28, 2019.

[321] Exhibit RE-152, Record of Notification of SUNAT Claim Resolution No. 0150140014815 to SMCV, May 28, 2019.

[322] Exhibit CE-868, SMCV, Payment Receipt (SMT for 2013).

[323] Exhibit CE-237, Assessment Resolution No. 012-003-0109172, December 20, 2019.

[324] Exhibit RE-153, Record of Notification of SUNAT Assessment Resolution No. 0120030109172 to SMCV, December 23, 2019.

[325] Exhibit CE-238, Written Claim to SUNAT No. 0150340017649, January 22, 2020.

[326] Exhibit CE-254, Withdrawal, Complementary Mining Pension Fund Tax 2013, Docket No. 0150340017649, February 27, 2020.

[327] Exhibit CE-878, SUNAT Resolution No. 0150140015384 (CMPF for 2013), May 13, 2020 (notified to SMCV on May 14, 2020); *see also* Claimant's Memorial at Annex A.

[328] Exhibit CE-208, SMCV Reimbursement Request, 4Q 2011, December 28, 2018; Exhibit CE-209, SMCV Reimbursement Request, GEM 1Q 2012, December 28, 2018; Exhibit CE-210, SMCV Reimbursement Request, GEM 2Q 2012, December 28, 2018; Exhibit CE-211, SMCV Reimbursement Request, GEM 3Q 2012, December 28, 2018.

[329] Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019).

[330] Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019).

[331] Exhibit CE-874, SUNAT, Resolution No. 0150140014950/SUNAT (GEM Q4 2011-Q3 2012), July 31, 2019 (notified to SMCV August 1, 2019), at p. 1.

[332] Exhibit CE-874, SUNAT, Resolution No. 0150140014950/SUNAT (GEM Q4 2011-Q3 2012), July 31, 2019 (notified to SMCV August 1, 2019); *see also* Claimant's Memorial at Annex A.

[333] Exhibit RE-154, Record of Notification of SUNAT Claim Resolution No. 0150140014950 to SMCV, July 31, 2019.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport-McMoran Inc. on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A.

v.

Republic of Peru

(ICSID Case No. ARB/20/08)

DISSENTING OPINION OF PROFESSOR DR. GUIDO SANTIAGO TAWIL

---

1. The Tribunal proposes, by majority, (i) to affirm its jurisdiction over Claimant's claims except for those claims based on the disputed Tax Assessments' penalties and interest; and (ii) to reject Claimant's claims on the merits in their entirety;[1].

2. I respectfully dissent.

3. In order to decline the Tribunal's jurisdiction concerning the disputed Tax Assessments' penalties and interest, the majority concludes that penalties and interest imposed on SMCV for its failure to pay taxes assessed in SUNAT's Tax Assessments constitute "*taxation measures*", which are excluded from the scope of Article 10.5 of the TPA under Article 22.3.1 of the TPA.

4. In doing so, the majority finds that the word "taxation" refers to a broader notion than the term "tax", and that measures that are part of the regime for the imposition and enforcement of a tax, as those including penalties and interest shall be considered *"taxation measures"* and, therefore, excluded from the Tribunal's jurisdiction by Article 22.3.1. of the TPA.[2]

5. However, the TPA's Tax exclusion under Article 22.3.1 should not bar Claimant's Article 10.5 claims for Peru's failure to waive penalties and interest on the Tax Assessments as the challenged measures did not impose or enforce taxes, and penalties and interest are not taxes under Peruvian law.

6. One of the basic principles (and guarantees) of modern taxation is that taxes are not sanctions or penalties for unlawful actions, but a mandatory levy set out in law to be paid by the person that falls within the specific situation determined by the statute.[3]

---

[1] Award, ¶ 1047.
[2] Award, ¶¶ 540-553.
[3] *See* Constitutional Court of Perú, Case No. 3303-2003-AA/TC, decision dated 28 June 2004, pp. 1-2 **(CA-378)** ("*Asi, el tributo es definido como: la obligación jurídicamente pecuniaria,* ex lege*, que no constituye sanción de acto ilícito, cuyo sujeto activo es, en principio, una persona pública y cuyo sujeto pasivo es alguien puesto en esa situación por voluntad de la ley… A partir de esta noción, podemos establecer los elementos esenciales de un tributo, los cuales son: a) su creación por ley; b) la obligación pecuniaria basada en el* ius imperium *del Estado; y c) su carácter coactivo, pero distinto a la sanción por acto ilícito*"). (emphasis added). As a logical consequence of such reasoning, if taxes are not sanctions or penalties, sanctions or penalties cannot be considered taxes.

7. The challenged measures did not impose taxes. The Peruvian Tax Code establishes only three types of levies (*tributos*): taxes (*impuestos*), contributions and fees (*tasas*). Penalties and interest are not included among them.[4]

8. The challenged measures did not enforce taxes. They failed to waive penalties and interest and, as such, although they constitute acts of Respondent, they were not taxation measures themselves.[5]

9. While most States view their power to impose taxes in their territory as a central element of their sovereignty, its exercise is subject to very strict limits.[6] Consistent with such idea, when treaties provide for tax exclusions from investment protection, their purpose is to preserve the States' sovereign power to impose taxes in their territory[7] and they should not be extended to other governmental decisions or measures at risk of affecting protected rights and diverting from the very same purpose that inspired the tax carve-out clauses.

10. On the merits of the dispute, the majority summarizes the discussion in two main questions:

    (a) Did the Respondent breach the 1998 Stability Agreement?; and

    (b) Did the Respondent breach Article 10.5 of the TPA?

    to further conclude that Perú has neither breached the 1998 Stability Agreement nor Article 10.5 of the TPA.[8]

11. In order to reach the conclusion that Respondent did not breach the 1998 Stability Agreement the majority is of the view that such agreement limited its scope to the

[4] Hernandez II (**CER-8)**, ¶¶ 129-144, citing Rule II of the Tax Code (**CA-14).**
[5] As explained by one of the tax experts (Hernandez II (**CER-8)**, ¶ 137), even if some penalties could be applied as a consequence of non-payment of taxes, they are, in themselves, independent and separate obligations.
[6] Constitutional Court of Perú, Case No. 3303-2003-AA/TC, decision dated 28 June 2004, p. 1 **(CA-378)** ("*…están sometidos a la observancia de los principios constitucionales consagrados por el artículo 74° de la Constitución, que regulan el régimen tributario, como son el de legalidad, de igualdad, de no confiscatoriedad, de capacidad contributiva y los derechos fundamentales. Estos principios de la tributación constituyen límites de observancia obligatoria para quienes ejercen el poder tributario de acuerdo a la Constitución*").
[7] *See Murphy Exploration & Production Company – International v The Republic of Ecuador,* PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 **(CA-279)**, ¶ 165.
[8] Award, ¶¶ 646-647.

investment in the leaching facility[9] and that the extension of the Beneficiation Concession did not extend the scope of the 1998 Stability Agreement to the Concentrator.[10]

12. I disagree.

13. When interpreting the Mining Law and the Mining Regulations, the majority considers that nothing in the Mining Law and the Mining Regulations provide in favour of the view that stabilizations agreements should apply to entire "*concessions*" or "*mining units*". On the contrary, my co-arbitrators affirm that such regulations limit the scope of stabilization agreements to a specific investment project,[11] understanding by such –in the case of Cerro Verde– only the original investment in the leaching facility.

14. However, the Mining Law and the Mining Regulations provisions defining the stability guarantees' scope referred to the mining units or concessions, not to specific investment projects. In fact, the term "investment projects" did not exist in the Mining Law or the Mining Regulations until the July 2014 amendments to the Mining Law.

15. Article 82 of the Mining Law granted stability guarantees to "mining activity titleholders" to promote investment within an "Economic-Administrative Unit", defined as a "set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that constitute a single production unit due to sharing supply, administration and services".[12]

16. In interpreting Article 82 of the Mining Law and Article 22 of the Mining Regulations, the majority provides particular value to the term "*exclusively*" of Article 22 of the Mining Regulations in the understanding that such term limits the

[9] Award, ¶¶ 698-699.
[10] Award, ¶ 814.
[11] Award, ¶¶ 698-699, also referred to as a "specific mining project set out in the investment program of the feasibility study" (Award, ¶ 699) or as a "specific investment in a specific mining project" (Award, ¶ 703).
[12] Mining Law **(CA-1)**, Article 82. Article 44 of the Mining Law established that "*[t]o fulfill the work obligations established in the preceding chapter, the titleholder of more than one mining concession of the same class and nature, may group them into Economic Administrative Units, provided they are located within an area of a 5 kilometer radius, in the case of non-ferrous metallic minerals or primary gold metallic minerals; a 20 kilometer radius in the case of iron, coal and non-metallic mineral…*".

scope of stabilization agreements to a specific investment project and that the reference to concessions or Economic Administrative Units (or **EUAs**) in such provision only shows the location where the investments are made.[13]

17. I fail to find in those provisions the clarity that the majority affirms. On the contrary, when reading Article 22 of the Mining Regulations, the term "*exclusively*" appears to be referring to "*the investments that it makes **in the concessions or Economic-Administrative Units***" (emphasis added).[14]

18. As the activities and investments of the mining companies are carried out through the concession system,[15] the wording of Article 22 of the Mining Regulations seems consistent with the intention of preventing an investor from obtaining stability for non-mining activities and to exclude affiliates of the investor other than the mining company that made the investment,[16] a concern existing at the time of drafting the statute and that appears to have originated in the privatization of the State-owned conglomerate Centromín.[17]

19. The majority also finds that the only way to give effect to the term "*exclusively*" in Article 83 is to interpret the provision as meaning that not all activities of a mining company are subject to stability guarantees, rather only those in relation to the undertaken investment project set out in the feasibility study.[18] Concerning the fact that Article 83 of the Mining Law was amended in 2014 and that Article 83-B was

[13] Award, ¶¶ 702-703.
[14] Likewise, Article 2 of the Mining Regulations **(CA-432)** makes reference to concessions or Economic Administrative Units and not to "specific investment projects" establishing that when "*the titleholder*" has "*several concessions or Economic-Administrative Units*" stability qualification "*will only take effect for those **concessions** or **units** that are supported by… the [Stability] agreement*" (emphasis added). When implementing Article 83 of the Mining Law **(CA-1)**, Article 22 of the Mining Regulations **(CA-432)** established that in order to reflect the result of their operation, titleholders that have "*other **concessions or Economic-Administrative Units***" different from those already established, had to "*keep independent accounts and reflect them in separate earning statements*" (emphasis added).
[15] Article 7 of the Mining Law **(CA-1)** provides that "*[t]he exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons through the concession system*".
[16] In line with such reasoning, Article 83 of the Mining Law **(CA-1)** provides that "*[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made*".
[17] *See* Tr. 842:8-16; 843:8-844:14; 919:10-922:10 (Day 3) (Chappuis). Ms. Chappuis explained that Mr. Polo came from Centromín –a State-owned mining company with seven old underground mines, a lot of labor problems and without a tax stability agreement– and that their concern when drafting this provision of the Mining Law together with Mr. Polo was that Centromín not only had mines but also had factories.
[18] Award, ¶ 699.

therein introduced, the majority concludes that the amendment to Article 83 only clarified what legal framework was in force before the amendment.[19]

20. I cannot agree. The 2014 introduction of Article 83-B to the Mining Law meant a significant change in the existing regulatory scheme by relating the stability benefit to the investment plan contained in the feasibility study, forcing titleholders of concessions or EAUs to undergo a whole new procedure to stabilize expansions, and therefore restricting its applicability to future investments.[20]

21. Amendments to an existing legal regime are not made to clarify what is already clear. Much less amendments of the relevance of the one introduced through Article 83-B of the Mining Law by linking the stability benefit to the investment plan contained in the feasibility study, precisely the main area of disagreement between SMCV and the Peruvian authorities at the time.[21]

22. Under Article 86 of the Mining Law, stability agreements are adhesion contracts (*contratos de adhesión*) prepared by the Ministry of Energy and Mines and need to incorporate all the guarantees established in the Mining Law. Stability agreements cannot be interpreted against the Mining Law and the Mining Regulations nor be negotiated with a different scope than the one established by the Mining Law or the Mining Regulations.[22] All stability agreements were drafted in the same way, with few blanks to be filled in order to avoid the possibility of corruption.[23] The investor

[19] Award, ¶¶ 707-708.
[20] Mining Law **(CA-1)**, Article 83-B, third paragraph ("*The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made,* ***provided that said investments are expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the Stability Agreement****; or, the additional activities that are performed after the execution of the investment program, provided that such activities are performed within the same concession where the Investment Project that is the subject matter of the agreement entered into it with the State is being developed; they are related to the purpose of the Investment Project; that the amount of the additional investment is no less that the equivalent in domestic currency to U$S 25,000,000; and they are previously approved by the Ministry of Energy and Mines, without prejudice to subsequent auditing from the aforementioned Sector*" (emphasis added).
[21] At the hearing, Prof. Otto confirmed that such was not the common understanding of the authorities and other participants in the industry of how the stability guarantees worked. Referring to his 2002 meetings with the Peruvian authorities -who he was advising at the time – he expressed: "*During my many meetings to prepare my comprehensive review of the Peruvian mining fiscal system for the MEF, a limitation of stabilization to only the initial Feasibility Study never came up. It was a nonissue. No one was thinking that way. It would have been a unique position, worldwide, harming Perú's ability to compete for investment*" Tr. 2110:19-2111:3 (Day 7) (Otto).
[22] Tr. 2333:13-22; 2356:6-11 (Day 8) (Bullard); Bullard Presentation (**CD-8**), slide 9.
[23] Tr. 914:13-15; 931:19-21; 936:14-22 (Day 3) (Chappuis).

was not free to choose whether to apply for an administrative unit, a whole specific concession or a specific investment. The stability agreements applied to all the concessions indicated in Annex I of the Model Stability Agreement [24] and there was no room for negotiation of a different scope.[25]

23. Stability agreements must be constructed in accordance with the Mining Law and the Mining Regulations.[26] Therefore, as the Mining Law and the Mining Regulations provided that stability covered concessions and EAUs, not "specific investment projects", stability agreements must be considered as providing the same scope of guarantees that the Mining Law and the Mining Regulations, that is in connection to the concessions part of the stabilized mining unit.[27]

24. SCMV's investments were made in its Mining Concessions Cerro Verde No. 1, No. 2 and No. 3 and its Beneficiation Concession Plant Cerro Verde, located in the district of Uchumayo, Department of Arequipa, over an extension of 7,455 has and 463 has, respectively.[28] Those Mining (Cerro Verde No. 1, No. 2 and No. 3) and Beneficiary Concessions were the ones covered by the Stability Agreements, irrespective of the different techniques or processes (*i.e.* leaching or flotation) used in developing their mineral reserves.[29] The introduction of the term "*The Leaching Project of Cerro Verde*" used in the Stability Agreement,[30] which has probably contributed to trigger this dispute, appears to have followed the language used in Clause 1.1. of the Model Contract, which required the parties to define a name for the EAU.[31]

---

[24] Tr. 933:10-934:7 (Day 3) (Chappuis).
[25] Bullard II (**CER-7**), ¶¶ 12-16.
[26] Tr. 2333:10-22 (Day 8) (Bullard); Bullard Presentation (**CD-8**), slide 9.
[27] Tr. 2255:4-10 (Day 8) (Vega).
[28] Stability Agreement **(CE-12)**, Clause 3 and Exhibit 1.
[29] While the upper layers of minerals (oxide and secondary sulfides) are stripped and processed through a leaching facility, primary sulfides (also known as copper ore) need to be processed through a concentrator. At the end, the same minerals, in the same concessions (Cerro Verde No. 1, No. 2 and No. 3), are extracted and processed in a single production unit (EAU) through two different techniques (leaching and flotation). For a more detailed explanation, *see* Aquiño 1 (**CWS-1**), ¶¶ 12-18.
[30] Stability Agreement (**CE-12**), Clause 1.1. ("*…the guarantees of the benefits contained in articles 72, 80 and 84 of the same legal body be granted to it, in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3,* ***hereinafter 'The leaching project of Cerro Verde"***") (emphasis added).
[31] Model Contract, **(CE-778)** Clause 1.1. ("*…THE OWNER WILL BE GUARANTEED THE BENEFITS CONTAINED IN ARTICLES 72, 80 AND 84 OF SAID STATUTE, IN RELATION TO (OPERATIONAL STARTUP) (INVESTMENT IN) ITS CONCESSIONS, CONSISTING OF THE_____ ECONOMIC-*

25. The possibility of constructing a concentrator was not new to the Cerro Verde project. Such possibility was already contemplated as part of the project at the time of the privatization and included in its documents.[32] And so relevant was Perú's interest in the development of Cerro Verde's primary sulfide reserves that Minero Perú initiated an arbitration against Cyprus in 2001 for allegedly breaching the 1994 Share Purchase Agreement. The dispute was finally settled with SMCV's compromise to invest an additional U$D 50 million in the project and to explore additional ways of developing a concentrator.[33]

26. As already explained, Clauses 1.1. and 3 of the 1998 Stability Agreement identified as the subject of SMCV's stability guarantees the Mining Concession (Cerro Verde No. 1, No. 2 and No. 3) and the Beneficiation Concession (Cerro Verde Beneficiation Plant), which together comprise an EAU under Article 82 of the Mining Law.[34] A different interpretation would assume that SMCV claimed less than the scope established by the Mining Law, the Regulations, and the Model Contract, voluntarily reducing its rights. The title used in the 1998 Stability Agreement – the "*Leaching Project of Cerro Verde*" – was referential and could not have defined its scope.[35] A similar situation seem to have occurred in the case of SMCV's 1994 Stability Agreement[36] and those executed by other mining companies.[37]

ADMINISTRATIVE UNIT(S), ***HEREINAFTER '_____ PROJECT'***") (emphasis added). *See also* Tr. 2341:1-2342:1 (Day 8) (Bullard); Bullard Presentation (**CD-8**), slides 33-36.

[32] 1994 SMCV's Share Purchase Agreement **(CE-4)**, Annex G. The three initial phases referred to the leaching operation. The fourth and last one to the construction of a 28,000 tons per day expandable primary sulfide concentrator.

[33] 2001 Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. **(CE-17)**, Clause 3.1(B) ("*CYPRUS undertakes to continue carrying out, within the aforementioned period, the research and technological development tasks intended to continue evaluating economically reasonable ways for the exploitation and processing of primary sulfides at Cerro Verde*").

[34] Tr. 2334:1-10; 2356:6-17 (Day 8) (Bullard).

[35] Claimant's Post-Hearing Brief, ¶¶ 26 (b) and 28, referring to the testimonies at the hearing of Mr. Polo, Ms. Chappuis and Ms. Torreblanca.

[36] *See* 1994 Stability Agreement (**CE-344)**, Clauses 1.1 and 5.1. While the referential name used was "Cerro Verde Project", it clearly did not match with the scope of the stability agreement as the project was limited to a minor improvement of the existing facility, valued in U$S 2.2 million.

[37] *See List of Guarantee Contracts and Investment Promotion Measures, Report No. 153-2005-MEM/OGAJ* (**RE-175**), April 14, 2005. When referring to projects No. 2 of Minera Toromocho S.A. and No. 3 of Minera Yauricocha S.A. the referential names used in both cases in the list for the project is "Centromín Perú"; project No. 10 of Minsur S.A. is denominated "Minsur"; project No. 14 of Minera Ares S.A. is called "Ares"; project No. 16 of Minera Sipan S.A. is denominated "Sipán", etc. None of those names appear to explain or define the scope of the individual stability agreement executed in each case. *See also* Bullard Presentation (**CD-8**), slides 42-43.

27. The 1996 Feasibility Study's investment program was a qualifying prerequisite to demonstrate SMCV's compliance with the minimum U$S 50 million investment requirement for 15-year stability agreements under the Mining Law.[38] Neither the Mining Law, the Mining Regulations in force in 1998 nor the 1998 Stability Agreement established that the feasibility study would define the scope of the guarantees provided by them.[39]

28. The majority is also of the view that, as the Concentrator did not benefit from the guarantees of the 1998 Stability Agreement, none of the disputed Royalty and Tax Assessments applying the "*non-stabilized regime*" to the Concentrator constituted violations of the 1998 Stability Agreement. Therefore, in my colleagues' view, Respondent did not breach Clauses 9.4, 9.5, 9.6, 10.1 and 10.2. of the Stability Agreement.[40]

29. As explained above, the majority misinterprets the stabilized regime. Under the 1998 Stability Agreement, the SMCV's Cerro Verde EAU (which included the Cerro Verde No. 1, No. 2 and No. 3 Mining Concessions and the Beneficiation Concession) was stabilized and, upon their approval, all new investments made in such EAU while the Stability Agreement was in force should be considered stabilized.

30. In the course of 2004, Ms. Chappuis –at the time, the Director General of Mining and the officer in charge of controlling compliance with the 1998 Stability Agreement[41]– confirmed to SMCV and Phelps Dodge that the 1998 Stability Agreement would apply to the planned concentrator as long as the investment was made in the existing mining unit or site as the 1998 Stability Agreement comprised

[38] Tr. 2343:21-22; 2349:10-14 (Day 8) (Bullard).
[39] Respondent's witnesses were not in agreement on how such a system would have worked. While Ms. Bedoya (Supervisor at SUNAT's National Intendency of Challenges) was of the view that every new investment exceeding the items and amounts mentioned in the investment program should be considered non stabilized (even if they related to the leaching project subject of the feasibility study), Mr. Polo (Vice-minister of the MINEM and one of the drafters of the Mining Law) was not able to reach such conclusive determination (Tr. 1643:8-1644:15, 1648:2-7, 1652:6-21, (Day 6) (Bedoya); Tr. 1349:2-5, 1377:4-1378:9 (Day 5) (Polo)).
[40] Award, ¶ 816.
[41] Mining Law **(CA-1)**, Article 101(e) provides that "*[t]he powers of the Directorate General of Mining are the following: …(e) To ensure compliance with tax stability agreements…*".

all the investments made in such concessions.[42] The expansion approval confirmed that the Concentrator fell within the Beneficiation Concession, already stabilized under the 1998 Stability Agreement. And, therefore, also confirmed that it benefitted from the stabilized regime.

31. The majority has also concluded that Respondent did not breach Clauses 9.4, 9.5, 9.6, 10.1 and 10.2 of the Stability Agreement when certain of its Tax Assessments applying the non-stabilized regime to the stabilized activities (the so-called leaching activities) became final and enforceable.[43] Although the majority accepts that "*[i]t is undisputed between the Parties that such assessments were imposed on the stabilized leaching activities of Cerro Verde*",[44] it concludes that as some of its activities were stabilized (leaching activities) and other not (the Concentrator activities), SMCV was required to keep separate accounts for each of them.[45] As SMCV did not keep such separate accounts, it concludes that SUNAT's tax assessments on SMCV's stabilized project were not inappropriate.[46]

32. As explained, under SMCV's stabilized regime, all the investments made in the Cerro Verde's EAU or Mining Unit while the Stability Agreement was in force should be considered stabilized. Therefore, no Tax Assessments applying the non-stabilized regime should have been issued concerning the Cerro Verde's EAU. In addition, SMCV was not required to keep separate accounts for the Leaching and

[42] Chappuis I (**CWS-3**), ¶¶ 28, 52-53 and Chappuis II (**CWS-14**), ¶¶ 37, 40. At the hearing, Ms. Chappuis ratified that she informed SMCV that the Concentrator was covered by the 1998 Stability Agreement, that no written confirmation was necessary and –when asked by the Tribunal– she assumed personal responsibility for doing so. *See* Tr. 1011:17-1013:3 (Day 4) (Chappuis).
[43] As explained in ¶ 817 of the Award, Claimant alleges that (i) in the 2010 and 2011 Income Tax Assessments, SUNAT applied non-stabilized depreciation rates to certain assets without attributing them to the Concentrator and – in the 2012 and 2013 Income Tax Assessments – to all the assets that SMCV started using as of 2007, including some of the same leaching facilities' assets it had treated as stabilized in previous fiscal years; (ii) in the 2007-2013 Income Tax Assessments, SUNAT denied SMCV's income tax deductions for PTU, expenses accrued in prior years, and recreational expenses, as well as deductions for payments that SMCV recorded using the classification system applicable under the Stability Agreement; and (iii) SUNAT assessed the following taxes from which SMCV was exempted by operation of the 1998 Stability Agreement against the entire Cerro Verde Mining Unit: 2009-2013 TTNA; 2007-2013 AIT and the 2013 CMPF. *See also* Claimant's Reply, ¶ 124.
[44] Award, ¶ 818.
[45] Award, ¶ 824.
[46] Award, ¶¶ 820-828.

Concentrator activities as both activities were performed in the same Mining Unit/EAU[47] and were equally stabilized under the 1998 Stability Agreement.

33. Respondent's repudiation of its obligations under the 1998 Stability Agreement also constitute arbitrary actions that violate Freeport and SMCV's rights to a fair and equitable treatment under Article 10.5 of the Treaty. The legal framework existing in 1998 made clear that the Mining Law's stability guarantees would apply to the entire mining unit or concession and, therefore, all investments made within a stabilized concession or mining unit should have benefitted of the stability guarantees.

34. Even if there was any doubt that the 1998 Stability Agreement covered new investments in the Cerro Verde's EAU while the Stability Agreement was in force –a doubt which in my view did not exist– Respondent's actions should still be framed as unfair and inequitable under Article 10.5 of the TPA.

35. SMVC's position that it was not required to pay royalties and taxes was reasonable and consistent under the legal regime existing at the time of execution of the 1998 Stability Agreement. Such view was reaffirmed by senior officials as Ms. Chappuis and by enacting the 2014 and 2019 amendments to the Mining Law and Mining Regulations, Respondent itself took the view that, at a minimum, the prior versions of those regulations were ambiguous and casted reasonable doubts as to their correct interpretation.

36. In such circumstances, Respondent's decisions not to waive penalties and interest when it had the possibility to do so[48] and to retain both the GEM overpayments and the Royalty Assessments –when both Parties agree that either royalties or GEM

[47] Article 22 of the Mining Regulations **(CA-432)** provides that "[*t]o determine the results of its operations,* ***a mining activity titleholder that has <u>other</u> concessions or Economic-Administrative Units*** *shall keep independent accounts and reflect them in separate earning statements*" (emphasis added).

[48] *See* Articles 92(g) ("*Subjects are entitled,* inter alia*, to: g) Request the non-application of interest and adjustment for inflation based on the Consumer Price Index, if applicable, and of penalties in case of reasonable doubt or conflicting criteria in accordance with the provisions of Article 170*") and 170 *(*"*The assessment of interest, restatement of inflation based on the Consumer Price index or the assessment of penalties is not applicable if: 1. As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation had been paid until the clarification thereof, provided the clarifying provision expressly states that this paragraph is applicable*") of the Peruvian Tax Code (**CA-14**). When referring to Article 170, Mr. Bravo confirmed at the hearing that the waiver of penalties and interest could also take place in other cases (Tr. 2692:21-2693:22 (Day 9) (Bravo)).

payments could be owed but never both[49]– constitute, in my view, additional arbitrary actions that violated Freeport and SMCV's rights to a fair and equitable treatment under Article 10.5 of the Treaty.

37. Given the terms in which the majority of the Tribunal has ruled, I will render no opinion regarding the damages claimed.

[49] Award, ¶ 1003. In order to deny the claim for GEM overpayments, the majority interprets that the five-year statute of limitations set out in Article 1274 of the Civil Code should be disregarded and that the four-year term established in the Tax Code should be applied. Award, ¶¶ 1006-1010. I disagree. GEM payments were of a contractual nature and not tax payments. The construction sustained by the majority through Clauses 3 and 8 of the GEM Agreement **(CE-64**) and Article 5 of Law 29790 **(CA-181**) in order to apply the most restrictive rule – the one applicable to taxes – in the enforcement of contractual obligations run contrary to the very same (contractual) nature of the GEM payments and denies Claimant any possibility of exercising its rights. In addition, GEM payments only applied to companies with stability agreements that were exempted from royalties and Special Mining Tax (SMT) payments. SMCV made voluntarily GEM payments during 2012-2014 based on the premise that its entire Mining Unit was stabilized. Between June 2011 and April 2016, SMCV did not receive any royalties' assessments. SUNAT resumed assessing royalties against SMCV for the activities of the Concentrator in April 2016 and only in late 2017 the tax authority started assessing royalties and SMT against SMCV for the periods corresponding to the GEM payments (Q4/2011-2013). Therefore, it was only when SUNAT started assessing royalties and SMT against SMCV for the activities of the Concentrator that GEM payments became overpayments and Claimant was allowed to seek their refund. *See* Bullard II **(CER-7)**, ¶¶ 90-97 (explaining the interplay between Articles 1274 and 1993 of the Peruvian Civil Code).

[Signed]

Prof. Dr. Guido S. Tawil
Arbitrator

Date: 6 May 2024