BEFORE THE
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.,
Claimant,

v.

Republic of Perú,
Respondent.

Case N° ARB/20/8

Respondent's Rejoinder on the Merits and Reply on Jurisdiction

November 8, 2022

Counsel for Respondent:

Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC

Marinn Carlson
Jennifer Haworth McCandless
María Carolina Durán
Sidley Austin LLP

Ricardo Puccio Sala
Oswaldo Lozano
Navarro & Pazos Abogados

TABLE OF CONTENTS

I. INTRODUCTION

1. Claimant's Reply has now confirmed that Freeport-McMoRan Inc. ("Claimant") is seeking to relitigate before this Tribunal a dispute that has already been resolved in litigation all the way up to and including Perú's Supreme Court. Simply put, Claimant did not get the answer that it wanted in Perú, and it is now trying again here, hoping to persuade this Tribunal to overrule Perú's highest courts regarding the scope of a Peruvian-law administrative contract that has been interpreted according to Perú's mining laws and regulations.

2. All of Claimant's claims arise out of the legal stabilization agreement signed between Peruvian company Sociedad Minera Cerro Verde S.A.A. ("SMCV") and Perú's Ministry of Mines and Energy ("MINEM") on February 13, 1998 ("1998 Stabilization Agreement") and relevant provisions of Title Nine of the Single Unified Text of the General Mining Law (*Texto Único Ordenado de la Ley General de Minería* – "Mining Law"). The case turns on the scope of that Agreement under the Mining Law. That question, however, is a matter of Peruvian law, it has already been resolved by Perú's Supreme Court, and it should not be before this Tribunal.

3. In its Reply, Claimant insists that Peruvian law provides that legal stabilization agreements signed under the Mining Law ("mining stabilization agreements"), such as the 1998 Stabilization Agreement, grant unlimited and open-ended stability guarantees in advance to any and all activities and investment projects, present or future, that a mining titleholder might choose to carry out within the area of a mining concession or "mining unit" during a period of up to fifteen years. Unfortunately for Claimant, however, that is not the interpretation of the 1998 Stabilization Agreement correctly applied by Perú's mining and tax authorities consistent with Perú's laws and then confirmed by Perú's highest court.

4. On July 12, 2017, Perú's Supreme Court determined that the 1998 Stabilization Agreement shielded from legislative and regulatory changes only SMCV's activities related to the specific investment project for which the Agreement was signed—namely, a leaching plant that processes a particular type of copper ore. The Court found that this interpretation was in accordance with the Mining Law and its regulations that were in force at the time the 1998 Stabilization Agreement was signed, which provided that mining stabilization agreements grant stability guarantees only to the specific investment project for which the agreement was signed—as outlined in the underlying feasibility study on which the application for the stabilization agreement rests. The core problem with this arbitration is that Claimant is attempting to dress up

those local law questions—which have already been resolved by Perú's highest court—as an investment treaty dispute, in order to use this Tribunal as a court of last resort to overturn the Peruvian Supreme Court's answer to those Peruvian law questions.

5. In its Reply, Claimant once again insists that this "restrictive" understanding of the Stabilization Agreement was new, allegedly devised by Perú some eight years after the 1998 Stabilization Agreement was signed in order to deny stability coverage to SMCV's investment in a concentrator plant to process a different type of copper ore (primary sulfides) from the Cerro Verde Mine (the "Concentrator Project"). Perú did no such thing. Contrary to Claimant's allegations, Claimant is not the victim of arbitrary acts by Perú. Instead, over the term of Claimant's investment, Perú has strictly applied the terms of the Agreement and has acted consistently, reasonably, and in accordance with international and Peruvian law.

6. Of note, Claimant is a late arrival on the stage of the Cerro Verde story. In 2007, almost a decade after SMCV had signed the 1998 Stabilization Agreement and three years after SMCV had decided to invest in the Concentrator Project, Claimant, a U.S. company, acquired an indirect majority stake in SMCV. SMCV, in turn, holds a series of mining concessions ("Mining and Beneficiation Concessions") that grant it the right to operate the Cerro Verde copper mine located in Arequipa, Perú ("Cerro Verde Mine"). SMCV was established much earlier, in 1993, after Perú decided to privatize the operation of the Cerro Verde Mine. By the time Claimant invested in SMCV in 2007, it knew or should have known that SMCV's 1998 Stabilization Agreement would not shield the Concentrator Project from legislative or regulatory reforms.

7. Indeed, Claimant's Reply further confirms that SMCV (and Claimant) knew or should have known that its interpretation of the Agreement was contrary to Peruvian law and that the Concentrator Project fell outside the scope of the 1998 Stabilization Agreement. SMCV (and Phelps Dodge Mining Corporation ("Phelps Dodge")—Claimant's predecessor—and Claimant) understood and was concerned about the fact that its interpretation of the Agreement was never actually confirmed by any competent government official with authority to agree to the company's position. Nevertheless, SMCV and Phelps Dodge decided to take a calculated risk and invest in the Concentrator Project anyway. Claimant voluntarily and consciously took on a share of that same risk when it subsequently invested in SMCV in 2007. This has been established in this arbitration in at least four ways:

8. *First*, the record in document production has driven home the fact that SMCV and Phelps Dodge were worried about this question and repeatedly sought, but never obtained,

confirmation in writing from Perú that SMCV's interpretation of its 1998 Stabilization Agreement was correct. That should have concerned SMCV and Phelps Dodge and made them pause. Instead, SMCV and Phelps Dodge elected to forge ahead, relying on alleged oral assurances from select government officials (only one of whom provides a witness statement in these proceedings) and written documents that do not actually provide any confirmation of SMCV's (untenable) interpretation. When Claimant then appeared on the scene, it did not do any sort of due diligence on SMCV's interpretation prior to its investment.

9. Importantly, SMCV could have requested and signed a new stabilization agreement for the Concentrator Project. It did not take that approach for one simple reason: by the time SMCV was able to launch the Concentrator Project, Perú had already enacted the 2004 Mining Royalty Law, which imposed a royalty on mining concession holders for the extraction of ore. Had SMCV signed a new mining stabilization agreement at the time it launched the Concentrator Project (which is what it should have done under the law), it would have stabilized a legal and administrative regime that already included (as of 2004) an obligation to pay royalties to Perú for the primary sulfides it would extract and process under the Concentrator Project. SMCV and Phelps Dodge did not want to pay those royalties, as proven by contemporaneous documents obtained in document production.

10. Thus, SMCV and Phelps Dodge had to get creative and try to find a way to surreptitiously include the Concentrator Project in the 1998 Stabilization Agreement. For this reason, Claimant argues before this Tribunal—as SMCV unsuccessfully did before local administrative bodies and judicial courts—that MINEM allegedly confirmed that the Concentrator Project was included in the 1998 Stabilization Agreement when MINEM agreed to expand the area and production capacity of SMCV's Beneficiation Concession to include the Concentrator Project. But Claimant's theory is incorrect. The expansion of the physical boundaries and production capacity of the Beneficiation Concession was entirely unrelated to the legal scope of the 1998 Stabilization Agreement for tax and royalty purposes, and nothing in the process to approve that expansion or in the document that approves that expansion confirms that the Concentrator Project would now be included in the 1998 Stabilization Agreement.

11. SMCV's, Phelps Dodge's, and later Claimant's gambit was unsuccessful. Perú's competent administrative and judicial authorities have repeatedly told SMCV that the Concentrator Project was never part of and could never be part of the 1998 Stabilization

Agreement. Perú should not be held internationally liable for a calculated risk made by an investor that went awry.

12. *Second*, Claimant has not put on the record any evidence of credible due diligence that it undertook before it invested in SMCV in 2007, or even evidence that SMCV (and Phelps Dodge) undertook reasonable due diligence at the time they decided to proceed with the investment in the Concentrator Project in October 2004—even though the record shows that Claimant knew that the applicability (or not) of the 1998 Stabilization Agreement to that Project was a looming and economically significant issue both for SMCV and Phelps Dodge. During document production, the Tribunal ordered Claimant to produce documents containing its due diligence (or others' due diligence on which Claimant relied) with respect to the scope of the 1998 Stabilization Agreement. Claimant failed to produce any documents showing any type of adequate due diligence.

13. The documents that Claimant did produce show that SMCV and Phelps Dodge were concerned that the Stabilization Agreement would not cover the Concentrator Project and, because of that concern, sought confirmation in writing that the Concentrator Project would be covered by the 1998 Stabilization Agreement. Of course, no such confirmation in writing ever materialized. Nevertheless, SMCV and Phelps Dodge went forward with building the Concentrator Plant anyway. Claimant understood that SMCV's interpretation of the Agreement was anything but ironclad, and it took a calculated risk. Respondent should not be held internationally liable for Claimant's own expensive mistakes.

14. *Third*, it is clear that Claimant knew that there was a serious risk that SMCV's interpretation of the Agreement would not hold and that it would be obliged to pay royalties for the Concentrator Project. Phelps Dodge's contemporaneous 10-K Forms filed before the U.S. Securities Exchange Commission show that, even after Perú approved the expansion of the Beneficiation Concession (which Claimant asserts confirmed the Concentrator Project's inclusion in the scope of the Stabilization Agreement—it did not), Phelps Dodge was uncertain about whether SMCV would be obliged to pay royalties for the Concentrator Project.

15. *Finally*, although Claimant presents a fanciful conspiracy in which Perú's government officials initially agreed with SMCV's interpretation of its 1998 Stabilization Agreement and then reversed course and devised a new and restrictive position to deny stability coverage for the Concentrator Project due to alleged political pressure from Congress, the truth is very different. Contemporaneous evidence shows that Perú has consistently maintained that the

scope of mining stabilization agreements, and SMCV's 1998 Stabilization Agreement in particular, is limited to the specific investment project or projects for which the stabilization agreements were signed. Most notably, prior to June 2006 (when, according to Claimant, the government allegedly changed its mind regarding the scope of the 1998 Stabilization Agreement):

- 2002: The National Superintendency of Customs and Taxes (*Superintendencia Nacional de Aduanas y Tributos* –"SUNAT") issued a report explaining the limited scope of mining stabilization agreements. This report was made public on SUNAT's website.

- September 2003: In a report signed by Ms. Maria Chappuis—Claimant's own witness—MINEM explained to SMCV that the 1998 Stabilization Agreement covered only the Leaching Project and did not grant benefits to the company as a whole. This report is fatal to Ms. Chappuis's testimony in this arbitration.

- 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 Perú's Congress that mining stabilization agreements cover the specific investment project for which each agreement is entered into. The Mining Royalties Forum was a public event.

- March 2005: MINEM officials met with Phelps Dodge at a mining conference in Toronto, Canada, and discussed the limited scope of SMCV's 1998 Stabilization Agreement and, in particular, the fact that it did not cover the Concentrator Project.

- April 2005: MINEM's Legal Director, Mr. Felipe Isasi—a witness in this arbitration—prepared a report explaining the limited scope of stabilization agreements and the application of the 2004 Mining Royalty Law to mining companies with such agreements with respect to projects not covered by any such agreement.

- June 2005: The Minister of Mines and Energy, Mr. Glodomiro Sánchez, gave a televised, public presentation to Perú's Congress, specifically before the Energy and Mines Congressional Committee, to explain that mining companies were obliged to pay royalties with respect to every investment mining project that was not covered by a mining stabilization agreement at the time the Royalty Law was enacted (2004).

- September 2005: Mr. Isasi prepared another report explaining the limited scope of stabilization agreements in general, and the limited scope of SMCV's 1998 Stabilization Agreement in particular. This report was forwarded to Congress in October 2005.

- October 2005: Minister Sánchez sent a letter to Congressman Oré forwarding Mr. Isasi's September 2005 report, highlighting in the cover letter the fact that

SMCV's primary sulfide plant (*i.e.*, the Concentrator Project) was not covered by the 1998 Stabilization Agreement.

- November 2005: Minister Sánchez sent a letter to Congressman Diez essentially repeating what Mr. Isasi's April 2005 and September 2005 reports had explained.

- May 2006: Vice Minister of Mines Rómulo Mucho and Mr. Isasi made two televised presentations before Congress's Energy and Mines Congressional Committee, specifically explaining the limited scope of mining stabilization agreements, the scope of the 1998 Stabilization Agreement, and SMCV's obligation to pay royalties with respect to the Concentrator Project.

16. Faced with these facts, in its Reply, Claimant systematically misrepresents and takes out of context the content of these documents in order to support its dramatic, but invented, narrative that MINEM suddenly changed its position.

17. Notably, Claimant cannot even decide when MINEM allegedly changed its position with respect to the scope of the 1998 Stabilization Agreement. In its Memorial, Claimant alleged that MINEM changed its position in June 2006, with Mr. Isasi's June 2006 Report. In its Reply, Claimant comes up with new, unsupported theories and alleges that MINEM changed its position sometime either in June 2005, September 2005, October 2005, November 2005, or May 2006. Claimant simply does not know and is concocting baseless conspiracy theories to try to allege that the government acted out of purported political pressure to go against SMCV. The reality is much simpler than that: Respondent never changed its mind. Perú has always held that the 1998 Stabilization Agreement is limited to the Leaching Project.

18. In sum, SMCV and Claimant knew that the Concentrator Project could not benefit from the stabilized regime granted to the Leaching Project and would be subject to paying taxes and administrative fees (such as royalties) in accordance with Peruvian law. Nevertheless, they chose to ignore that information and took a calculated risk in the hopes that SMCV could get away with its interpretation of the Agreement.

19. When construction of the Concentrator Project was completed in 2006, SMCV willfully acted as if the new investment project were covered under the Agreement. It did not pay royalties owed in relation to that Project, it failed to keep separate accounts for the operations of the Leaching Project (the stabilized project) and the Concentrator Project (the non-stabilized project), and it failed to pay other taxes, among other omissions. Not surprisingly, Perú's tax authority, SUNAT, took note of those omissions and started to audit SMCV's accounts in 2008. SUNAT discovered that SMCV had failed to pay royalties and other taxes in

relation to the Concentrator Project and, thus, began to assess the past-due royalties ("Royalty Assessments") and taxes ("Tax Assessments").

20. In its Reply, Claimant does not contest that SMCV was provided ample opportunity to be heard and to challenge SUNAT's decisions. SMCV appealed SUNAT's assessments internally within SUNAT, then before Perú's Tax Tribunal (an administrative body that resolves disputes between taxpayers and SUNAT), and then before Perú's judiciary, including before the Supreme Court. SMCV was unsuccessful at every instance save one (a first-instance court decision that was subsequently overturned). Both the Tax Tribunal and Perú's judiciary, acting reasonably and in accordance with Peruvian law, held that the Concentrator Project was not covered by the 1998 Stabilization Agreement and that SMCV was obligated to pay royalties and taxes accordingly in connection with that project.

21. Not happy with SMCV's litigation results, Claimant has decided to try again before this Tribunal. Significantly, Claimant has not challenged the procedural soundness of Perú's 2008 Supreme Court Judgment. Thus, without making any claim that the Supreme Court denied it justice, Claimant is nevertheless asking this Tribunal to reject Perú's Supreme Court's interpretation of the 1998 Stabilization Agreement—a matter purely of Peruvian law—and to overturn that judgment and adopt SMCV's untenable and illegal interpretation.

22. Claimant's case is also defective, because the Tribunal lacks jurisdiction over the claims that Claimant has asserted in this arbitration. The Tribunal lacks jurisdiction on five grounds. *First*, Claimant failed to file its claims of alleged breaches of the 1998 Stabilization Agreement and of the TPA related to SUNAT's Royalty and Tax Assessments within the limitations period provided under Article 10.18.1 of the U.S.-Perú Trade Promotion Agreement ("TPA"). Because Claimant first knew or should have known about the alleged breaches and that SMCV incurred related loss or damage more than three years before Claimant submitted its Notice of Arbitration to ICSID on February 28, 2020 (*i.e.*, Claimant had that knowledge years before the cut-off date of February 28, 2017), its claims are time-barred under the TPA. *Second*, Claimant's claims of alleged breaches of the TPA based on the Peruvian government's decisions not to waive penalties and interest on SUNAT's Tax Assessments are outside the Tribunal's jurisdiction, because the imposition of penalties and interest for non-payment of taxes constitutes "taxation measures" which are carved out from the scope of the TPA pursuant to Article 22.3.1. *Third*, Claimant's claims of alleged breaches of the Agreement and of the TPA related to SUNAT's Assessments are deeply rooted in acts or facts that occurred before the TPA entered

into force on February 1, 2009, and thus, those claims fall outside of the Tribunal's jurisdiction under Article 10.1.3 of the TPA. *Fourth*, because SMCV has submitted most of the claims of alleged breaches of the Agreement that Claimant presses in these proceedings (*i.e.*, those challenging SUNAT's Royalty and Tax Assessments against SMCV) to administrative tribunals and binding dispute settlement procedures (*i.e.*, SUNAT's Claims Division, and the Tax Tribunal), Claimant may not submit (on behalf of SMCV) those same claims to this Tribunal under Article 10.18.4 of the TPA. Alternatively, Claimant also may not submit (on behalf of SMCV) those same claims to arbitration under Article 10.18.4, because SMCV submitted those claims to the Peruvian courts (*i.e.*, the Superior Court of Lima (appellate court) and the Supreme Court). *Fifth*, because Claimant failed to prove that it relied on the 1998 Stabilization Agreement when it established or acquired its covered investments, Claimant may not submit (on behalf of SMCV) claims of alleged breaches of the 1998 Stabilization Agreement under Article 10.16.1 of the TPA. In sum, because Claimant has failed to meet its burden to satisfy the jurisdictional requirements under the TPA, the Tribunal lacks jurisdiction to hear Claimant's claims in these proceedings. Nothing in Claimant's Reply changes the aforementioned status of Claimant's claims.

23. But, even if the Tribunal were to find that it has jurisdiction to hear Claimant's claims (it should not), Claimant's claims fail on the merits. To recall, Claimant asserts two broad sets of claims in this arbitration: (i) that Perú breached the 1998 Stabilization Agreement; and (ii) that Perú breached Article 10.5 of the TPA (requiring fair and equitable treatment ("FET") limited to the customary international law minimum standard of treatment). Perú explained in depth in its Counter-Memorial why neither of these claims has any merit. And Claimant has presented nothing that undermines that conclusion in its Reply.

24. As explained in Respondent's Counter-Memorial, Claimant's breach of contract claims, brought on behalf of SMCV, are based on Claimant's allegation that Perú breached obligations under the 1998 Stabilization Agreement when it imposed certain tax and royalty assessments on the Concentrator Project activities. These claims fail for at least two reasons.

25. *First*, as previously discussed, even if the Tribunal were to consider the interpretation of the 1998 Stabilization Agreement anew for itself, the Mining Law and Regulations and the Agreement are clear: the stability guarantees apply to the investment project that gave rise to and was specifically identified in the Agreement, not to any investment the applicant might ever choose to make anywhere in the entire mining unit or entire concession(s).

This being the case, Perú's imposition of the Assessments did not violate its obligations under the Stabilization Agreement.

26. But, *second*, the Tribunal does not even need to independently determine the correct Peruvian-law interpretation of the 1998 Stabilization Agreement, because Perú's highest courts—in cases initiated by SMCV—have already (and repeatedly) decided that, under Peruvian law, the Agreement does not extend to the Concentrator Project. This is fatal to Claimant's breach of contract claims because SMCV, having already thoroughly litigated this issue (at its initiation), is collaterally estopped from re-litigating it here and essentially using this Tribunal as a court of appeal. And because, even were that not the case, the Tribunal nevertheless must apply the Peruvian Supreme Court's decision on the scope of the 1998 Stabilization Agreement. In adjudicating Claimant's breach of contract claims, the Tribunal must answer the question of whether Perú violated its obligations under the 1998 Stabilization Agreement. Perú does not contest that it imposed the Royalties and Tax Assessments on the Concentrator Project. Where the Parties disagree, and what this claim turns on, is the scope of the 1998 Stabilization Agreement—whether the stabilization guarantees covered the Concentrator Project. That is a question of contract interpretation that the Parties agree is governed by Peruvian law. And the Peruvian Supreme Court has already answered that question, holding that the stability guarantees provided in the 1998 Stabilization Agreement are limited to the investment project that was the subject of that Agreement, which did not include the Concentrator Project. The Tribunal need not look any further.

27. Claimant's Article 10.5 claim fares no better. To recall, Claimant argues that Perú's actions violated its FET obligations under Article 10.5, because they allegedly (i) frustrated Freeport's and SMCV's legitimate expectations; (ii) were arbitrary and based on political calculations; (iii) were inconsistent and non-transparent; and (iv) constituted a denial of justice. But, as Respondent has explained, FET provisions (like Article 10.5) that are limited to the customary international law minimum standard of treatment will only be breached by truly egregious government misconduct, and they do not afford many of the protections that Claimant seeks to invoke. For Claimant to succeed on its Article 10.5 claim, the Tribunal would have to either find that SMCV was denied due process in those proceedings, or that Perú's applicable laws and legal system themselves are impermissibly unfair and inequitable under international law standards. The facts would in no way support such findings.

28. And, even if Claimant could invoke certain FET protections (notwithstanding the fact that such protections are not part of the customary international law minimum standard of treatment), Claimant in its Reply fails to rebut the fact that Perú has consistently interpreted the 1998 Stabilization Agreement and the Mining Law and Regulations to provide stability guarantees only to the investment project defined in the feasibility study that served as the basis for the stabilization agreement, not to whatever unlimited and unrelated investment projects that the investor might undertake at any point in the 15 years following the signing of a mining stabilization agreement. Claimant's argument that Perú arbitrarily changed its interpretation of the 1998 Stabilization Agreement as a result of political pressure is simply belied by the record.

29. Moreover, as Respondent explained in its Counter-Memorial, SMCV has had, and has availed itself of, every opportunity to adjudicate this matter before the applicable administrative bodies and the Peruvian national courts. From SUNAT, to the Tax Tribunal, to the first-instance Contentious Administrative Courts, to the appellate Superior Courts, and all the way up to Perú's Supreme Court, SMCV has litigated the scope of the stability guarantees and whether they extend to the Concentrator Project (and sought a waiver of interest and penalties to which, under Peruvian law, it was not entitled). SMCV repeatedly lost. As already discussed, the Peruvian Supreme Court issued a thorough and well-reasoned 80-page decision in which it held that the stability guarantees do not apply to the Concentrator Project. Claimant disagrees with these decisions, but does not and cannot contest these determinative points. Notably, Claimant raises a denial of justice (or due process) claim only with respect to certain Tax Tribunal proceedings. But, even with its Reply, Claimant fails to muster any evidence that SMCV was treated unfairly or somehow denied its due process rights (and, contrary to Claimant's arguments, there is a very high bar to such a finding, particularly when the due process or procedural denial of justice claims involve administrative, not judicial, proceedings). Claimant simply repeats its same arguments in its Reply, trying to construe routine administrative conduct as reflecting some vague, nefarious plot against SMCV (again, without evidence).

30. Notwithstanding the deficiencies in Claimant's claims, even if, contrary to the facts and law of the case, the Tribunal were to assign international liability to Perú (it should not), the Tribunal would nevertheless need to disregard Claimant's damages calculation as it significantly overstates any alleged damages. To recall, Claimant's damages theory is that, but for the Tax and Royalty Assessments (or, for Claimant's alternative claim, but for the penalties and interest), SMCV would have obtained additional cash flows, and SMCV would have

subsequently distributed that cash to its shareholders, including Claimant. As explained in Respondent's Counter-Memorial, Perú, generally, does not resist that approach.

31. However, Claimant's calculation of its damages under that approach is fatally flawed in several respects, five of which Perú highlights here. *First*, Claimant ignores the fact that SMCV failed in its duty to mitigate its damages, a well-established principle in investment arbitration. SMCV could (and should) have significantly reduced the amount of penalties and interest it ultimately paid by simply paying its obligations when due (or, at least, after receiving SUNAT's first assessment in 2009) and then requesting a refund and challenging the assessments before the applicable administrative and judicial bodies. Had SMCV taken this obvious step, it would have protected itself from most of the penalties and interest it ultimately incurred if it lost its legal challenges (as it did). Perú should not be held responsible for SMCV's unreasonable conduct.

32. *Second*, Claimant includes in its calculation penalties and interest on certain taxes that are explicitly excluded from protection under Article 22.3 of the TPA.

33. *Third*, Claimant includes in its calculation certain tax obligations that SMCV has not actually paid—some of which have been outstanding since 2006. Notably, while Claimant argues in its Reply that the inclusion of these outstanding obligations is proper simply because they appear as liabilities on SMCV's books, Claimant (SMCV's majority shareholder) never argues that, if it prevails in this arbitration (and establishes that the basis for the obligations is unlawful), SMCV will actually pay these obligations. The Tribunal cannot compensate Claimant for damages it has not suffered and that (if it prevails here) it likely will never suffer.

34. *Fourth*, Claimant erroneously assumes, without adequate foundation, that in the but-for scenario where SMCV did not have to pay the assessments, SMCV would have distributed as dividends 100% of the assessment amounts and would have done so immediately on the next available dividend distribution date. But SMCV's past distribution practice does not support this assumption. To the contrary, the evidence shows that SMCV routinely distributed far less in dividends than the available retained earnings balance. SMCV management instead chose to retain most of its profit in the form of cash. There is simply no reason to believe SMCV would not have done the same with the assessment amounts.

35. And *fifth*, Claimant applies an excessive and improper interest rate. The TPA explicitly provides that any interest shall be awarded at a commercially reasonable rate. Claimant almost entirely ignores this provision and, instead, argues that the Tribunal should use

SMCV's cost of equity for calculating pre- and post-award interest. Under Claimant's own theory, the interest rate should reflect what Claimant, but for the Assessments, would have done with the money. Claimant has put forward no evidence whatsoever that SMCV's shareholders would have reinvested the money back into SMCV or that they had other investment opportunities that would offer SMCV-level returns. Claimant is, in effect, asking the Tribunal for consequential damages without putting forth any evidence of such damages—a request the Tribunal must reject.

36. When these (and other) errors are corrected, with respect to Claimant's treaty-based claim, Claimant's alleged damages are materially reduced to no more than US $119 million for its main claim and US $69.3 for its alternative claim. And with respect to Claimant's contract-based claims, Claimant's alleged damages are materially reduced to no more than US $288.1 million for its main claim and US $163.5 million for its alternative claim.

37. For the reasons described more fully herein, the Tribunal must reject all of Claimant's claims in full. In the sections that follow, Respondent explains that: (i) Claimant's claims are contradicted by the factual record (Section II below); (ii) the Tribunal lacks jurisdiction to hear Claimant's claims (Section III below); (iii) Claimant's legal claims have no merit (Section IV below); and (iv) Claimant's damages calculations are improperly inflated (Section V below).

38. Respondent's Rejoinder is accompanied by 168 factual exhibits numbered RE-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 84 legal authorities numbered RA-91 to RA-174. Respondent also submits the following witness statements and expert reports:

- Second Witness Statement of César Polo (RWS-8);
- Second Witness Statement of Felipe Isasi (RWS-9);
- Second Witness Statement of Oswaldo Tovar (RWS-10);
- Second Witness Statement of Gabriela Bedoya (RWS-11);
- Second Witness Statement of Zoraida Olano (RWS-12);
- Second Witness Statement of Marco Camacho (RWS-13);
- Second Witness Statement of Haraldo Cruz (RWS-14);
- Witness Statement of Jorge Sarmiento (RWS-15);

- Second Expert Report of Francisco Eguiguren (RER-6);
- Second Expert Report of Rómulo Morales (RER-7);
- Second Expert Report of Jorge Bravo and Jorge Picón (RER-8);
- Second Expert Report of Stephen Ralbovsky (RER-9); and
- Second Expert Valuation Report of Isabel Kunsman of AlixPartners (RER-10).

II. FACTUAL BACKGROUND

39. In its Reply, Claimant insists that Respondent breached the TPA when it allegedly violated the 1998 Stabilization Agreement.[1] According to Claimant, the 1998 Stabilization Agreement, consistent with the Mining Law, granted tax and administrative stability benefits for all of SMCV's assets and investments within its Mining and Beneficiation Concessions or so-called "mining unit," including the construction and operation of the Concentrator Project.[2]

40. Claimant alleges that it is the Mining Law and the 1993 Regulation that define the scope of stability guarantees—and not the language of the Agreement, which Claimant relegates to a secondary place. Claimant argues that under the Mining Law, mining stabilization agreements automatically grant stability benefits to all of the activities and investments conducted by a mining company within the same concession or "unit" in which the original stabilized investment project was developed. Claimant also asserts (i) that the language of the 1998 Stabilization Agreement indicates that its scope extends to the entirety of SMCV's Mining and Beneficiation Concession, and is not limited to the Leaching Project,[3] and (ii) that Respondent's interpretation of the 1998 Stabilization Agreement is a result of Perú's allegedly flawed interpretation of the Mining Law and the 1993 Regulation.

41. Claimant also insists on a series of acts and/or omissions by Respondent that Claimant alleges constitute breaches of Respondent's obligations under the BIT: (i) MINEM's alleged inconsistent interpretation of the scope of the 1998 Stabilization Agreement;[4] (ii) SUNAT's alleged incorrect application of the 1998 Stabilization Agreement when it ordered

[1] *See* Claimant's Reply and Counter-Memorial on Jurisdiction, September 13, 2022 ("Claimant's Reply"), at Section II.B.2.

[2] *See* Claimant's Reply at Section II.A.

[3] *See* Claimant's Reply at Section II.A.3(ii).

[4] *See* Claimant's Reply at Section II.A.2(i).

SMCV to pay royalties on ore that was processed in the Concentrator Project;[5] (iii) the Tax Tribunal's alleged violation of SMCV's due process rights in the context of reviewing SMCV's administrative appeals against SUNAT's orders to SMCV to pay royalties related to the Concentrator Project;[6] (iv) Perú's acceptance of SMCV's voluntary financial contributions for investments in local infrastructure and social projects on the alleged understanding that SMCV was making those contributions only because it was not obliged to pay royalties related to the Concentrator Project;[7] and (v) SUNAT's assessment of certain taxes against SMCV that, according to Claimant, should have been barred by the 1998 Stabilization Agreement.[8] As to all of these allegations, Claimant's description of the facts is incorrect and misleading. Perú's interpretation and application of the 1998 Stabilization Agreement has been consistent, reasonable, and in accordance with Peruvian law.

42. In the sections that follow, Respondent describes the relevant facts to this dispute:

43. *First*, Respondent shows that Claimant's allegations before this Tribunal have already been reviewed and decided by Peruvian local courts, finding in favor of Perú's interpretation of the relevant provisions of the 1998 Stabilization Agreement consistent with the Mining Law. In particular, Perú's Supreme Court confirmed that MINEM's and SUNAT's interpretation and application of the 1998 Stabilization Agreement is correct. In short, SMCV's Concentrator Project is not covered by the 1998 Stabilization Agreement (Section A).

44. *Second*, given Claimant's allegation that Respondent's interpretation of the Agreement derives from its allegedly incorrect reading of the Mining Law, before analyzing the specific language of the Agreement—which is the primary means of interpretation of the scope of the stability guarantees granted to SMCV—Respondent (i) clarifies that the Mining Law and the 1993 Regulation only grant stability guarantees to the specific investment project(s) set forth in the corresponding feasibility study; and (ii) refutes Claimant's interpretation of the law (Section B).

45. *Third*, Respondent addresses Claimant's untenable interpretation of SMCV's 1998 Stabilization Agreement and demonstrates that it was never intended to cover SMCV's investment in the Concentrator Project. Respondent's interpretation of the language of the 1998

[5] *See* Claimant's Reply at Section II.C.3.

[6] *See* Claimant's Reply at Section II.C.3(iii).

[7] *See* Claimant's Reply at Section II.C.2 at paras. 160-62.

[8] *See* Claimant's Reply at II.B.2(ii).

Stabilization Agreement is consistent with the Mining Law and the 1993 Regulation. (Section C).

46. *Fourth*, Respondent shows that contemporaneous documents demonstrate that (i) Claimant's predecessor, Phelps Dodge, and SMCV knew or should have known that the Concentrator Project would not be covered by the 1998 Stabilization Agreement before investing in the Concentrator Project, and (ii) Claimant knew or should have known that the Concentrator Project would not be covered by the 1998 Stabilization Agreement prior to acquiring its investment in SMCV through the acquisition of Phelps Dodge. Claimant took a calculated risk and Perú should not be held internationally liable for Claimant's own expensive mistakes (Section D).

47. *Fifth*, Respondent demonstrates that, contrary to Claimant's allegations, MINEM consistently held that mining stabilization agreements grant benefits exclusively to specific investment projects, carefully outlined in a feasibility study attached to the agreement. Accordingly, MINEM did not and could not have confirmed that the 1998 Stabilization Agreement covered SMCV's investment in the Concentrator Project (Section E).

48. *Sixth*, Respondent addresses Claimant's allegations with respect to the voluntary contribution regimes adopted by Perú, demonstrating that these programs could not be interpreted by SMCV (or Claimant) as somehow endorsing SMCV's interpretation of the scope of the 1998 Stabilization Agreement (Section F).

49. *Seventh*, Respondent demonstrates that SUNAT has also acted consistently and that its Royalty Assessments on ore processed through the Concentrator Project were reasonable and in accordance with Peruvian law (Section G).

50. *Eighth*, Respondent shows that the Tax Tribunal's review of SMCV's challenges to SUNAT's orders to pay royalties was reasonable and in accordance with Peruvian law (Section H).

51. *Ninth*, Respondent demonstrates that Perú's denials of Claimant's requests for waivers of interest and penalties were procedurally and substantively sound (Section I).

52. *Tenth*, Respondent shows that SUNAT acted reasonably and in accordance with Peruvian law when it issued other tax assessments applicable to SMCV's activities and investment projects outside the Leaching Project (Section J).

53. *Finally*, in Section K we provide a short conclusion.

A. PERÚ'S HIGHEST COURTS HAVE DEFINITIVELY DETERMINED AS A MATTER OF PERUVIAN LAW THAT THE 1998 STABILIZATION AGREEMENT DID NOT COVER THE CONCENTRATOR PROJECT

54. In its Reply, Claimant discusses extensively its preferred reading of Perú's Mining Law, Perú's Supreme Decree No. 024-93-EM, a regulation implementing Title Nine of the Mining Law ("1993 Regulation"), and the 1998 Stabilization Agreement, which is governed by Peruvian law. Claimant puts forward its own interpretation of the Peruvian legal regime, asserting that the legal framework in force at the time the 1998 Stabilization Agreement was signed provided that mining stabilization agreements granted stability benefits to investors for the entire "mining unit" or concession in which the qualifying minimum investment was made.[9] Claimant also insists on its own interpretation of a Peruvian-law contract, claiming that the language of the 1998 Stabilization Agreement shows that it granted stability benefits to SMCV's entire Mining and Beneficiation Concessions (its so-called "mining unit").[10] Claimant's characterizations of the legal framework applicable to mining stabilization agreements and the provisions of the 1998 Stabilization Agreement are factually incorrect and misleading, as Respondent discusses in Sections II.B and II.C below.

55. But more importantly, Claimant's expositions of its reading of Peruvian law and Peruvian-law contracts are simply irrelevant. It matters not what Claimant thinks the Mining Law, the 1993 Regulation, and the 1998 Stabilization Agreement say or mean, because those exact legal questions have already been definitively answered by the highest—and the only—bodies with the power to authoritatively interpret and apply Peruvian law: Perú's courts. Those courts—including Perú's Supreme Court in its August 18, 2017 judgment rendered in the 2008 Royalty Assessment case ("2008 Supreme Court Judgment")—held as a matter of Peruvian law that SMCV's (and Claimant's) interpretation of the law and the 1998 Stabilization Agreement is incorrect and contrary to the laws of Perú.[11]

56. This should have been the end of the road for SMCV (and Claimant). The 2008 Supreme Court Judgment put an end to an eight-year battle whereby SMCV sought to expand the scope of its 1998 Stabilization Agreement through an untenable interpretation of the Mining

[9] *See generally* Claimant's Reply at Section II.A.1.

[10] *See generally* Claimant's Reply at Section II.A.3.

[11] *See* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, May 4, 2022 ("Respondent's Counter-Memorial"), at Section II.H.1; *see also generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017.

Law, its 1993 Regulation, and the Agreement itself. During those eight years, SMCV was afforded every possible opportunity to challenge SUNAT's Royalty Assessments—before SUNAT itself, the Tax Tribunal, and Peruvian courts. At every instance, SMCV's interpretation of the law and 1998 Stabilization Agreement was rejected. Because it did not like those outcomes, Claimant is attempting to take a second (or rather, a fourth, or fifth) bite of the apple by now pressing the same untenable claims on this Tribunal and hoping for the opposite result. Claimant's unabashed attempt to relitigate a matter of Peruvian law that has already been fully and finally litigated in Perú should be rejected outright.

57. Apparently conscious of the magnitude of what it is asking this Tribunal to do—namely, to override and reverse the judgment of Perú's Supreme Court about the meaning and application of Peruvian law—in its Reply, Claimant tries to downplay the Supreme Court's findings. According to Claimant, this Tribunal may revisit and dismiss the Supreme Court's interpretation of Peruvian law and the 1998 Stabilization Agreement (which is governed by Peruvian law) because the 2008 Supreme Court Judgment is not binding on this Tribunal and because it allegedly does not hold any precedential value in Perú.[12] Claimant's arguments are unavailing.

58. In the following sections, Respondent first briefly highlights the most important findings in the Supreme Court's judgment in the 2008 Royalty Assessment proceedings and the Lima Superior Court's July 12, 2017 judgment in the 2006-2007 Royalty Assessment proceedings ("2006-2007 Superior Court Judgment") with respect to the scope of the 1998 Stabilization Agreement. Respondent will then discuss in greater detail in Sections II.B and II.C below the specific findings of those judgments with respect to the correct interpretation of relevant provisions in the Mining Law, the 1993 Regulation, and the 1998 Stabilization Agreement. Second, Respondent establishes the authority of the 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment under Peruvian law. Critically, Claimant does not dispute the procedural soundness of the Peruvian courts' judgments that are relevant in this case. Thus, the Tribunal should consider as final and not open to reconsideration or reversal the Peruvian courts' *ratio decidendi* and holdings on matters of Peruvian law. Unless the Tribunal were to identify a denial of justice (it should not—Claimant has not raised any claims of denial of justice with respect to the courts' decisions in this case) or to find that there is something

[12] *See generally* Claimant's Reply at Section II.B.1.

fundamentally defective in the applicable Peruvian law (there is not), then Peruvian law issues already decided by Peruvian courts cannot properly be relitigated before this Tribunal.

1. Perú's Supreme Court and Appellate Court Have Already Determined That the 1998 Stabilization Agreement Did Not Cover the Concentrator Project

59. As Respondent explained in its Counter-Memorial, in 2009 and 2010, SUNAT issued assessments against SMCV for royalties due on the minerals processed in the Concentrator Plant from October 2006 (when it started operating) to December 2007 (the "2006-2007 Royalty Assessment") and from January to December 2008 (the "2008 Royalty Assessment").[13] SMCV appealed those resolutions before the Tax Tribunal, which confirmed both the 2006-2007 ("2006-2007 Royalty Case") and 2008 Royalty Assessments ("2008 Royalty Case").[14] SMCV then challenged both Assessments (in separate proceedings) before Perú's judiciary, ultimately all the way up to the Supreme Court.[15]

60. With respect to the 2008 Royalty Assessment, the Superior Court of Lima (the applicable appellate court) agreed with SUNAT's interpretation of the law and the 1998 Stabilization Agreement, and held that the 2008 Royalty Assessment had been issued in accordance with Peruvian law (the "2008 Superior Court Judgment").[16] SMCV appealed that decision to Perú's Supreme Court.

61. On the exact same issues that are before this Tribunal (*i.e.*, whether the 1998 Stabilization Agreement covered the Concentrator Project and whether Claimant's interpretation of the Mining Law, the 1993 Regulation, and the Agreement is correct),[17] the Supreme Court issued an 80-page judgment confirming, as a matter of Peruvian law, the propriety and legality of SUNAT's 2008 Royalty Assessment.[18] The Supreme Court, thus, agreed with the appellate court

[13] *See* Respondent's Counter-Memorial at Sections II.F.2-3.

[14] *See* Respondent's Counter-Memorial at Section II.G.2.

[15] *See* Respondent's Counter-Memorial at para. 349.

[16] *See generally* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016.

[17] *See* Exhibit RER-1, Expert Report of Francisco Eguiguren, May 4, 2022 ("First Eguiguren Report"), at para. 101.

[18] *See generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017.

and held that the 1998 Stabilization Agreement did not cover the Concentrator Project, and that the Concentrator Project was properly subject to royalties.[19]

62. With respect to the 2006-2007 Royalty Assessment, the Superior Court of Lima again agreed with SUNAT's position and held that the 1998 Stabilization Agreement covered only the Leaching Project (*i.e.,* it held that SMCV was required to pay royalties with respect to the Concentrator Project for October 2006 to December 2007).[20] SMCV appealed the Superior Court's judgment to the Supreme Court. However, it then withdrew the appeal on June 17, 2017, before the Supreme Court could issue a decision on the appeal.[21] As a result, the 2006-2007 Superior Court Judgment became a final judgment (*sentencia firme*) on the matter.[22]

63. Both the 2008 Royalty Assessment proceedings and the 2006-2007 Royalty Assessment proceedings analyzed the scope of the 1998 Stabilization Agreement and the interpretation of the Mining Law and 1993 Regulations—the only factual difference was the fiscal years at issue. In both cases, the Peruvian courts, including the Supreme Court, interpreted and applied Peruvian law to hold that the 1998 Stabilization Agreement did not provide any stability guarantees to the Concentrator Project. In the following sections, Respondent recaps and provides additional details of the main findings of the Peruvian courts in these cases.

a. The 2008 Supreme Court Judgment

64. In the 2008 Royalty Assessment proceedings before the Supreme Court, SMCV raised the same issues and made the same arguments to the ones that Claimant now submits in this arbitration.[23] SMCV argued—like Claimant in this arbitration—(i) that Articles 78, 82, 83, and 86 of the Mining Law and Articles 2 and 22 of the 1993 Regulation provide that mining stabilization agreements grant stability benefits to all the investments made within the area of a

[19] *See generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017. *See also generally* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016.

[20] *See* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017 (this decision became the final judgment on the matter after SMCV withdrew its challenge before the Supreme Court).

[21] SMCV withdrew its appeal on June 27, 2017, and on October 7, 2017 the Supreme Court issued a resolution approving SMCV's withdrawal. *See* Exhibit CE-789, Supreme Court, Resolution Approving SMCV's Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment), October 7, 2020, at p. 2, Section Sixth.

[22] *See* Exhibit CE-789, Supreme Court, Resolution Approving SMCV's Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment), October 7, 2020, at p. 2, Section Sixth. *See also* Exhibit RER-6, Second Expert Report of Francisco Eguiguren, November 3, 2022 ("Second Eguiguren Report"), at para. 6.

[23] *See* Exhibit RER-2, Expert Report of Rómulo Morales, May 4, 2022 ("First Morales Report"), at paras. 82-84.

mining company's concession;[24] (ii) that only Clauses 3, 9, and 10 of the 1998 Stabilization Agreement are relevant to determine the scope of the Agreement[25] and that a literal and systematic[26] interpretation of such Clauses shows that the Agreement covered the Concentrator Project;[27] and (iii) that SUNAT, the Tax Tribunal, and Peruvian courts misinterpreted the literal meaning of Clause 1 of the 1998 Stabilization Agreement[28] and provided an incorrect systematic interpretation of Clauses 2, 3, 4, 5, 7, and 8 of the Agreement.[29]

65. In deciding the key dispute (*i.e.,* whether the 1998 Stabilization Agreement covered the Concentrator Project), the Supreme Court conducted an analysis of the relevant provisions in the Mining Law and the 1993 Regulation, the legal nature of mining stabilization agreements, and the specific provisions of the 1998 Stabilization Agreement.

66. *First*, in line with the 2008 Superior Court Judgment, the Supreme Court held, based on its interpretation of the Mining Law and 1993 Regulation, that the guarantees of a mining stabilization agreement apply solely to the investment projects outlined in the feasibility study that forms part of such stabilization agreement.[30] The Supreme Court specifically concluded that:

> [T]aking into consideration the grammatical context in which the wording was given for paragraph four of Article 83 of the TUO of the General Mining Law, this Supreme Court finds that this rule was

[24] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at pp. 3, 9, 14, 27-37; Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 64 ff, Sections 5.1-5.3; *see also* Claimant's Reply at Section II.A.1(i).

[25] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at pp. 13-15, 16; Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 32, paras. 30-31; *see also* Claimant's Reply at Section II.A.3(ii).

[26] Both Dr. Morales and Dr. Bullard agree that under Peruvian Law, the starting point of contractual interpretation must be the literal text of the contract (*i.e.*, the literal interpretation), followed by a systematic analysis of the contract as a whole (*i.e.*, the systematic interpretation). The systematic interpretation is regulated by Article 169 of the Civil Code which states that doubtful clauses must be interpreted in the sense that is consistent with the whole of the contract's clauses. *See* Exhibit RER-2, First Morales Report at paras. 50, 58; Exhibit CER-2, Expert Report of Alfredo Bullard, October 19, 2021 ("First Bullard Report"), at paras. 22-23; *see also* Exhibit CA-39, Peruvian Civil Code, Legislative Decree No. 295, July 24, 1984, at Art. 169.

[27] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 19, para. 2.

[28] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at p. 14; Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 20, para. 4; *see also* Claimant's Reply at Section II.A.3(ii).

[29] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at pp. 14-15; *see also* Claimant's Reply at Section II.A.3(ii).

[30] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 73-74, paras. 167, 170.

> not violated from a regulatory standpoint, because it was the legislator who provided that the effect of the contractual benefit would fall {'solely' or 'excluding any other'} on 'the mining company activities for which the investment has been made' and, thus, not on any activities of the mining company. In sum, the scope of the contractual benefit extends 'solely' to those activities related to the investment according to what was set forth in the Feasibility Study.[31]

67. Notably, the Supreme Court confirmed that the feasibility study is not merely a requirement to qualify for a stabilization agreement, but it is also a determining factor in the assessment of what investments are covered by a given stabilization agreement.[32] The Supreme Court reached that conclusion after analyzing Articles 78, 82, 83, and 85 of the Mining Law and Articles 18, 19, 20, 23, and 25 of the 1993 Regulation.[33]

68. *Second*, the Supreme Court analyzed the relevant clauses of the 1998 Stabilization Agreement and concluded that the Agreement covered only the Leaching Project:

> [A]n objective interpretation of those rules [i.e., the Mining Law and 1993 Regulation], in accordance with what is established in the Stability Agreement and based upon the principles [of] good faith, and interpreting those clauses based upon one another, allows the conclusion that the reference to the 'investment' is legislatively limited. Ultimately, the contractual benefits that result from the Stability Agreement are not as broadly enjoyed as the appellant has suggested, which is why it isn't possible to reach the conclusion that the benefit extends to [] every investment the mining company makes in the concession that is the subject of the Stability Agreement, rather only to that investment in its concession related to the 'Cerro Verde Leaching Project,'

[31] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 73, para. 167 ("*[T]eniendo en cuenta el contexto gramatical en que se redactó el cuarto párrafo del artículo 83° del TUO de la Ley General de Minería, este Supremo Tribunal considera que no se infringió normativamente tal dispositivo, toda vez que es el propio legislador quien previno que el efecto del beneficio contractual recaería ['únicamente' o 'excluyendo a cualquier otra'] a 'las actividades de la empresa minera a favor de la cual se efectúe la inversión' y no así para cualquiera de las actividades de la empresa minera. En definitiva, los alcances del beneficio contractual se extienden 'únicamente' a aquellas actividades relacionadas con la inversión en función de lo previsto por el Estudio de Factibilidad*.") (emphasis added, bold omitted) (bracketed text marked with {} in the English translation appears in original). Respondent is providing an updated corrected translation of this paragraph.

[32] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 58, para. 123.

[33] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 59-61, paras. 126-31.

according to what is established in the 'Technical-Economic Feasibility Study.'[34]

69. More importantly, the Supreme Court explicitly and definitively rejected SMCV's (and Claimant's) interpretation of the provisions of the 1998 Stabilization Agreement:

- The Supreme Court stated that Clauses 1.3, 4.2, and 7.2 of the 1998 Stabilization Agreement are the relevant clauses that determine the scope of the Agreement[35]—and not Clauses 3, 9, and 10, as SMCV alleged.

- The Supreme Court rejected SMCV's allegations that Clause "1.3 . . . is not intended to define the scope or the subject of the stability guaranteed by the Stability Agreement,"[36] and held that an interpretation of Clause 1.3 together with other clauses of the Agreement leads to the conclusion that the 1998 Stabilization Agreement covered only the investments described in the 1996 Feasibility Study—namely, the Leaching Project.[37]

- Contrary to SMCV's arguments,[38] the Supreme Court concluded that a systematic interpretation of Clauses 1, 4, 5, 7, and 8 of the 1998 Stabilization Agreement proved that the Agreement applied only to the Leaching Project.[39]

---

[34] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 74, para. 170 ("*[U]na interpretación objetiva de tales dispositivos [i.e., la Ley de Minería y la Regulación de 1993] de acuerdo con lo que se haya expresado en el Convenio de Estabilidad y según el principio de la buena fe, e interpretando sus cláusulas las unas por medio de las otras, permiten concluir que la referencia a la 'inversión' viene limitada legislativamente. Por ende, los beneficios contractuales que se derivan del Convenio de Estabilidad no gozan de la amplitud a la que elude la recurrente, por lo que no es posible interpretar que el beneficio se extiende a 'toda la inversión que realice la empresa minera en la concesión objeto del Contrato de Estabilidad, sino únicamente a aquella inversión en su concesión relacionada con el 'Proyecto de Lixiviación de Cerro Verde', según lo que establece el 'Estudio de Factibilidad Técnico-Económico*.'") (emphasis added).

[35] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at p. 16. *See also* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 34, para. 36 ("The 'Investment in its Concession' is any 'investment' that includes the Feasibility Study, and that the Investment Plan covers. They only extend to the scope of the benefits arising from the Stability Agreement, which can be interpreted based on the stipulations in clause 1.3, clause 4.2, and clause 7.2 of the Stability Agreement") ("*Es decir, la 'Inversión en su Concesión' es toda 'inversión' que incluye el Estudio de Factibilidad y que el Plan de Inversiones comprende, y a la cual únicamente se extenderán los alcances de los beneficios que se derivan del Convenio de Estabilidad, ya que ello es lo que se interpreta a partir de lo estipulado en el numeral 1.3 de la cláusula primera, el numeral 4.2 de la cláusula cuarta y del numeral 7.2 de la cláusula séptima del Convenio de Estabilidad*.") (emphasis added).

[36] Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at p. 14.

[37] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 34, para. 36.

[38] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at pp. 14-15.

[39] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 27, para. 16.

70. In sum, the Supreme Court analyzed the issues of Peruvian law that SMCV pled to it—and that Claimant has now raised again before this Tribunal—and reached conclusions consistent with Respondent's position in this arbitration: that, under Peruvian law, mining stabilization agreements only cover the specific projects for which the agreements are entered into, as outlined and described in the feasibility study that forms part of the agreements, and, applying the same law, that the 1998 Stabilization Agreement did not cover the Concentrator Project.

b. The 2006-2007 Superior Court Judgment

71. In the 2006-2007 Royalty Assessment proceedings before the Superior Court and the Supreme Court (before the appeal was withdrawn), SMCV also raised the same issues and made the same arguments as the ones that Claimant now submits in this arbitration.[40] SMCV claimed, among other things: (i) that Articles 82 and 83 of the Mining Law and Articles 2 and 22 of the 1993 Regulation provide that mining stabilization agreements grant stability benefits to all the investments made within the area of a mining company's concession;[41] and (ii) that the provisions of the 1998 Stabilization Agreement confirm that the Agreement provides stability to all activities in the Beneficiation Concession.[42] In addition, SMCV argued that the extension of the Beneficiation Concession indicated that the 1998 Stabilization Agreement would cover the Concentrator Project.[43]

72. The Superior Court analyzed the Mining Law, the 1993 Regulation, and the language contained in the 1998 Stabilization Agreement before concluding that the Agreement covered only the Leaching Project:

> [T]he [1998 Stabilization Agreement], guarantees the conduct of the mining activities connected with the investment that is expressly mentioned in that agreement, i.e. that contemplated by the Technical Economic Feasibility Study. This study, according to the request for guarantees submitted by the current petitioner

[40] Exhibit RER-6, Second Eguiguren Report at paras. 4, 6.

[41] *See* Exhibit CE-697, SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment), August 9, 2017, at p. 5, Section 1.7; Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, Section Thirteenth, at pp. 18-19; *see also* Claimant's Reply at Section II.A.1.

[42] *See* Exhibit CE-697, SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment), August 9, 2017, at p. 16; Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at pp. 43-44, para. 2.8(a); *see also* Claimant's Reply at Section II.A.3.

[43] *See* Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at p. 44, para. 2.8(b); *see also* Claimant's Reply at Section II.A.4.

> '*was related to the investment to be made in its Concession: Cerro Verde No. 1, No. 2 and No. 3 (hereinafter, the "Cerro Verde Leaching Project*'). Therefore, the provisions of this agreement cannot be made extensive to other investments made subsequently, as is the case of the 'Primary Sulfides Project' in the 'Cerro Verde No. 1, No. 2 and No. 3' Mining Concession . . . .[44]

73. In particular, the Superior Court rejected SMCV's interpretation of Article 83 of the Mining Law and Article 22 of the 1993 Regulation and concluded that those Articles "provid[e] that the effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made, in this case the Cerro Verde Leaching Project."[45] Also, after analyzing the relevant clauses of the 1998 Stabilization Agreement, the Superior Court opined that "it follows, that the contractual guarantees established in [the 1998 Stabilization Agreement] apply solely to the investment plan titled 'Cerro Verde leaching project,' as well as to any modification and expansion [accepted] and inserted into that plan, as long as it pursues the same objective."[46] Finally, the Superior Court also concluded that SUNAT's approval of the expansion of the Beneficiation Concession to operate the Concentrator Project did not expand the guarantees of the 1998 Stabilization Agreement to the Concentrator.[47]

---

[44] *See* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, Section Thirteenth, at p. 19 ("*[El Convenio de Estabilidad de 1998] garantiza el desarrollo de las actividades mineras vinculadas a la inversión expresamente consignada en dicho contrato, esto es, aquella contemplada en el Estudio de Factibilidad Técnico-Económico, el mismo que de acuerdo a la solicitud de garantías presentada por la ahora demandante "era en relación a la inversión en su Concesión [Cerro Verde] N° 1, N° 2 y N° 3 en adelante 'El Proyecto de Lixiviación de [Cerro Verde],' por lo que lo establecido en este contrato no puede extenderse a inversiones distintas que se efectúen posteriormente, como ocurre con el 'Proyecto de Sulfuros Primarios' en la Concesión Minera "[Cerro Verde] N° 1, N° 2 y N° 3 . . . .*") (emphasis added; italics in the original).

[45] *See* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, Section Seventeeth, at p. 24 ("*establece que el beneficio contractual recae exclusivamente en las actividades de la empresa minera referidas a una inversión, en el presente caso el Proyecto de Lixiviación [de Cerro Verde]*") (emphasis added).

[46] Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, Section Fifteenth, at p. 21 ("*se colige, que las garantías contractuales establecidas en el [Contrato de Estabilidad de 1998] se aplican únicamente al plan de inversión denominado 'Proyecto de Lixiviación [Cerro Verde]', así como a toda modificación y ampliación convalidada e insertada en el mencionado plan, cuyo propósito sea el mismo*.) (emphasis added). Respondent is providing a corrected translation of the sentence above.

[47] *See* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, Section Sixteenth, at pp. 22-23 ("the administrative stability guarantee granted for the investment plan known as 'Cerro Verde Leaching Project' is not made extensive to the so-called 'Primary Sulfides Project.' The fact that both investment plans were executed in the area of the Cerro Verde No. 1, No. 2 and No. 3 mining concession of the same owner, and that the installation of the Concentrator Plant and the expansion to the area of the Cerro Verde Beneficiation Plant were approved by Directorate Resolution No. 056-2007-MEM /DGM (pages 900 to 902, EA),

74. Thus, Peruvian courts, including the Supreme Court, have already analyzed the issues of Peruvian law that Claimant is putting before this Tribunal, and have already concluded as a matter of Peruvian law (including the very same Peruvian law provisions that Claimant cites to this Tribunal) that the scope of the 1998 Stabilization Agreement did not extend to the Concentrator Project.

2. The 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment Are Binding on the Parties to Those Proceedings

75. To salvage its claims, Claimant asserts that the Tribunal should ignore the Peruvian courts' judgments in the Royalty Assessments proceedings and, in particular, should ignore the 2008 Supreme Court Judgment.[48] Claimant makes two arguments in its attempt to substitute its self-interpreted judgment for that of Perú's courts: (i) it claims that, under Peruvian law, the 2008 Supreme Court Judgment is not binding on Peruvian courts nor on SMCV in other Peruvian legal proceedings;[49] and (ii) it argues that the 2008 Supreme Court Judgment is not binding on this Tribunal under international law.[50] Respondent will address the first argument in this section, and the second legal argument in Section III.A.3 below.

76. With respect to the first argument, Claimant contends (i) that the 2008 Supreme Court Judgment is not binding under Peruvian law; and (ii) that, even if the 2008 Supreme Court Judgment were binding, it "should not be accorded any weight by this Tribunal"[51] because a contentious administrative proceeding is not an adequate evidentiary forum to make the case that Claimant presents in this arbitration.[52] Claimant's arguments fail on their merits for the reasons presented below.

---

are not reason enough to conclude otherwise. This merely reflects the administrative process applicable for the case of modifications to the beneficiation concessions . . . . ") ("*[L]a garantía de estabilidad administrativa concedida al plan de inversión 'Proyecto de 'Lixiviación de [Cerro Verde] no se extiende al denominado 'Proyecto de Sulfuros Primarios,' no siendo razón suficiente para concluir en sentido opuesto, el hecho de que ambos planes de inversiones se desarrollaron en el área de la Concesión Minera [Cerro Verde] N° 1, N° 2 y N° 3 del mismo titular minero, y que la instalación de la Planta Concentradora, así como la ampliación del área de la Planta de Beneficio [Cerro Verde] fueron aprobados con Resolución Directoral N° 056-2007-MEM/DGM (fojas 900 a 902 EA), pues ello obedece al trámite administrativo para los casos de modificaciones de las concesiones . . . .*").

[48] *See* Claimant's Reply at para. 105.

[49] *See* Claimant's Reply at paras. 105, 112.

[50] *See* Claimant's Reply at para. 109.

[51] *See* Claimant's Reply at para. 119.

[52] *See* Claimant's Reply at paras. 115, 119.

77. But as a threshold matter, Claimant has not raised any claims of lack of due process with respect to the 2008 Supreme Court Judgment or the 2006-2007 Superior Court Judgment. Thus, Perú should not be held internationally liable because an investor disagrees with the substance of a decision from the highest court in Perú.

a. The 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment Are Binding on SMCV under Peruvian Law

78. In its Reply, Claimant alleges that the 2008 Supreme Court Judgment is not binding on SMCV under Peruvian law, because (i) the Supreme Court's decision lacks precedential effect in Perú; and (ii) Perú cannot satisfy the "triple identity" test which is required for *res judicata* under Peruvian law.[53] Claimant contends that Respondent holds two irreconcilable positions because, on the one hand, it acknowledges that the 2008 Supreme Court Judgment has no *erga omnes* precedential effect, and, on the other hand, it asserts that the Supreme Court provided a definitive answer under Peruvian law regarding the scope of the 1998 Stabilization Agreement.[54] These positions are not irreconcilable. Claimant misses the point and is trying to distance this arbitration from the Peruvian proceedings on purely formalistic grounds.

79. It is correct that Respondent is not arguing that the Supreme Court's judgment has *erga omnes* precedential effect.[55] It is a resolution of the specific dispute that was before the Supreme Court. As a matter of Peruvian law, the 2008 Supreme Court and the 2006-2007 Superior Court judgments provide final and binding judgments with respect to SMCV's obligation to pay royalties for those fiscal years.[56] On those matters, the Peruvian courts' judgments are *res judicata*—SMCV cannot relitigate under Peruvian law whether it was obliged or not to pay royalties connected to the Concentrator Project for those years. Respondent's point is that Claimant is indeed relitigating that very same, specific dispute that was resolved by the Supreme Court's judgment—namely, whether, under Peruvian law, SMCV is or is not obligated to pay those same royalties. There is no inconsistency between saying that the Supreme Court's judgment is not binding in other, different disputes, and saying that it is and must be respected as a definitive resolution of this dispute.

[53] *See* Claimant's Reply at paras. 113, 116-17.

[54] *See* Claimant's Reply at paras. 116, 119.

[55] *See*, *e.g.*, Respondent's Counter-Memorial at para. 551; *see also* Exhibit RER-1, First Eguiguren Report at para. 41; Exhibit RER-2, First Morales Report at para. 86.

[56] *See* Exhibit RER-6, Second Eguiguren Report at paras. 90, 102; *see also* Exhibit RER-7, Second Expert Report of Rómulo Morales, November 3, 2022 ("Second Morales Report"), at para. 90.

80. Moreover, the highest Peruvian courts' interpretation and application of Peruvian law that led to their judgments are entitled to receive deference, whether formally binding or not. As Respondent's legal expert on constitutional law, Dr. Eguiguren, explains, the Supreme Court is a court of cassation tasked with reviewing the proper interpretation and application of law; it has what is called a "nomophylactic" role.[57] Within this role, the Supreme Court is specifically tasked with "determin[ing] the correct interpretation and application of the law to the specific case in order to . . . standardize the content of domestic case law with respect to a given subject-matter."[58] Thus, Supreme Court decisions, even if they do not have direct precedential effect, are a highly persuasive source of Peruvian law, and they would strongly influence any decision-maker adjudicating issues of Peruvian law.[59]

81. In order to reach the conclusion that SMCV was obliged under Peruvian law to pay the Royalty Assessments related to the Concentrator Project, the courts had to analyze and interpret the Mining Law, the 1993 Regulation, and the 1998 Stabilization Agreement, and on that basis determine whether the Concentrator Project was covered by the Agreement. The courts held that it was not. The courts' *ratio decidendi* and judgments on those issues should not be ignored by this Tribunal as they are issues of Peruvian law that have been interpreted by Perú's highest courts.

82. In an effort to avoid the application of the conclusions of the 2008 Supreme Court Judgment in this arbitration, Claimant contends that the 2008 Supreme Court Judgment does not have either binding or persuasive effect. Claimant tries to find meaning from the (alleged) fact that three Supreme Court justices who voted to dismiss SMCV's appeal of the 2006-2007 Royalty Assessments (before the appeal was withdrawn), SUNAT, and the Tax Tribunal did not say that the Supreme Court judgment in the 2008 Royalty Case was binding on them or that it would otherwise dictate their decisions on the 2006-2007 Royalty Assessments.[60] Claimant's arguments are without merit.

83. Contrary to Claimant's allegations,[61] in the 2006-2007 Royalty Assessment judicial proceedings, the Supreme Court justices who voted to dismiss SMCV's appeal did

[57] *See* Exhibit RER-1, First Eguiguren Report at para. 101; Exhibit RER-6, Second Eguiguren Report at para. 91.

[58] *See* Exhibit RER-1, First Eguiguren Report at para. 101.

[59] *See* Exhibit RER-6, Second Eguiguren Report at para. 120.

[60] *See* Claimant's Reply at para. 118.

[61] *See* Claimant's Reply at para. 118.

recognize that the 2008 Supreme Court Judgment dictated their votes. In particular, in the Supreme Court decision agreeing to dismiss SMCV's appeal with respect to the 2006-2007 Royalty Assessment (because of SMCV's withdrawal of the appeal), the Supreme Court—including the justices who allegedly were going to vote in favor of SMCV—stated:

> TWENTY-FIFTH.- Moreover, it should also be taken into account that the Supreme Court, in Cassation No. 5212-2016-LIMA, issued by the 3rd Transitory Constitutional and Social Law Chamber, dated August 18, 2007, in a different case involving Cerro Verde S.A.A., has established that: "the effect of the contractual benefit that derives from a Legal Stability Agreement in the mining sector executed pursuant to article 82 of the Single Unified Text of the General Mining Law, approved by Supreme Decree No. 014-92-EM, exclusively falls upon the activities of the mining company in favor of which the investment included in the Technical-Economic Feasibility Study is made, which includes the Investment Program, in compliance with article 83 of such law."[62]

84. Thus, the 2008 Supreme Court Judgment was characterized by the justices as having already "established" the scope of SMCV's 1998 Stabilization Agreement. The Tax Tribunal and SUNAT have likewise referred on multiple occasions to the particular relevance of the 2008 Supreme Court Judgment, and its binding effect on SMCV.[63] For example,

---

[62] Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, Section Twenty fifth, at pp. 30-31 ("*VIGÉSIMO QUINTO.- A mayor abundamiento, también debe tenerse presente que la Corte Suprema, en la Casación N.º 5212-2016-LIMA, expedida por la Tercera Sala de Derecho Constitucional y Social Transitoria, de fecha dieciocho de agosto de dos mil diecisiete, en otro caso de la empresa minera Cerro Verde S.A.A, ha establecido que: 'El efecto del beneficio contractual que se deriva de un Convenio de Estabilidad Jurídica en el sector minero suscrito al amparo de lo dispuesto por el artículo 82 del Texto Único Ordenado de la Ley General de Minería, aprobado por Decreto Supremo Nro. 014-92-EM, recae exclusivamente en las actividades de la empresa minera a favor de la cual se efectúe la inversión según el Estudio de Factibilidad Técnico-Económico, que incluye el Programa de Inversión, en aplicación de lo dispuesto por el artículo 83 de dicho cuerpo normativo.*'") (emphasis added).

[63] *See*, *e.g.*, Exhibit CE-165, Assessment No. 012-003-0092962, December 29, 2017 (notified on January 18, 2018), at Annex No. 3 at pp. 75, 83, 94; Exhibit CE-166, Assessment No. 012-003-0092963, December 29, 2017 (notified on January 18, 2018), at Annex No. 3, pp. 75, 83, 94; Exhibit CE-174, SUNAT Assessment No. 012-003-0092685, Q4 2011 Royalty Assessments, December 29, 2017 (notified on January 18, 2018), at Annex No. 4, pp. 81, 91, 107; Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018 (notified to SMCV on April 18, 2018), at Annex No. 4, pp. 86, 96-97, 112; Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018), at pp. 15, 61, 66; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at p. 38; Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018 (notified to SMCV on October 10, 2018), at Annex No. 4, pp. 89, 115; Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018), at p. 29; Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018), at p. 31; Exhibit CE-205, Tax Tribunal Resolution No. 10372-9-2018, December 14, 2018 (notified to SMCV January 7, 2019), at p. 6; Exhibit CE-221, SUNAT Resolution No. 0150140014815, May 28, 2019, at pp. 23, 31; Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019 (Q4 2011-2012 Special Mining Tax Assessments), June 20, 2019, at p. 13; Exhibit CE-232, SUNAT Assessment No. 012-003-0108051, November 26, 2019, at Annex 2, p. 3 (of

- In its March 4, 2019 Resolution concerning the GEM payments, SUNAT emphasized the 2008 Supreme Court Judgment, signaling that the decision was determinative (*i.e.*, the Concentrator Plant "is not covered"):

> By means of Cassation Judgment No. 5212-2016 [*i.e.,* the 2008 Supreme Court Judgment], the Transitory Third Chamber of Constitutional and Social Law of the Supreme Court of Justice of the Republic ruled that the benefits conferred under the Legal Stability Agreement appertain exclusively to the investments contained in the Technical-Economic Feasibility Study presented as a requirement to sign the aforementioned agreement, i.e., only on the Cerro Verde Leaching Project; in this vein, the Primary Sulfide Project is not covered by the guarantees granted under that stability agreement, since it was implemented after its signing.[64]

- SUNAT, in its three Resolutions regarding the 2011, 2012, and 2013 Royalty Assessments, concluded that the main legal issue in all the Royalty Assessment proceedings was the scope of the 1998 Stabilization Agreement, and that the 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment provided a definitive answer to this question. In the three resolutions SUNAT included similar paragraphs to the paragraphs below:

> In this regard, it should be noted that the position widely described by the Tax Administration in the preceding paragraphs, is more consistent with the rulings issued by the Judiciary. . . . On the same end, Decision No. 48 issued on July 12, 2017 by the Seventh Specialized Chamber for Contentious Administrative Matters with Subspecialty in Tax and Customs Issues of the Superior Court of Justice of Lima [i.e., the 2006-2007 Superior Court Judgment], where CERRO VERDE's Claim was declared unfounded on all grounds. Finally, through Cassation Judgment No. 5212-2016 issued on August 18, 2017 by the Supreme Court of Justice of the Republic - Third Transitory Chamber of Constitutional and Social Law [i.e., the 2008 Supreme Court Judgment] where, the appeal filed by CERRO VERDE regarding Decision No. 51 issued on January 29, 2016 by the Sixth Chamber Specialized in Administrative Litigation

PDF); Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at pp. 7, 10.

[64] Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019), at p. 4, n.4 ("*Mediante Sentencia de Casación N° 5212-2016, la Tercera Sala de Derecho Constitucional y Social Transitoria de la Corte Suprema de Justicia de la República resolvió que, los beneficios conferidos en virtud del Contrato de Estabilidad Jurídica recaen exclusivamente en las inversiones contenidas en el Estudio de Factibilidad Técnico - Económico presentado como requisito para suscribir el citado contrato, es decir, únicamente sobre el Proyecto de Lixiviación de Cerro Verde; en ese sentido, el Proyecto de Sulfuros Primarios no está cubierto por las garantías que otorga dicho contrato de estabilidad, toda vez que fue implementado con posterioridad a la celebración del mismo.*") (emphasis added).

> with Subspecialty in Tax and Customs Matters of the Superior Court of Justice of Lima was declared unfounded.
>
> Although it is true, [those Judgments] refer to the Mining Royalties of other tax periods, it should be pointed out that the main discussion is centered on the scope of the Legal Stabilization Contract in mining signed between CERRO VERDE and the Peruvian State, which is also the central issue in this Audit Procedure, since from the determination of such scope, it has been established that the Primary Sulfides Project is not covered by the benefits of the contract signed on February 13, 1998. As it can be seen, the conclusion reached in Request No. 0122170002188 and its Result is consistent with the position held by the Judiciary and the Tax Tribunal.[65]

- The Tax Tribunal, in both its August 15, 2008 decision regarding the 2009 Royalty Assessment, and in its January 17, 2019 decision regarding the 2013 Temporary Tax on Net Assets, also confirmed the relevance of the 2008 Supreme Court Judgment as having already pronounced upon the scope of the 1998 Stabilization Agreement:

> That the aforementioned criterion has been ratified by the Judiciary when resolving the contentious-administrative lawsuit filed against Resolution No. 08252-1-2013, resolution in which the contract in question was analyzed, verifying that in point 3. 3 of the third recital of the cassation judgment issued in Case No. 5212-2016 of the Transitory Constitutional and Social Law Chamber of the Supreme Court of Justice of the Republic (folios 146 to 183) [the 2008 Supreme Court Judgment] {footnote: Which have

[65] Exhibit CE-174, SUNAT Assessment No. 012-003-0092685, Q4 2011 Royalty Assessments, December 29, 2017 (notified on January 18, 2018), at p. 81 ("*Al respecto se debe señalar que la posición ampliamente descrita por la Administración Tributaria en los párrafos precedentes, tiene mayor coherencia con las sentencias emitidas por el Poder Judicial . . . En ese mismo extremo, la Resolución N° 48 emitida el 12 de julio del 2017 por la Sétima Sala Especializada en lo Contencioso Administrativo con Subespecialidad en Temas Tributarios y Aduaneros de la Corte Superior de Justicia de Lima [i.e., la Sentencia de la Corte Superior 2006-2007], donde se declara infundada la Demanda de CERRO VERDE en todos sus extremos. Finalmente a través de la Sentencia de Casación N° 5212-2016 emitida el 18 de agosto del 2017 por la Corte Suprema de Justicia de la República -Tercera Sala de Derecho Constitucional y Social Transitoria [i.e., la Sentencia del Tribunal Supremo 2008], donde, se declaró infundado el recurso de casación interpuesto [por] CERRO VERDE respecto de la Resolución N° 51 emitida el 29 de enero del 2016 por la Sexta Sala Especializada en lo Contencioso Administrativo con Subespecialidad en Temas Tributarios y Aduaneros de la Corte Superior de Justicia de Lima. Si bien es cierto, estas sentencias están referidas a las Regalías Mineras de otros periodos tributarios, cabe precisar que la principal discusión está centrada en el alcance del Contrato de Estabilidad Jurídico en minería suscrito entre CERRO VERDE y el Estado Peruano, es también el tema central en este Procedimiento de Fiscalización puesto que desde la determinación de tal alcance, se ha establecido que el Proyecto de Sulfuros Primarios, no está alcanzado por los beneficios del contrato firmado el 13.02.1998. Como puede observarse, la conclusión a la que se ha arribado en el Requerimiento Nº 0122170002188 y su Resultado, es coherente con la posición sostenida por el Poder Judicial y el Tribunal Fiscal.*") (emphasis added); *see also* Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018 (notified to SMCV on April 18, 2018), at p. 86; and Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018 (notified to SMCV on October 10, 2018), at p. 89.

> specifically ruled on the scope of the stability enjoyed by the appellant based on the contract analyzed in the case}, it has been made clear that it was the contract signed which defined the scope of the stability guarantee enjoyed by the appellant, not the legal provisions it alleges.[66]

85. Thus, Claimant's assertion that the 2008 Supreme Court Judgment had no persuasive effect in Perú is incorrect. Especially because there is no other final judgment in Perú that contradicts the Supreme Court's interpretation of the Mining Law, the 1993 Regulation, and the 1998 Stabilization Agreement in the 2008 Supreme Court Judgment, in practice, a decision-maker adjudicating issues of Peruvian law will not—indeed, in effect cannot—depart from that decision.[67] As Dr. Eguiguren explains in his second report, the 2008 Supreme Court Judgment "should be taken into account as an interpretation parameter, as it is an interpretation of the 1998 Stabilization Agreement and of the Mining Law that Peruvian courts **must** follow, unless they expressly state the reasons or the legal grounds for their departure from it."[68] The Tribunal likewise should take the content of that decision as determinative when interpreting the 1998 Stabilization Agreement.[69]

b. Claimant's Contention that the Tribunal Should Not Accord Any Weight to the Judgments of Perú's Highest Courts Is Without Merit

86. In its Reply, Claimant argues that whether or not the 2008 Supreme Court Judgment is binding or has persuasive authority in the Peruvian legal system, it "should not be accorded any weight by this Tribunal"[70] because (i) a contentious administrative proceeding is

---

[66] Exhibit CE-205, Tax Tribunal Resolution No. 10372-9-2018, December 14, 2018 (notified to SMCV January 7, 2019) ("*Que el criterio antes expuesto ha sido ratificado por el Poder Judicial al resolver la demanda contencioso administrativa interpuesta contra la Resolución Nº 08252-1-2013, resolución en la que se analizó el contrato materia de autos, verificándose que en el punto 3.3 del considerando tercero de la sentencia de casación emitida en el Expediente Nº 5212-2016 de la Sala de Derecho Constitucional y Social Transitoria de la Corte Suprema de Justicia de la República (folios 146 a 183) [la Sentencia de la Corte Suprema de 2008] {nota al pie: Las cuales se han pronunciado en específico sobre los alcances de la estabilidad de la que gozaba la recurrente en base al contrato analizado en autos} se ha dejado claro que fue el contrato suscrito el que delimitó los alcances de la garantía de estabilidad de la que gozaba la recurrente, no las normas que ella alega*.") (emphasis added) (bracketed text marked with {} appears in original); *see also* Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 36.

[67] *See* Exhibit RER-6, Second Eguiguren Report at para. 120.

[68] Exhibit RER-6, Second Eguiguren Report at para. 120 ("*debe ser tomada en cuenta como parámetro de interpretación en la materia, pues se trata de una interpretación del Contrato de Estabilidad de 1998 y de la LGM que los tribunales peruanos deben seguir, a no ser que consignen expresamente las razones o fundamentos jurídicos para su apartamiento de ella*.") (emphasis added); *see also* Exhibit RER-2, First Morales Report at para. 94.

[69] *See* Exhibit RER-1, First Eguiguren Report at para. 101; Exhibit RER-2, First Morales Report at para. 100.

[70] *See* Claimant's Reply at para. 119.

not equivalent to a civil proceeding (due to, *e.g.*, different procedural deadlines and different evidentiary rules); and (ii) the Peruvian government itself has criticized and delegitimized Perú's judicial system and its decisions.[71] Claimant's contentions are misleading and without merit.

87. *First*, even if from a formalistic point of view a "breach of contract claim" and a "breach of administrative law claim" are distinct causes of action under Peruvian law, the issue that a Peruvian court will analyze and decide in a civil proceeding regarding the 2008 Royalty Assessment and in a contentious administrative proceeding regarding the 2008 Royalty Assessment will be the same (namely, the scope of the 1998 Stabilization Agreement). In both a civil and an administrative proceeding about a given Royalty Assessment against SMCV, the main responsibility of the court hearing the case would be to interpret the Mining Law, the 1993 Regulation, and the 1998 Stabilization Agreement according to Peruvian law. The parties appearing in either setting would have to present and argue the very same legal questions. Therefore, both a contentious administrative proceeding and a civil law proceeding constitute adequate fora in which a court could and would interpret Peruvian law and apply it to assess the scope of the 1998 Stabilization Agreement. There is simply no basis to suggest that the 2008 Supreme Court Judgment was an inadequate legal forum in which to determine the scope of the 1998 Stabilization Agreement.[72]

88. *Second*, Claimant's arguments that contentious administrative proceedings are not adequate because they have "very short procedural deadlines" and "limited evidentiary methods"[73] are inconsequential. Claimant itself elected to pursue a contentious administrative proceeding, and deliberately chose not to initiate a civil proceeding for a breach of contract claim. Claimant cannot use its own decision not to pursue a civil proceeding to discredit the 2008 Supreme Court Judgment.

89. *Third*, Claimant alleges that the Tribunal should not give any weight to the 2008 Supreme Court Judgment because the Supreme Court did not have in front of it certain evidence that Claimant is now submitting in this arbitration.[74] This argument is entirely misleading.

---

[71] *See* Claimant's Reply at paras. 112-19.

[72] *See* Exhibit RER-6, Second Eguiguren Report at paras. 105-06.

[73] *See* Claimant's Reply at para. 115 (quoting Exhibit CER-7, Reply Expert Report of Alfredo Bullard, September 13, 2022 ("Second Bullard Report,") at para. 67).

[74] *See* Claimant's Reply at para. 119.

90. As noted above, the Supreme Court acts as a cassation court, which does not review for itself the facts of a given case; it only interprets and applies the relevant law.[75] As such, "evidence" plays little if any role in its analysis. In the 2008 Supreme Court Judgment, the Supreme Court carried out a thorough analysis of the applicable Peruvian law and the 1998 Stabilization Agreement and reached a legal conclusion based on its interpretation of the law. The fact that Claimant is now attempting to take another bite of the apple with additional evidence—which was unnecessary for the Supreme Court's analysis—is entirely irrelevant.

91. In any event, as Dr. Eguiguren explains in his second report, both a civil proceeding and a contentious administrative proceeding in Perú have a "a procedural design that [] guarantees due process to both parties, with a plurality of instances (which may go as far as cassation before the Supreme Court), phases of debate and evidentiary proceedings, the possibility of oral and written reports, etc."[76]

92. *Finally,* Claimant also tries to challenge the credibility of the 2008 Supreme Court Judgment by pointing to media reports that Perú's President characterized Perú's judicial system as needing anti-corruption reforms.[77]

93. Claimant submits no evidence that the reported broad statement supposedly made by the President was in any way related to the 2008 Supreme Court Judgment or anything else connected to this case. The purported statement was made 11 months after the 2008 Supreme Court Judgment was issued. Notably, from 2017 (the year when the 2008 Supreme Court Judgment was issued) to 2018 (the year when the President made the statement regarding anti-pollution reforms) the different chambers of the Supreme Court reviewed no less than 19,494 case files.[78] More importantly, Claimant has not put forward any allegation of corruption against the 2008 Supreme Court Judgment or any other judicial decision at issue in this case. The fact that Claimant has resorted to making vague aspersions about Perú's courts that rest on press reports about political grandstanding, with no actual connection to the events of this case, speaks volumes about the (lack of) support for its claims.

---

[75] *See* Exhibit RER-1, First Eguiguren Report at para. 101; Exhibit RER-7, Second Morales Report at para. 92.

[76] Exhibit RER-6, Second Eguiguren Report at para. 105 ("*un diseño procesal que garantiza [], el debido proceso a ambas partes, con pluralidad de instancias (que pueden llegar hasta la casación ante la Corte Suprema), etapas de debate y actuación probatoria, posibilidad de realizar informes orales y escritos, etc.*").

[77] *See* Claimant's Reply at para. 119.

[78] Exhibit RE-305, Judiciary's Judicial Research Center, Annual Report 2017-2018 (2019) (excerpts), at p. 44.

c. Claimant Does Not Challenge the Procedural Soundness of the 2008 Supreme Court Judgment or the 2006-2007 Superior Court Judgment

94. As Respondent explains in greater detail in Section III.B.1(c), Claimant has not raised any claims of denial of justice in connection with the 2008 Supreme Court Judgment or the 2006-2007 Superior Court Judgment. Claimant's objections to the 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment relate to the content of those decisions. Claimant is unhappy with their conclusions, and it is now asking this Tribunal to act as an international appellate court to overturn them. But Claimant has never claimed in this arbitration that SMCV suffered any deprivation of due process in the Peruvian court proceedings that led to those Judgments.

95. Absent any such due process claims against the judicial proceedings that generated the Judgments, there is simply no basis to look behind or second-guess those final rulings on Peruvian law that Perú's judiciary has generated. Unless and until Claimant were to prove that SMCV suffered a denial of justice that could call into question the integrity of Perú's judicial processes themselves (which Claimant has not even tried to do), Perú's courts must be respected as the authoritative interpreters of Peruvian law, and their decisions on the meaning and application of Peruvian law must be treated as definitive.

* * *

96. In conclusion, the 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment put an end to an eight-year battle in which SMCV was afforded every opportunity to challenge SUNAT's Royalty Assessments—before SUNAT itself, the Tax Tribunal, and Peruvian courts. During those eight years, SMCV raised the same or very similar arguments to the ones that Claimant now submits (on its own behalf and on behalf of SMCV) in this arbitration. On every occasion, Peruvian courts ultimately dismissed SMCV's arguments. The 2008 Supreme Court Judgment and the 2006-2007 Superior Court Judgment should have been the end of the road for SMCV (and Claimant). But Claimant has insisted on pressing further and has brought this arbitration to (improperly) use this Tribunal as a court of last resort. As Respondent explains in next sections, Claimant's interpretation in this arbitration of the Mining Law, the 1993 Regulation, and the Stabilization Agreement—which is the same interpretation that SMCV pressed before the Supreme Court and Lima's Superior Court in the 2006-2007 and 2008 Royalty Assessment proceedings—is incorrect.

B. THE MINING LAW AND 1993 REGULATION CONFIRM THAT STABILIZATION AGREEMENTS ARE INTENDED TO PROTECT ONLY SPECIFIC INVESTMENT PROJECTS

97. Even if Respondent agrees with Claimant that the Mining Law and the 1993 Regulation define the scope of stability guarantees,[79] the Agreement itself is the instrument that defines the object of those guarantees. As Respondent explained in its Counter-Memorial, and further explains in Section II.C.1(a) below, the language of the specific stabilization agreement that SMCV signed with Perú (*i.e.*, the 1998 Stabilization Agreement) was clear: it solely and exclusively granted stability guarantees to the "Cerro Verde Leaching Project."[80] In fact, while the 1998 Stabilization Agreement mentioned the term "Cerro Verde Leaching Project" multiple times, it did not refer even once to the Concentrator Project.

98. In an attempt to divert from the specific terms contained in the Agreement and expand its scope, Claimant insists in its Reply that the Mining Law and the 1993 Regulation granted stability guarantees to entire concessions or mining units and, thus, SMCV and Perú could not have limited stability guarantees to a specific project. Claimant also adds that Respondent's interpretation of the 1998 Stabilization Agreement is a result of Perú's allegedly flawed interpretation of the Mining Law and the 1993 Regulation.[81]

99. Given Claimant's arguments, (i) *first*, in this section, Respondent clarifies that the Mining Law and the 1993 Regulation only granted stability guarantees to the specific investment project(s) outlined in the feasibility study that serves as a basis for such agreement, and (ii) *second*, in Section II.C, Respondent turns to the interpretation of the 1998 Stabilization Agreement.

100. In its Memorial, Claimant provided a brief description of the Mining Law and asserted that certain provisions of the 1993 Regulation in force when the 1998 Stabilization was signed "clarified that stability benefits were granted to an investor with respect to one or more concessions or a 'mining unit'—a group of concessions and facilities that constitute an Economic Administrative Unit."[82] In its Counter-Memorial, Respondent corrected Claimant's mischaracterization of the law and demonstrated that language contained in both the Mining Law

[79] *See* Claimant's Reply at para. 79.

[80] Respondent's Counter-Memorial at paras. 9, 86; *see also infra* at Section II.C.1(a).

[81] *See* Claimant's Reply at para. 81.

[82] Claimant's Memorial at para. 56; *see also id*. at Sections I.C.1(ii)-(iii).

and its 1993 Regulation confirms that mining stabilization agreements cover only the investment project outlined in the feasibility study that serves as the basis for any such agreement.[83]

101. In its Reply, Claimant contends that Respondent's interpretation of the Mining Law and 1993 Regulation is incorrect,[84] commercially unreasonable, and administratively burdensome.[85] But it is Claimant's interpretation of the Mining Law that is mistaken and misguided. Moreover, Claimant's opinions about what the scope of stability guarantees should be, in order for Perú to be a more attractive destination for foreign direct investment, are irrelevant to the interpretation of the law.

102. In its interpretation of the Mining Law and 1993 Regulation, Claimant consistently ignores the plain language of the law and regulation—which is the starting point of every exercise of interpretation of Peruvian law.[86] In particular, Claimant selectively quotes portions of provisions of the Mining Law and the 1993 Regulation (failing to quote the portions that do not support its position), and, in some cases, bases its interpretation of the 1993 Regulation exclusively on the language of the legal provisions that were not in force when SMCV signed the 1998 Stabilization Agreement.[87]

103. It is arguably more important that, as described in Section II.A above, Perú's Supreme Court has already ruled on the correct interpretation of all of the same provisions of the Mining Law and the 1993 Regulation that Claimant discusses in its Reply, and has held that the interpretations that Claimant promotes are contrary to Peruvian law.[88] Claimant's attempt to relitigate matters of Peruvian law that have already been fully and finally decided by the highest courts of Perú should be rejected outright, and there should be no need even to consider the merits of (or rather, lack thereof) Claimant's contrary interpretations of Peruvian law. However, for the sake of completeness, Respondent feels obliged to respond to—and demonstrate the fatal defects of—Claimants' legal theories about the Mining Law and the 1993 Regulation. In doing so, Respondent does not wish to encourage the Tribunal to engage in any of this legal analysis. There is no need, and it is not appropriate, for this Tribunal to take sides with or against the

[83] *See* Claimant's Reply at Sections II.A.1(i)-(ii).

[84] *See* Claimant's Reply at para. 33.

[85] *See* Claimant's Reply at Section II.A.1(iii).

[86] *See* Exhibit RER-2, First Morales Report at para. 50.

[87] *See infra* at Section II.B.1(a)(ii).

[88] *See infra* at Section II.A.1.

Peruvian courts and to declare their interpretation and application of Peruvian law to be correct or incorrect—that is exactly the exercise in which the Tribunal should not engage. But Respondent feels that it should provide some comfort that those interpretations of Peruvian law are indeed correct, and that they readily withstand all of Claimant's contrary arguments and theories.

104. In this section, Respondent *first* explains the correct interpretation of the provisions of the Mining Law and the 1993 Regulation that are most relevant to the scope of mining stabilization agreements and points out how Claimant mischaracterizes the law (Section 1). *Second*, Respondent explains why its interpretation of the law is commercially reasonable and reflects the purpose of the Mining Law of promoting investment, and why Claimant's arguments to the contrary are without merit (Section 2).

1. A Literal, Systematic, and Functional Interpretation of the Mining Law and 1993 Regulation Confirms that Stability Guarantees Apply Solely to the Investment Projects Included in the Feasibility Study That Are the Subject of the Agreement

105. In its Counter-Memorial, and in line with Perú's Supreme Court's conclusions,[89] Respondent explained that the plain language of Article 83 of the Mining Law limits the scope of 15-year mining stabilization agreements to only activities related to the investment project that is the subject of the agreement.[90] In its Reply, Claimant once again turns a blind eye to the actual language of the law and incorrectly insists that (i) Articles 82 and 83 of the Mining Law, (ii) Articles 2 and 22 of the 1993 Regulation, and (iii) the 2014 and 2019 amendments to the law provide that mining stabilization agreements apply to entire concessions or mining units.[91] Claimant also mischaracterizes the meaning of other secondary provisions of the law.[92] Respondent rebuts each point below. Specifically, Respondent provides a correct interpretation of (i) Articles 82 and 83 of the Mining Law and Articles 2 and 22 of the 1993 Regulation (Section a); and (ii) other provisions of the Mining Law and 1993 Regulation that are relevant to interpret the scope of stabilization agreements (Section b).

[89] *See supra* at Section II.A.1; *see also* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 61 and 73.

[90] *See* Respondent's Counter-Memorial at para. 59.

[91] *See* Claimant's Reply at Sections II.A.1(i)-(iii).

[92] *See* Claimant's Reply at Section II.A.1(ii).

a. Articles 82 and 83 of the Mining Law and Articles 2 and 22 of the 1993 Regulation Provide that Stability Guarantees Apply Only to Specific Investment Projects

(i) Articles 82 and 83 of the Mining Law

106. In its Counter-Memorial, Respondent showed that, in the early 1990s, Perú introduced a series of measures to promote investments in the mining sector, including offering legal stabilization agreements that grant stability benefits to mining companies with respect to specific investment projects.[93] For example, Respondent explained in its Counter-Memorial that the text of Article 83 of the Mining Law—and, in particular, its reference to the fact 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,"[94]—made clear that stability guarantees only apply to the investments included in the feasibility study approved by MINEM.[95]

107. In its Reply, Claimant insists that Article 83 of the Mining Law shows that mining stabilization agreements grant stability benefits to the entire concession(s), "mining unit," or Economic Administrative Unit(s) ("EAU") of a mining company. In particular, Claimant alleges (i) that the reference in Article 83 to "activities of the mining company in whose favor the investment is made"[96] implies that stability guarantees cover all activities in a concession or "mining unit" of a given mining investor (*i.e.*, not only a mining investor's identified "investment projects" but anything that it might later choose to do in the mining unit);[97] (ii) that Respondent's reading of the term "exclusively" in Article 83 is allegedly incorrect;[98] and (iii) that Article 83's reference to an "investment program" is irrelevant.[99] Claimant also asserts that Article 82 of the Mining Law supports its interpretation of Article 83. Claimant's arguments are without merit.

108. *First*, Article 83 of the Mining Law should be read in conjunction with Article 82 of the Mining Law. Article 82 of the Mining Law provides that 15-year mining stabilization agreements are made available to mining titleholders "[i]n order to promote investment and

[93] *See* Respondent's Counter-Memorial at Sections II.B.1-2.

[94] Exhibit CA-1, General Mining Law at Art. 83 (emphasis added).

[95] *See* Respondent's Counter-Memorial at paras. 49-52.

[96] Exhibit CA-1, General Mining Law at Art. 83.

[97] *See* Claimant's Reply at paras. 35, 36(a), 37(a), (b), (d), and (f).

[98] *See* Claimant's Reply at para. 37(c).

[99] *See* Claimant's Reply at paras. 37(c) and (e).

facilitate the financing of mining projects" that aim to reach production of at least 5,000 MT/day.[100] Thus, the main purpose of mining stabilization agreements is to encourage specific investment projects by reassuring the investor that its expected internal rate of return for a specific project will not be affected by legislative or regulatory reforms for a specific period of time.[101]

109. Claimant, however, would have this Tribunal believe that the State goes blindly into that agreement and grants stability benefits in advance with respect to any and all present and future activities, and with respect to any and all investments that a mining titleholder may someday wish to make, within the physical boundaries of its mining concessions. That cannot be correct. It makes no sense that a State would deprive itself of its legislative and regulatory powers in such an unknown, unlimited, and unqualified manner.[102] More importantly, Claimant's position is contradicted by the plain meaning of the provisions contained in the Mining Law.

110. Article 82's reference to "mining projects" indicates that stabilization agreements were intended to benefit specific, planned investment projects within one or more mining concessions. As Respondent explained in its Counter-Memorial, a mining concession grants the right to an investor to explore and/or exploit a mineral resource within a specific geographical area for a period of time.[103] Within the area of a mining concession, the titleholder of the concession may develop one or more investment projects to explore and/or exploit the mineral resources encompassed by the concession and to increase its production.[104] A concession in itself is not a "project" nor does it produce any revenue; to the contrary, projects that are developed within a concession are the elements that produce economic value. For example, a

[100] Exhibit CA-1, General Mining Law at Art. 82 ("*A fin de promover la inversión y facilitar el financiamiento de los proyectos mineros con capacidad inicial no menor de 5,000 TM/día o de ampliaciones destinadas a llegar a una capacidad no menor de 5,000 TM/día referentes a una o más Unidades Económicas Administrativas, los titulares de la actividad minera gozarán de estabilidad tributaria que se les garantizará mediante contrato suscrito con el Estado, por un plazo de quince años, contados a partir del ejercicio en que se acredite la ejecución de la inversión o de la ampliación, según sea el caso*.") (emphasis added).

[101] *See* Exhibit CA-1, General Mining Law at Art. 82; *see also* Exhibit RWS-2, Witness Statement of Felipe Isasi, April 18, 2022 ("First Isasi Statement"), at paras. 53-54; Exhibit RWS-8, Second Witness Statement of César Polo, November 3, 2022 ("Second Polo Statement"), at para. 7.

[102] *See* Exhibit RER-1, First Eguiguren Report at paras. 38-39; Exhibit RER-3, Expert Report of Jorge Bravo and Jorge Picón, May 4, 2022 ("First Bravo and Picón Report"), at paras. 27-29; Exhibit RER-4, Expert Report of Stephen Ralbovsky, May 4, 2022 ("First Ralbovsky Report"), at para. 44.

[103] *See* Exhibit RE-20, Organic Law for the Sustainable Use of Natural Resources, Law No. 26821, June 25, 1997, at Art. 23; Exhibit CA-1, General Mining Law at Art. 9.

[104] *See* Exhibit RWS-3, Witness Statement of Oswaldo Tovar, April 18, 2022 ("First Tovar Statement") at para. 19.

mining activity titleholder may opt to invest in multiple mining pits, or any number of different types of plants and equipment facilities to process the minerals, or in a range of extractive equipment to separate the ore from the soil, among others.[105] Those specific mining projects are the ones that benefit from a mining stabilization agreement if they have been included in such an agreement. Contrary to Claimant's claims in this arbitration, all of these types of projects, present or future, are not automatically stabilized merely because they are also developed within the physical area covered by a mining concession in which some other stabilized project was developed. Claimant's position is untenable.

111. Claimant alleges that Article 82's reference to Economic Administrative Units or "mining units" shows that stability benefits were meant to be granted to all investments developed within a concession, "mining unit," or EAU of a mining company.[106] Claimant twists the language in Article 82. 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.[107]

---

[105] *See* Exhibit RWS-3, First Tovar Statement at para. 19.

[106] *See* Claimant's Reply at para. 42(a).

[107] Exhibit CA-1, General Mining Law at Art. 82 (emphasis added) ("*Artículo 82.- A fin de promover la inversión y facilitar el financiamiento de los* ***proyectos mineros*** *con capacidad inicial no menor de 5,000 TM/día o de ampliaciones destinadas a llegar a una capacidad no menor de 5,000 TM/día referentes a una o más Unidades Económicas Administrativas, los titulares de la actividad minera gozarán de estabilidad tributaria que se les garantizará mediante contrato suscrito con el Estado, por un plazo de quince años, contados a partir del ejercicio en que se acredite la ejecución de la inversión o de la ampliación, según sea el caso. Para los efectos del contrato a que se refiere el párrafo precedente, se entiende por Unidad Económica Administrativa, el conjunto de concesiones mineras ubicadas dentro de los límites señalados por el Artículo 44 de la presente Ley, las plantas de beneficio y los demás bienes que constituyan una sola unidad de producción por razón de comunidad de abastecimiento, administración y servicios que, en cada caso, calificará la Dirección General de Minería.*") (emphasis added).

112. Nothing in this Article provides that mining stabilization agreements grant stability benefits to all investments and activities that might ever be conducted by a mining company within a mining concession, as Claimant alleges.

113. The first paragraph of Article 82 provides that in order to qualify for a 15-year stabilization agreement, a mining company is required to seek to develop a mining project that will allow the company to produce at least 5,000 MT/day. Given that a company may not be able to exploit 5,000 MT/day of minerals from one single concession, the qualifying production may come from minerals exploited from one or more concessions or EAUs[108] (*i.e.*, an investor can add the production capacity of several EAUs to reach the minimum production capacity required to obtain a 15-year stabilization agreement). Contrary to Claimant's assertions, this article does not say that if the State agrees to sign a stabilization agreement with a mining company that has operations of at least 5,000 MT/day (or seeks to reach operations of at least 5,000 MT/day), then the benefits of that agreement will apply to every activity and investment that the company undertakes in that Economic-Administrative Unit(s) in which the investment project is executed.

114. The final part of the first paragraph of Article 82 also ties the scope of the agreement to a specific investment project. It provides—as Mr. César Polo, Perú's Vice Minister of Mines who spearheaded the drafting of the provisions of L.D. 708 (and Title Nine of the Mining Law) explains—that the term of "the stabilization agreement begins to run ('the meter starts to run') from the moment that the investment's completion is credited [and] [t]his shows . . . that the effects of the agreement are necessarily tied to the investment approved in the feasibility study."[109] Thus, the stability benefits take effect as of the moment when the investment that is the subject of the agreement—namely, the investment described and analyzed in the Feasibility Study that is required in order to obtain the agreement—is completed. If Claimant's interpretation of the agreement were correct, and the agreement were to grant benefits to all investments and activities conducted within a concession, then this provision would be superfluous. There would be no need to wait until the completion of the investment to start the stabilization effects of the agreement. It would also be nonsensical because there would be no

[108] *See* Respondent's Counter-Memorial at para. 48.

[109] Exhibit RWS-1, Witness Statement of César Polo, April 18, 2022 ("First Polo Statement"), at para. 24 ("*[E]l plazo del contrato de estabilidad se empieza a contar ("se baja la bandera"), desde que se acredita la ejecución de la inversión [y] [e]sto demuestra . . . que los efectos del contrato están necesariamente atados a la inversión que fue aprobada en el estudio de factibilidad*.") (internal citation omitted).

way to know when the investment was "completed"; on Claimant's theory, the covered investments are potentially unlimited within a given mining unit.

115. The second paragraph of Article 82 does not help Claimant's interpretation. Claimant argues that the definition of an EAU provided in the second paragraph of Article 82 is relevant for establishing the scope of stability guarantees.[110] It is not. Claimant focuses on this paragraph to try to claim that stabilization agreements grant stability benefits to a so-called "mining unit." Claimant, thus, argues that all of the activities conducted under SMCV's Mining and Beneficiation Concessions constitute a "mining unit" and that the 1998 Stabilization Agreement covered every activity and investment conducted in that unit.[111] It did not.

116. Claimant twists the meaning of Article 82. As indicated above, Article 82 refers to EAUs for the sole purpose of indicating that the qualifying production capacity to obtain a stabilization agreement may come from one or more concessions or EAUs. Thus, Article 82's explanation of the term EAU does not delimit the scope of stabilization agreements.

117. Moreover, as Respondent explained in its Counter-Memorial, the term EAU is defined in Article 44 of the Mining Law as a grouping of concessions "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; and a 10 kilometer radius in detritus gold metallic deposits or detritus heavy minerals."[112] As Vice Minister César Polo explains in its witness statements, an EAU is simply an administrative construct that is used in order to group together mining concessions and other mining activities that share the same location.[113] Moreover, as Claimant itself has admitted, SMCV's Mining and Beneficiation Concessions have not been declared or registered as EAUs.

118. *Second,* the plain text of Article 83 leaves no doubt that stability guarantees cover only the investments that are described and analyzed in the feasibility study. For convenience, Respondent copies below the text of Article 83 that was in force when the 1998 Stabilization Agreement was signed.

> Article 83.- Mining activity titleholders who submit <u>investment programs</u> of not less than the equivalent in local currency of

[110] *See* Claimant's Reply at para. 47.

[111] *See* Claimant's Reply at para. 47.

[112] Exhibit CA-1, General Mining Law at Art. 44.

[113] *See* Exhibit RWS-8, Second Polo Statement at para. 22; *see also* Exhibit RWS-1, First Polo Statement at para. 29.

> 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 . . .
>
> 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.
>
> The mining activity titleholder that enters into these agreements may, at its election, advance the stabilized contractual regime to the investment stage with a maximum of 8 consecutive fiscal years, term which shall be deducted from the one guaranteed by the agreement.[114]

119. The first three paragraphs of Article 83 provide that the companies wishing to obtain the "contractual benefit" described in Article 82 of the Mining Law—which intended to benefit "mining projects"—had to submit an "investment program" when making their investment in order to obtain the contractual benefit.[115] Immediately thereafter, the fourth paragraph of Article 83 provides that the contractual benefit applies "exclusively to the activities of the company in whose favor the investment is made."[116] As Respondent explained in its Counter-Memorial, the term "exclusively" shows that the legislator intended to restrict stability

[114] Exhibit CA-1, General Mining Law at Art. 83 ("*Artículo 83. Tendrán derecho a celebrar los contratos a que se refiere el artículo anterior, los titulares de la actividad minera, que presenten programas de inversión no menores al equivalente en moneda nacional a US$ 20'000,000.00, para el inicio de cualquiera de las actividades de la industria minera. Tratándose de inversiones en empresas mineras existentes, se requerirá un programa de inversiones no menor al equivalente en moneda nacional a US$ 50'000,000.00. Por excepción, tendrán derecho a acceder a estos contratos, las personas que realicen inversiones no menores al equivalente en moneda nacional a US$ 50'000,000.00, en las empresas que conforman la actividad empresarial del Estado sujetas al proceso de privatización, según el Decreto Legislativo N° 674. El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión. El titular de la actividad minera que celebre estos contratos, podrá, a su elección, adelantar el régimen contractual estabilizado a la etapa de inversión, con un máximo de 8 ejercicios consecutivos, plazo que se deducirá del garantizado por el contrato.*") (emphasis added).

[115] *See* Exhibit CA-1, General Mining Law at Art. 82.

[116] Exhibit CA-1, General Mining Law at Art. 83 (emphasis added).

guarantees to certain activities, not all of the activities of the company.[117] The same interpretation applies to Article 79, which regulates 10-year mining stabilization agreements. Article 79 also 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."[118]

120. *Second*, Claimant conveniently omits that, in its 2008 Supreme Court Judgment regarding the 2008 Royalty Assessment, Perú's Supreme Court corroborated Respondent's reading of Article 83, including Respondent's interpretation of the term "exclusively."[119] Notably, during the 2008 Royalty Assessment proceedings, SMCV argued—as Claimant and Ms. Chappuis do in this arbitration[120]—that Article 83 granted stability guarantees to all of the activities of a mining company within its concession.[121] The Supreme Court dismissed SMCV's arguments and provided a detailed interpretation of Article 83 (including an interpretation of the term "exclusively"):

> [T]he scope of the Legal Stability Agreement (or the effects of the contractual benefit) depend on the type of Legal Stability Agreement that the mining activity owner enacts and '(...) will reside exclusively with mining company activities for which the investment has been made.' That does not mean that the contractual benefit will go to any of the mining activities that a mining company performs, rather solely to the activities resulting from the investment made. That is why the rule introduces the term 'exclusively' in that paragraph. Please note that according to the *Diccionario de la Real Academia de la Lengua* [Royal Academy Spanish Language Dictionary], the meaning of this term is as follows: 'Adverb. In an exclusive manner.' What is more, the definitions of the term 'exclusive,' as far as its importance for understanding the meaning, are: '1. Adjective. That which excludes or has the power or virtue of exclusion; 2. Adjective. Unique, single, excluding any other.'
>
> For that reason, taking into consideration the grammatical context in which the wording was given for paragraph four of Article 83 of the TUO of the General Mining Law, this Supreme Court finds that this rule was not violated from a regulatory standpoint, because it was the legislator who provided that the effect of the contractual benefit[s] would fall {'solely' or 'excluding any other'} on 'the

[117] *See* Respondent's Counter-Memorial at para. 52 (internal citation omitted).

[118] Exhibit CA-1, General Mining Law at Art. 79 (emphasis added).

[119] *See also* Respondent's Counter-Memorial at para. 5.

[120] *See* Claimant's Reply at paras. 37(c) and (e); *see also* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at pp. 29-30.

[121] *See* Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at pp. 29-30.

> mining company activities for which the investment has been made' and, thus, not on any activities of the mining company. In sum, the scope of the contractual benefit extends 'solely' to those activities related to the investment according to what was set forth in the Feasibility Study.[122]

121. *Third*, Vice Minister Polo, also confirms Respondent's reading of Article 83.[123] Vice Minister Polo explains that he was the government official who suggested to include the language "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made"[124] in Article 83 and that he did so "to make it absolutely clear that the stability regime benefited solely and exclusively the investment for which the contract had been signed."[125]

122. Claimant cites to Minister Fernando Sánchez Albavera's book "The Cards on the Table" in an attempt to discredit Vice Minister Polo's interpretation of the Mining Law. In particular, Claimant argues that Vice Minister Polo's intention "runs counter to the instructions of his superior, Minister Sánchez Albavera, who . . . sought to 'radically change the orientation of the tax regime that had prevailed over the last two decades' and 'make [Perú's mining] legislation as attractive as or more so than the legislation prevailing in countries with a similar mining potential.'"[126] Claimant's argument is simply wrong:

---

[122] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 72-73, paras. 166-67 ("*[L]os alcances del Convenio de Estabilidad Jurídica (o los efectos del beneficio contractual) dependen de la clase de Convenio de Estabilidad Jurídica que celebra el titular de la actividad minera y '(...) recaen exclusivamente en las actividades de la empresa minera a favor de la cual se efectúe la inversión.' Ello no quiere decir que el beneficio contractual recae en cualquiera de las actividades mineras que desarrolle la empresa minera sino únicamente en las actividades que se derivan de la inversión realizada; por ello es que el dispositivo introduce el término 'exclusivamente' en dicho parágrafo. Debe indicarse que, según el Diccionario de la Real Academia de la Lengua, el significado de ese término es: 'Adverbio. De manera exclusiva'. Aún más, los significados del término 'exclusiva' que interesan para comprender el significado de aquel son: '1. Adjetivo. Que excluye o tiene fuerza y virtud para excluir; 2. Adjetivo. Único, solo, excluyendo a cualquier otro.' Por tal razón, teniendo en cuenta el contexto gramatical en que se redactó el cuarto párrafo del artículo 83° del TUO de la Ley General de Minería, este Supremo Tribunal considera que no se infringió normativamente tal dispositivo, toda vez que es el propio legislador quien previno que el efecto del beneficio contractual recaería ['únicamente' o 'excluyendo a cualquier otra'] a 'las actividades de la empresa minera a favor de la cual se efectúe la inversión' y no así para cualquiera de las actividades de la empresa minera. En definitiva, los alcances del beneficio contractual se extienden 'únicamente' a aquellas actividades relacionadas con la inversión en función de lo previsto por el Estudio de Factibilidad*.") (emphasis added, bold omitted) (bracketed text marked with {} in the English translation appears in original).

[123] *See* Exhibit RWS-8, Second Polo Statement at paras. 11-21.

[124] *See* Exhibit CA-1, General Mining Law at Art. 83.

[125] *See* Exhibit RWS-1, First Polo Statement at para. 18 ("*con el fin de dejar absolutamente claro que el régimen de estabilidad beneficiaba única y exclusivamente a la inversión para la cual se había suscrito el contrato*") (emphasis added); *see also* Exhibit RWS-8, Second Polo Statement at para. 17.

[126] Claimant's Reply at para. 37(f) (emphasis added) (internal citation omitted).

- Minister Sánchez Albavera's book states that, in the past, Perú "changed tax regulations 'overnight,' without giving further explanations."[127] Thus, any mining stability regime—including a mining stability regime that only covers specific investment projects and not an entire concession—could be described as "radically chang[ing] the orientation of the tax regime that had prevailed over the last two decades" (*i.e.,* Vice Minister Polo's conclusions are not contrary to Mr. Sánchez Albavera's statement that he sought to "radically change the orientation of the tax regime").

- Claimant seems to argue that Mr. Sánchez Albavera wanted to implement a stability regime at least as favorable as the regime in other competing legislations. It is relevant to note that, as Vice Minister Polo explains, both he and Minister Sánchez Albavera tried to devise a balanced foreign direct investment strategy, and that is why they ultimately concluded that Perú's mining stability regime should be favorable to investors, but that it did not have to be as favorable as other mining regimes (*e.g.*, Chile's mining regime).[128]

- Finally, as Vice Minister Polo explains, he and Minister Sánchez Albavera shared the same vision of the Mining Law, and that is precisely why Minister Sánchez Albavera put Vice Minister Polo in charge of drafting the text of the law that would become the Mining Law.[129]

123. *Fourth*, if, as Claimant alleges,[130] the legislators intended to grant the contractual benefits to all of the activities conducted in an entire mining concession or EAU of a mining investor, they would have said so. However, nothing in Article 83 states that mining stabilization agreements benefit all of the activities of a mining company conducted in the concession or EAU in which the initial investment is made. Nor does Article 83 provide that it grants benefits to entire "mining units." As explained above, Articles 79 and 83 both explicitly limit the stability guarantees "exclusively to the activities of the company in whose favor the investment is made"[131] (*i.e.*, where "the investment" is the investment identified in the feasibility study).

124. *Finally*, Claimant's argument that Article 83 of the Mining Law does not distinguish between initial and subsequent investments,[132] and, thus, it can be understood that stability guarantees apply to all initial and future activities of a mining concession is without

[127] Exhibit CE-311, Fernando Sánchez Albavera, *Cards on the Table* (1992), at p. 77.

[128] *See* Exhibit RWS-8, Second Polo Statement at para. 5.

[129] *See* Exhibit RWS-8, Second Polo Statement at para. 4.

[130] *See* Claimant's Reply at para. 37.

[131] Exhibit CA-1, General Mining Law at Art. 83 (emphasis added); *see also supra* at para. 118.

[132] *See* Claimant's Reply at para. 37(a).

merit. Article 83 implies that initially, stability guarantees are only granted to the investments made, *i.e.*, to the initial investments described in the feasibility study[133]—notwithstanding the fact that the initial investment plan can later be supplemented with subsequent investments as provided in Clause 3 of MINEM's model stabilization agreement.[134]

(ii) Articles 2 and 22 of the 1993 Regulation

125. Claimant argues in its Reply that Respondent ignored Articles 2 and 22 in its Counter-Memorial.[135] That is not correct, and in any event, Articles 2 and 22 of the 1993 Regulation do not support Claimant's arguments.

126. In its Counter-Memorial, Respondent explained that Article 22 of the 1993 Regulation, which provides that stability guarantees "shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units,"[136] echoes the language of Article 83 of the Mining Law (which, as mentioned above, provides that the benefits of a stabilization agreement "shall apply exclusively to the activities of the mining company in whose favor the investment is made"[137]), and thus also limits the scope of stabilization agreements to a specific investment project. Respondent also explained that Article 2 of the 1993 Regulation provides certain conditions with which mining titleholders must comply in order to apply for and sign a stabilization agreement.[138]

127. In its Reply, Claimant argues that Articles 2 and 22, which implemented Article 83, confirmed that Article 83's reference to the "activities of the mining company" that were granted stability guarantees referred to all of the activities performed in the concessions or EAUs included in stabilization agreements.[139] Claimant, once again, demonstrates a penchant for misinterpreting and mischaracterizing the express language of the law. In the section below,

---

[133] *See* Exhibit CA-1, General Mining Law at Arts. 83 and 85.

[134] S*ee* Exhibit CE-778, Model Stabilization Agreement, Supreme Decree No. 04-94-EM, February 3, 1994, at Clause 3.

[135] *See* Claimant's Reply at para. 39(a).

[136] Exhibit CA-2, Mining Regulations at Art. 22 ("*Las garantías contractuales, beneficiarán al titular de la actividad minera exclusivamente por las inversiones que realice en las concesiones o Unidades Económico-Administrativas*.") (emphasis added).

[137] Exhibit CA-1, General Mining Law at Art. 83 ("*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión*.") (emphasis added).

[138] *See also* Respondent's Counter-Memorial at para. 58.

[139] *See* Claimant's Reply at para. 39(e).

Respondent provides an interpretation of Articles 2 and 22 and responds to Claimant's specific arguments raised in its Reply.

128. *As a preliminary point*, it is relevant to note that Claimant agrees that the President has to "regulate laws without transgressing or distorting them" (*i.e.,* that the 1993 Regulation cannot transgress the meaning of the text of the Mining Law).[140] Thus, if the Tribunal were to find that Respondent's interpretation of Article 83 is correct, Claimant's arguments regarding Articles 2 and 22 of the 1993 Regulation should be dismissed outright.

129. *First,* Article 2 of the 1993 Regulation simply provides that (i) mining activity titleholders are individuals or companies that carry out mining activities in one or more concessions and that are granted benefits from provisions in the Mining Law if they have actually signed a stabilization agreement; and (ii) mining titleholder's benefits only take effect after the investment program has been approved. For ease of reference, Respondent reproduces below the version of Article 2 of the 1993 Regulation that was in force when SMCV signed the 1998 Stabilization Agreement:

> The provisions contained in Title Nine of the Single Unified Text shall apply as of right to all mining activity titleholders, defined as the natural or legal persons that perform mining activities in a concession or in concessions grouped in an Economic Administrative Unit, as titleholders or assignees, provided that they:
>
> a) Prove to have substantiated before the mining authority the minimum annual production set forth in Article 38 of the Single Unified Text or to have complied with the obligation for beneficiation concessions required by Article 46 of the aforementioned text; or,
>
> b) Prove to have substantiated before the mining authority the minimum investment established in Article 41 of the Single Unified Text; or,
>
> c) Holders of general labor and mining transportation concessions prove the execution of works and services that are the object of the concession and have the concession registered in the Public Registry of Mining; or,

[140] *See* Claimant's Reply at para. 39(e) (internal citation omitted).

> d) Enter into a stability agreement under Articles 78 and 82 of the Single Unified Text, as from the date of approval of the corresponding Investment Program.[141]

130. Nothing in the language of Article 2 is relevant to interpreting the scope of stabilization agreements under Peruvian law. That is probably why the Supreme Court, in its 2008 Supreme Court Judgment, did not refer to Article 2 of the Regulation when analyzing the scope of stabilization agreements.[142]

131. Claimant takes Article 2 out of context and, in an attempt to support its interpretation of the 1993 Regulation, incorrectly quotes the language of Article 2 that was included in the 2019 amendment to that Regulation. Claimant asserts that Article 2 of the 1993 Regulation "not only provided the conditions [to obtain a stabilization agreement], it also clearly stated that once a mining company satisfies these conditions, the stability guarantees 'will only take effect for those concessions or units' supported by the stability agreement."[143]

132. The language Claimant quotes—that is, that the guarantees "will only take effect for those concessions or units"[144] supported by the agreement—is from the 2019 amended version of Article 2, which did not exist when SMCV signed the 1998 Stabilization Agreement.[145] Article 2 of the 1993 Regulation had no such language in the version in force at

---

[141] Exhibit CA-2, Mining Regulations at Art. 2 ("*Artículo 2.- Las disposiciones contenidas en el Título Noveno del Texto [Ú]nico Ordenado, se aplican de pleno derecho a todos los titulares de actividad minera, definidos como las personas naturales o jurídicas que ejerzan actividad minera en una concesión o en concesiones agrupadas en una Unidad Económica Administrativa, como concesionarios o cesionarios, siempre que: a) Acrediten haber sustentado ante la autoridad minera, la producción mínima anual se señala en el Artículo 38 del Texto [Ú]nico Ordenado o haber cumplido con la obligación que para las concesiones de beneficio exige el Artículo 46 del mencionado texto; o b) Acrediten haber sustentado ante la autoridad minera, la inversión mínima establecida en el Artículo 41 del Texto [Ú]nico Ordenado; o c) Los concesionarios de labor general y de transporte minero, acrediten la ejecución de obras y servicios objeto de la concesión y tengan inscrita la concesión en el Registro Público de Minería; o d) Celebren un contrato de estabilidad bajo los Artículos 78 y 82 del Texto [Ú]nico Ordenado desde la fecha de aprobación del Programa de Inversión correspondiente*.").

[142] *See generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017.

[143] Claimant's Reply at paras. 38(b), 39(a) (emphasis in the original and emphasis added).

[144] Claimant's Reply at paras. 38(b), 39(a) (emphasis omitted).

[145] *See supra* at para. 128; *see also* Exhibit CA-2, Mining Regulations ("Paragraph d) amended by Article 2 of Supreme Decree No. 021-2019-EM, published on December 2019, the text of which is as follows: 'd) Enter into a stability agreement under Articles 78, 82 and 83-A, of the Single Unified Text, as from the approval date of the Investment Program or of the respective Technical-Economic Feasibility Study. When the natural or legal person is the titleholder of several concessions or Economic-Administrative Units, the qualification will only take effect for those concessions or units that are supported by the declarations or by the agreement referred to in this Article.'") ("*Inciso d) modificado por el Artículo 2 del Decreto Supremo N° 021-2019-EM, publicado el 28 diciembre 2019, cuyo texto es el siguiente: 'd) Celebren un contrato de estabilidad bajo los artículos 78, 82 y 83-A del Texto Único Ordenado desde la fecha de aprobación del Programa de Inversión o del Estudio de Factibilidad técnico-*

the time the 1998 Stabilization Agreement was signed. Instead, it merely provided that the guarantees shall apply to "all mining activity titleholders" provided that they "[e]nter into a stability agreement under Articles 78 and 82 of the Single Unified Text, as from the date of approval of the corresponding Investment Program . . . ."[146]

133. *Second*, the first paragraph of Article 22 explicitly provides that stabilization guarantees shall apply "exclusively for the investments that [the mining titleholder] makes in the concessions or Economic-Administrative Units."[147] The provision could not be clearer: stability guarantees apply exclusively to the investment that the mining company makes in a specific concession or EAU.

134. For ease of reference, and to show that, contrary to Claimant's assertion, Respondent does not "rewrite[] the actual text of Article 22,"[148] the version of Article 22 in force in 1998 is reproduced below:

> Article 22.- 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.[149]

---

económico correspondiente. *Cuando la persona natural o jurídica sea titular de varias concesiones o Unidades Económico-Administrativas, la calificación sólo surtirá efecto para aquellas concesiones o unidades que estén sustentadas por las declaraciones o por el contrato a que se refiere el presente artículo*.'") (emphasis added, bold omitted).

[146] Exhibit CA-2, Mining Regulations at Art. 2(d).

[147] Exhibit CA-2, Mining Regulations at Art. 22 ("*exclusivamente por las inversiones que [el titular de la actividad minera] realice en las concesiones o Unidades Económico-Administrativas*.") (emphasis added).

[148] Claimant's Reply at para. 39(b).

[149] Exhibit CA-2, Mining Regulations at Art. 22 ("*Artículo 22.- Las garantías contractuales, beneficiarán al titular de la actividad minera exclusivamente por las inversiones que realice en las concesiones o Unidades Económico-Administrativas. Para determinar los resultados de sus operaciones el titular de actividad minera que tuviera otras concesiones o Unidades Económico-Administrativas deberá llevar cuentas independientes y reflejarlas en resultados separados. Los gastos que no sean identificables directamente en cada concesión o Unidad Económico-Administrativa, se distribuirá entre ellas en proporción a las ventas netas de las sustancias mineras que se extraigan de las mismas.*") (emphasis added).

135. Contrary to Claimant's assertion, the second paragraph of Article 22 does not provide that "guarantees apply to concessions and Economic-Administrative Units."[150] The second paragraph of Article 22 only indicates what the investor has to do if it has an investment project in several concessions or EAUs. Also, in any case, as Respondent pointed in its Counter-Memorial, the second paragraph of Article 22 has to be consistent with the Mining Law.[151] Thus, if the Tribunal found that Respondent's and Perú's Supreme Court's interpretation of Article 83 of the Mining Law is correct (*i.e.*, that stability guarantees only cover specific investments) then Claimant's interpretation of Article 22 should be automatically rejected.

136. Perú's Supreme Court and Vice Minister Polo also corroborated Respondent's reading of Article 22.[152] First, Vice-Minister Polo stated the following in his second witness statement:

> The norm is clear in establishing that the guarantees of the stabilization agreement benefit the mining holder exclusively for the investments that were made—not for any other concept or quality or qualification or nature. In other words, the concessions and the EAUs are the places where the investments are made and nothing else. There is nothing that attributes the guarantee to the concessions or to the EAUs or any other figure in this article.[153]

137. Contrary to Claimant's allegations, Vice Minister Polo's testimony is relevant. Even if Vice Minister Polo did not draft the 1993 Regulation, the Regulation cannot contradict the meaning of the Mining Law,[154] and Vice Minister Polo was one of the drafters of the Mining Law. Therefore, the Vice Minister knows first-hand what the meaning of Article 22, which implemented Article 83 of the Mining Law, should be.

---

[150] Claimant's Reply at para. 39(b).

[151] *See* Respondent's Counter-Memorial at paras. 57-58.

[152] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at Section 5.2, pp. 70 ff; *see also* Exhibit RWS-1, First Polo Statement at para. 33 and Exhibit RWS-8, Second Polo Statement at para. 20.

[153] Exhibit RWS-8, Second Polo Statement at para. 20 ("*La norma es clara al establecer que las garantías del contrato de estabilidad benefician al titular minero exclusivamente por las inversiones que realice—no por otro concepto o cualidad o calificación o naturaleza. Es decir, las concesiones y las UEAs son el lugar en donde se realizan las inversiones y nada más. No hay nada que les atribuya la garantía a las concesiones o a las UEAs o cualquier otra figura en este articulado*.").

[154] *See* Exhibit RER-6, Second Eguiguren Report at para. 42.

138. The Supreme Court rejected SMCV's interpretation of Article 22[155] (which was the same interpretation that Claimant is now trying to advance before this Tribunal) and upheld the Lima Superior Court Judgment that concluded, in line with Respondent's position in this arbitration, that Article 22 confirms that stability guarantees applied solely to the investment projects included in the feasibility study.[156] The Superior Court found that:

> **NINTH.-** On the other hand, as laid down by Article 83 of the TUO of the General Mining Law, specifically the fourth paragraph and the provisions of Article 22 of the Regulations of Title Nine of the General Mining Law, it is [necessary] that the contractual benefits arising from the Stability Agreement lie solely with the title holder of the mining company and 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; therefore, the benefits of legal Stability Agreements should not be applied broadly to the other activities of the title holders of mining activities; consequently, the so-called Primary Sulfide Project is not covered by the guarantees granted by such contract for promotion and guarantee of investment, since the project was implemented after having concluded the Stability Agreement with the State in 1998.[157]

139. Claimant has not identified or submitted any judicial decision that supports its contrary interpretation of Article 22.

---

[155] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at Sections 5.2 and 5.3, pp. 70 ff and 76 ff.

[156] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at Sections 5.2 and 5.3, pp. 70 ff and 76 ff.

[157] Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at p. 11 ("***NOVENO*** **.-** *De otro lado, conforme a lo dispuesto por el Artículo 83°del TUO de la Ley General de Minería, específicamente el cuarto párrafo, así como lo establecido en el Artículo 22° del Reglamen to del T[í]tulo Noveno de la referida ley, resulta preciso que los beneficios contractuales proveniente de la celebración de un contrato de estabilidad recaen únicamente en el titular de la actividad minera y exclusiva y excluyentemente sobre la inversión ejecutada en determinada concesión minera, lo cual permite establecer mediante inferencia lógica, que una inversión futura, posterior a la fecha de celebración del contrato no estará cubierta con los beneficios del contrato de estabilidad firmado antes de esta última inversión; por lo que, los beneficios de los contratos de estabilidad jurídica no deben ser aplicados de manera amplia a las demás actividades de los titulares mineros; en consecuencia el denominado proyecto de sulfuros primarios, no está cubierto con las garantías que otorga el referido contrato de garantía y promoción de la inversión, toda vez que el proyecto fue implementado con posterioridad a la celebración del contrato de estabilidad suscrito con el Estado en el año 1998*.") (emphasis added). Respondent will provide a corrected translation of this paragraph.

(iii) The 2014 and 2019 Amendments to the Mining Law and the 1993 Regulation

140. Respondent explained in its Counter-Memorial that (i) the 2014 and 2019 amendments to the Mining Law and the 1993 Regulations expanded the stability guarantees to "additional activities" if certain requirements were met; and (ii) contrary to Claimant's arguments in its Memorial,[158] the 2014 and 2019 amendments did not prove that prior to the amendments, stabilization agreements were not limited to the feasibility study's investment program but to entire concessions. Claimant mechanically repeats in its Reply the same arguments that it made in its Memorial to allege that the 2014 and 2019 amendments to Article 83 of the Mining Law and Article 22 of the 1993 Regulation confirm its interpretation of the law.[159] Importantly, Claimant ignores relevant sections included in the statement of reasons of the 2014 amendment to the Mining Law (the "Statement of Reasons") (*exposición de motivos*) which—as shown below—specifically confirms that the Mining Law granted stability benefits only to the investment project that was specifically outlined in the feasibility study that served as a basis for the agreement. In addition, Claimant, misreads the amendments to Articles 83 of the Mining Law and Article 22 of the 1993 Regulation. Claimant also conveniently omits addressing the amended text of Article 2 of the 1993 Regulation.

141. *First,* the 2014 amendment to Article 83 of the Mining Law, which became Article 83-B, expands the stability guarantees granted under the previous version of Article 83 to "additional activities that are performed after the execution of the investment program[.]"[160] Indeed, while under the previous version of Article 83, in force at the time SMCV entered into the 1998 Stabilization Agreement, stability guarantees extended exclusively to the investment project included in the feasibility study; under Article 83-B, mining investors with a stabilized project can—if certain requirements are met—automatically stabilize additional activities that were not initially listed in the feasibility study. The relevant language of both versions of Article 83 leaves no doubt:

[158] *See* Claimant's Memorial at Section IV.A.2(iii)(b).

[159] *See* Claimant's Memorial at Section IV.A.2(iii)(b).; *see also* Claimant's Reply at paras. 36, 44(a).

[160] Exhibit CA-1, General Mining Law at Art. 83-B.

> Article 83
>
> The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made.[161]
>
> Article 83-B
>
> 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 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 than the equivalent in domestic currency to US$ 25[0],000,000.00; and they are previously approved by the Ministry of Energy and Mines, without prejudice to subsequent auditing from the aforementioned Sector.[162]

142. The Statement of Reasons, corroborates Respondent's reading of Article 83-B. The Statement of Reasons notes that the 2014 amendment to Article 83 was precisely devised to improve and expand the guarantees after the government realized that the previous version of Article 83 could, to a certain extent, disincentivize additional investment in the stabilized mining projects:

> **PROBLEM**
>
> 3. Therefore, 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

[161] Exhibit CA-1, General Mining Law at Art. 83 ("*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión*.") (emphasis added).

[162] Exhibit CA-1, General Mining Law at Art. 83-B ("*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera a favor de la cual se efectúe la inversión, sea que aquellas estén expresamente mencionadas en el Programa de Inversiones contenido en el Estudio de Factibilidad que forma parte del Contrato de Estabilidad; o, las actividades adicionales que se realicen posteriormente a la ejecución del Programa de Inversiones, siempre que tales actividades se realicen dentro de la misma concesión donde se desarrolle el Proyecto de inversión materia del contrato suscrito con el Estado; que se encuentren vinculadas al objeto del Proyecto de inversión; que el importe de la inversión adicional sea no menor al equivalente en moneda nacional a US$ 250'000,000.00; y sean aprobadas previamente por el Ministerio de Energía y Minas, sin perjuicio de una posterior fiscalización del citado Sector*.") (Claimant's English translation is mistaken; instead of US $25,000,000 it should be US $250,000,000)(emphasis added).

> expand their investments as they would have to undergo a whole new procedure to stabilize the expansion.
>
> **PROPOSAL**
>
> 4. For this reason, it is proposed that in the case of the owners of the mining activity that start or are carrying out activities in the mining industry that present investment programs of not less than the equivalent in national currency of US$ 250,000,000.00, the effect of the contractual benefit rests exclusively on the activities of the mining company in favor of which the investment is made, whether those are expressly mentioned in the Investments Program contained in the Feasibility Study that is part of the Stabilization Agreement; or, additional activities that are carried out after the execution of the Investments Program.[163]

143. Under Peruvian law, a statement of reasons is a source for interpretation of the law.[164] Therefore, contrary to Claimant's assertions,[165] the Statement of Reasons is a valid source with which to interpret the 2014 amendment to the Mining Law. Dr. Eguiguren explains, in line with the Statement of Reasons of the 2014 amendment to the Mining Law,[166] that the only reasonable justification for carrying out this legislative reform was to extend stability guarantees to additional activities performed subsequently during the term of the agreement, provided that they met the requirements set forth under Article 83-B.[167]

144. Finally, Claimant's statement that Perú modified the Mining Law because it "recognized the impracticability of its restrictive interpretation"[168] is an admission that Respondent's interpretation of the Mining Law is correct: until it was amended, the law limited

---

[163] Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at pp. 9-10 ("***PROBLEMÁTICA*** *3. Por lo que de acuerdo al marco legal vigente no cabría estabilizar activos o instalaciones pre existentes ni aquellas inversiones que no constan en el Estudio de Factibilidad que se adjunta a los [contratos de estabilidad], lo que podría representar poco atractivo para los titulares de la actividad minera que deseen ampliar sus inversiones, pues tendrían que sujetarse a todo un nuevo procedimiento para estabilizar la ampliación.* ***PROPUESTA*** *4. Por ello se plantea que para el caso de los titulares de la actividad minera que inicien o estén realizando actividades de la industria minera que presenten programas de inversión no menores al equivalente en moneda nacional a US$ 250 000 000, 00, el efecto del beneficio contractual recaiga exclusivamente en las actividades de la empresa minera a favor de la cual se efectúe la inversión, sea que aquellas estén expresamente mencionadas en el Programa de Inversiones contenido en el Estudio de Factibilidad que forma parte del Contrato de Estabilidad; o, las actividades adicionales que se realicen posteriormente a la ejecución del Programa de Inversiones*.") (emphasis added).

[164] *See* Exhibit RER-6, Second Eguiguren Report at para. 85.

[165] *See* Claimant's Reply at para. 44(b).

[166] *See* Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at p. 9.

[167] *See* Exhibit RER-1, First Eguiguren Report at para. 94; *see also* Exhibit RER-6, Second Eguiguren Report at paras. 85, 87.

[168] Claimant's Reply at para. 44(c).

the scope of stabilization agreements to "investment projects" identified in the feasibility study that was the subject of the agreement. Respondent amended the Mining Law to make it more practical for investors (*i.e.,* so that additional activities of an investor within an approved investment project would be covered by a stabilization agreement).

145. *Second*, the additional language that was added in 2019 to Article 22 of the 1993 Regulation related to the content of the Feasibility Study (*i.e.,* "the investments set out in the agreement that it implements in the Concessions or [EAUs]"), was included to implement Article 83-B, and equally expands the stability guarantees granted under the previous version of Article 22.

b. Other Provisions of the Mining Law and the 1993 Regulation Confirm that Stability Guarantees Apply Solely to the Investment Projects Included in a Feasibility Study

146. Claimant seems to agree that Article 83 of the Mining Law and Article 22 of the 1993 Regulation are two of the most relevant Articles to interpret the scope of stability guarantees under Peruvian law.[169] However, as the Supreme Court confirmed, the systematic interpretation of other provisions of the Mining Law and 1993 Regulation is also relevant to assess the scope of the mining stability guarantees under the law.[170]

147. Respondent provided in its Counter-Memorial an interpretation of other provisions of the 1993 Regulation that it found relevant to interpret the scope of the 1998 Stabilization Agreement (including Articles 18, 19, and 24 of the 1993 Regulation) or that Claimant mentioned in its Memorial[171] (including Articles 1, 2, 18, and 25 of the 1993 Regulations).[172] Respondent explained that such provisions either supported its position that stabilization agreements only covered specific investments, or were irrelevant to interpret the scope of a stabilization agreement.[173]

148. In its Reply, Claimant reiterates that Articles 1, 18, and 25 of the 1993 Regulation confirm that stability guarantees applied to all the investments in a given concession or mining

[169] *See* Claimant's Reply at Section II.A(ii).

[170] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 34, 74, 77-78, paras. 36, 170, 180.

[171] *See* Claimant's Memorial at paras. 56, 304.

[172] *See*, *e.g.*, Respondent's Counter-Memorial at paras. 56-60.

[173] *See* Respondent's Counter-Memorial at paras. 57, 59.

unit, and argues that Articles 4, 5, 14, and 15 of the 1993 Regulation also support its position.[174] In addition, Claimant argues that Articles 72, 80, and 84 of the Mining Law equally demonstrate that stability guarantees applied to an entire concession.[175]

149. In this section, Respondent demonstrates that a systematic interpretation of the provisions of the Mining Law and the 1993 Regulation—including the provisions that Claimant mentions in its Reply—leads to the conclusion that stabilization agreements only covered specific investment projects. In particular, the requirements in Articles 18, 19, and 24 of the 1993 Regulation reinforce the fact that stabilization agreements grant benefits only to activities related to the investment project that is the subject of the agreement.

(i) Articles 18, 19, and 24 of the 1993 Regulation

150. In its Counter-Memorial, Respondent explained that Articles 18, 19, 22, and 24 of the 1993 Mining Regulation provide that a mining titleholder needs to prepare a detailed feasibility study/investment plan in order to apply for a stabilization agreement and that the stabilization agreement benefits the activities related to the investment project that is described in that feasibility study.[176] In its Reply, Claimant asserts that none of these provisions support Respondent's position.[177] Claimant's assertion is simply incorrect.

151. *First*, it is relevant to note that the Supreme Court devoted an entire section of its decision to analyzing all the provisions in the Mining Law and 1993 Regulation related to feasibility studies and their relevance for stability guarantees.[178] The Supreme Court analyzed, among others, Articles 18, 19, and 24 of the 1993 Regulation (*i.e.*, the same provisions that Claimant alleges that Respondent misinterpreted) and concluded, in line with Respondent,[179] that a mining titleholder needs to prepare a detailed feasibility study in order to apply for a stabilization agreement and that such a stabilization agreement benefits the activities related to the investment project that is described in that feasibility study.

> [Articles 78, 82, 83, 85, and 86 of the Mining Law and Articles **18, 19,** 20, 23, **24** and 25 of the 1993 Regulation] enable one to

[174] *See* Claimant's Reply at paras. 47-48, 49(c)-(f).

[175] *See* Claimant's Reply at para. 46.

[176] *See* Respondent's Counter-Memorial at para. 59.

[177] *See* Claimant's Reply at paras. 49(b)-(f).

[178] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at Section 4.1(e) ("The Feasibility Study in Legal Stabilization Agreements"), at paras. 126-31 (emphasis added).

[179] *See* Respondent's Counter-Memorial at para 59.

> conclude, beyond a shadow of a doubt, that the provisions in the Consolidated Uniform Text of the General Mining Law, in accordance with the regulations approved by D.S. No. 024-93-EM, qualify for the Technical/Economic Feasibility Study not only as a requirement for being able to sign a Stability Agreement, but also as a technical management instrument that is essential to consider for assessing and measuring the level of investment made by the mining activity's owner . . .
>
> Moreover, in fact, nonfulfillment of said Feasibility Study may give rise to termination of the Stability Agreement, as provided for in Article 38 of D. S. No. 024-93-E M. This proves that the content of said Feasibility Study is a determining factor in evaluating the effects of the Stability Agreement and its functionality in the entire design of the contractual scheme proposed for the government to grant a stability guarantee.[180]

152. In line with the Supreme Court's conclusions, Vice Minister Polo explains that the intent of the legislature when drafting the provisions of the Mining Law related to the feasibility study (*i.e.*, the provisions that were later implemented in the 1993 Mining Regulation) was to clarify that stability guarantees will only apply to specific investment projects:

> During the drafting process of Decree 708, it was proposed that the feasibility study be a prerequisite for signing the stabilization agreement . . . When the provisions related to the feasibility study were conceived, the idea was to state precisely and clearly and in a precise manner that stabilization agreements grant guarantees to a new and specific investment that has been outlined in the feasibility study, and not to just any investment made by the mining companies within their concessions.[181]

---

[180] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 61, paras. 130-31 ("*[L]os Artículos 78, 82, 83, 85 and 86 de la Ley de Minería y los Artículos **18, 19,** 20, 23, **24** and 25 de la Regulación de 1993] permiten concluir, sin lugar a dudas, que las disposiciones del TUO de la Ley General de Minería, en concordancia con el reglamento aprobado por D.S. N°024-93-EM , califican al Estudio de Factibilidad Técnico Económico no solo como un requisito para acceder a la suscripción del Convenio de Estabilidad Jurídica sino como un instrumento técnico de gestión que es esencial tener en cuenta para evaluar y medir el grado de inversión realizado por el titular de la actividad minera . . . Más aún, incluso, el incumplimiento al aludido Estudio de Factibilidad puede dar lugar a la resolución del Convenio de Estabilidad conforme lo prescribe el artículo 38°del D.S. N°024-93-EM. Lo que evidencia que el contenido de dicho Estudio de Factibilidad es determinante para evaluar los efectos del Convenio de Estabilidad Jurídica y su funcionalidad en todo el diseño del esquema contractual propuesto para que el Estado otorgue la garantía de estabilidad.*") (original emphasis omitted, emphasis added).

[181] Exhibit RWS-1, First Polo Statement at para. 22 ("*Durante el proceso de redacción del proyecto del Decreto 708, se propuso que el estudio de factibilidad fuera un requisito previo para la celebración del contrato de estabilidad . . .Cuando se concibieron las disposiciones relativas al estudio de factibilidad, se consideró plasmar en forma precisa y meridiana que los contratos de estabilidad otorgan garantías a una inversión nueva y específica que ha sido delimitada en el estudio de factibilidad, y no a cualquier inversión realizada por las empresas mineras a dentro de sus concesiones.*").

153. *Second*, a detailed analysis of Articles 18, 19, and 24 also shows that Claimant is incorrect to claim that those Articles do not support Respondent's position:

- Article 18 of the 1993 Regulation, which sets out the process to apply for a 10-year or a 15-year agreement,[182] provides that a mining titleholder who wishes to apply for a stabilization agreement must submit a feasibility study to the General Mining Directorate of MINEM, and thus proves that the feasibility study /investment plan is a key requirement to qualify to apply for a stabilization agreement.[183] In the same line, the Supreme Court notes that Article 18's relevance is that it "stipulates that [the Feasibility Study] is a requirement for persons or companies that wish to be covered under the provisions in Articles 78 and 82 of the [Mining Law]."[184] Contrary to Claimant's arguments, the fact that the feasibility study and its investment project is a "key requirement" for qualification is material for the scope of a stabilization agreement. The Supreme Court confirmed this conclusion.[185]

  Also, Claimant focuses on the fact that one of the requirements listed in Article 18 is to name the "mining rights" that are subject to the request.[186] However, the reference to "mining rights" in Article 18 only refers to the fact that the investor must name the concession where the investment takes place.

- Article 19 further specifies the requirements that the feasibility study must include in the case of 15-year contracts, such as the projected production or sales resulting from the investment, for example.[187] Respondent explained in its Counter-Memorial that Article 19 of the 1993 Regulation would be superfluous if stability guarantees applied to all investments made within a concession: 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—it would either request such information about all investments covered or to be covered by the agreement, or none of them.[188] In its Reply, Claimant argues that all that information was necessary because there were certain threshold requirements in order to be granted a stabilization agreement, and Perú wanted to ensure that the threshold requirements were met.[189] However, as explained above, Claimant's interpretation of the feasibility study is wrong. As Perú's Supreme Court

[182] *See* Respondent's Counter-Memorial at para. 57; *see also* Exhibit CA-2, Mining Regulations at Art. 18.

[183] *See* Respondent's Counter-Memorial at para. 59.

[184] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 60, para. 127.

[185] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 58-59, paras. 123-125.

[186] *See* Claimant's Reply at para. 48 (a); *see also* Claimant's Memorial at para. 312(c).

[187] *See* Exhibit CA-2, Mining Regulations at Art. 19; *see also* Respondent's Counter-Memorial at para. 59.

[188] Respondent's Counter-Memorial at para. 59.

[189] *See* Claimant's Reply at para. 49(c).

concluded, the feasibility study is not a mere requirement, but it also limits the scope of the guarantees covered by such agreement.

- 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 [which are the] subject matter of the agreement . . ."[190] Also, Article 24 provides that the investments detailed in the feasibility study—and not any eventual and undefined investments done within a concession or so called "mining unit"—are the investments that are the "subject matter" of the agreement.[191] Vice Minister Polo also corroborates this conclusion.[192]

154. Claimant does not agree with Respondent's revised translation of Article 24 of the 1993 Regulation.[193] The most accurate translation of "*inversiones materia del contrato*" is the one suggested by Respondent. Article 24 should be translated as referencing "the investments that are the subject matter of the agreement" instead of "the investments set out in the agreement."[194] Article 18 of the 1993 Regulation, which as Respondent explained,[195] sets out the process to apply for a 10-year or a 15-year agreement, does not include the term "*inversiones materia del contrato*" but instead mentions the "*derechos mineros materia de la solicitud*." Also as Respondent described, Article 18 provides that a mining titleholder who wishes to apply for a stabilization agreement must submit a feasibility study to the General Mining Directorate of MINEM, and the reference to "mining rights" in Article 18 only refers to the fact that the investor must name the concession where the investment plan attached to the feasibility study takes place.[196] Respondent agrees that it is a similar wording, and thus Respondent also suggests amending the translation of Article 18 of the 1993 Regulation.

(ii) Articles 72, 80, and 84 of the Mining Law

155. Articles 72, 80, and 84 of the Mining Law describe (i) the benefits covered under stabilization agreements, and (ii) who can benefit from such benefits (namely, "mining titleholders"). Contrary to Claimant's arguments,[197] the fact that such Articles provide that

[190] Exhibit CA-2, Mining Regulations at Art. 18.

[191] Exhibit CA-2, Mining Regulations at Art. 24.

[192] *See* Exhibit RWS-8, Second Polo Statement at para. 23.

[193] *See* Claimant's Reply at para. 49(d)-(e).

[194] *See* Respondent's Counter-Memorial at n.68.

[195] *See supra* at para. 152.

[196] *See supra* at para. 152.

[197] *See* Claimant's Reply at para. 46(a).

stability guarantees are granted to "mining titleholders" does not demonstrate that stability guarantees are applied to entire concessions. Claimant bases its conclusion on the false premise that when the Mining Law is referring to "mining titleholders" it is referring to all the mining units or concessions belonging to a given titleholder.[198] In that case, Claimant's interpretation of Articles 72, 80, and 84 would be contrary to Claimant's interpretation of Article 83 of the Mining Law, where Claimant concluded that stability guarantees applied to "the entire concessions . . . in which the investor made the qualifying minimum investment"[199] and not to all of the concessions that a titleholder owns.

156. Claimant tries to divert attention from the meaning of the law by stating that "granting stability guarantees to the concession holder makes sense [because] concessions are the standard by which the Mining Law operates,"[200] and it adds that concessions are "the defined unit by which Peru regulates all economic activities."[201] This is not correct, and in any case this argument does not affect the literal interpretation of the Mining Law.

157. As the Supreme Court confirmed in its 2008 Supreme Court Judgment, the benefits covered under Articles 72, 80, and 84 of the Mining Law should be understood "in relation to the investment in its concession, but depending on what was included in the 'Feasibility Study'"[202] (*i.e.*, not in relation to a "mining unit" or a "mining titleholder"):

> Clause 1.1 and 1.3 of the Stability Agreement, as well as of the clauses outlined in conclusion of law seven thereto, do reveal that the Stability Agreement intended that the benefits covered in [A]rticles 72, 80 and 84 of the D. S. No. 014-92-EM be understood 'in relation to the investment in its concession, but depending on what was included in the 'Feasibility Study' referred to in Clause 1.3 of the Stability Agreement, in harmony with Clause Two thereof, and of what was included in the 'Investment Plan' referred

[198] *See* Claimant's Reply at para. 46 ("Articles 72, 80, and 84 of the Mining Law demonstrate that stability guarantees applied to entire concessions or mining units, because they confirmed that it was the 'mining activity titleholder' that was entitled to tax stability.").

[199] Claimant's Reply at para. 30.

[200] Claimant's Reply at para. 46(b).

[201] Claimant's Reply at para. 38(b) (*citing* Exhibit CER-10, Second Vega Report at para. 16).

[202] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, p. 27, para. 17 ("*en relación a la inversión en su concesión, pero en función de lo que incluía el 'Estudio de Factibilidad' . . . .*") (emphasis added).

> to in Clause 4.1 of the Stability Agreement, which is what the decision of the Superior Court reveals.[203]
>
> . . .
>
> However, one must bear in mind that Article 84 of the Consolidated Uniform Text of the General Mining Law— which also served as the grounds for the request dated January 25, 1996 – is what establishes that the Stability Agreements assure to the mining activity operator the benefits listed in Article 80 of that law, "based upon the specific characteristics of each project." In other words, these are the specific characteristics of each [investment] project that the Feasibility Study covers that could ultimately trigger the benefits listed in Article 80 of the Consolidated Uniform Text of the General Mining Law . . .[204]

158. Claimant also alleges that Articles 1, 4, 5, 14, and 15 of the 1993 Regulation "confirm that stability guarantees were granted to 'mining activity titleholders,'" *i.e.*, their concessions.[205] Claimant again bases its conclusion on the false premise that when the Mining Law is referring to "mining activity titleholders," it is referring to entire mining units or concession. As explained above, it is not.

(iii) Article 25 of the 1993 Regulation

159. Article 25 simply sets out the instructions for certain tax filings in situations where expansion of facilities or new investments benefit from stabilization agreements. Claimant argues that Article 25 of the 1993 Regulation acknowledged that a mining company could undertake new expansions and/or new investments unrelated to the investments set forth in the feasibility study and that the stabilization agreement would automatically cover such

---

[203] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, p. 27, para. 17 ("*[P]uesto que del tenor de los numerales 1.1 y 1.3 de la cláusula primera del convenio de Estabilidad, así como de las cláusulas reseñadas en la consideración séptima de ese Convenio, sí fluye que el Convenio de Estabilidad tuvo por objeto que los beneficios contenidos en los artículos 72°, 80°y 84°del D.S. N°014-9 2-EM sean entendidos 'en relación a la inversión en su concesión, pero en función de lo que incluía el 'Estudio de Factibilidad' a que se refiere el numeral 1 .3 de la cláusula primera del Convenio de Estabilidad, en concordancia con la cláusula segunda del mismo, y de lo que comprendía el 'Plan de Inversiones' a que se refiere el numeral 4.1 de la cláusula cuarta del Convenio de Estabilidad, que es lo que revela la decisión de la Sala Superior*.") (emphasis added).

[204] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 68-69, para. 156 ("*De otro lado, debe advertirse que el artículo 84°del TUO de la Ley General de Minería, —en que también se sustentó la solicitud de 25 de enero de 1996—es el que dispone que los Convenios de Estabilidad garantizan al titular de la actividad minera los beneficios señalados en el artículo 80° de esa ley, de acuerdo a las características propias de cada proyecto.' Es decir, son las características propias de cada proyecto [de inversión] que contempla el Estudio de Factibilidad lo que determinaría el goce de los beneficios señalados en el artículo 80° del TUO de la Ley General de Minería*.") (emphasis added, bold omitted).

[205] Claimant's Reply at para. 46.

additional investment.[206] Claimant's interpretation is incorrect. Claimant only cites to one sentence of Article 25 and omits the second part of that same Article that clearly shows that Claimant should have applied for the stabilization of the Concentrator Plant in order for it to be stabilized as well:

> Article 25.- 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.[207]

160. As shown in the text, nothing in Article 25 provides that new, unrelated investments would be covered by a stabilization agreement automatically if conducted within the same concession as the protected investment. The reference to expansion or new investments must be read in accordance with Article 82 of the Mining Law which provides that mining titleholders may apply for a new stabilization agreement for a new investment project or an investment project that expands the production capacity of the company. Thus, the reference to expansions and/or new investments does not support Claimant's theory.[208] Moreover, Article 25 in fact makes clear that for those investment projects for which the mining titleholder obtained a stabilization agreement, it had to keep separate records and make them available to the Tax Administration when required.

161. The Supreme Court concluded that Article 25 was in line with its conclusion that stability guarantees only apply to the specific investments listed in the feasibility study.

> [Among others, Article 25 of the Mining Regulation and other provisions of the Mining Regulation] enable one to conclude, beyond a shadow of a doubt, that the provisions in the Consolidated Uniform Text of the General Mining Law, in accordance with the [1993 Regulation] approved by D.S. No. 024-93-EM, qualify the Technical/Economic Feasibility Study not only as a requirement for being able to sign a Stability Agreement, but also as a technical

[206] *See* Claimant's Reply at para. 48(b).

[207] Exhibit CA-2, Mining Regulations at Art. 25 ("*Sin perjuicio de la Declaración Jurada de los impuestos a la Renta y al Patrimonio Empresarial que, de acuerdo a ley, el titular de la actividad minera debe presentar en los casos de ampliación de instalaciones o de nuevas inversiones que gocen contractualmente de la garantía de estabilidad jurídica dicho titular deberá mantener a disposición de la Administración Tributaria los anexos demostrativos de la aplicación del régimen tributario concedido a las referidas ampliaciones o nuevas inversiones*.") (emphasis added).

[208] Exhibit RWS-8, Second Polo Statement at para. 26.

management instrument that is essential to consider for assessing measuring the level of investment made by the mining activity's owner.[209]

2. Perú's Interpretation of the Mining Law and 1993 Regulation Does Not Undermine the Mining Law's Purpose of Promoting Investment, and Claimant's Arguments to the Contrary Are Irrelevant

162. Reflective of the thinness of its arguments based on the text of the law, Claimant insists that, in its view, limiting stability guarantees to a specific investment undermines the purpose of the Mining Law to promote foreign direct investment in the mining sector, because it creates "unnecessary administrative burdens and legal uncertainty."[210] As Respondent notes in its Counter-Memorial, this argument is both incorrect and irrelevant.[211] Claimant's opinion that Perú's policy choice does not offer enough of an incentive for foreign investors does not change the fact that Perú did in fact make that policy choice and that Perú had every right to do so.[212] In its Reply, Claimant also adds that Perú's policy choice to limit stability guarantees to a specific investment is "commercially unreasonable"[213] and "at odds in the practice in other major mining jurisdictions."[214] However, the question of what policy Claimant believes is more commercially sound, or more common in other jurisdictions, has absolutely no bearing on the scope of the Mining Law. Perú addresses Claimant's specific arguments below.

a. Perú Has the Right to Choose Its Foreign Direct Investment Policy, and in Any Case, the Mining Law Furthered Perú's Goal to Promote Investment

163. Claimant's argument that "limiting stability guarantees only to a specific investment and not to all investments within a concession or mining unit would undermine the purpose of the Mining Law . . . to promote investment"[215] is without merit.

---

[209] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 61, para. 130 ("*[Entre otros el Artículo 25 de la Regulación de 1993 y otros artículos de la Regulación de 1993] permiten concluir, sin lugar a dudas, que las disposiciones del TUO de la Ley General de Minería, en concordancia con el reglamento aprobado por D.S. N°024-9 3-EM , califican al Estudio de Factibilidad Técnico Económico no solo como un requisito para acceder a la suscripción del Convenio de Estabilidad Jurídica sino como un instrumento técnico de gestión que es esencial tener en cuenta para evaluar y medir el grado de inversión realizado por el titular de la actividad minera.*") (emphasis added, bold omitted).

[210] Claimant's Reply at para. 50; *see also* Claimant's Memorial at paras. 344-47.

[211] *See* Respondent's Counter-Memorial at para. 606.

[212] *See* Respondent's Counter-Memorial at para. 606.

[213] Claimant's Reply at Section (iii).

[214] Claimant's Reply at para. 54.

[215] Claimant's Reply at para. 53.

164. *First*, Claimant's argument is simply wrong. Perú's inward foreign direct investment flows and exports in the mining sector substantially increased after enacting the Mining Law.[216] Also, after SUNAT explicitly clarified in 2002 that mining stabilization agreements only stabilize specific investment projects that are the subject of the agreement, investment in the mining sector continued to increase, and from 2003 to 2011, the mining sector was one of the fastest growing sectors in Perú.[217] In fact, as the Statement of Reasons of the 2014 amendment to the Mining Law indicates, given the large volume of investments in the mining sector that Perú was receiving, Perú even had to modify the Mining Law to limit investment in the mining sector by (i) increasing the amount of minimum investment required to be granted a stabilization agreement, and (ii) decreasing the number of years during which an investor will enjoy the stabilized regime:

> **PROBLEM**
>
> Although the stabilization agreements in general, have been a mechanism that has managed to attract significant investments, which is reflected in the overall increase of exports, improvement of the country's trade balance, job creation, in recent years investments in the mining sector have far exceeded the minimum investment amounts . . .
>
> **PROPOSAL**
>
> a. Modify the amount of investment in the existing types of CET contained in Article 79 and 83, which implies increasing the investment amounts, from two to 20 million dollars and from twenty to one hundred million dollars respectively.
>
> Likewise, in the case of mining titleholders of existing companies, the amount is increased from 50 million to 250 million dollars.

[216] *See* Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at p. 8 ("Although the stabilization agreements in general, have been a mechanism that has managed to attract significant investments, which is reflected in the overall increase in exports, improvement of the country's trade balance, job creation, in recent years investments in the mining sector have far exceeded the minimum investment amounts . . . ") ("*Si bien los convenios de estabilidad en general, han sido un mecanismo que ha logrado atraer inversiones significativas, lo cual se refleja en el incremento global de ·las exportaciones, mejoramiento de la balanza comercial del país, creación de empleo, en los últimos años las inversiones en el sector minero han sobrepasado ampliamente los montos mínimos de inversión . . .* ") (emphasis added).

[217] *See* Exhibit RE-260, "An Assessment of the Competitiveness and Health of Peru's Mining Industry," McKinsey&Company, May 2013, at p. 9, Fig. 1.

> b. Modify the term in the type of CET included in article 82° of the TUO of the General Mining Law, from fifteen to twelve years.[218]

165. S*econd*, in any event, Claimant's argument is irrelevant. Both Claimant and Respondent agree that one of Perú's primary objectives in approving the Mining Law was to attract foreign direct investment in the mining sector.[219] However, as Respondent explained in its Counter-Memorial, the fact that Perú wanted to attract foreign investment in the mining sector did not imply that it wanted to attract as much investment as possible, at any cost.[220] Perú—like any other sovereign state—can and must strike an appropriate balance between (i) the benefits of attracting foreign direct investment that Claimant lists in its Reply (*e.g.*, creation of skilled jobs, technology transfer, etc.),[221] and (ii) the costs of attracting investments (*e.g.*, in the case of mining stabilization guarantees, the millions in taxes that the Peruvian government will forgo, which in many cases will directly benefit the local communities where the mining project is located[222]).[223] In this case, Perú deliberately chose to limit stability guarantees to specific investments. It is relevant to note that when drafting the Mining Legislation, Perú considered adopting Chile's mining stability regime, which granted stability guarantees to entire concessions. However, it decided not to adopt Chile's regime, as Vice Minister Polo explains.[224]

---

[218] Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at p. 8 ("***PROBLEMÁTICA 2.*** *Si bien los convenios de estabilidad en general, han sido un mecanismo que ha logrado atraer inversiones significativas, lo cual se refleja en el incremento global de las exportaciones, mejoramiento de la balanza comercial del país, creación de empleo, en los últimos años las inversiones en el sector minero han sobrepasado ampliamente los montos mínimos de inversión . . .* ***PROPUESTA*** *a. Modificar el monto de inversión en los tipos de {convenios de estabilidad] existentes contenidos en el artículo 79 y 83, lo cual implica incrementar los montos de inversión, de dos a 20 millones de dólares y de veinte a cien millones de dólares respectivamente. Asimismo, en el caso de los titulares de actividad minera de empresas existentes, se incrementa el monto de 50 millones a 250 millones de dólares. b. Modificar el plazo en el tipo de CET comprendido en el artículo 82° del TUO de la Ley General de Minería, de quince a doce años*.").

[219] *See* Respondent's Counter-Memorial at para. 573; *see also* Claimant's Reply at para. 53.

[220] *See* Respondent's Counter-Memorial at paras. 573, 607.

[221] *See* Claimant's Reply at para. 53(c).

[222] *See* Exhibit RE-170, Political Constitution of Perú of 1993 (with amendments), at Art. 77 ("In accordance with law, every circumscription shall receive an adequate share of the total income and revenue collected by the State for the utilization of natural recourses in each zone as a natural resource royalty (canon)") ("*Corresponde a las respectivas circunscripciones, conforme a ley, recibir una participación adecuada del total de los ingresos y rentas obtenidos por el Estado en la explotación de los recursos naturales en cada zona en calidad de canon.*"); *see also* Exhibit CA-1, General Mining Law at Art. 72(f).

[223] *See* Respondent's Counter-Memorial at para. 573; *see also* Exhibit RER-4, First Ralbovsky Report at paras. 19, 32, 37, 39, 45; Exhibit RER-9, Second Expert Report of Stephen Ralbovsky, November 3, 2022 ("Second Ralbovsky Report"), at paras. 137, 139.

[224] *See* Exhibit RWS-8, Second Polo Statement at para. 5.

Minister Sánchez Albavera describes Perú's decision not to adopt Chile's mining stabilization regime during the Royalties Forum:

> [T]his law, for which . . . I feel responsible together with the Engineer César Polo, who was the Vice-Minister of Mining, in fact we defend the validity of Law 708 because we are the authors of that law. And, consequently, the results show that the law has worked . . . I remember, and Engineer César Polo can give me more details, that we conducted a competitiveness analysis of the mining legislations so that the Peruvian mining legislation would be more attractive than that of other countries, and the Chilean regime seemed to us to be already too much. And then, on purpose, on purpose, we decided that it should not be as attractive as the Chilean regime, which we thought was a **little bit excessive**.[225]

166. Also, Respondent thought that limiting stability guarantees to specific investments would enable Perú to better supervise the investments and the amount of taxes it would forgo. As Respondent explained in its Counter-Memorial, mining concessions can potentially involve a too-unpredictable range of activities, equipment, and plants.[226] Under Claimant's position (*i.e.*, offering stability guarantees to entire concessions), Perú would not be able to supervise the amount of investment in the country's mining sector nor to decide whether it needs more or less investment.

167. The Supreme Court confirmed Perú's position that limiting stability guarantees to specific investments in order to better supervise the mining activities that were stabilized was logical from a foreign direct investment policy perspective. As the Supreme Court stated, the State must be able to monitor the amount of tax exemptions to manage its resources accordingly:

> The "Investment in its Concession" is any "investment" that includes the Feasibility Study, and that the Investment Plan covers . . . The purpose of the contractual design is to pursue this functionality of the investment that the investor implements in order to earn the benefits granted to it, likewise providing with that identification and understanding that the government is in the right position to supervise and oversee which goods, services, and rights

[225] Exhibit RE-183, Audio of Minister Fernando Sánchez Albavera's Response, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts), at timestamps 00:00:40 – 00:01:02 and 00:02:01 – 00:02:29 (emphasis added) ("*[E]sta ley de la que efectivamente, de la cual … en honor a la verdad me siento responsable junto con el Ingeniero César Polo, que era el Viceministro de Minería, efectivamente nosotros defendemos la vigencia de la Ley 708 porque somos autores de esa ley. Y, consecuentemente, [] los resultados demuestran que la ley ha funcionado. . . Yo recuerdo y que me puede hacer mayores precisiones el Ingeniero César Polo que nosotros hicimos un análisis de competitividad de las legislaciones mineras para que la legislación minera peruana fuera más atractiva que la de otros países, y el régimen chileno minero nos pareció ya demasiado. Y entonces, adrede, adrede, decidimos que no fuese tan atractivo como el régimen chileno que nos parecía* ***un poquito exagerado***."") (emphasis added.)

[226] *See* Respondent's Counter-Memorial at para. 39.

to which it shall have to apply the stabilized benefits for the owner of the mining activity.[227]

168. Mr. Ralbovsky, Respondent's international mining tax expert, also explains that stabilization agreements should balance the interests of host states and investors.[228]

169. *Third*, as Respondent noted in its Counter-Memorial, Claimant is overselling the importance of the administrative and fiscal framework in an investor's decision-making process of where to invest.[229] Respondent agrees that the tax regime is one important factor in an investor's decision-making process. However, it does not share Claimant's oversimplistic view that stability guarantees are the "only or most important" factor in an investment decision.[230] As Mr. Ralbovsky explained, depending on the situation, other factors have been found to be equally—if not more—important, such as the policy climate, the quality of the resources, and the expected return on the investment model in each project.[231] Also, another important factor in an investor's decision-making process is diversification. Investors could well prefer investing in two different countries—even if one country has a stability regime that is slightly more beneficial—over having two investments in the same country subject to the same country risk. For instance, right now, given the potential Constitutional reform in Chile, a mining investor could well prefer investing in another Latin American country, even if such country has a mining stability regime that is not as favorable as Chile's.

170. *Fourth,* Claimant's argument that Perú's position is "at odds with the practice in other major mining jurisdictions"[232] is irrelevant to an analysis regarding the scope of stabilization agreements. As discussed above, Perú has the choice to design its foreign direct investment policy as it wants, and it is irrelevant whether Perú's policy choice is similar or not to that of other jurisdictions. In any event, this is not the case. Respondent agrees that some

[227] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at paras. 36-37, p. 34 ("*[L]a 'Inversión en su Concesión' es toda 'inversión' que incluye el Estudio de Factibilidad y que el Plan de Inversiones comprende . . . El diseño contractual tiene como fin buscar esa funcionalidad de la inversión que implementa el inversionista para hacerse merecedor de los beneficios que se le otorgan, propiciando además que con esa identificación y comprensión el Estado se halle en posición adecuada de supervisar y fiscalizar cuáles son los bienes, servicios y derechos a los cuales tendrá que aplicar los beneficios estabilizados a la titular de la actividad minera*.") (emphasis added).

[228] *See* Exhibit RER-4, First Ralbovsky Report at para. 19.

[229] *See* Respondent's Counter-Memorial at para. 607.

[230] Claimant's Reply at para. 53.

[231] *See* Exhibit RER-4, First Ralbovsky Report at para. 33. *See also* Exhibit RER-9, Second Ralbovsky Report at para. 13; Respondent's Counter-Memorial at para. 575.

[232] Claimant's Reply at para. 54.

mining jurisdictions, such as Chile, grant stability guarantees to all concessions, and that that is a valid choice for a stability regime. However, Respondent deliberately decided not to adopt Chile's mining stability regime, and its choice must be respected.[233]

171. *Fifth*, and finally, as Claimant noted, Minister Sánchez Albavera expressed a desire to implement a legal framework that was as attractive or more attractive than that of other countries with mining potential.[234] Indeed, Perú implemented a regime that grants stability to specific projects where initially mining companies did not have to pay royalties, that was more attractive than the mining regime of other competing countries such as Bolivia, Colombia, or Venezuela.[235] Hence, Perú implemented a stability regime that was in line with what Minister Sánchez Albavera described in his book.

b. Claimant's Opinion Regarding the Excessive Administrative Burdens that the Mining Law Allegedly Creates Is Irrelevant and in Any Case Is Not Correct

172. On the other hand, Claimant complains that Perú's interpretation of its Mining Law cannot be correct, because it would impose excessive administrative burdens. Not only is Claimant's opinion irrelevant, but its factual predicates are incorrect.

173. *First*, Claimant argues that Perú's interpretation of the law would create a patchwork of fiscal regimes within a single concession or mining unit that "might be difficult or impossible to disentangle," because there are many costs and assets within a concession that cannot be allocated between projects in an obvious manner.[236] However, as Mr. Ralbovsky explains in his first expert report, "accounting practitioners and government authorities have encountered this situation before and have identified several methods to differentiate those mining costs effectively."[237] In his second report, Mr. Ralbovsky adds that the situation of apportioning shared common costs in mining has been addressed by the international mining and tax community for over thirty years.[238] This is also the method provided in Article 22 of the 1993 Regulation for investors that have a specific investment project that covers two concessions

[233] *See* Exhibit RWS-8, Second Polo Statement at para. 5.

[234] *See* Claimant's Reply at para. 54(b); *see also* Exhibit CE-311, Fernando Sánchez Albavera, *Cards on the Table* (1992), at p. 77.

[235] *See* Exhibit RE-312, The Fraser Institute's Annual Survey of Mining Companies 2002/2003 (excerpts), at p. 9.

[236] Claimant's Reply at para. 52(b).

[237] Exhibit RER-4, First Ralbovsky Report at para. 87 (internal citation omitted).

[238] *See* Exhibit RER-9, Second Ralbovsky Report at paras. 94, 109.

or two EAUs; so, it cannot be as burdensome as Claimant would like this Tribunal to believe. As Mr. Ralbovsky explains in his second report, SMCV is capable of separating the accounting between its Leaching Project and Concentrator Project.[239] In fact, multiple investors in the mining sector in Perú have had to divide costs between two concessions, two EAUs, or two investment projects.[240]

174. *Second*, Claimant complains that "the patchwork of different fiscal regimes would require companies to maintain multiple accounting systems within the same concession or mining unit" and that Perú did not provide guidance on how to actually implement a stability regime based on individual investments.[241] As Respondent explained in its Counter-Memorial, this does not show that Perú's interpretation was out of line with the intent of the drafters of the Mining Law, as Claimant would like this Tribunal to believe.[242] As Mr. Ralbovsky explained in his first report, there are generally two methods to differentiate the costs where a miner has shared mining costs but two different processes (*i.e.*, based on the relative value of the copper, or based on the tons of ore moved in each operation).[243] The fact that Perú left the choice up to the company in no way undermines Perú's interpretation of the scope of the stability guarantees. Also, Claimant's argument that, in the absence of a system to divide common costs, "SUNAT could disagree and assess taxes and penalties against it"[244] is without merit. Not only, as explained, is dividing costs a common practice, but if Claimant or any other mining investor had doubts regarding how to allocate costs, it could have filed a tax inquiry (*consulta tributaria*) with SUNAT on how to divide costs between two projects or could have hired a tax professional to assist with that exercise.

175. *Third,* Claimant claims that in his book, Minister Sánchez Albavera stated that with the enactment of the Mining Law, "the supervision of mining operations [was] more effective" and that under Perú's approach, auditing separate accounts of companies with

---

[239] *See* Exhibit RER-9, Second Ralbovsky Report at para. 107.

[240] For example, Southern Peru Copper Corporation ("Southern") had within the same EAU both stabilized and non-stabilized projects, and it only paid royalties with respect to the minerals processed in its non-stabilized concentrator plants (presumably separating the accounting systems of its stabilized and non-stabilized projects). *See infra* Section II.E.1 and II.G.3(b).

[241] Claimant's Reply at para. 52(c).

[242] *See* Respondent's Counter-Memorial at para. 607.

[243] *See* Exhibit RER-4, First Ralbovsky Report at para. 88. *See also* Exhibit RER-9, Second Ralbovsky Report at para. 92.

[244] Claimant's Reply at para. 52(c).

stabilized and non-stabilized projects will be counter to that objective.[245] Claimant takes Mr. Sánchez Albavera's statement out of context. Respondent quotes the full paragraph of the book for the Tribunal's benefit:

> The mining reform introduces the principles of administrative simplification to expedite matters procedurally, based on the presumption of truthfulness and positive administrative silence in all procedures. These principles are aimed at de-bureaucratizing decisions by making the administration of concessions more transparent and the supervision of mining operations more effective, which under previous regulations lent themselves to maneuvers that facilitated administrative corruption.[246]

176. In fact, the Mining Law rendered the supervision of mining operations more effective, because the time to approve the stabilization agreement was shortened.[247]

c. Claimant's Opinion that Perú's Position Will Be Commercially Unreasonable Does Not Advance Claimant's Argument, and Is, in Any Event, Incorrect

177. Claimant further complains that under Perú's approach, and under the version of the Mining Law in force in 1998, "mining companies making new investments within the same concession or mining unit would either have to apply for *additional* stabilization agreements—if the investment was large enough—or proceed with smaller investments that would not be stabilized"[248] and that this approach would supposedly deter continuous investment within mining projects.[249] Claimant believes that this confirms Claimant's argument that the intent of the legislators was to extend stability guarantees to entire concessions. It does nothing of the sort.

178. A law should not be interpreted based on the meaning of the law that is more "practical" for investors or that incentivizes additional investments in a project. In this case, at the time Perú introduced L.D. No. 708, which supplemented the Mining Law, Perú thought that

---

[245] Claimant's Reply at para. 52(f).

[246] Exhibit CE-311, Fernando Sánchez Albavera, *Cards on the Table* (1992), at p. 83 ("*La reforma minera introduce los principios de simplificación administrativa para la celeridad procesal, en base a la presunción de veracidad y silencio administrativo positivo en todos los trámites. Estos principios se orientan a desburocratizar las decisiones haciendo más transparente la administración de las concesiones y más efectiva la fiscalización de las operaciones mineras, que bajo las normas anteriores se prestaban a maniobras que facilitaban la corrupción administrativa*.") (emphasis added).

[247] *See* Exhibit CE-311, Fernando Sánchez Albavera, *Cards on the Table* (1992), at p. 83.

[248] Claimant's Reply at para. 52(a).

[249] *See* Claimant's Reply at para. 52(a).

an investor would be sufficiently incentivized to invest in Perú if its initial investment project were stabilized.[250] In any event, contrary to Claimant's allegations, the 1998 version of the Mining Law did incentivize additional investments in the mining sector. As provided in Article 72 of the Mining Law, any mining investor was entitled to request approval from MINEM to reinvest its undistributed profits, free of tax, in other new investment projects.[251]

179. Perú also thought that if an investor wanted to make an additional substantial investment in a given concession, it would be reasonable to apply for a separate stabilization agreement. However, as Respondent acknowledged in the 2014 Statement of Reasons for the revisions to the Mining Law, this vision turned to be impractical for investors to a certain extent, and Perú realized that it might disincentivize additional investment in the stabilized mining project. It was for that reason that some of the 2014 amendments were implemented:

> Therefore, 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 agreement], 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.[252]

180. However, while Perú undoubtedly had the right to modify the Mining Law to make it more "practical" for investors (such as through the 2014 reforms), Perú did not have an obligation to initially implement the law in whatever manner Claimant says was more practical for investors. Claimant's argument is based on the false premise that host countries always implement the most practical solution for investors. There is simply no obligation to do so.

181. Therefore, the fact that Perú's Mining Law, while potentially giving millions of dollars in tax breaks, could initially deter—to a certain extent—additional minor investments in the project does not support Claimant's argument that the law must instead be read to cover entire concessions.

---

[250] *See* Exhibit RWS-8, Second Polo Statement at paras. 6-7.

[251] *See* Exhibit CA-1, General Mining Law at Art. 72.

[252] Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at pp. 9-10 ("*Por lo que de acuerdo al marco legal vigente no cabría estabilizar activos o instalaciones preexistentes ni aquellas inversiones que no constan en el Estudio de Factibilidad que se adjunta a los [contratos de estabilidad], lo que podría representar poco atractivo para los titulares de la actividad minera que deseen ampliar sus inversiones, pues tendrían que sujetarse a todo un nuevo procedimiento para estabilizar la ampliación*.") (emphasis added).

182. In sum, Claimant's interpretation of the Mining Law is incorrect, and its opinion regarding what the scope of stability guarantees should be in order for Perú to be a more attractive destination for foreign direct investment is irrelevant to the interpretation of that law. As Respondent discusses in the next section, Claimant also alleges that the language of the 1998 Stabilization Agreement shows that it granted stability benefits to SMCV's entire Mining and Beneficiation Concessions. Claimant's description the provisions of the 1998 Stabilization Agreement—similar to its description of the applicable legal framework to stabilization agreements—is incorrect and misleading.

C. SMCV'S 1998 STABILIZATION AGREEMENT DID NOT EXTEND TO THE CONCENTRATOR PROJECT

183. In its Counter-Memorial, Respondent demonstrated that SMCV's 1998 Stabilization Agreement did not cover and could not have covered the Concentrator Project. Respondent explained that the terms of the Agreement demonstrate that the Agreement covered only the expansion of SMCV's leaching facilities to increase the production of copper cathodes (the "Leaching Project").[253] Respondent also explained that the Concentrator Project, which was built from 2004 to 2006, was a new project separate from the Leaching Project and was also entirely different from various, much smaller concentrator projects that had been envisioned, but never executed, by Minero Perú in the 1970s at the time of the sale of the Cerro Verde copper mine from Minero Perú to Cyprus, and mentioned (but shelved) in the 1996 Feasibility Study.[254]

184. In its Reply, Claimant insists that the terms of the 1998 Stabilization Agreement show that the Agreement covered all of SMCV's investments within its concessions or mining units, including the Concentrator Project.[255] Claimant further claims that its reading is consistent with Perú's willingness since the 1970s to see a concentrator developed for the Cerro Verde Mine.[256] Claimant mischaracterizes the provisions of the 1998 Stabilization Agreement and the history of the Cerro Verde Mine.

185. In this section, Respondent *first* explains that the 1998 Stabilization Agreement, consistent with the Mining Law and 1993 Regulation, confirms that the guarantees in the Agreement are limited to the Leaching Project described in the 1996 Feasibility Study. Perú's

[253] *See* Respondent's Counter-Memorial at Section II.B.3.

[254] *See* Respondent's Counter-Memorial at paras. 62, 67, 81.

[255] *See* Claimant's Reply at Section II.A(iii).

[256] Claimant's Reply at paras. 94-95.

courts—including Perú's Supreme Court in its 2008 Supreme Court Judgment—have corroborated this view. *Second*, Respondent explains that the Concentrator Project was an entirely different project, distinct from the Leaching Project and from much smaller sulfide plants contemplated from time to time in Cerro Verde's past.

1. The 1998 Stabilization Agreement Grants Stability Guarantees Only to SMCV's Leaching Project

186. As Respondent explained in its Counter-Memorial, on January 25, 1996, SMCV filed an application before the General Mining Directorate of MINEM to enter a 15-year agreement pursuant to Article 82 of the Mining Law.[257] SMCV's application was accompanied by the 1996 Feasibility Study which specified that the stability guarantees should be granted to the Leaching Project.[258] As Respondent explained in Section II.B.1 above, and as Perú's Supreme Court confirmed, a feasibility study is not a mere technical or paperwork requirement to apply for a mining stabilization agreement; the feasibility study delimits the scope of the stability guarantees under the agreement.

187. Claimant alleges that certain language in the 1998 Stabilization Agreement shows that the Agreement was intended to cover not only the Leaching Project—which was the only project outlined in the 1996 Feasibility Study—but any future investment in the Cerro Verde Mine.[259] This is incorrect. The 1998 Stabilization Agreement, in line with the Mining Law and the 1993 Regulation, was limited to a specific investment project—in this case, to the Leaching Project (Section a). Also, as Respondent further explains in this section, there is no doubt that in this case, the 1996 Feasibility Study analyzed and outlined the investment only in the Leaching Project; it did not analyze or outline anything in relation to the Concentrator Project (Section b).

a. The Language in the 1998 Stabilization Agreement Confirms that It Only Covers SMCV's Leaching Project

188. Claimant, Respondent, and their legal experts agree that the 1998 Stabilization Agreement implements the stability guarantees of the Mining Law and the 1993 Regulation.[260] Also, both parties agree on the most relevant principles of contract interpretation under Peruvian

[257] Respondent's Counter-Memorial at para. 76.

[258] Respondent's Counter-Memorial at para. 76; *see also* Exhibit CE-9, Feasibility Study, Executive Summary, 1996.

[259] *See* Claimant's Reply at para. 74.

[260] *See* Claimant's Reply at para. 82; *see also* Exhibit RER-1, First Eguiguren Report at para. 35; Exhibit RER-2, First Morales Report at para. 59.

law.[261] However, Respondent and Claimant reach two very different interpretations of the scope of the 1998 Stabilization Agreement.

189. In its Counter-Memorial, Respondent interpreted the provisions of the 1998 Stabilization Agreement, consistent with the definitive interpretation of that contract under Peruvian law rendered by Perú's highest court (*see* Section II.A.1 above), [262] and concluded that the 1998 Stabilization Agreement was applicable only to the activities related to investments made to the Leaching Project, as it was discussed in the 1996 Feasibility Study.[263] In its Reply, Claimant contests Respondent's interpretation of the 1998 Stabilization Agreement and claims that the provisions of the Agreement support Claimant's position that the Agreement covered the entire Cerro Verde Mine.[264] But it is Claimant's assertions that are incorrect.

190. Claimant's interpretation of the 1998 Stabilization Agreement disregards the principles of contract interpretation under Peruvian Law and is at odds with the Supreme Court's interpretation of the Agreement. In particular, Claimant and its legal expert, Mr. Bullard, forget that, under Peruvian law, the starting point of contractual interpretation must be the text of the contract. In this section, Respondent (i) provides a correct interpretation of Clauses 1 and 4 of the Agreement; (ii) describes the meaning of other provisions of the Agreement that are also relevant to interpret the scope of the stability guarantees (Clauses 4, 5, 6, 7, and 8); (iii) rebuts Claimant's interpretation of Clauses 9 and 10; and (iv) clarifies how any ambiguity in the provisions of the Agreement should be resolved (principally, the provisions must be read restrictively (*i.e.*, in accordance with the text of the Agreement) and the principle of *contra proferentem* does not apply in this case).

(i) Clause 1 of the 1998 Stabilization Agreement

191. As Respondent explained in its Counter-Memorial, Clause 1 of the 1998 Stabilization Agreement defines the scope and the purpose of the Agreement:[265]

---

[261] Dr. Bullard and Dr. Morales agree Peruvian legislation has not established a sequence of prioritization among the rules of interpretation, and that the starting point of contractual interpretation must be the literal text of the contract, followed by a systematic analysis of the contract, and finally by an analysis based on contextual interpretation methods. *See* Exhibit RER-2, First Morales Report at para. 50; *see also* Exhibit CER-2, First Bullard Report at para. 23.

[262] *See supra* at Section II.A.1.

[263] *See* Respondent's Counter-Memorial at Section II.B.3(b).

[264] *See* Claimant's Reply at para. 83.

[265] Respondent's Counter-Memorial at para. 87.

- Clause 1.1 provides that SMCV requested a mining stabilization agreement "in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3 . . . 'The leaching project of Cerro Verde;'"[266]

- Clause 1.2 indicates that the investment was made based on the content of the feasibility study;[267] and

- Clause 1.3 defines the Leaching Project's purpose to "extend the production capacity from 72,000,000 to 105,000,000 lbs. (48,000 MT) of [c]opper 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 . . . ."[268]

192. The text of Clause 1 could not be clearer: SMCV signed a stabilization agreement, which (i) stated that the application of the stabilization agreement was "in relation with the investment in [the Cerro Verde Mine]," and (ii) defined that investment as "[t]he leaching project of Cerro Verde."[269] As Respondent noted in its Counter-Memorial, nothing in the text of Clause 1 (or in any other Clause of the Agreement) mentions any other future investment project, much less a future investment in a concentrator plant to process primary sulfide ore (a different type of copper ore) to produce copper concentrate (a different copper end product).[270]

193. Peruvian courts have confirmed this interpretation of Clause 1 of the Agreement. In its 2008 Supreme Court Judgment, the Supreme Court provided the following interpretation of Clauses 1.1 and 1.3 of the Agreement:

- Clause 1.1: "Clause 1.1 of the Stability Agreement only shows that the application to guarantee the benefits to the appellant was made in relation to 'the investment in its concession,' not in a generic fashion but rather in terms of what the Feasibility Study and the Investment Plan included, which did not

[266] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1 (emphasis added) ("*en relación a la inversión en su concesión: Cerro Verde N°1, N°2, N°3 . . . 'el Proyecto de Lixiviación de Cerro Verde*.'") (emphasis added).

[267] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.2.

[268] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.3 ("*ampliar la capacidad de producción de 72'000,000 a 105'000,000 de libras (48,000 TM) de cátodos de cobre por año procedentes de la lixiviación en pilas de mineral de cobre en las instalaciones de Cerro Verde con recuperación de 65% instalarán los equipos necesarios para mejorar la lixiviación de los sulfuros secundarios* . . .") (emphasis added).

[269] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1 (emphasis added).

[270] Respondent's Counter-Memorial at para. 88.

specify that the 'Primary Sulfide Plant' was an infrastructure project of the "Cerro Verde Leaching Project;"[271] and

- Clause 1.3: "Clause 1.3 of the Stability Agreement in a systematic interpretation of this Agreement based on what the content of the Feasibility Study establishes and of the Investment Plan that gave rise to the Stability Agreement does not allow to conclude that the 'Primary Sulfide Plan' was part of the 'Cerro Verde Leaching Project,' since none of the clauses in the Stability Agreement allude 'to the investment in general and [to] the entire mining concession [Cerro Verde No. 1, No. 2 and No. 3]' as the appellant contends."[272]

194. In its Reply, Claimant disregards the Supreme Court's interpretation of Clause 1 and alleges that Clause 1 of the Agreement is irrelevant to interpreting the scope of its stability guarantees—which, Claimant alleges, are set forth in Clause 3 of the Agreement.[273] Claimant argues that (i) Clause 1 merely and only describes some background facts of the Agreement;[274] and (ii) the reference in Clause 1.1 to "[t]he leaching project of Cerro Verde" likewise has a "merely referential character"[275] as allegedly confirmed by the names used in other mining stabilization agreements to describe the investment project in Clause 1.1.[276] Claimant's interpretation of Clause 1 is incorrect.

195. *First*, Dr. Morales, a leading jurist in Peruvian civil law appearing as an expert presented by Respondent, explains that Clause 1 does not merely provide background information about the investment project.[277] Dr. Morales agrees with the Supreme Court conclusion that *"*the wording of Clause[s] 1.1 and 1.3 of the Stability Agreement . . . reveal[s]

---

[271] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 26, para. 14, ("*Aún más, el numeral 1.1 de la cláusula primera del Convenio de Estabilidad solo evidencia que la solicitud para que se le garantice los beneficios a la recurrente se efectuó en relación 'a la Inversión en su Concesión,' pero no de un modo genérico sino en función de lo que incluía el Estudio de Factibilidad y de lo que comprendía el Plan de Inversiones, que como se concluye no detallaron que la 'Planta de Sulfuros Primarios' era una obrade infraestructura del 'Proyecto de Lixiviación de Cerro Verde.*'") (emphasis added).

[272] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 26, para. 14 ("*El numeral 1.3 de la cláusula primera del Convenio de Estabilidad en una interpretación sistemática de este Convenio a partir de lo que establece el contenido del Estudio de Factibilidad y de lo que comprende el Plan de Inversiones que dio origen al Convenio de Estabilidad no permite concluir que la 'Planta de Sulfuros Primarios' fue parte del 'Proyecto de Lixiviación de Cerro Verde', dado que en ninguna de las cláusulas se aludió a que el Convenio de Estabilidad se extendía 'a la inversión en general y [a] toda la concesión minera [de Cerro Verde N°1, N°2 y N°3]'como lo sostiene la recurrente*.") (emphasis added).

[273] *See* Claimant's Reply at para. 85(b).

[274] *See* Claimant's Reply at para. 85(a).

[275] *See* Claimant's Reply at para. 85(b).

[276] *See* Claimant's Reply at para. 85(b).

[277] *See* Exhibit RER-7, Second Morales Report at paras. 45-47.

that the Stability Agreement intended that the benefits covered in articles 72, 80 and 84 of the D.S. No. 014-92-EM be understood 'in relation to the investment in its concession,' but depending on what was included in the 'Feasibility Study.'"[278]

196. *Second,* the name "Leaching Project" included in Clause 1.1 is not without meaning. Clause 1 refers exclusively to the "Leaching Project" and so does Clause 3 of the Agreement.[279] If the parties had wanted to extend the 1998 Stabilization Agreement to the Concentrator Project (or to any other future investment project), they would not have specified that "the guarantees of the benefits contained in articles 72, 80 and 84" are granted to "[t]he [L]eaching [P]roject of Cerro Verde."[280] The parties could have either used a general name to define the project (such as "the project in the Cerro Verde Mine") or included a specific reference to the Concentrator Project in the text of the Agreement (such as "the Leaching and Concentrator Projects of Cerro Verde"). They did not. The parties decided to explicitly and exclusively refer to the "[L]eaching [P]roject of Cerro Verde" to describe the investment covered by the Agreement. The deliberate selection of the name "[L]eaching [P]roject of Cerro Verde," and not, for example, "Investment Projects of Cerro Verde," shows the clear intent of the parties to grant stability guarantees specifically and exclusively to the Leaching Project described in the 1996 Feasibility Study.

197. *Third*, the wording of Clause 1.1 that has been used in certain other stabilization agreements involving other mines and mining companies that Claimant cites in its Reply[281] is irrelevant to interpret the meaning of Clause 1 of this 1998 Stabilization Agreement, and, in any case, does not support Claimant's position. As Dr. Morales explains, under Peruvian law, if the text of the contract is clear and unambiguous, there is no need to refer to other means of interpretation (*i.e.*, there is no need to analyze the context of the 1998 Stabilization Agreement and compare its wording to that of other contemporaneous stabilization agreements signed with

[278] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 27, para. 17(emphasis added, bold in the original) ("*sí fluye que el Convenio de Estabilidad tuvo por objeto que los beneficios contenidos en los artículos 72°,80° y 84°del* ***D.S. N° 014-92-EM*** *sean entendidos 'en relación a la inversión en su concesión,'* pero *en función de lo que incluía el 'Estudio de Factibilidad'*.") (emphasis added; bold omitted).

[279] *See* Exhibit RER-7, Second Morales Report at paras. 45-46, 49-50.

[280] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1.

[281] *See* Claimant's Reply at para. 85(b).

the Peruvian government).[282] In this case, as explained above, the text of Clause 1 is clear, and it refers only to the "[L]eaching [P]roject of Cerro Verde."[283]

198. In any event, the other contract clauses cited by Claimant—(i) Clause 1.1 of the 1994 Stabilization Agreement; (ii) Clause 1.1 of Sociedad Minera Cajamarquilla's stabilization agreement; and (iii) Clause 1.1 of Sociedad Minera Sipan's stabilization agreement—all indicate that the respective agreements likewise cover exclusively the investment outlined in the investment program described in the underlying feasibility study.[284] In all three examples—even if some agreements were more specific than others in the selection of the project name—Clause 1.1 made it clear that the stabilization agreements were triggered by, and addressed to, a specific investment and to a specific investment program and not to an entire concession. The fact that some stabilization agreements chose a more general name to describe the project covered by the agreement (*e.g.*, "Cerro Verde Project"[285]) instead of using the specific name of the project covered by the agreement (*e.g.*, the "[L]eaching [P]roject of Cerro Verde"[286]) does not mean that when the parties did choose a specific and narrow name for the project, their intention was actually different, because they intended to cover an entire concession.

199. In addition, other examples of stabilization agreements that Claimant cites in its Reply confirm Respondent's reading of Clause 1. For instance, Clauses 1.1 and 1.3 of the mining stabilization agreement that Tintaya signed in December 2003 provide that the stability guarantees are exclusively provided to the "Copper Oxides Project," and not to the entire Tintaya concession.[287] Claimant cannot cherry-pick some mining stabilization agreements that have broader descriptions of the projects and then proceed to ignore other agreements where the parties specifically used Clause 1.1 of the agreement to delimit the project that benefited from the stability guarantees.

---

[282] Exhibit RER-2, First Morales Report at para. 51.

[283] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1 ("*Proyecto de Lixiviación Cerro Verde*").

[284] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1; Exhibit CE-344, 1994 Stabilization Agreement at Clause 1; Exhibit CE-913, Sociedad Minera Refinería Cajamarquilla Stability Agreement, February 15, 1995, at Clause 1. *See also* Claimant's Reply at para. 85(b).

[285] Exhibit CE-344, 1994 Stabilization Agreement at Clause 1.1 ("*Proyecto Cerro Verde*").

[286] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1 ("*Proyecto de Lixiviación Cerro Verde*").

[287] *See* Exhibit CE-414, Stability Agreement Between BHP Billiton Tintaya and Peru, December 1, 2003, at Clause 1.1 ("*Proyecto Óxidos de Cobre*").

(ii) Clause 3 of the 1998 Stabilization Agreement

200. Respondent explained in its Counter-Memorial that Clause 3 of the 1998 Stabilization Agreement is not relevant to analyzing whether the Agreement covered the Concentrator Project.[288] The first paragraph of Clause 3 of the Agreement provides that "[a]ccording 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."[289] As Respondent and its witnesses Mr. Oswaldo Tovar (former Director of Promotion of MINEM) and Ms. Gabriela Bedoya (from SUNAT's Claims Division in Arequipa) explained, that paragraph—including the cross reference to Exhibit I—simply identifies the location where the Leaching Project should be executed.[290]

201. The second paragraph of Clause 3 provides that the fact that the Leaching Project is "circumscribed" to the Mining and Beneficiation Concession "does not prevent [SMCV] from incorporating other mining rights to the Cerro Verde Leaching Project after approval by the Directorate General of Mining."[291] As Respondent explained in its Counter-Memorial, under Clause 3, SMCV was allowed to incorporate additional mining rights in relation "to the Cerro Verde Leaching Project."[292] However, this provision does not allow the Agreement to cover an entirely new and unrelated investment such as the Concentrator Project, nor to bring any new mining rights within the Leaching Project without the DGM's ("Directorate General of Mining") approval.

202. Perú's Supreme Court agrees with this interpretation of Clause 3 of the Agreement and, like Respondent, it concluded that Clause 3 is not relevant to determine the scope of the 1998 Stabilization Agreement:

> In this regard, the Supreme Court considers that the clauses invoked by the appellant are not suitable for establishing the object of the Stability Agreement, because Clause Three of the

[288] Respondent's Counter-Memorial at paras. 93, 599.

[289] Exhibit CE-12, 1998 Stabilization Agreement at Clause 3 ("*Conforme a lo expresado en 1.1. el Proyecto de Lixiviavión Cerro Verde se circunscribe a las concesiones, relacionadas en el Anexo I, con las áreas correspondientes.*") (emphasis added).

[290] Respondent's Counter-Memorial at para. 91; *see also* Exhibit RWS-3, First Tovar Statement at paras. 26-27; Witness Statement of Gabriela Bedoya, April 18, 2022 ("First Bedoya Statement"), at para. 38.

[291] Exhibit CE-12, 1998 Stabilization Agreement at Clause 3 ("*no impide que [SMCV] incorpore otros derechos mineros al Proyecto de Lixiviación de Cerro Verde, previa aprobación de la Dirección General de Minería*.").

[292] *See* Respondent's Counter-Memorial at para. 93; *see also* Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

> Stability Agreement governs the "mining rights" that form part of the "Cerro Verde Leaching Project," and the issue here is whether the "Primary Sulfide Plant" was part of the Investment Plan that could enjoy the benefits of the Stability Agreement.[293]

203. In its Reply, Claimant disagrees with Respondent's and the Supreme Court's interpretation of Clause 3 and alleges that the literal interpretation of Clause 3 supports Claimant's position that the Agreement covered the Concentrator Project. This is incorrect. *First*, Claimant alleges that the first paragraph of Clause 3 extended the scope of the Agreement to the concessions set out in Exhibit I (*i.e.*, to the entire Beneficiation and Mining Concession).[294] However, once again, Claimant is unable to refer to any language that specifically supports such a claim.

204. *Second*, Claimant argues that the fact that the second paragraph of Clause 3 allowed SMCV to incorporate "other mining rights" as opposed to "other investments" reaffirmed that the scope of the 1998 Stabilization Agreement was limited to all the concessions included in Exhibit I.[295] Claimant takes the second paragraph of Clause 3 out of context. As Mr. Tovar explains, Clause 3 simply provides that if SMCV's mining concessions were expanded (*e.g.*, to include new mine pits on new land to be included within the existing concession), and SMCV requested MINEM to have that expansion stabilized, after MINEM's approval, the processing at the leaching facilities of secondary ore from that new land would also be stabilized.[296] However, as Mr. Tovar explains, if SMCV "wished to develop a new investment project, different from the project that is stabilized in its concessions, the company would have to request to sign a new stabilization agreement and present all the requirements, including the corresponding Feasibility Study for such project to enjoy a stability regime."[297]

---

[293] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017 at p. 32, para. 31 (emphasis added) ("*Al respecto, este Supremo Tribunal considera que las cláusulas que invoca la recurrente no son idóneas para establecer el objeto del Convenio de Estabilidad, puesto que la cláusula tercera del Convenio de Estabilidad regula sobre los 'derechos mineros' que forman parte del 'Proyecto de Lixiviación de Cerro Verde', y de lo que se trata en el caso es establecer si la 'Planta de Sulfuros Primarios' formaba parte o no del Plan de Inversiones que podía gozar de los beneficios que se derivaban del Convenio de Estabilidad*.").

[294] Claimant's Reply at para. 84(a).

[295] Claimant's Reply at para. 84(a).

[296] Exhibit RWS-3, First Tovar Statement at para. 27; Exhibit RWS-10, Second Witness Statement of Oswaldo Tovar, November 3, 2022 ("Second Tovar Statement"), at para. 27; *see also* Respondent's Counter-Memorial at paras. 91-92, 583.

[297] Exhibit RWS-3, First Tovar Statement at para 27; Exhibit RWS-10, Second Tovar Statement at para. 27 ("*qu[isiera] desarrollar un proyecto de inversión nuevo, diferente al proyecto estabilizado en sus concesiones, la empresa tendría que solicitar la firma de un nuevo contrato de estabilidad y presentar todos los requisitos, entre ellos, el correspondiente Estudio de Factibilidad para que dicho proyecto gozara de un régimen de estabilidad.*").

205. Also, Dr. Morales notes that Clause 4.2 of the Agreement corroborates Respondent's reading of the second paragraph of Clause 3.[298] Clause 4.2 notes that "provided the final object of the investment plan is not affected"[299] (in this case, as explained, the object of the Agreement was "to improve the leaching of the secondary sulfides"[300]), and provided that SMCV "file[s] previously with the General Direction of Mining the Request for approval of such modifications and/or expansions," then the investment project could be expanded.[301] Therefore, what Clause 3 actually demonstrates is that SMCV could expand the scope of the Leaching Project (but only the Leaching Project).

206. *Finally*, the expansion of the unrelated Parcoy Project that Claimant mentions as an example to support its interpretation of Clause 3 of the Agreement does not support Claimant's position—instead, it supports Respondent's interpretation of Clause 3. As explained in more detail in Section II.E.2 below, the mining group Consorcio Minero Horizonte relied on the second paragraph of Clause 3 of the Parcoy stabilization agreement (the "Parcoy Stabilization Agreement") precisely to extend the stability guarantees of the contract to new mining rights.[302]

(iii) Clauses 4 5, 7, and 8 of the 1998 Stabilization Agreement Linked and Limited the Scope of the Agreement to the Investment That Was Outlined in the Investment Plan

207. Respondent explains in its Counter-Memorial that Clauses 4, 5, 7, and 8 of the 1998 Stabilization Agreement are linked and that they limited the scope of the Agreement to the investment that was outlined in that investment plan attached to the 1996 Feasibility Study (*i.e.*, the Leaching Project).[303] Dr. Morales similarly concludes in his First Report that a systematic interpretation of Clauses 2, 3, 4, 5, 7, and 8 demonstrates that only the investment included in the Feasibility Study may be guaranteed under the 1998 Stabilization Agreement.[304] In the interest of brevity, Respondent refers the Tribunal to the description of Clauses 4, 5, 7, and 8 that

[298] Exhibit RER-2, First Morales Report at para. 55.

[299] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.2 (emphasis added).

[300] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.3 (emphasis added).

[301] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.2; *see also* Exhibit RER-2, First Morales Report at para. 55.

[302] *See infra* at Section II.E.2.

[303] *See* Respondent's Counter-Memorial at para. 94.

[304] *See* Exhibit RER-2, First Morales Report at para. 64.

Respondent included in its Counter-Memorial.[305] In this sub-section, Respondent simply rebuts Claimant's contrary interpretation of those clauses in its Reply.

208. Notably, the Supreme Court also agreed that, among others, Clauses 4, 5, and 7 of the 1998 Stabilization Agreement are relevant to interpreting the scope of the Agreement.[306] Specifically, the Supreme Court provided a detailed explanation of the role of Clauses 4 and 7 in defining the scope of the Agreement:

- For the Supreme Court, "an objective interpretation of [**Clause 4** of the 1998 Stabilization Agreement], in accordance with what is established in the Stability Agreement and based upon the principles good faith, and interpreting those clauses based upon one another, allows the conclusion that the reference to the 'investment' is legislatively limited. Ultimately, the contractual benefits that result from the Stability Agreement are not as broadly enjoyed as the appellant has suggested, which is why it isn't possible to reach the conclusion that the benefit extends to every investment the mining company makes in the concession that is the subject of the Stability Agreement, rather only to that investment in its concession related to the 'Cerro Verde Leaching Project,' according to what is established in the 'Technical-Economic Feasibility Study.'"[307]

- Also, the Supreme Court concluded that "**[C]lause 7** of the Legal Stability Agreement incorporates into [C]lause 7.2 the understanding that, 'The General

[305] *See* Respondent's Counter-Memorial at para. 94.

[306] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 27, para. 16 ("Thus, the outline in recital seven of the contested review, as well as the inference therein, aim to justify why the conclusion of recital six is consistent with the interpretative meaning derived from Clauses 2, 3, Clause 4.1 and 4.3, Clause 5.2, Clause 7.2, and Clause 8.1 of the Stability Agreement. Through the wording of these clauses and from a joint interpretation of them, it is possible to arrive at what was in fact the object of the Stability Agreement and which were the investments in its concession to which the appellant could apply the benefits of the Stability Agreement, as can be derived from the provisions of Clause 4.1 and Clause 7.2 of the Stability Agreement . . .") ("*Por ello, lo reseñado en la consideración séptima de la sentencia impugnada, así como la inferencia allí glosada, tienen por finalidad justificar porqué aquella conclusión de la consideración sexta es conforme con el sentido interpretativo que se derivan de las cláusulas segunda, tercera, cuarta, en sus numerales 4.1 y 4.3, quinta, en su numeral 5.2, séptima, en su numeral 7.2, y octava, en su numeral 8.1, del Convenio de Estabilidad. Y es que del tenor literal de esas cláusulas y de una interpretación conjunta de aquellas por medio de las otras cláusulas es posible atribuir cuál fue en realidad el objeto del Convenio de Estabilidad y cuáles las inversiones en su concesión a las que la recurrente podía extender los beneficios del Convenio de Estabilidad, tal como fluye de lo estipulado en el numeral 4.1 de la cláusula cuarta y en el numeral 7.2 de la cláusula séptima del Convenio de Estabilidad.*") (emphasis added); *see also* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at p. 8.

[307] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 74, para. 170 ("*una interpretación* objetiva *[de la **Cláusula 4** del Convenio de Estabilidad de 1998], de acuerdo con lo que se haya expresado en el Convenio de Estabilidad y según el principio de la buena fe, e interpretando sus cláusulas las unas por medio de las otras, permiten concluir que la referencia a la "inversión" viene limitada legislativamente. Por ende, los beneficios contractuales que se derivan del Convenio de Estabilidad no gozan de la amplitud a la que alude la recurrente, por lo que no es posible interpretar que el beneficio se extiende a "toda la inversión que realice la empresa minera en la concesión objeto del Contrato de Estabilidad, sino únicamente a aquella inversión en su concesión relacionada con el 'Proyecto de Lixiviación de Cerro Verde,' según lo que establece el 'Estudio de Factibilidad Técnico-Económico.'*") (emphasis added).

> Mining Bureau, within 120 days from the date that the documentation established in 7.1.1, 7.1.2 and 7.1.3 is made available to it may make remarks referring solely to the inclusion of investments and expenses not anticipated in the Investment Plan or in its duly approved modifications (...)', which is to say, all of the terms stipulated in the Legal Stability Agreement reveal that the effect of the contractual benefit extends 'only' to the activities for which the mining company made the investment, which are detailed and covered in the Feasibility Study referred to in [C]lause 1.3 of the Legal Stability Agreement, and that includes the Investments Plan referred to in [C]lause four of the Legal Stability Agreement."[308]

209. In its Reply, Claimant argues that Clauses 4, 5, 7, and 8 "nowhere limit the effects of the Agreement to the 'investment project,' as these provisions have nothing to do with the scope of the Agreement, which is set forth in Clause 3 of the Agreement."[309] This argument has no merit. As Dr. Morales and Dr. Eguiguren explain, Claimant and its expert Dr. Bullard mischaracterize the content of Clauses 4, 5, 7, and 8.

- Clause 4: Claimant argues that Respondent does not offer an explanation of why this clause is relevant.[310] This is simply not true. Respondent and Dr. Morales noted that Clause 4.3 listed the main works that were contained in the investment plan attached to the 1996 Feasibility Study, and that, in contrast to one of the works listed being the "Leaching system," none of the works referred to a concentrator plant to process primary sulfides and produce copper concentrate.[311] Therefore, Respondent and Dr. Morales concluded that the absence of the Concentrator Project and the inclusion of the Leaching Project in the list was relevant in concluding that the scope of the Agreement was limited to the Leaching Project. In his second report, Dr. Morales notes, in line with the Supreme Court's opinion,[312] that the fact that Clause 4.2 provides that certain changes to the investment plan can be implemented "provided the final object of the investment plan is not affected" also proves that any expansion or

[308] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 74-75, para. 171 ("***la [C]láusula séptima*** *del Convenio de Estabilidad Jurídica se incorpora el numeral 7.2 en que se acuerda que: 'La Dirección General de Minería, dentro de los 120 días de presentada y puesta a su disposición la documentación prevista en 7.1.1, 7.1.2 y 7.1.3 podrá formular observaciones referidas únicamente a la inclusión de inversiones y gastos no previstos en el Plan de Inversiones o en sus modificaciones debidamente aprobadas . . . ', es decir, todos los acuerdos estipulados en el Convenio de Estabilidad Jurídica revelan que el efecto del beneficio contractual se extiende 'únicamente' a las actividades de la empresa minera favor de la cual se efectuó la* inversión, *la misma que viene detallada y comprendida en el Estudio de Factibilidad al que alude el numeral 1.3 de la cláusula tercera del Convenio de Estabilidad Jurídica, y que incluye el Plan de Inversiones a que se refiere la cláusula cuarta del Convenio de Estabilidad Jurídica*") (original emphasis omitted; emphasis added).

[309] Claimant's Reply at para. 87.

[310] Claimant's Reply at para. 87(a).

[311] Respondent's Counter-Memorial at para. 94; *see also* Exhibit RER-2, First Morales Report at para. 64.

[312] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 74, para. 169.

modification to the investment project needs to be related to the initial object of the investment—in this case, the Leaching Project.[313]

- Clause 5: Claimant also argues that Respondent does not offer an explanation of why Clause 5 is relevant.[314] This is again incorrect. Dr. Morales explained in his first expert report that Clause 5 "expressly refers to the 'amount of the investment of the Cerro Verde Leaching Project,' and to the total amount of SMCV's investment (approximately USD 237 million)," and that "[t]herefore, the Clause indicates that the totality of the investment was directed at all times to the Leaching Project and not to the Concentrator Plant."[315] The Supreme Court also concludes that the reference to the "Leaching Project" in Clause 5 of the Agreement is relevant to analyze the scope of the Agreement.[316]

- Clause 7: Claimant contends that Clause 7 confirms that the investment plan is a mere technical requirement for the investor to be granted stability guarantees.[317] This is incorrect. As Respondent explained in its Counter-Memorial, Clause 7.2 provides that if there were any discrepancies between the information provided to the General Mining Directorate and the investment plan, and if SMCV failed to provide a reasonable explanation for such differences, then the benefits of the Stabilization Agreement would be suspended.[318] If the Agreement's benefits were not defined by the investment that was outlined in the investment plan, such suspension would be unnecessary.[319] The Supreme Court also corroborates this interpretation of Clause 7.2.[320] Therefore, a concrete mechanism was contemplated in the Agreement to exclude investments that were not mentioned in the Investment Plan, which confirms that the parties' intent was that the only thing that would be covered by the Agreement was the investment set out in the Feasibility Study's Investment Plan.[321]

- Clause 8: Clause 8.1 provides that the guarantees agreed to in the Agreement would extend for 15 years, counted from the completion of the investment—*i.e.*, the investment that was outlined in the investment plan.[322] Claimant argues that the initial investment confirms the threshold question of whether the investor is entitled to stability guarantees at all—so it makes complete sense that the agreement would not commence until the DGM confirms that the qualifications

[313] *See* Exhibit RER-7, Second Morales Report at para. 53.

[314] Claimant's Reply at para. 87(a).

[315] Exhibit RER-2, First Morales Report at para. 64.

[316] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 32.

[317] Claimant's Reply at para. 87(b).

[318] Respondent's Counter-Memorial at para. 94.

[319] Respondent's Counter-Memorial at para. 94.

[320] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 30, paras. 24-26.

[321] *See* Respondent's Counter-Memorial at para. 94.

[322] Respondent's Counter-Memorial at para. 94.

> are satisfied.[323] However, as Respondent explained in its Counter-Memorial, "[i]f the Agreement's effects were not limited to the investment that was outlined in the investment plan, it would be unnecessary to wait until the completion of the investment to allow the effects of the Agreement to commence."[324]

210. In sum, contrary to Claimant's arguments, the lack of express references to the Concentrator Project and the explicit references made to the Leaching Project in these clauses is relevant. Claimant itself admits that "at the time SMCV signed the Stability Agreement, it had not yet determined whether the Concentrator would ultimately be economically and financially feasible."[325] Therefore, the Concentrator Project could not have been covered by the Agreement in 1998. Claimant should have applied for a different stabilization agreement to cover the Concentrator Project, but it did not.

(iv) Clauses 9 and 10 of the 1998 Stabilization Agreement

211. In his first expert report, Dr. Morales explained that Clauses 9 and 10 are essentially irrelevant to analyzing the scope of the 1998 Stabilization Agreement.[326] Dr. Morales noted that (i) Clause 9 merely lists the benefits that SMCV may enjoy in relation to the "[i]nvestment in its [c]oncession;"[327] and (ii) Clause 10 states a rule that limits the effects of the laws that are enacted after the date of approval of the 1996 Feasibility Study.[328] Neither Clause 9 nor 10 of the Agreement mentions the Concentrator Project.

212. Perú's Supreme Court, in line with Dr. Morales' opinion, concluded that Clauses 9 and 10 of the 1998 Stabilization Agreement are irrelevant to deciding whether the Concentrator Project is covered by the 1998 Stabilization Agreement.[329] In particular, the Supreme Court described Clauses 9 and 10 as follows:

---

[323] Claimant's Reply at para. 87(c).

[324] Respondent's Counter-Memorial at para. 94.

[325] Claimant's Reply at para. 87(d).

[326] Exhibit RER-2, First Morales Report at para. 61.

[327] Exhibit RER-2, First Morales Report at para. 61.

[328] Exhibit RER-2, First Morales Report at para. 61.

[329] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 34, para. 35 ("clauses nine and ten of the Stability Agreement do not render the above [conclusion regarding the scope of the 1998 stabilization Agreement] ineffective") ("*la cláusula novena y décima delConvenio de Estabilidad no enervan lo antes señalado [con relación al Convenio de Estabilidad]*.").

- Clause 9: "[C]lause nine only outlines all the benefits that will be enjoyed by the [C]laimant in relation to the 'Investment in its Concession.'"[330]

- Clause 10: "On the other hand, [C]lause 10 of the Stability Agreement only contains one rule limiting the effects that the legal regulations will have, which are issued after the approval date of the Feasibility Study of the 'Cerro Verde Leaching Project', but not so for those corresponding to the Investment Project which gave rise to the 'Primary Sulfur Plant.'"[331]

213. Claimant argues, to the contrary, that Clauses 9 and 10 of the 1998 Stabilization Agreement reaffirmed that mining stabilization agreements extended to all investments in the Cerro Verde Mine.[332] In particular, Claimant argues that Clauses 9 and 10 mention that stability guarantees are granted to the "owner" (*el titular*), which somehow implies, according to Claimant, that the guarantees should be offered to all the concessions of a specific mining owner.[333] Claimant's interpretation makes no sense. Clauses 9 and 10 discuss the guarantees provided by the 1998 Stabilization Agreement. They mention the "owner" of the mine because it is the owner of the mine that is the recipient of the guarantees (*e.g.*, it is the owner of the mine that is able to freely convert national currency to foreign currency). The clauses have nothing to do with the scope of the Agreement, as Dr. Morales and the Peruvian Supreme Court concluded.[334]

(v) The Provisions of the Agreement Must be Read Restrictively (i.e., in Accordance with Its Terms), and the Contra Proferentem Principle Is Inapplicable to This Case

214. Respondent's legal experts Dr. Morales and Dr. Eguiguren explained in their first expert reports that the provisions of the 1998 Stabilization Agreement need to be interpreted "restrictively" (*i.e.*, strictly), because stabilization agreements provide benefits to individuals that

[330] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 34, para. 35 ("*cláusula novena solo reseña todos los beneficios que serán objeto de goce por la demandante en relación a la "Inversión en su Concesión*.") (emphasis added).

[331] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 34, para. 37 ("*De otro lado, la referida cláusula décima del Convenio de Estabilidad solo contiene una regla de limitación de los efectos que tendrán las normas jurídicas dictadas con posterioridad a la fecha de aprobación del Estudio de Factibilidad del 'Proyecto de Lixiviación de Cerro Verde', mas no así en lo que corresponde al Proyecto de Inversión que dio lugar a la 'Planta de Sulfuros Primarios*') (emphasis added).

[332] Claimant's Reply at para. 86.

[333] Claimant's Reply at para. 86.

[334] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at para. 35; *see also* Exhibit RER-2, First Morales Report at para. 61.

are exceptions to the State's regulatory tax and administrative power.[335] A "restrictive interpretation" implies that the text of the Agreement should not be expanded *via* interpretation,[336] as Claimant attempts to do; rather, it should be strictly limited to the ordinary meaning of the text. Claimant objects that interpreting the Agreement "restrictively" "lacks any basis in law and contradicts [Respondent's] experts' own acknowledgement that the Stability Agreement must strictly implement the guarantees of the Mining Law."[337] Claimant's argument is without merit. Dr. Morales explains in detail in his second report the rationale behind a strict reading of the provisions of the Agreement, and, in particular, he clarifies that a strict interpretation of the provisions of the Agreement does not limit the rights granted under the Mining Law as Claimant alleges:

> It is appropriate to interpret the Agreement based on the strict sense of what is expressly provided for therein. That is to say, understanding that the benefits of the Agreement apply restrictively to the object foreseen therein, and not seeking to expand that object by means of inapplicable methods of interpretation. In the specific case, what was expressly agreed was that the investor undertook to carry out the investment program for the Leaching Plant and therefore the stability regime will only apply to such project. The goal of such "restrictive" interpretation is not to limit rights granted by law. On the contrary, this interpretation neither restricts nor broadens what is provided for in the Mining Law.[338]

215. Similarly, Dr. Eguiguren concludes that a strict reading of the provisions of the 1998 Stabilization Agreement does not limit SMCV's rights:

> Since it is an exceptional benefit granted in favor of the investor, and a waiver by the State of the general effects . . . of the tax or administrative laws that it approves, **the strict interpretation of the scope of the guarantees does not imply anything other than 'restricting' or 'limiting' their application and protection exclusively to the cases contemplated and expressly contained in**

[335] Exhibit RER-2, First Morales Report at paras. 46-47; Exhibit RER-1, First Eguiguren Report at para. 66.

[336] *See* Exhibit RER-7, Second Morales Report at para. 39; Exhibit RER-6, Second Eguiguren Report at paras. 33-34; *see also* Exhibit RER-2, First Morales Report at para. 47; Exhibit RER-1, First Eguiguren Report at para. 66.

[337] Claimant's Reply at para. 88.

[338] Exhibit RER-7, Second Morales Report at para. 39 ("*Lo adecuado es interpretar el Contrato en el sentido estricto de lo que está expresamente previsto en él. Es decir, entendiendo que los beneficios del Contrato se aplican restrictivamente al objeto previsto en el mismo, y no pretender ampliar ese objeto mediante métodos de interpretación inaplicables. En el caso concreto, lo que se pactó expresamente fue que el inversionista se comprometió a realizar el plan de inversiones de la Planta de Lixiviación y por ello mismo solo se aplicará el régimen de estabilidad a dicho proyecto. Tal interpretación "restrictiva" no es para limitar derechos otorgados por la ley. Por el contrario, esta interpretación ni restringe ni amplía lo que está previsto en la Ley de Minería.*") (emphasis added).

> **the agreement formalized by the parties; that is, to the investments contemplated or incorporated in the stabilization agreement**. This is in application of the legal principle according to which the rules that regulate exceptional situations must be interpreted restrictively, *i.e*., without extending or broadening their application to different or ordinary situations.
>
> As one can see, the strict and restrictive interpretation of the scope of the legal and contractual stability guarantees does not imply or suggests, at all, to adopt an interpretation that limits or reduces the rights granted to the investor by the Mining Law or agreed by the parties in the *contrato-ley*. It simply subjects ("restricts") the scope of its application and execution strictly to what was stipulated in the contract, which is totally reasonable since a special or exceptional regime has been agreed upon in favor of the investors that meet the requirements provided by the law.[339]

216. On the other hand, Claimant argues that any ambiguity in the Agreement must be interpreted "according to the principle of *contra proferentem,* which applies to adhesion contracts."[340] However, the *contra proferentem* rule of interpretation does not apply in this case. As Dr. Morales and Dr. Eguiguren explained in their first expert reports, the 1998 Stabilization Agreement is not an ordinary adhesion contract, because there were negotiations between SMCV and Perú (the Agreement is a contract proposed by and at the request of SMCV), and because SMCV is not considered a "weak" contractual party in the negotiation.[341] In his second report, Dr. Morales explains that the issue in dispute in this arbitration (*i.e*., the scope of the Agreement) was precisely defined by SMCV in the 1996 Feasibility Study.[342]

---

[339] Exhibit RER-6, Second Eguiguren Report at paras. 33-34 ("*Por tratarse de un beneficio excepcional en favor del inversionista, y de una renuncia del Estado a los efectos generales . . . de las leyes que aprueba en materia tributaria o administrativa, **la interpretación estricta de los alcances de las garantías no implica otra cosa que 'restringir' o 'limitar' su aplicación y protección exclusivamente a los supuestos contemplados y contenidos de forma expresa en el contrato celebrado por las partes; es decir, a las inversiones previstas o incorporadas en el contrato de estabilidad**. Ello en aplicación de un principio jurídico fundamental en materia de interpretación de normas, según el cual las normas que regulan situaciones excepcionales deben interpretarse de forma restrictiva, es decir, sin extender o ampliar su aplicación o alcances a situaciones distintas u ordinarias. Como se puede apreciar, la interpretación estricta y restrictiva de los alcances de las garantías de estabilidad legal y contractual, no supone ni propone, en absoluto, adoptar una interpretación que limite o reduzca los derechos otorgados al inversionista por la LGM ni pactados por las partes en el contrato-ley. Simplemente sujeta ('restringe') los alcances de su aplicación y ejecución estrictamente a aquello que se estipuló y protegió en el contrato, lo que resulta totalmente razonable por haberse acordado un régimen especial o excepcional en favor de los inversionistas que cumplen los requisitos previstos por la ley*.") (emphasis added).

[340] *See* Claimant's Reply at para. 88.

[341] *See* Exhibit RER-1, First Eguiguren Report at paras. 63-64; *see also* Exhibit RER-2, First Morales Report at paras. 43-45.

[342] *See* Exhibit RER-7, Second Morales Report at paras. 62, 64, 71, 84.

217. With the *contra proferentem* interpretation, Claimant attempts to expand the Agreement beyond what is strictly provided in the Agreement. But, the Agreement expressly states that it applies to the Leaching Project, which, as Respondent explains in next subsection, was the only project outlined in the 1996 Stabilization Agreement.

b. The 1996 Feasibility Study Shows that SMCV Requested a Stabilization Agreement Exclusively for Its Leaching Project

218. In its Memorial, Claimant argued that the 1996 Feasibility Study laid the groundwork for building a concentrator next to the leaching facilities.[343] In its Counter-Memorial, Respondent demonstrated that (i) the 1996 Feasibility Study; (ii) the report by the General Mining Directorate analyzing the 1996 Feasibility Study; and (iii) the Resolution approving the study, all indicated that the investment project for which SMCV sought to obtain the 1998 Stabilization Agreement was exclusively for the expansion of SMCV's leaching facilities to increase the production of copper cathodes.[344] None of the aforementioned documents outlined, analyzed, or approved an investment with respect to any type of concentrator plant.[345] In its Reply, Claimant largely ignores Respondent's arguments, and simply asserts (incorrectly) that while a feasibility study may be a key requirement to apply for a mining stabilization agreement, it is immaterial to the scope of that agreement.[346] At the same time, and somewhat inconsistently, Claimant's witness Ms. Chappuis insists in her second witness statement that certain language in the 1996 Feasibility Study "laid the groundwork for additional future investments in the mining unit, in particular the concentrator."[347] This, too, is incorrect.

219. *First*, SMCV's request to MINEM to approve the 1996 Feasibility Study and grant it the right to sign the 1998 Stabilization Agreement (the "1998 Stabilization Agreement Request") shows that the Agreement was never intended to cover the Concentrator Project. In its Request, SMCV outlined only the Leaching Project that was to be executed within the Cerro Verde Mine:

---

[343] Claimant's Memorial at para. 73; *see also* Exhibit CWS-3, Witness Statement of Marita Chappuis Cardic, October 19, 2021 ("First Chappuis Statement"), at para. 21.

[344] *See generally* Respondent's Counter-Memorial at Section II.B.3(a).

[345] *See generally* Respondent's Counter-Memorial at Section II.B.3(a); *see also id.* at para 85.

[346] *See*, *e.g.*, Claimant's Reply at para. 49(b).

[347] Exhibit CWS-14, Reply Witness Statement of María Chappuis Cardich, September 13, 2022 ("Second Chappuis Statement"), at para. 30 (emphasis added).

> Feasibility study related to the project that our company is executing and which 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 . . .
>
> We note that the mining right held by our company with respect to whose exploitation the expansion project is being executed is CERRO VERDE Nos. 1, 2 and 3, located in the area of Cerro Verde, District of Uchumayo, Province and Department of Arequipa, with an area of 7,455 hectares.[348]

220. There is no mention anywhere in the 1998 Stabilization Agreement Request of a concentrator plant.

221. *Second*, the 1996 Feasibility Study, which served as the basis for the 1998 Stabilization Agreement, analyzed only one project: SMCV's investment in the Leaching Project. As the 1996 Feasibility Study states:

> **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.[349]

---

[348] Exhibit CE-7, Stabilization Agreement Request, January 25, 1996, at pp. 2-3 ("*Estudio de factibilidad correspondiente al proyecto que nuestra empresa está ejecutando y que está destinado a ampliar la capacidad de producción de 72'000,000a 105'000,000 de libras (48,000 toneladas métricas) de cátodos de cobre por año con una inversión total de US$240'247,000 . . . Dejamos constancia que el derecho minero del que nuestra sociedad es titular y respecto de cuya explotación se ejecuta el proyecto de ampliación es Cerro Verde Nº 1, Nº 2 y N º 3, ubicado en el paraje de Cerro Verde, Distrito de Uchumayo Provincia y, Departamento de Arequipa, con una extensión de 7,455 hectáreas*.") (emphasis added).

[349] Exhibit CE-9, Feasibility Study, Executive Summary, 1996, at pp. 2-3 ("***1.1 Alcances del Estudio de Factibilidad*** *El estudio de factibilidad cubre el proyecto de lixiviación de Cerro Verde, desde la geología hasta la producción y ventas de cátodos. El estudio describe todas las operaciones, incluyendo aquellas que forman parte del proyecto de lixiviación y sus instalaciones de apoyo . . .* ***1.2 Objetivo del Estudio*** *El objetivo del estudio es*

222. Thus, the 1996 Feasibility Study made clear that the planned investment at issue was the investment in the Leaching Project. Ms. Chappuis claims that even if the Study did not analyze or commit SMCV to build a concentrator, the fact that the investment program of the Study mentioned only once a "feasibility study for a mill" (according to Claimant, the reference to "mill" is a reference to a concentrator plant) demonstrated that SMCV had in mind—and expected to obtain stability guarantees for in the same Agreement—the idea of eventually building a concentrator plant.[350] However, as Claimant admits in its Memorial, the "feasibility study for a mill" was carried out in 1996, well prior to the 1998 Stabilization Agreement, and based on that study, SMCV had concluded that it was uneconomical to invest in a concentrator plant at that time.[351] Thus, in 1998 SMCV did not plan to pursue, and indeed never pursued, the "mill" investment that was so briefly mentioned in the 1996 Feasibility Study.

223. *Third*, MINEM's analysis of the 1996 Feasibility Study and its approval also show that MINEM understood that the Study, and thus SMCV's request for a new mining stabilization agreement concerned only the Leaching Project. As Respondent explained in its Counter-Memorial, the report that supports MINEM's approval of the 1998 Stabilization Agreement explained that the objective of the 1996 Feasibility Study was to "expand the processing capacity of Cerro Verde by installing the necessary equipment to improve the leaching process using the latest technology."[352] No other investment was described or analyzed; in particular, the MINEM report makes no reference to any concentrator plant.

224. *Fourth*, the Resolution approving the Study also shows that the 1998 Stabilization Agreement was only intended to cover the Leaching Project.[353] Among other things, the Resolution provides "[t]hat [SMCV] has submitted [before] the General Mining Directorate [a Feasibility Study] . . . which objective is the production of approximately 105 million pounds per

---

evaluar la factibilidad de producir 105 millones (MM) lb/año (48,000 tmpa) de cátodos de cobre de la lixiviación en pilas de mineral de cobre en las instalaciones de Cerro Verde . . . ***1.3 Base del Estudio*** *El estudio se basa en los resultados de pruebas y experiencia operativa obtenida hasta la fecha de la lixiviación de sulfatos secundarios en Cerro Verde, así como de la experiencia operativa en las otras unidades de procesos en Cerro Verde.*") (emphasis added, bold in the original).

[350] Exhibit CWS-14, Second Chappuis Statement at para. 30.

[351] Claimant's Memorial at para. 75; *see also* Respondent's Counter-Memorial at para. 81.

[352] Exhibit RE-25, MINEM, Report No. 033-96-EM-DGM-DFM/DFAE, March 27, 1996, at "Objective."

[353] *See* Exhibit RE-24, MINEM, Directorial Resolution No. 158-96-EM/DGM, May 6, 1996; *see also* Exhibit RE-25, MINEM, Report No. 033-96-EM-DGM-DFM/DFAE, March 27, 1996; Exhibit CE-8, Feasibility Study Approval, Informe No. 043-96-EM-DGM-DFM/DFAE, May 6, 1996.

year of copper cathodes in Cerro Verde's facilities"[354] (*i.e.*, the objective of which is to execute the Leaching Project).

225. In sum, neither the 1996 Feasibility Study nor any of the documents related to its presentation or approval contemplates or plans for—or indeed, in most cases, even mentions in passing—a concentrator plant. The documents instead demonstrate that the investment project for which SMCV sought a stabilization agreement focused exclusively on the Leaching Project (and not in the Concentrator Project).

226. As Respondent explains in the next section, the Concentrator Project is a different, new, and entirely separate project, built years after SMCV entered into the Agreement was entered into. It is, thus, not covered under the 1998 Stabilization Agreement no matter how strongly Claimant wishes it were so.

2. The Concentrator Project Was a Separate and New Investment, Not Related to the Leaching Project

227. To recall, as Respondent explained in its Counter-Memorial, until 2006 (when SMCV started operating the Concentrator Project), the Cerro Verde Mine had primarily extracted oxide ore and had processed it through its leaching facilities; it had not developed a concentrator project, which was an entirely new and separate operation launched in 2004.[355] For ease of reference, Respondent includes a short summary of the history of Cerro Verde's mine, up through Claimant's acquisition of its majority stake at SMCV:[356]

- Between 1970 and 1994, Cerro Verde was owned by the state-owned company, Empresa Minero del Perú ("Minero Perú"). In 1970 and 1972, the government granted mining rights to Minero Perú to extract ore from the two open pits at Cerro Verde.[357] As Respondent describes below, during this period, Cerro Verde focused on extracting oxide ore and processing it through leaching facilities. Cerro Verde envisioned building a concentrator plant (to process primary sulfide ore), but had to set aside those plans, because it was uneconomical.

- In the early 1990s, Perú sought to privatize Minero Perú's mining assets. On June 1, 1993, Minero Perú created SMCV for purposes of privatizing the Cerro

[354] *See* Exhibit RE-24, MINEM, Directorial Resolution No. 158-96-EM/DGM, May 6, 1996, at p. 2.

[355] *See* Exhibit RER-4, First Ralbovsky Report at para. 61.

[356] *See* Respondent's Counter-Memorial at para. 67.

[357] *See* Claimant's Memorial at para. 33; Exhibit CE-287, Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM, December 15, 1970; Exhibit CE-289, Establishing the Right of the State Over Expired Metal Concessions, Supreme Decree No. 012-72-EM/DGM, January 20, 1972.

Verde Mine.[358] Cyprus Minerals Company, a U.S. company, submitted the only bid for the Cerro Verde Mine.[359]

- On March 17, 1994, Minero Perú and Cyprus Amax Minerals Company ("Cyprus"), a subsidiary of Cyprus Minerals Company, executed a share purchase agreement under which Minero Perú sold 91.65% of its shares in SMCV to Cyprus (the "1994 Share Purchase Agreement").[360] The 1994 Share Purchase Agreement also envisioned the construction of a concentrator plant, but those plans were also set aside because they were economically unfeasible.

- In January 1996, SMCV—owned at the time by Cyprus—requested that MINEM enter into a mining stabilization agreement with SMCV with respect to a US $238 million dollar investment project to expand SMCV's leaching facilities to increase its production capacity of cathodes of copper from certain types of copper ore (oxides and secondary sulfides) (the Leaching Project). On February 13, 1998, SMCV entered into the 1998 Stabilization Agreement for the "Leaching Project," which is being discussed in this arbitration.[361]

- In October 1999, U.S. company Phelps Dodge acquired Cyprus, becoming SMCV's majority shareholder.[362]

- In December 2004, SMCV began construction of the Concentrator Project, which was completed in 2006.[363] Until 2004, SMCV had discarded any plans to build a concentrator plant, because it was not economically viable; SMCV had not been able to economically extract and process the necessary primary sulfides from the Cerro Verde Mine. In 2004, access to water and energy supply improved significantly in Arequipa, which allowed SMCV to go forward with the project to build the Concentrator. The Concentrator Project was built for purposes of processing primary sulfide ore to produce copper concentrate.

- On March 19, 2007, Freeport completed its acquisition of Phelps Dodge (and of a majority stake in SMCV), creating the world's largest publicly traded copper.[364]

228. In its Reply, faced with the undeniable fact that the 1998 Stabilization Agreement makes no reference to any type of concentrator project, Claimant tries to argue that the

[358] *See* Claimant's Memorial at para. 64.

[359] *See* Claimant's Memorial at para. 66; Exhibit CE-334, Cyprus Minerals Company Privatization Proposal, November 4, 1993; Exhibit CE-351, CEPRI, Minutes for SMCV, July 3, 1996, at pp. 24-25.

[360] *See* Claimant's Memorial at para. 67; Exhibit CE-4, Share Purchase Agreement between Cyprus Climax Metals Company and Empresa Minera del Peru S.A., March 17, 1994.

[361] *See* Exhibit CE-12, 1998 Stabilization Agreement.

[362] *See* Claimant's Memorial at para. 84; Exhibit CWS-8, Witness Statement of Cristián Morán, October 19, 2021 ("First Morán Statement"), at para. 10. Notably, Claimant has failed to provide any documents related to its predecessors' (Phelps Dodge) acquisition of Cyprus.

[363] *See* Claimant's Memorial at paras. 117, 155.

[364] *See* Claimant's Memorial at para. 158.

Concentrator Project was always part of the Leaching Project, and thus, covered by the 1998 Stabilization Agreement. It was not. As Respondent explained in Section II.C.1 above, Claimant argues that when the 1998 Stabilization Agreement expressly refers to the "[L]eaching [P]roject," it could also be referring to the Concentrator Project. In particular, Claimant's witness, Ms. Chappuis alleges that the reference to "[L]eaching [P]roject" in the Agreement is just "a referential name"[365] that could encompass the Concentrator Project. Claimant argues that the latter is consistent with the discussions that took place between 1993 and 1994, during Cerro Verde Mine's privatization period between Minero Perú and Cyprus, where Perú allegedly "emphasized the availability of stability guarantees for Cerro Verde, without distinguishing between different processing methods or specific investments."[366]

229. In its Reply, Claimant also alleges that the Concentrator Project that SMCV built from 2004-2006 is virtually the same as that which was envisioned in the 1970s when the government granted mining rights to Minero Perú, or in the 1994 Share Purchase Agreement between Minero Perú and Cyprus.[367] Specifically, Claimant alleges that "MINEM's inclusion of the Concentrator within the existing Beneficiation Concession was entirely in line . . . with its clear recognition [since the 1970s] of the need to develop a concentrator as part of Cerro Verde's integrated production unit."[368] Claimant's wholly self-interested arguments are without merit.

230. As Respondent explained in its Counter-Memorial, as Mr. Ralbovsky explained in his first expert report, and as Respondent further explains in this section, the Leaching Project covered by the 1998 Stabilization Agreement and the large Concentrator Project built from 2004-2006 are entirely different projects: they use different ore, different processes, and produce different products.[369] Thus, the numerous and explicit references to the "[L]eaching [P]roject" in the Agreement cannot be interpreted as a reference to the Concentrator Project (Section a). In addition, the large Concentrator Project differs significantly from the concentrator plants envisioned in the 1970s or in the 1994 Share Purchase Agreement. Claimant cannot credibly claim that the Concentrator Project built from 2004-2006 was envisioned as part of the original Cerro Verde mine (Section b).

---

[365] Exhibit CWS-3, First Chappuis Statement at para. 46.

[366] Claimant's Reply at para. 95.

[367] Claimant's Reply at para. 95.

[368] Claimant's Memorial at para. 329 (emphasis added).

[369] Respondent's Counter-Memorial at paras. 65-67; *see also* Exhibit RER-4, First Ralbovsky Report at Section IV.B.2.

a. The Large Concentrator Project Is a Separate and New Investment, Not Related to the Leaching Project

231. The Cerro Verde Mine's mineral deposits contain three types of copper ore: oxides, secondary sulfide, and primary sulfide.[370] As Respondent explained in its Counter-Memorial, each type of ore is processed in a different manner: (i) oxides and secondary sulfides are processed through leaching and solvent extraction/electrowinning ("SX/EW") facilities to obtain cathodes of 99.99% of copper (refined copper); (ii) primary sulfides are processed through a concentrator plant to obtain copper concentrate (25% copper).[371] Primary sulfides are a type of copper ore (different from oxides and secondary sulfides) which cannot be economically processed in a leaching facility.

232. In his first expert report, Mr. Ralbovsky confirmed that the Concentrator Project (which processed exclusively primary sulfides) was an entirely different project from the Leaching Project (which processed secondary sulfides) that is the subject of the 1998 Stabilization Agreement.[372] Mr. Ralbovsky explained that the Concentrator Project (i) used different ore (primary sulfides instead of secondary sulfides); (ii) processed primary sulfide ore through a different process (through a concentrator process instead of a leaching process); and (iii) produced a different product (concentrate instead of copper cathodes).[373] Also, as Mr. Ralbovsky notes, "leaching is a very specific procedure for processing ore. And, importantly for the purposes of understanding the scope of the Stability Agreement, it is a very different process from the concentrator process which was the subject of SMCV's new investment."[374] Mr. Ralbovsky also explains that the Leaching Project and the Concentrator Project are different projects, because they differ dramatically in size.[375] To illustrate, Mr. Ralbovsky explains that at the time the 2004 Feasibility Study was performed, the Concentrator Project was 6.87 times the size of the Leaching Project in terms of saleable copper relating to each project.[376] Similarly, Mr. Aquiño's first witness statement (Figure 17) also shows the significant difference in size between the Leaching Project and the Concentrator Project when

[370] Claimant's Memorial at para. 30; Respondent's Counter-Memorial at para. 64.

[371] Respondent's Counter-Memorial at para. 66.

[372] *See* Exhibit RER-4, First Ralbovsky Report at Section IV.B.2.

[373] *See* Exhibit RER-4, First Ralbovsky Report at para. 67.

[374] Exhibit RER-4, First Ralbovsky Report at para. 76.

[375] Exhibit RER-9, Second Ralbovsky Report at paras. 6, 79.

[376] Exhibit RER-9, Second Ralbovsky Report at para. 79.

Figure 17 indicates that the Concentrator Project accounts for 64% of the total mining costs.[377] In light of the foregoing, explicit references to the "[L]eaching [P]roject" in the Agreement are clearly intentional, not coincidental and cannot (and should not) be interpreted as including reference to an entirely different investment such as the Concentrator Project. Claimant's arguments to the contrary are not credible.

b. The Large Concentrator Project Is a Separate and New Investment, Not Related to the Sulfide Plants Envisioned in the Cerro Verde Mine in the 1970s and in 1994

233. The large Concentrator Project that SMCV built from 2004-2006 was also entirely different from the sulfide plants envisioned in the 1970s[378] and in the 1994 Share Purchase Agreement.[379]

234. *First*, the sulfide plant that Minero Perú initially considered in 1972 and 1979 is completely different from the Concentrator Project. In 1972, Minero Perú commissioned a feasibility study to explore the possibility of exploiting the Cerro Verde Mine in two different stages: first, the oxides near the surface (which are processed through a leaching process); then, the primary sulfides (which would be processed through a concentrator plant).[380] Claimant admits that around 1972, the cost of the concentrator plant was "prohibitive,"[381] and Minero Perú decided not to build a concentrator plant at that time.[382] Minero Perú conducted additional feasibility studies in 1975, 1977, and 1980 to assess the possibility of building a concentrator plant with a 60,000 MT/D capacity to process Cerro Verde's primary sulfide ore, but none of the feasibility studies indicated it would be economically justifiable to build such a plant.[383] The 60,000 MT/D capacity concentrator plant envisioned in the 1970s was thus never built. In 1979, Minero Perú built a pilot concentrator plant with a capacity of 100 MT/D[384] (by way of comparison, the large Concentrator Project built from 2004-2006 was 1,470 times the size of the

[377] Exhibit RER-9, Second Ralbovsky Report at para. 82. *See* Exhibit CWS-1, Witness Statement of Ramiro Aquiño, August 27, 2021 ("First Aquiño Statement"), at para. 56 and Fig. 17.

[378] Respondent's Counter-Memorial at para. 63.

[379] Respondent's Counter-Memorial at para. 81.

[380] *See* Claimant's Memorial at paras. 36-37.

[381] *See* Claimant's Memorial at para. 35; Exhibit CE-290, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú, Vol. I, February 1, 1972.

[382] Respondent's Counter-Memorial at para. 67; *see also* Claimant's Memorial at para. 37; Exhibit CE-290, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú, Vol. I, February 1, 1972.

[383] *See* Claimant's Memorial at para. 39.

[384] *See* Claimant's Memorial at para. 39.

pilot concentrator).[385] Minero Perú used this small concentrator primarily to test the efficiency of the flotation process on Cerro Verde's primary sulfides. The pilot project was at some point expanded to 3,000 MT/D but, due to a lack of efficiency, it was dismantled in 1997.[386]

235. As Mr. Ralbovsky explains in his first expert report, the large Concentrator Project is substantially different from the 3,000 MT/D pilot concentrator plant:

> First, the 108,000 MT/day concentrator for which SMCV was seeking approval [i.e., the 2004-2006 Concentrator Project] was 36 times the size of the 3,000 MT/day concentrator. Further, the reserves attributed to the concentrator were significantly larger than the reserves identified for leaching. For example, SMCV's 2010 audited financial statements list its unaudited proven reserves of ore for leaching at 243,213/MT, while its proven ore reserves for the concentrator were 3,328,318/MT. Other years I sampled showed similar relationships. The amounts for 2011 were: Leaching- 224,541/MT; Concentrator- 3,752,670/MT (unaudited).[387]

236. *Second*, the sulfide plant envisioned in the 1994 Share Purchase Agreement between Cyprus and Minero Perú was entirely different from the large Concentrator Project. Importantly, the concentrator plant that was envisioned in the 1994 Share Purchase Agreement was never built. In 1996, SMCV conducted additional studies to assess the feasibility of building a concentrator plant and concluded that it was uneconomical to invest in it at the time. In 2000, there was litigation between Phelps Dodge (as Cyprus's acquirer) and Minero Perú (as the seller) over the failure to build the 28,000 MT/D capacity concentrator plant.[388] The matter was settled in March 2001; Phelps Dodge agreed to make additional investments into the Cerro Verde Mine while Minero Perú relinquished its claim regarding the 28,000 MT/D sulfide plant which was never built.

237. Moreover, the concentrator that was envisioned in the 1994 Share Purchase Agreement was much smaller than the one built from 2004-2006. While the 1994 unbuilt-concentrator plant was supposed to have a capacity of 28,000 MT/D, the large Concentrator Project had a capacity of 147,000 MT/D—*i.e.*, the large Concentrator Project that SMCV ended up building in 2004 was 5.3 times larger than the one that had been originally planned but never

[385] Exhibit RER-4, First Ralbovsky Report at para. 75.

[386] *See* Exhibit CWS-1, First Aquiño Statement at para. 31; s*ee also* Exhibit RER-4, First Ralbovsky Report at para. 61.

[387] Exhibit RER-4, First Ralbovsky Report at para. 75 (emphasis omitted).

[388] Respondent's Counter-Memorial at para. 81.

built.[389] Also, while the concentrator plant envisioned in 1994 only represented an investment of about US $200 million, SMCV made a whopping US $850 million investment to build the Concentrator Project.[390]

238. Given that the large Concentrator Project, which was built between 2004 and 2006, was entirely different from that which had been envisioned—but never executed—in the sale between Minero Perú and Cyprus, Claimant should not be able to argue that the large Concentrator Project developed out of the privatization of the Cerro Verde mine. It did not.

239. In conclusion, a review of the applicable legal framework in force when the 1998 Stabilization Agreement was signed and an analysis of the provisions of the Agreement demonstrate that the 1998 Stabilization Agreement granted stability guarantees solely and exclusively to the activities related to the investment project (the Leaching Project) for which the Agreement was approved. The text of the 1998 Stabilization Agreement, the 1996 Feasibility Study, the 1998 Stabilization Agreement Request, and MINEM's Resolution approving the Agreement are free from ambiguity: they refer multiple times to the "[L]eaching [P]roject" of Cerro Verde or to the investment outlined in the 1996 Feasibility Study and they include no reference to a concentrator project. Contrary to Claimant's allegations, the references to "'[L]eaching [P]roject" in the Agreement cannot be understood as comprising the Concentrator Project. The large Concentrator Project was entirely different from the Leaching Project and from the sulfide plants envisioned in the Cerro Verde Mine in the 1970s and in 1994.

240. As Respondent explains in the next section, given the unambiguity of the provisions of the 1998 Stabilization Agreement regarding stability guarantees, Cyprus, SMCV, Phelps Dodge, and Claimant either failed to conduct any serious or adequate due diligence on the scope of the Agreement, or they are hiding the due diligence documents that demonstrate that they knew there was a significant risk that the Agreement did not cover the Concentrator Project.

D. SMCV, CYPRUS, PHELPS DODGE, AND FREEPORT FAILED TO CONDUCT ADEQUATE DUE DILIGENCE ON THE SCOPE OF THE 1998 STABILIZATION AGREEMENT

241. In its Counter-Memorial, Respondent showed that (i) SMCV failed to conduct adequate due diligence about the scope of the 1998 Stabilization and whether it would cover other investment projects prior to signing the Agreement in 1998 and prior to deciding to invest

[389] *See* Exhibit RE-100, Aide Memoire (Cyprus), July 9, 1999, at p. 1; *see also* Claimant's Memorial at para. 164.

[390] *See* Exhibit RE-100, Aide Memoire (Cyprus), July 9, 1999, at p. 1; *see also* Claimant's Memorial at para. 120.

in the Concentrator Project in 2004; (ii) Cyprus (Phelps Dodge's predecessor and owner of SMCV at the time the 1998 Stabilization Agreement was signed) also failed to conduct adequate due diligence prior to investing in SMCV in 1994 and prior to SMCV entering into the Stabilization Agreement in 1998; (iii) Phelps Dodge (Freeport's predecessor) also failed to conduct adequate due diligence on the same matters prior to investing in SMCV in 1999 and prior to approving the investment in the Concentrator Project in October 2004; and (iv) Freeport (the actual Claimant in this case) also failed to conduct any adequate due diligence of its own on the same matters prior to investing in SMCV in March 2007 (after the Concentrator Project had already been completed).[391]

242. Respondent pointed out the large gaps in Claimant's evidence—namely, that Claimant failed to submit any documents prepared for it by internal or external counsel about the scope of the 1998 Stabilization Agreement or the Mining Law and the 1993 Regulation,[392] or a single document showing any due diligence previously conducted by any of SMCV, Cyprus, or Phelps Dodge regarding the scope of the Agreement (on which Freeport allegedly relied before investing in SMCV).[393] Moreover, there is no evidence that SMCV, Phelps Dodge, or any other related entity ever received any written confirmation from the government endorsing SMCV's interpretation of the 1998 Stabilization Agreement. Instead, SMCV and Phelps Dodge elected to cross their fingers and hope that their interpretation of the law and the 1998 Stabilization Agreement was correct, taking the chance that it was not—and, to the extent that it paid the matter any attention at all, Freeport evidently decided, in turn, that SMCV and Phelps Dodge's finger-crossing was sufficient for its purposes.

243. Respondent pressed further on the point in document production. In response to Respondent's requests, Claimant still was unable to produce any documents that would show that adequate due diligence was undertaken (i) before SMCV and Cyprus entered into SMCV's 1994 and 1998 Stabilization Agreements; (ii) before Phelps Dodge decided to invest in Perú in 1999; (iii) before SMCV or Phelps Dodge decided to invest in the Concentrator Project in October 2004; or (iv) before Freeport appeared on the scene and invested in SMCV in March 2007 (after

[391] *See generally* Respondent's Counter-Memorial at Section II.C.

[392] *See* Respondent's Counter-Memorial at para. 102. *See generally id.* at Section II.C.

[393] *See* Respondent's Counter-Memorial at paras. 109, 111. *See generally id.* at Section II.C. *See also* Exhibit CWS-5, Witness Statement of Randy L. Davenport, October 19, 2021 ("First Davenport Statement"), at para. 31.

the construction of the Concentrator Plant).[394] Nor did Claimant put on the record with its Reply evidence of adequate due diligence by any of the aforementioned companies. And, once again, Claimant's Reply did not contain a single, contemporaneous written confirmation from any representative of the government of Perú endorsing Claimant's, Phelps Dodge's, or SMCV's claimed interpretation of the scope of the Agreement.

244. As Respondent discusses in greater detail in Section II.D.5 below, the documents that Claimant did produce or put on the record further confirm that SMCV, Phelps Dodge, and Freeport failed to conduct any adequate due diligence and that, at a minimum, they knew or should have known that there was a risk that the Concentrator Project would not be covered by the Agreement. Regarding the documents Claimant produced, as a general matter, they reflect what the companies thought they had heard or what they hoped to hear from government officials. But, once again, Claimant brought forward no evidence of serious analyses of the scope of the 1998 Stabilization Agreement or of whether the Concentrator might be subject to taxes or royalty payments—no analyses by Cyprus and SMCV when entering into the 1998 Stabilization Agreement, by Phelps Dodge when acquiring Cyprus, by SMCV and Phelps Dodge when considering investing in the Concentrator Project, or by Freeport when considering acquiring Phelps Dodge (and with it, a part of SMCV). More importantly, the documents produced do show (i) that SMCV and Phelps Dodge knew that neither the Concentrator Project, nor any other investment project other than the Leaching Project, was included in the 1998 Stabilization Agreement; (ii) that SMCV and Phelps Dodge understood that they had to amend the 1998 Stabilization Agreement in order to include the Concentrator Project; and (iii) that they were particularly interested in including the Concentrator Project in the 1998 Stabilization Agreement in order to avoid having to pay royalties for that Project.

245. Lacking evidence of any meaningful due diligence, in its Reply, Claimant *first* contends that "SMCV, Freeport or Phelps Dodge's due diligence is completely irrelevant to the question of SMCV's legal rights . . . "[395] *Second*, Claimant continues to rely on the purported due diligence that Phelps Dodge and SMCV (but, notably, not Freeport itself) performed about the scope of the 1998 Stabilization Agreement (which Respondent discussed and rejected as

[394] *See* Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request Nos. 5 to 11 (pp. 20-54).

[395] Claimant's Reply at para. 97.

inadequate in its Counter-Memorial)[396] and insists, without merit, that it did constitute adequate due diligence (it did not).[397]

246. Claimant's failure to produce or exhibit any documents evidencing meaningful due diligence is telling. *First*, by not even attempting to show or argue that Freeport conducted any meaningful due diligence with respect to the scope of the 1998 Stabilization Agreement, Claimant is conceding that Freeport did not, in fact, do any due diligence on the scope of the 1998 Stabilization Agreement when it acquired Phelps Dodge (and, in turn, the Cerro Verde Mine) on March 19, 2007.[398] *Second*, in light of the size of the investment in the Concentrator Project (US $850 million[399]), it is hard to imagine that SMCV and Phelps Dodge did not undertake a lengthy due diligence process and serious analysis on the scope of the 1998 Stabilization Agreement. The absence of any documentation on the record of such analysis suggests two alternative scenarios. Either Claimant is withholding SMCV's/Phelps Dodge's due diligence documents, because those documents would show that it knew full well that the Concentrator Project was not, or very well might not be, covered by the 1998 Stabilization Agreement, or SMCV and Phelps Dodge did not undertake any meaningful due diligence before constructing the Concentrator Project. Either scenario is fatal to Claimant's case.

247. As a preliminary matter, an investor's lack of adequate due diligence is relevant context in determining whether its treaty rights have been breached. As the tribunal in *MTD v. Chile* concluded, it is the investor's responsibility (i) to assure itself that it is properly advised—particularly when investing abroad in an unfamiliar environment; and (ii) to conduct adequate due diligence before investing in a specific project.[400] Along the same lines, the tribunal in *Naturgy v. Colombia*, when analyzing the claimant's legitimate expectations claims, noted that the investor's due diligence (or lack thereof) provided an "important context relevant to assessing the specific claims based on the FET standard that Claimants ma[de]."[401] The tribunal in *Stadtwerke v. Spain* went a step further and held that "[f]or an investor's expectation to be

[396] *See* Respondent's Counter-Memorial at Section II.C.3-4.

[397] *See* Claimant's Reply at para. 90.

[398] *See generally* Claimant's Reply at Section II.A.4.iii.

[399] Claimant's Reply at para. 1.

[400] *See* Exhibit RA-91, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, at paras. 164, 167, 242.

[401] Exhibit RA-92, *Naturgy Energy Group, S.A. and Naturgy Electricidad Colombia, S.L. (formerly Gas Natural SDG, S.A. and Gas Natural Fenosa Electricidad Colombia, S.L.) v. Republic of Colombia*, ICSID Case No. UNCT/18/1, Award, March 12, 2021, at para. 281 (emphasis added).

reasonable, it must also arise from a rigorous due diligence process carried out by the investor."[402] Therefore, Claimant's allegation that "SMCV, Freeport or Phelps Dodge's due diligence is completely irrelevant to the question of SMCV's legal rights under the Mining Law and Regulations and the Stability Agreement"[403] is flatly incorrect.

248. In the following sub-sections, Respondent focuses on the record evidence to which Claimant points in attempting to assert that adequate due diligence was undertaken and on the documents that Claimant produced in response to Respondent's document production requests related to Cyprus's, Phelps Dodge's, SMCV's, and Claimant's due diligence (Document Requests Nos. 5-11). *First*, Respondent explains that, once again, Claimant cannot point to any contemporaneous documents that demonstrate that SMCV, Cyprus, Phelps Dodge, and/or Freeport undertook any adequate or reasonable due diligence to conclude that the 1998 Stabilization Agreement covered the Concentrator Project (Sections 1, 2, 3, and 4). *Second*, Respondent shows that documents contemporaneous to SMCV's and Phelps Dodge's (Freeport's predecessor) decision to build the Concentrator Project, and to Freeport's decision to invest in Perú in March 2007, demonstrate that SMCV, Phelps Dodge (Claimant's predecessor), and Claimant knew, at a minimum, that there was a real risk that the 1998 Stabilization Agreement did not cover the Concentrator Project (Section 5). They must be held to that contemporaneous knowledge, which flies in the face of their claims here about the Stabilization Agreement's scope.

1. SMCV and Cyprus Did Not Conduct Adequate Due Diligence Regarding the Scope of Mining Stabilization Agreements Before SMCV Entered into the 1994 and 1998 Stabilization Agreements

249. As Respondent discussed in its Counter-Memorial, SMCV signed two mining stabilization agreements many years prior to investing in the Concentrator Project in 2004: the 10-year 1994 Stabilization Agreement and the 15-year 1998 Stabilization Agreement (the subject of this arbitration).[404] In its Counter-Memorial, Respondent explained that Claimant failed to submit or to even mention in its Memorial any document showing any due diligence conducted by SMCV or Cyprus at the time SMCV entered into the 1994 and 1998 Stabilization Agreements

[402] Exhibit RA-93, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, December 9, 2019, at para. 264.

[403] Claimant's Reply at para. 97.

[404] *See* Respondent's Counter-Memorial at Sections II.B.2 and II.B.3.

with Perú that would support Claimant's or SMCV's alleged understanding of the scope of the 1998 Stabilization Agreement.[405]

250. In its Reply, based exclusively on Mr. Davenport's and Mr. Morán's witness statements, Claimant asserts that "SMCV's initial assumption that the Concentrator would be entitled to stability guarantees was well-founded."[406] However, Claimant fails, once again, to submit or to even mention any document showing adequate due diligence conducted by SMCV or Cyprus that would support such an assertion. Even if some of the information in any such documents were privileged, Claimant could have redacted privileged information from the documents and submitted the redacted documents on the record in order to show that SMCV actually conducted adequate due diligence at the time. Claimant has not done that. It is appropriate, therefore, to conclude that SMCV did not conduct any such analysis at the time it entered into the 1998 Stabilization Agreement (or that any analysis it did conduct did not support its current interpretation of the Agreement).

251. During document production, and in response to Document Requests Nos. 5, 6, and 7, Freeport agreed to produce "[d]ocuments recording due diligence [Cyprus or SMCV] performed on the scope of stability guarantees under the Mining Law and Regulations"[407] before Cyprus acquired 91.65% of Minero Perú's shares in SMCV in 1994,[408] before SMCV entered into the 1994 Stabilization Agreement,[409] and before SMCV entered into the 1998 Stabilization Agreement.[410] Claimant produced only one document responsive to these requests: a draft Information Memorandum that Cyprus prepared in April 1994 ("Cyprus's Draft Information Memorandum"), and the final version of the same Information Memorandum prepared in June 1994 ("Cyprus's Final Information Memorandum").[411]

---

[405] *See* Respondent's Counter-Memorial at para. 105.

[406] Claimant's Reply at para. 92.

[407] Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at p. 25 (Tribunal's Decision regarding Document Request No. 5), p. 30 (Tribunal's Decision regarding Document Request No. 6), and p. 35 (Tribunal's Decision regarding Document Request No. 7).

[408] *See* Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 5 (pp. 21, 25).

[409] *See* Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 6 (pp. 26, 30).

[410] *See* Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 7 (pp. 31, 35).

[411] *See generally* Exhibit RE-319, Cyprus Amax Minerals Company, "Information Memorandum: Cerro Verde Project, Arequipa, Peru," April 1994; Exhibit RE-316, Cyprus Amax Minerals Company, "Information Memorandum: Cerro Verde Project, Arequipa, Peru," June 1994.

252. Cyprus's Draft and Final Information Memoranda, however, confirm that Cyprus did not conduct adequate due diligence regarding the scope of mining stabilization agreements and it certainly fails to support Claimant's assertion in this arbitration that mining stabilization agreements cover every investment made within a mining company's concessions or mining unit during the Agreement's term. Cyprus's Draft and Final Information Memoranda devote a brief section to describing the types of stability benefits granted under 10-year and 15-year mining stabilization agreements (*i.e.*, tax, administrative or foreign exchange stability) in Perú.[412] That section (which is identical both in the Draft and the Final Information Memoranda), however, does not discuss the scope of those stability guarantees under 10- or 15-year mining stabilization agreements (*e.g.*, whether those stability guarantees are generally granted to a specific investment project, the mining company's concessions, or "mining units"), much less show that Cyprus understood that mining stabilization agreements covered every activity or investment conducted within SMCV's concession or mining unit.[413]

253. In response to Respondent's Document Production Requests Nos. 5, 6, and 7, Claimant also withheld six documents and listed them on its privilege log.[414] None of these documents indicates that Cyprus or SMCV conducted adequate and meaningful due diligence with respect to the scope of mining stabilization agreements generally or the 1998 Stabilization Agreement, in particular.

254. *First*, Claimant lists a memorandum prepared by internal counsel at Cyprus, allegedly containing legal advice on a draft of the 1994 Share Purchase Agreement dated September 30, 1993.[415] Based on Claimant's own description, this document does not appear to contain any analysis regarding the scope of mining stabilization agreements under Peruvian law. Thus, it does not show that Cyprus conducted adequate due diligence on the matter.

255. *Second*, Claimant lists (i) three faxes sent by Estudio Rubio, Leguia, Normand & Asociados ("Estudio Rubio") (SMCV's counsel) dated June 11 and 18, 1997, allegedly

---

[412] *See* Exhibit RE-319, Cyprus Amax Minerals Company, "Information Memorandum: Cerro Verde Project, Arequipa, Peru," April 1994, at pp. 28-29; Exhibit RE-316, Cyprus Amax Minerals Company, "Information Memorandum: Cerro Verde Project, Arequipa, Peru," June 1994, at pp. 20-21.

[413] *See generally* Exhibit RE-319, Cyprus Amax Minerals Company, "Information Memorandum: Cerro Verde Project, Arequipa, Peru," April 1994, at pp. 28-29; Exhibit RE-316, Cyprus Amax Minerals Company, "Information Memorandum: Cerro Verde Project, Arequipa, Peru," June 1994, at pp. 20-21.

[414] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

[415] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

containing legal advice about stability guarantees under the Mining Law and the 1994 Stabilization Agreement; and (ii) one fax dated June 18, 1997, allegedly transmitting and relaying internally within SMCV Estudio Rubio's legal advice regarding stability guarantees under the Mining Law and the 1994 Stabilization Agreement.[416] Notably, these documents were prepared three years after the 1994 Stabilization Agreement was signed. Thus, they do not constitute contemporaneous (*i.e.*, at the time of signing) diligence about the scope of that Agreement. Moreover, based on Claimant's description of the documents, there is no basis to believe they assessed whether future stabilization agreements would cover all of the investments and activities that SMCV conducted within its concessions or "mining unit." The Mining Law and Regulations identify multiple types of stability guarantees that can be granted in a mining stabilization agreement (for example, tax, administrative, and currency exchange stability). Thus, the mere fact that Estudio Rubio provided advice about "stability guarantees under the Mining Law,"[417] does not show that SMCV did any adequate due diligence on whether mining stabilization agreements cover a specific investment project or instead cover any investment or activity conducted within a mining company's concession or "mining unit".

256. *Third*, Claimant lists a fax dated June 18, 1997, allegedly requesting legal advice from Estudio Rubio regarding stability guarantees under the Mining Law and Regulations, and the *Comisión Nacional de Inversiones y Tecnologías Extranjeras* ("CONITE") stabilization agreement.[418] Based on Claimant's vague description, this document also does not prove adequate due diligence on the particular question at issue here: whether mining stabilization agreements cover all activities or investments made within a mining company's concessions or so-called "mining unit." As mentioned above, the mere fact that SMCV asked Estudio Rodrigo about stability guarantees under the Mining Law and Regulations does not mean that they did due diligence on the scope of mining stabilization agreements with respect to additional investments not mentioned in the agreements.

257. Therefore, Claimant has failed to submit on the record or to produce to Respondent any document showing any due diligence conducted by SMCV or Cyprus at the time

[416] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

[417] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

[418] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

SMCV entered into the 1994 and 1998 Agreements with Perú that would support Claimant's or SMCV's alleged understanding of the scope of mining stabilization agreements in general or the 1998 Stabilization Agreement, in particular. This is perhaps not surprising, given their timing (many years before any serious discussion of the Concentrator Plant), but it is noteworthy nonetheless that Claimant has no evidence on the record of due diligence at the time of the 1998 Stabilization Agreement (or earlier) about its applicability or not to projects other than the Leaching Plant on which the Agreement was based.

2. Phelps Dodge Did Not Conduct Adequate Due Diligence Regarding the Scope of the 1998 Stabilization Agreement before It Invested in SMCV in 1999

258. In October 1999, a year and eight months after Perú and SMCV (then owned by Cyprus) entered into the 1998 Stabilization Agreement, Phelps Dodge acquired Cyprus.[419] In its Counter-Memorial, Respondent demonstrated that Phelps Dodge failed to conduct adequate due diligence regarding the scope of the 1998 Stabilization Agreement prior to its investment in SMCV in 1999.[420] In its Reply, Claimant cites to the second witness statement of Mr. Cristián Morán (former Director of Finance at Phelps Dodge Mining Services), and insists that when Phelps Dodge invested in Perú, it understood that the 1998 Stabilization Agreement would apply to the entire Cerro Verde Mine.[421] Mr. Morán's description of the facts is misleading, and Claimant has failed to produce any document that would prove his claim.

259. *First*, during document production, Claimant was ordered to produce "[d]ocuments recording due diligence Phelps Dodge performed on the scope of stability guarantees under the Mining Law and Regulations."[422] However, Claimant failed to produce any documents in response to that request.[423] Also, Claimant did not list any document related to this request in its privilege log.[424] Thus, the Tribunal should conclude that no such due diligence was

[419] *See* Claimant's Memorial at para. 84; Exhibit CWS-8, First Morán Statement at para. 10.

[420] *See* Respondent's Counter-Memorial at Section II.D.2.

[421] *See* Exhibit CWS-19, Reply Witness Statement of Cristián Morán, September 13, 2022 ("Second Morán Statement"), at paras. 5-8; *see also* Claimant's Reply at para. 100(b); Exhibit CWS-8, First Morán Statement at paras. 10-16.

[422] Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 8 (p. 40).

[423] Exhibit RE-340, Claimant's Letter to Respondent transmitting Claimant's Voluntary Production, June 22, 2022; *see also* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022.

[424] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

performed by Phelps Dodge (nor, therefore, could any such diligence have been relied upon by Claimant).

260. *Second*, in his second witness statement, Mr. Morán contends that in his first witness statement he did point to documents that allegedly show that, at the time Phelps Dodge acquired SMCV, Phelps Dodge understood the 1998 Stabilization Agreement to have an all-encompassing scope.[425] According to Mr. Morán, a 372-page report that he cited in his first witness statement supports his testimony.[426] It does not. The 372-page report that described Phelps Dodge's due diligence of SMCV does not mention even once the 1998 Stabilization Agreement, much less discuss whether that Agreement (on its terms and/or pursuant to Peruvian law) would cover investments in new projects other than the Leaching Plant, such as the Concentrator Project.[427]

261. Mr. Morán also alleges that he reviewed SMCV's accounting records after Phelps Dodge acquired SMCV and that those records confirmed that SMCV treated some investments that were not described in the 1996 Feasibility Study as stabilized,[428] and that in the years thereafter, no Peruvian authority sought to deny the 1998 Stabilization Agreement's guarantees to those investments.[429] By definition, events that occurred after Phelps Dodge invested in SMCV cannot establish that due diligence was undertaken before it made its investment. Moreover, the fact that the Peruvian government had not audited SMCV's investments, and therefore had not had the occasion to deny stabilization to some of them, is not evidence that the additional investments were, in fact, stabilized. At best, it is evidence that SMCV acted according to its preferred interpretation of the Agreement; it is not evidence that SMCV or Phelps Dodge undertook any due diligence to establish whether that interpretation was consistent with Peruvian law, and certainly is not evidence that Perú agreed that that interpretation was actually correct.

262. *Third*, Mr. Morán states that he reviewed the 1994 Share Purchase Agreement between Cyprus and Minero Perú.[430] He contends that the 1994 Share Purchase Agreement

---

[425] *See* Exhibit CWS-19, Second Morán Statement at para. 7.

[426] *See* Exhibit CWS-19, Second Morán Statement at para. 7.

[427] *See generally* Exhibit CE-363, Phelps Dodge, Cerro Verde Assessment (October-November 1999).

[428] Exhibit CWS-8, First Morán Statement at para. 16; Exhibit CWS-19, Second Morán Statement at para. 7; *see also* Claimant's Reply at para. 100(b).

[429] *See* Exhibit CWS-8, First Morán Statement at paras. 16-17.

[430] *See* Exhibit CWS-19, Second Morán Statement at para. 8.

supposedly confirmed Claimant's position that the 1998 Stabilization Agreement would cover the Concentrator Project because (i) the 1994 Share Purchase Agreement contained a commitment to build a flotation plant (a version of a concentrator plant);[431] and (ii) nothing in the 1994 Share Purchase Agreement—including the model mining stabilization agreement attached as Appendix H—"suggested . . . that each Peruvian mining stability agreement only applied to one specific investment in a mining unit . . . ."[432] Mr. Moran's assertion is simply wrong.

263. Mr. Morán's reference to the 1994 Share Purchase Agreement is entirely irrelevant. The fact that, in 1994, Cyprus had planned to eventually build a concentrator plant does not say anything about whether that plant would fall within scope of the 1998 Stabilization Agreement. No concentrator plant was included in SMCV's 1996 Feasibility Study (which outlines the object of the 1998 Stabilization Agreement) nor in the 1998 Stabilization Agreement; thus, it was not covered by the Agreement. Moreover, as Respondent explains in its Counter-Memorial and in Section II.C.2 above, the flotation plant that was envisioned in the 1994 Share Purchase Agreement to exploit primary sulfides was not the same project that SMCV later developed in 2004. To give the simplest illustration, the plant that was envisioned in 1994 was supposed to have a capacity for 28,000 MT/D, which is less than one-fifth the size of the Concentrator Project that was built in 2004, which had a capacity of 147,000 MT/D.[433]

264. In addition, contrary to Mr. Morán's allegations, the plain language of the model stabilization agreement contained in Appendix H of the 1994 Share Purchase Agreement does not indicate that all of SMCV's future investments in its concession would be covered either by the 1994 Stabilization Agreement or the 1998 Stabilization Agreement. More importantly, nothing in that document states that mining stabilization agreements generally apply to concessions or so-called mining units. To the contrary, Clause 1.3 describes the specific investment for which that 10-year mining stabilization agreement (the 1994 Stabilization Agreement) was signed.[434]

---

[431] *See* Exhibit CWS-19, Second Morán Statement at para. 8.

[432] Exhibit CWS-19, Second Morán Statement at para. 8.

[433] Respondent's Counter-Memorial at para. 81; *see also* Exhibit RER-9, Second Ralbovsky Report at paras. 6, 78-80.

[434] *See* Exhibit CE-4, Share Purchase Agreement between Cyprus Climax Metals Company and Empresa Minera del Peru S.A., March 17, 1994, at Appendix H.

3. Phelps Dodge and SMCV Failed to Conduct Adequate Due Diligence When They Decided to Invest in the Concentrator Project

265. On October 11, 2004, Phelps Dodge's and SMCV's Boards of Directors conditionally approved an additional investment of US $850 million for the construction of the Concentrator Project, "contingent upon receiving all required permits from the Peruvian government and placing necessary financing."[435] In February 2005, Phelps Dodge confirmed its approval to go forward with the Concentrator Project.[436]

266. In its Counter-Memorial, Respondent showed that Phelps Dodge and SMCV failed to conduct adequate due diligence and failed to obtain any written assurances from the government that the Concentrator Project would be covered by the 1998 Stabilization Agreement when they decided to invest in that Project.[437] Claimant's Reply and documents produced during document production confirm this. In particular, Claimant's Reply and Claimant's document production show (i) that Phelps Dodge and SMCV understood that the 1998 Stabilization Agreement, without any amendments, covered only the Leaching Project and did not cover any other investment project, such as the Concentrator Project—which directly contradicts Claimant's unfounded theory in this arbitration that mining stabilization agreements automatically cover any and all investments of any kind in a concession or so-called "mining unit" (rather than specific investment projects); (ii) that Phelps Dodge and SMCV failed to conduct adequate due diligence to determine whether expanding the area and capacity of the Beneficiation Concession would also have the effect of expanding the scope of the 1998 Stabilization Agreement to include the Concentrator Project; and (iii) that Phelps Dodge and SMCV understood that they needed, but failed ever to obtain, written confirmation from the government that the scope of the 1998 Stabilization Agreement would cover the Concentrator Project.

267. In its Reply, Claimant and its witnesses insist that, at the time Phelps Dodge and SMCV were considering the additional capital investment in the Concentrator Project in 2004, they understood that the 1998 Agreement extended its stability guarantees to the Concentrator

---

[435] Respondent's Counter-Memorial at para. 112 (*citing* Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5; Exhibit CE-470, SMCV, Board of Directors Meeting Minutes, October 11, 2004, at p. 1 (of PDF)). *See also* Exhibit CWS-5, First Davenport Statement at para. 41; Exhibit CWS-8, First Morán Statement at para. 27.

[436] *See* Exhibit CWS-8, First Morán Statement at para. 30; Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5.

[437] *See* Respondent's Counter-Memorial at Section II.C.3.

Project and that MINEM's approval to expand SMCV's Beneficiation Concession (obtained on October 26, 2004) confirmed this understanding.[438] However, Claimant fails to submit any contemporaneous Phelps Dodge or SMCV documents from that time that support its assertions. Claimant relies exclusively on witness testimony or on documents that, in fact, do not prove that Phelps Dodge or SMCV undertook adequate due diligence or obtained any written document from the government confirming that the Concentrator Project would be covered by the 1998 Stabilization Agreement. In particular, the witness testimony presented by Claimant is revealing. It shows that Phelps Dodge's and SMCV's understanding of the scope of the Agreement was (and is) based on mere unsubstantiated assumptions. Moreover, documents produced by Claimant during document production—which Claimant elected not to exhibit in its Reply—show that Phelps Dodge and SMCV knowingly took a calculated risk regarding the coverage of the 1998 Stabilization Agreement when deciding to invest in the Concentrator Project.

268. *First,* two years before Phelps Dodge and SMCV decided to invest in the Concentrator Project, SUNAT had already issued a public report in response to an inquiry of a taxpayer (the "2002 SUNAT Report") in which it explained that the scope of mining stabilization agreements was limited to the investment project(s) that gave rise the specific agreement. As discussed in more detail in Section II.G below,[439] in the 2002 SUNAT Report, SUNAT concluded 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."[440] Contemporary documents on the record (*i.e.*, a power point presentation allegedly made by SMCV and Phelps Dodge to MINEM in 2004) show Phelps Dodge and SMCV were aware of the existence and content of this report.[441] Specifically, on August 2004, SMCV prepared a presentation to MINEM regarding the

[438] *See* Claimant's Reply at Section II.A.4 and at para. 90; *see also* Exhibit CWS-5, First Davenport Statement at para. 31; Exhibit CWS-16, Reply Witness Statement of Randy L. Davenport, September 13, 2022 ("Second Davenport Statement"), at para. 14; Exhibit CWS-8, First Morán Statement at para. 24; Exhibit CWS-11, Witness Statement of Julia Torreblanca, October 19, 2021 ("First Torreblanca Statement"), at paras. 25-27.

[439] *See infra* at Section II.G.

[440] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa.*") (emphasis added).

[441] *See* Exhibit CE-453, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement, August 2004, at slide 39.

possibility to amend the 1998 Stabilization Agreement to include the Concentrator Project, as discussed below in Section II.E.4(a). On slide 39 of this presentation, SMCV quotes SUNAT's report in an attempt to show that SUNAT supported SMCV's request.

269. Thus, as early as 2002 and certainly by August 2004, Phelps Dodge and SMCV knew of SUNAT's position that a new investment project (different from the Leaching Project, which was the "investment activit[y] that [was] the subject matter of the agreement[]") would not be covered by the 1998 Stabilization Agreement—or at a minimum, they knew that there was a risk that such project would not be covered by the Agreement. A diligent investor should have sought—at a minimum—to investigate further SUNAT's publicly declared interpretation of the Mining Law before investing US $850 million in a new project, at least if the investor intended to rely on a specific stabilization agreement in order to make that investment (an intent that Claimant has failed to prove in this arbitration). Neither Phelps Dodge nor SMCV undertook any such due diligence.

270. *Second,* on March 2004, seven months before Phelps Dodge and SMCV made their decision to invest in the Concentrator Project, Vice Minister Polo explained at a public event organized by Congress— the Mining Royalties Forum, which Congress convened to discuss the enactment of a royalties law with various private- and public-sector stakeholders—that Stabilization Agreements only cover specific investment projects. As Vice Minister Polo explained:

> Stabilization agreements are not granted per company, that is important to clarify. A company can have stabilization agreement for one project and not have it for another, or 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.[442]

271. Apparently, SMCV and Phelps Dodge chose to ignore Mr. Polo's explanation.

272. *Third*, Claimant alleges that, before proceeding with the investment in the Concentrator Project, "SMCV representatives met multiple times with Government officials to

[442] Exhibit RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts), at timestamp 00:08:12 ("*Los contratos de estabilidad no se dan por empresa, eso es importante aclarar. Una empresa puede tener [un] contrato de estabilidad por un proyecto y no tenerlo por otro, o tener una actividad antigua que no tiene contrato de estabilidad y una nueva que sí lo tiene. Eso es así, no se da para toda la empresa. Se hace una inversión arriba de 20 millones o arriba de 50, según sea el caso, y eso da derecho a estabilidad por esa inversión, por ese desarrollo, no a toda la empresa.*") (emphasis added).

discuss, among other[] [things], whether the Concentrator would be entitled to stability guarantees," and that in those meetings "Peru confirmed to SMCV that the Concentrator would be covered . . . "[443] Perú, however, did not provide any such confirmation. Aware of the weaknesses in its own case, Claimant relies exclusively on unsubstantiated witness testimony, and is unable to identify any contemporaneous written statement from the government endorsing or confirming SMCV's alleged (but incorrect) understanding of the scope of the Agreement:[444]

a) Mr. Randy Davenport (President and General Manager of SMCV from 2000 to 2005) alleges that three facts were the foundation for SMCV's "assum[ption]"[445] that the Agreement covered the Concentrator Project: (i) "SMCV understood that the Government expected SMCV to exploit the primary sulfides at Cerro Verde;"[446] (ii) the fact that under the 1994 Stabilization Agreement "the Government had stabilized SMCV's small pilot concentrator . . . along with SMCV's leaching operations;"[447] and (iii) the government's (alleged) application of the 1998 Stabilization Agreement to certain 2001 investments that were intended to expand the leaching pads.[448]

None of these facts supports SMCV's interpretation of the scope of the 1998 Stabilization Agreement, and, of course, none shows any due diligence having been performed prior to investing in the Concentrator Project in 2004-2005. First, as Respondent explained above, the reference to the government's alleged expectations in the 1994 Share Purchase Agreement (entered between Cyprus and the state-owned company Minero Perú) are entirely irrelevant to the scope of the 1998 Stabilization Agreement (entered between SMCV and the Peruvian government), which was an entirely separate contract with a different entity that is necessarily governed by its own terms. Whatever expectations Cyprus might have had in 1994 regarding a share purchase agreement could not determine the terms of a mining stabilization agreement, let alone a mining stabilization agreement that was entered into some four years later with a different

[443] Claimant's Reply at para. 101.

[444] *See generally* Claimant's Reply at Section II.A.4(i); Claimant's Memorial at Section III.G.3.

[445] Exhibit CWS-16, Second Davenport Statement at para. 9.

[446] Exhibit CWS-16, Second Davenport Statement at para. 9(a).

[447] Exhibit CWS-16, Second Davenport Statement at para. 9(b).

[448] Exhibit CWS-16, Second Davenport Statement at para. 9(c).

counterparty. Second, Mr. Davenport simply does not explain how the small concentrator was supposedly stabilized under the 1994 Stabilization Agreement. It is not mentioned in the 1994 Agreement. Third, the fact that the Peruvian government did not audit (and thus had not considered the propriety of stabilization for) the investments intended to expand the leaching pads, is not evidence that the additional investments were stabilized or had Perú's blessing.

b) Mr. Davenport alleges that in late 2003, a lawyer who worked for Ms. Chappuis (who was MINEM's Director General of Mining from 2002 to 2004 and now Claimant's witness) "told" Mr. Davenport's team that "SMCV could count" on the 1998 Stabilization Agreement protections.[449] However, Mr. Davenport fails to submit any contemporaneous document that proves a meeting where such a statement allegedly was made actually happened or that the statement itself was ever, in fact, made. Ms. Chappuis's assertion alone is insufficient.

c) Mr. Davenport also claims that, in September 2003, "MINEM gave [Phelps Dodge] further confidence that the Stability Agreement would apply to the Concentrator by confirming that SMCV was eligible to use the profit reinvestment benefit to construct the Concentrator."[450] The documents Mr. Davenport references do not support his assertion. As Respondent explains below in Section II.E.4(a), in September 2003, SMCV received two reports in which the government confirmed that SMCV was eligible to reinvest profits from the Leaching Project into the Concentrator Project.[451] However, MINEM did <u>not</u> state that the Concentrator Project and all of its related activities would be covered by the stability benefits that had been granted to the Leaching Project.[452] More importantly, in one of those reports, Ms. Chappuis herself clarified that the scope of the 1998 Stabilization Agreement was limited to the Leaching Project:

> 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 <u>is granted to the Cerro Verde Leaching Project and not to the company and</u>

[449] Exhibit CWS-5, First Davenport Statement at para. 36.

[450] Exhibit CWS-16, Second Davenport Statement at para. 9(d).

[451] *See infra* at Section II.E.4(a).

[452] *See infra* at Section II.E.4(b).

> the Regime is the one described in the aforementioned agreement.[453]

Thus, Claimant's own witness, Ms. Chappuis, declared in 2003 that the Stabilization Agreement only covered the "Cerro Verde Leaching Project" and "not [] the company."[454] Mr. Davenport could not, therefore, have relied on these documents to support his alleged understanding that the scope of the 1998 Stabilization Agreement covered all investment made by the company. If he did see those documents at the time, then he knew that stabilization was granted to the Cerro Verde Leaching Project, not the company *in toto* and, thus, not the Concentrator Project.

Moreover, as Respondent explains in further detail in Section II.E.4(b) below, the 2004 approval of reinvestment of profits from the Leaching Project to build the Concentrator Project did not constitute any type of confirmation regarding the scope of the 1998 Stabilization Agreement. Neither the report recommending the profit reinvestment approval nor the actual approval itself said anything about whether the 1998 Stabilization Agreement would cover all the activities related to the new investment in the Concentrator Project.[455]

d) Mr. Davenport also claims that in August 2004, Ms. Chappuis informed his team that "because the Concentrator would be part of the Cerro Verde Mining Unit, SMCV's existing Stability Agreement would apply to the Concentrator if MINEM approved its incorporation into the Beneficiation Concession, which was covered by the Stability Agreement."[456] Mr. Davenport fails to cite to a single document that proves that Ms. Chappuis ever made such a statement, or that MINEM ever confirmed Ms. Chappuis's alleged statement.

---

[453] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1 ("*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8° del Decreto Supremo N° 027-98-EF, se precisa que la aplicación del Régimen Estabilizado está otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato.*") (emphasis added).

[454] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1.

[455] *See* Respondent's Counter-Memorial at para. 168; s*ee also* Exhibit CE-477, MINEM, Report No. 1334-2004-EM-DGM/TNO, October 29, 2004; Exhibit CE-479, MINEM, Report No. 841-2004-MEM/DGM/PDM, November 30, 2004.

[456] Exhibit CWS-16, Second Davenport Statement at para. 16.

Moreover, as Respondent discusses in further detail below in Section II.E.4(a), even if Ms. Chappuis made such a statement, Phelps Dodge and SMCV should not have relied on it. Ms. Chappuis's statement did not constitute an actual confirmation from MINEM that SMCV could include the Concentrator Project within the scope of the Stabilization Agreement. In addition, MINEM's approval of the expansion of the Beneficiation Concession did not indicate that the Concentrator Project would be covered by the 1998 Stabilization Agreement as a result of the expansion.[457] The Beneficiation Concession expansion approval is entirely silent on the matter, and Claimant and its witnesses failed to produce or mention any document that proved otherwise.

e) Ms. Torreblanca (SMCV's internal lawyer) discusses in her witness statements certain alleged meetings with government officials, where she purportedly obtained oral statements that the Agreement covered the Concentrator Project.[458] Although Ms. Torreblanca also cites in her witness statements to some contemporaneous documents, she fails to cite to any relevant documents that (i) support her (and Claimant's) position that the Agreement extended to the Concentrator Project; or (ii) confirm the content of the alleged meetings with government officials that she describes in her witness statements. First, Ms. Torreblanca cites to SMCV's 2002 Pre-Feasibility Study,[459] but the Study does not demonstrate that the 1998 Stabilization Agreement covered the Concentrator Project. The 2002 Pre-Feasibility Study, similar to the 2004 Feasibility Study, simply assumed without analysis that the 1998 Stabilization Agreement applied to the Concentrator Project.[460] Second, Ms. Torreblanca alleges that in MINEM's 2003 report regarding the profit reinvestment benefit, the government already recognized that the Concentrator Project would form part

[457] *See infra* at Section II.E.4(a).

[458] *See* Exhibit CWS-21, Reply Witness Statement of Julia Torreblanca, September 13, 2022 ("Second Torreblanca Statement"), at paras. 16-17; *see also* Exhibit CWS-11, First Torreblanca Statement at paras. 24-26.

[459] Exhibit CWS-21, Second Torreblanca Statement at paras. 6-7.

[460] Exhibit CE-928, SMCV, Primary Sulfide Preliminary Pre-Feasibility Study, December 2002, at pp. 17, 37; *see also* Exhibit CE-20, Fluor Feasibility Study, *Cerro Verde Primary Sulfide Project*, May 2004, at pp. 167-68 (of PDF); Exhibit CE-459, Fluor, *Sociedad Minera Cerro Verde S.A.A.: Primary Sulfide Project Feasibility Study, Project Update*, September 2004, at p. 46.

of SMCV's mining unit,[461] and thus, (she concludes) it would be covered by the 1998 Stabilization Agreement.[462] However, as Respondent explained in its Counter-Memorial, the fact that SMCV had received approval to use the profit reinvestment benefit (*i.e.*, to reinvest profits resulting from the Leaching Project into the Concentrator Project, free of taxes) did not mean that the Concentrator Project was covered by the 1998 Stabilization Agreement.[463]

f) Ms. Chappuis, who was Director General of Mining at the time, testifies that she confirmed to SMCV representatives that the Concentrator Project would be entitled to benefit from the 1998 Stabilization Agreement, provided that the investment was made within the existing "mining unit."[464] However, Ms. Chappuis—who, as Respondent explains in Section II.E. below, has a history of working for Phelps Dodge—is unable to produce any contemporaneous document that supports her assertion. To the contrary, as described above, in September 2003, she signed a document stating that the Agreement applied exclusively to the "Leaching Project" and "not to the company."[465] In any case, such an unsubstantiated oral statement from Ms. Chappuis (assuming it was, in fact, made) cannot be taken as an official commitment from the State that it agreed to or would adhere to that interpretation. As Mr. Oswaldo Tovar has explained, Ms. Chappuis had no power to make such a commitment, and "a confirmation of this nature must be in writing . . . ."[466]

273. Moreover, during document production, Claimant voluntarily offered to produce the following documents in response to Respondent's Request No. 13:

> Any document(s) from 2004 created or received by Ms. Torreblanca or Mr. Davenport discussing or recording that they communicated to SMCV's management and/or to SMCV's shareholders:
>
> What transpired in the meetings that Ms. Torreblanca had with Ms. Chappuis; Luis Panizo (MINEM's Legal Advisor); Jorge Merino (Project Manager in Mining Affairs of the Private

[461] *See* Exhibit CWS-21, Second Torreblanca Statement at para. 14.

[462] *See* Exhibit CWS-21, Second Torreblanca Statement at para. 10.

[463] *See* Respondent's Counter-Memorial at para. 216.

[464] Exhibit CWS-3, First Chappuis Statement at paras. 52-53; *see also id.* at para. 37.

[465] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1.

[466] Exhibit RWS-3, First Tovar Statement at para. 14.

> Investment Promotion Agency of Perú); and/or Juana Rosa Del Castillo (Manager at Empresa Minera del Centro del Perú) in which they allegedly confirmed that "[SMCV] 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" [CWS-11, paras. 24-25]; or
>
> Recording the discussions that Mr. Davenport had with Ms. Chappuis where she allegedly confirmed that "SMCV could count on the protections of the Stabili[zation] Agreement for [its] investment [in the concentrator]" [CWS-5, para. 36].[467]

274. Claimant, however, failed to produce any responsive documents. Instead, Claimant withheld and listed two email chains among Mr. Davenport, Phelps Dodge officials, and Estudio Rodrigo in its privilege log.[468] Based on Claimant's own description of these documents, it does not appear that any of these documents discuss any alleged oral confirmation from Perú regarding the scope of the 1998 Stabilizations nor do they specifically address the scope of the 1998 Stabilization Agreement and whether it covered the Concentrator Project.[469] Notably, it is telling that Claimant did not redact privileged information but still produce or exhibit the rest of the documents in order to try to show that SMCV and Phelps Dodge actually conducted adequate due diligence at the time of their investment in the Concentrator Project. Claimant conveniently decided not to do that.

275. *Fourth,* during document production, Claimant voluntarily offered to produce the following in response to Respondent's Document Request No. 9:

> Any document(s) discussing, prepared for, or recording what transpired at the October 11, 2004 Board of Directors meeting where SMCV's Board conditionally approved the investment in the Concentrator Project, as well as at any corresponding meeting of the Phelps Dodge Board of Directors [; and]

[467] Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 9 at p. 70.

[468] *See* Exhibit RE-341, Claimant's Letter to Respondent regarding Document Production, November 3, 2022, Privilege Log ("Subject Matter: MINEM resolution approving the use of the reinvestment of profits benefit to construct the Concentrator.").

[469] *See* Exhibit RE-341, Claimant's Letter to Respondent regarding Document Production, November 3, 2022, at pp. 3-4 and Privilege Log.

> Any document(s) discussing Phelps Dodge Finance Committee's assessment of the investment, and documents discussing the Finance Committee's recommendation to the Phelps Dodge Board.[470]

276. Claimant produced several documents in response to that request.[471] None of those documents, however, shows that Phelps Dodge and/or SMCV conducted adequate due diligence regarding the scope of the 1998 Stabilization Agreement when they decided to make an additional investment to develop the Concentrator Project. To the contrary, they show (i) that SMCV and Phelps Dodge fully understood that the 1998 Stabilization Agreement needed an amendment in order to include the Concentrator Project—directly contradicting Claimant's theory that the Agreement always covered any investment made in the concessions or so-called "mining unit" from the outset; (ii) that Phelps Dodge and SMCV knew they needed a written confirmation from the government but never obtained it; and (iii) that Phelps Dodge and SMCV were particularly interested in including the Concentrator Project within the scope of the 1998 Stabilization Agreement in order to avoid paying royalties on that Project. Respondent discusses each of the produced documents below:

a. Phelps Dodge's Draft Presentation Titled "PDMC Growth Projects Cerro Verde Sulfide Update" [undated] Prepared for the October 2004 Board of Directors Meeting[472]

277. The first document is a draft presentation prepared on August 25, 2004 for a Phelps Dodge October 2004 Board of Directors meeting, which describes Perú's economic and

[470] Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 9 at pp. 47, 50.

[471] *See* Exhibit RE-340, Claimant's Letter to Respondent transmitting Claimant's Voluntary Production, June 22, 2022; Exhibit RE-314, Phelps Dodge Corporation, "Cerro Verde Sulfide Project, Background Materials," September 22, 2004; Exhibit RE-320, Phelps Dodge Corporation, Draft Memorandum to the Board, "Re: Cerro Verde Sulfide Project – Open Items," September 20, 2004; Exhibit RE-318, Email Correspondence between Dennis Bartlett, Timothy Snyder, William S. Brack, Lowell Shonk, and H. (Red) Conger, "RE: Cerro Verde Board Presentations" (Attaching Draft Presentation "Cerro Verde Sulfide Project, Permitting and Financial Status"), September 13 and 21, 2004 ; Exhibit RE-322, Email Correspondence between H. (Red) Conger Dennis Bartlett, Timothy Snyder, Lowell Shonk, Jorge Riquelme, and William S. Brack, "FW: Cerro Verde Board Presentations" (Attaching Draft Presentation, "Cerro Verde Sulfide Project Permitting and Financial Status"), September 13-15, 2004; Exhibit RE-323, Email Correspondence between H. (Red) Conger, Dennis Bartlett, Timothy Snyder, Lowell Shonk, Randy Davenport, Jorge Riquelme, William Brack, and Cristian Strickler, "CV Sulfide Board Update," August 25-26, 2004; Exhibit RE-324, 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"), August 25, 2004; Exhibit RE-315, Phelps Dodge Corporation, Draft Memorandum to the Board, "Re: Cerro Verde Sulfide Project – Open Issues," September 14, 2004; Exhibit RE-317, Phelps Dodge Corporation, Draft Presentation, "Board of Directors Meeting," undated.

[472] *See* Exhibit RE-324, 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"), August 25, 2004.

political context that was relevant for the investment in the Concentrator, the Concentrator Project, its financial prospects, and items that were relevant for the Board's approval of the Project, among other issues. Notably, the presentation shows that Phelps Dodge understood that the 1998 Stabilization Agreement covered only the Leaching Project.

278. First, on slide 5, it includes in the Project timeline a step to "[m]odify [the] Stability Agreement" in order to include the Concentrator Project.[473] Second, on slide 6, Phelps Dodge states that "Cerro Verde's existing stability agreement will shield the leaching operation from the royalty."[474] Third, also on slide 6, Phelps Dodge states that "the Mines Ministry [] proposed a process to include [the] sulfide plant in the facility covered by the existing stability agreement" and that "[t]his will shield the sulfide operation from the royalty."[475] Thus, at that time, Phelps Dodge understood that the Agreement only covered the Leaching Project and had to be "modified" in order to include the Concentrator Project. In other words, at that time, Phelps Dodge understood full well that mining stabilization agreements are investment project-specific, not concession- or "mining unit"-specific, as Claimant now alleges in this arbitration.

279. Moreover, with respect to the "process" allegedly "proposed" to include the Concentrator Project within the scope of the Stabilization Agreement, the presentation does not show any substantive analysis with respect to the legality of the alleged proposal, does not identify any document from the Ministry setting out such a "process" or confirming this understanding, and does not even indicate who in the Mines Ministry allegedly made such a statement. It is hard to believe that Phelps Dodge approved an US $850 million investment based on hearsay. At best, the reality is that Phelps Dodge understood the risk it was taking by not obtaining written assurances from the Peruvian government with respect to the scope of its agreement, and it decided to invest anyway.

---

[473] Exhibit RE-324, 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"), August 25, 2004, at presentation slide 5 (p. 6 of PDF); *see also* Exhibit RE-317, Phelps Dodge Corporation, Draft Presentation, "Board of Directors Meeting," undated, at slide 51.

[474] Exhibit RE-324, 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"), August 25, 2004, at presentation slide 6 (p. 7 of PDF) (emphasis added).

[475] Exhibit RE-324, 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"), August 25, 2004, at presentation slide 6 (p. 7 of PDF).

b. Email dated August 26, 2004 among Phelps Dodge Senior Officials (Harry Conger, Dennis Barlett, Timothy Snider and Lowell Shonk)[476]

280. The second produced document is an August 26, 2004 email from Mr. Harry Conger to other Phelps Dodge senior officials. In that email, Mr. Conger states, "On the stability agreement [Phelps Dodge] will be submitting the application to modify the beneficiation concession contained within [its] current stability agreement in person on Friday . . . [Phelps Dodge] continue[s] to get positive signals that this will be a fast track process and that there are no barriers."[477] This email shows that SMCV's and Phelps Dodge's plans to expand the Beneficiation Concession (presumably because they imagined that doing so could modify the scope of the 1998 Stabilization Agreement) was based on mere assumptions and "signals" from unspecified sources.

c. Phelps Dodge Draft Presentations Titled "Cerro Verde Sulfide Project Permitting and Financial Status" [478] Prepared for the October 2004 Board of Directors Meeting

281. The third and fourth documents are draft presentations prepared on September 15 and 21, 2004 that describe the permitting and financial status of the Concentrator Project. Notably, the presentations state that "Cerro Verde's existing mining and beneficiation concessions are protected by a[] pre-existing stability agreement until 2013," and that "the agreement shields operations on the concessions from royalty and provides a tax credit for profit reinvestment."[479] These statements contradict Phelps Dodge's own assertions in the earlier draft

[476] *See* Exhibit RE-323, Email Correspondence between H. (Red) Conger, Dennis Bartlett, Timothy Snyder, Lowell Shonk, Randy Davenport, Jorge Riquelme, William Brack, and Cristian Strickler, "CV Sulfide Board Update," August 25-26, 2004.

[477] Exhibit RE-323, Email Correspondence between H. (Red) Conger, Dennis Bartlett, Timothy Snyder, Lowell Shonk, Randy Davenport, Jorge Riquelme, William Brack, and Cristian Strickler, "CV Sulfide Board Update," August 25-26, 2004, at p. 1.

[478] *See* Exhibit RE-322, Email Correspondence between H. (Red) Conger Dennis Bartlett, Timothy Snyder, Lowell Shonk, Jorge Riquelme, and William S. Brack, "FW: Cerro Verde Board Presentations" (Attaching Draft Presentation, "Cerro Verde Sulfide Project Permitting and Financial Status"), September 13-15, 2004; Exhibit RE-318, Email Correspondence between Dennis Bartlett, Timothy Snyder, William S. Brack, Lowell Shonk, and H. (Red) Conger, "RE: Cerro Verde Board Presentations" (Attaching Draft Presentation "Cerro Verde Sulfide Project, Permitting and Financial Status"), September 13 and 21, 2004 .

[479] Exhibit RE-322, Email Correspondence between H. (Red) Conger Dennis Bartlett, Timothy Snyder, Lowell Shonk, Jorge Riquelme, and William S. Brack, "FW: Cerro Verde Board Presentations" (Attaching Draft Presentation, "Cerro Verde Sulfide Project Permitting and Financial Status"), September 13-15, 2004, at presentation slide 2; Exhibit RE-318, Email Correspondence between Dennis Bartlett, Timothy Snyder, William S. Brack, Lowell Shonk, and H. (Red) Conger, "RE: Cerro Verde Board Presentations" (Attaching Draft Presentation "Cerro Verde Sulfide Project, Permitting and Financial Status"), September 13 and 21, 2004 , at presentation slide 2 (p. 4 of PDF).

presentation stating that the Stabilization Agreement only shielded SMCV's leaching operations.[480] This contradiction shows at best that Phelps Dodge did not have a clear or consistent understanding regarding the scope of the 1998 Stabilization Agreement, which it presumably might not have suffered had it conducted adequate due diligence on the matter. The fact that Phelps Dodge *itself* had changeable and changing understandings of the scope of the 1998 Stabilization Agreement was (or should have been) a clear signal about the legal risks it was taking that the Concentrator would not be considered part of the Stabilization Agreement.

d. Document Titled "Cerro Verde Sulfide Project, Background Materials" dated September 22, 2004, Prepared for Phelps Dodge's Board of Directors to decide whether to Approve the Concentrator Project[481]

282. The fifth document is a multi-part set of "background materials" about Cerro Verde for the October 2004 Phelps Dodge board meeting. Tab 9 of the document contains a memorandum to the Board from Dennis Bartlett (a Phelps Dodge senior official) describing the pending items regarding the Concentrator Project. That document states that "[t]he 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."[482] This statement shows that (i) Phelps Dodge understood that the Concentrator Project was not included in the 1998 Stabilization Agreement *ab initio* (contrary to Claimant's interpretation here); and (ii) Phelps Dodge was particularly interested in including the Project within the scope of the Agreement in order to avoid paying royalties to which it would otherwise be subject. As Respondent further explains in Section E.4 below, SMCV could have applied for a new mining stabilization agreement for the Concentrator Project in 2004 in order to ensure the Project was covered by such an agreement. But that would have meant stabilizing the then-current regime that did include an obligation to pay royalties for the Concentrator Project. As a result, Phelps Dodge decided instead to take the risk of trying to claim that the Concentrator Project was incorporated into the 1998 Stabilization Agreement through the back door (*i.e.*, via the Beneficiation Concession expansion).

---

[480] *See* Exhibit RE-324, 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"), August 25, 2004, at slide 6 (p. 6 of PDF).

[481] *See* Exhibit RE-314, Phelps Dodge Corporation, "Cerro Verde Sulfide Project, Background Materials," September 22, 2004.

[482] Exhibit RE-314, Phelps Dodge Corporation, "Cerro Verde Sulfide Project, Background Materials," September 22, 2004, at p. 122 (of PDF).

e. Documents Withheld by Claimant for Alleged Privilege Reasons

283. In response to Respondent's Document Request No. 9, Claimant also listed on its privilege log four additional documents that it did not produce:[483]

a) An email from Jorge Riquelme (Phelps Dodge) relaying legal advice received from Luis Carlos Rodrigo (Estudio Rodrigo, Elias & Medrano) and other attorneys regarding "customs duties, investment tax credit, and royalties" dated September 8, 2004.

b) A draft memorandum prepared by David. S. Colton (Phelps Dodge's attorney) "containing legal analysis of issues related to the Concentrator [Project]" dated September 17, 2004.

c) A draft memorandum prepared by David. S. Colton (Phelps Dodge's attorney) "containing legal analysis of issues related to the Concentrator Project" dated September 20, 2004.

d) A memorandum prepared by attorneys from Estudio Rodrigo, Elias, & Medrano "containing legal analysis of issues related to the investment in the Concentrator [Project]" dated September 27, 2004.

284. Based on Claimant's own description of these documents, it is not apparent that any of these documents specifically address the scope of the 1998 Stabilization Agreement and whether it covered the Concentrator Project. Moreover, it is telling that Claimant did not redact privileged information but still produce or exhibit the rest of the documents in order to try to show that SMCV and Phelps Dodge actually conducted adequate due diligence at the time of their investment in the Concentrator Project. Claimant conveniently decided not to do that.

285. In sum, neither Phelps Dodge nor SMCV ever obtained the "written assurance"[484] they (correctly) thought it was important (or at the very least, "prudent") to obtain,[485] and they

[483] *See* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

[484] Claimant's Memorial at para. 107; *see also* Exhibit CWS-5, First Davenport Statement at paras. 33, 36, 39; Exhibit CWS-11, First Torreblanca Statement at paras. 24-25; Exhibit CWS-21, Second Torreblanca Statement at para. 13.

[485] Exhibit CWS-11, First Torreblanca Statement at para. 23; Exhibit CWS-21, Second Torreblanca Statement at para. 9.

either disregarded or did not consider SUNAT's public and contrary interpretation of the law. Instead, Phelps Dodge and SMCV—based on alleged oral statements—assumed that their purported understanding of the scope of the Agreement (or of the expansion of the Beneficiation Concession) was correct. Claimant has failed to produce any documents to corroborate its claim that Phelps Dodge and SMCV conducted adequate due diligence. The assumptions, hearsay, and "signals" on which they evidently relied instead are certainly not adequate due diligence for a US $850 million investment.

4. Freeport Did Not Conduct Adequate Due Diligence Regarding the Scope of the 1998 Stabilization Agreement Before It Invested in Perú in 2007

286. In its Memorial, Claimant did not refer to any specific due diligence that it—Freeport, the Claimant in this proceeding—had ever carried out to determine the scope of the 1998 Stabilization Agreement. Claimant's Memorial instead simply relied on Ms. Torreblanca's testimony that MINEM's February 2007 resolution formalizing the expansion of the Beneficiation Concession to include the Concentrator "assure[d] [SMCV] that [it] had complied with all the steps to guarantee its stability, as Director Chappuis confirmed."[486]

287. In its Counter-Memorial, Respondent showed that Freeport's due diligence regarding the scope of the 1998 Stabilization Agreement, at the time it was considering acquiring Phelps Dodge and with it a majority interest in SMCV in March 2007, was woefully insufficient. Instead of carrying out and relying on its own meaningful analysis, Freeport elected to rely on Ms. Torreblanca's unsupported "view" about the scope of the 1998 Stabilization Agreement and never insisted upon or obtained written confirmation from the government that the Concentrator Project was covered by the Agreement.[487] None of that constitutes the kind of adequate due diligence in which a reasonable mining investor ought to engage before investing hundreds of millions of dollars to acquire a controlling stake in a mining project.

288. In its Reply, Claimant simply argues that whether Freeport conducted its own sufficient due diligence prior to its acquisition of Phelps Dodge is irrelevant—which as Respondent explained above,[488] is incorrect—and once again, it fails to point to any legal memorandum or report prepared on behalf of Claimant to assist it in understanding the scope of

[486] Claimant's Memorial at para. 157.

[487] *See* Respondent's Counter-Memorial at paras. 124-27.

[488] *See supra* at para. 246.

the 1998 Stabilization Agreement, nor even to any Phelps Dodge document on which Freeport relied that analyzed the scope of the Agreement.[489] By failing to submit any such documents, Freeport concedes that it—the Claimant here—failed to conduct any due diligence on the scope of the 1998 Stabilization Agreement prior to making its investment in SMCV.

> During document production, Claimant was ordered by the Tribunal to produce the following in response to Respondent's Document Request No. 11:
>
> Documents exchanged between: (i) Freeport; and (ii) Phelps Dodge and/or SMCV in 2006 or 2007 discussing or analyzing the regulatory framework applicable to stabilization agreements signed under Title Nine of the Mining Law, and/or the scope of the Stability Agreement.[490]

289. Claimant, however, did not produce any responsive documents nor did it list any responsive documents on its privilege log. Evidently, Claimant failed to carry out any adequate due diligence on the matter. This shows that, if it analyzed the issue at all, Claimant took a risk on its questionable interpretation of the law and the Agreement when it invested in SMCV in March 2007. Perú cannot be held internationally liable for Claimant's failure to fully investigate or understand the nature of the investment it made in Perú. Furthermore, as Respondent explains in the next section, at the time Phelps Dodge (Freeport's predecessor) decided to invest in the Concentrator Project, and around the time Freeport started to explore a potential acquisition of Phelps Dodge (and with it, of a majority interest in SMCV), Phelps Dodge and Freeport knew or they should have known that, at a minimum, there was a significant risk that the Agreement did not cover the Concentrator Project.

5. Other Documents on the Record Demonstrate That Phelps Dodge (Freeport's Predecessor) and Freeport Knew There Was a Significant Risk That the 1998 Stabilization Agreement Did Not Cover the Concentrator Project

290. In the following section, Respondent demonstrates that certain documents that were available (i) to Phelps Dodge (Freeport's predecessor) at the time it decided to make an additional investment in the Concentrator Project in the fourth quarter of 2004; and (ii) to Freeport when it analyzed whether to acquire Phelps Dodge and with it, SMCV (between 2006

[489] *See* Claimant's Reply at para. 96.

[490] Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 11 at pp. 58, 60.

and March 2007),[491] show that both Phelps Dodge and Claimant knew there was a significant risk that the 1998 Stabilization Agreement did not cover the Concentrator Project. Nevertheless, Phelps Dodge (and later Freeport) apparently believed it was worth the risk of financing the Concentrator and investing in SMCV, even if the Concentrator Project were not covered under the Agreement.

a. Phelps Dodge's 10-K Forms (March 7, 2005, and February 27, 2006)

291. Claimant cites to Phelps Dodge's 10-K form submitted to the United States Securities and Exchange Commission ("SEC") for fiscal year 2004 ("Phelps Dodge's 10-K Form") to show that Phelps Dodge's and SMCV's investment decision was contingent on obtaining approval for the expansion of the Beneficiation Concession, which they allegedly viewed as confirmation that the 1998 Stabilization Agreement covered the Concentrator Project.[492] However, Phelps Dodge's 10-K form refers only to the transaction being contingent on "all required permits from the Peruvian government." Notably, it does not mention the scope of the 1998 Stabilization Agreement as a variable that was considered by the Board when making the decision to invest in the Project, nor does it discuss Phelps Dodge's Board's alleged understanding of the scope of the Agreement.[493] It discusses the 1998 Agreement's profit reinvestment provision and its use for the Concentrator Project, but does not discuss the Agreement's stabilization provisions as applicable to the Concentrator Project. In fact, to the contrary, in discussing the approval of the new Royalty Law, Phelps Dodge's 10-K Form states, "it is not clear what, if any, effect the new royalty law will have on operations at Cerro

[491] SMCV acquired the financing of the Concentrator through the Master Participation Agreement (dated September 2005), and a US $90 million bond issuance program (dated April 2006). *See* Claimant's Memorial at para. 122.

[492] *See* Claimant's Reply at para. 101, n.467; *see also* Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5.

[493] *See* Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5 ("On October 11, 2004, the Phelps Dodge board of directors announced conditional approval for an $850 million expansion of the Cerro Verde mine. Final approval was contingent upon receiving all required permits from the Peruvian government and placing necessary financing. The required permits and approvals were obtained in the 2004 fourth quarter. In early February 2005, the board approved moving forward on financing and project development. We expect to finalize financing during 2005.") and p. 73 ("Cerro Verde's Mining Stability Agreement of 1998 contains a provision that allows it to exclude from taxable income any profits reinvested in an investment program that is duly filed with and approved by the Ministry of Energy and Mines (the Mining Authority). The annual exclusion is limited to 80 percent of the lesser of book profits after tax or taxable income. On December 9, 2004, Cerro Verde received confirmation from the Mining Authority that Cerro Verde's reinvestment of profits from its current operation into its planned expansion qualifies for the taxable income exclusion for the period from October 2004 through February 2007. This period can, at the discretion of the Mining Authority, be extended for up to three years. Any amounts excluded from taxable income must be set aside in separate equity accounts, capitalized, and may not be repatriated for a period of four years after the reinvestment program is completed and approved by the Mining Authority.").

Verde."[494] Similarly, Phelps Dodge 10-K Form for fiscal year 2005 dated February 27, 2006 notes that "it is not clear what, if any, effect the new royalty law will have on operations at Cerro Verde."[495] Thus, contrary to all Claimant's witnesses' claims of Phelps Dodge's confidence about the scope of the 1998 Stabilization Agreement, that is not what Phelps Dodge said at the time to its most important regulator. Rather than claiming it was shielded by the 1998 Stabilization Agreement, or even saying something as modest as that it had a good-faith belief that it was so shielded, as of March 2005 (after MINEM approved the expansion of the Beneficiation Concession (in October 2004)), and as of February 2006 (only a few months before Phelps Dodge and Freeport signed the merger agreement[496]), Phelps Dodge instead declared to the public and to the U.S. regulators in its SEC 10-K filing that it was "not clear" what impact Perú's Royalty Law would have on the Cerro Verde operations.

b. Master Participation Agreement (September 30, 2005)

292. Mr. Morán, Phelps Dodge's Assistant Treasurer from 2000 to 2007, explains in his second witness statement that Phelps Dodge started conversations with financial institutions to finance the Concentrator Project in the first quarter of 2004 and that Citigroup expected that "financiers would likely want to confirm that the Concentrator was protected by the Stability Agreement . . . ."[497] On September 30, 2005 (*i.e.*, after the construction of the Concentrator Project was underway[498]), SMCV entered into a Master Participation Agreement with lenders interested in financing the construction of the Concentrator Plant.[499] The Master Participation Agreement demonstrates that the potential lenders and SMCV were not able to confirm whether the Concentrator Project would be covered under the 1998 Stabilization Agreement.

293. *First*, for the following reasons, one can infer from the clauses of the Master Participation Agreement that the lenders considered the issue of whether the Concentrator Project was covered by the 1998 Stabilization Agreement to be one of the risks affecting the Master Participation Agreement:

---

[494] Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 80 (emphasis added).

[495] Exhibit RE-184, Phelps Dodge, SEC Form 10-K for Fiscal Year 2005, February 26, 2006 (excerpts), at p. 83 (emphasis added).

[496] *See* Claimant's Memorial at para. 156.

[497] Exhibit CWS-19, Second Morán Statement at para. 11.

[498] *See* Exhibit CWS-5, First Davenport Statement at para. 41 (confirming that the SMCV began constructing the Concentrator Project in December 2004).

[499] *See* Exhibit CWS-19, Second Morán Statement at para. 18.

a) Clause 5.01(l) of the Master Participation Agreement ("No Material Dispute Clause"), and Article 1 ("Definitions," "Force Majeure") of the draft bond prospectus attached to the Master Participation Agreement, contain similar wording that excludes from the scope of the Clauses "an assertion or determination that **certain benefits of the Stability Agreement do not apply to part of the operations of [SMCV]"**:

> Clause 5.01(l) ("No Material Dispute")
>
> There shall be no material dispute that is reasonably likely to impair the ability of the Borrower to repay the Senior Loans or construct or operate the Business at the production volumes and cost levels and in the manner contemplated by the current Mine Plan with respect to the mining rights, rights of way, easements or surface interests relating to the mining property, water rights or other material rights necessary for the construction and development of the Sulfide Project or for the operation of the Business until the Final Maturity Date (it being understood that an assertion or determination that **certain benefits of the Stability Agreement do not apply to parts of the operations of the Borrower** will not be treated as a material dispute that could cause this condition not to be satisfied).[500]
>
> Clause 1 (Definitions; Event of Political Force Majeure)
>
> [T]he occurrence of an Expropriatory Action, War or a material breach or effective unilateral amendment or cancellation by the Republic of Peru of the Stability Agreement (it being understood that an assertion or determination that **certain benefits of the Stability Agreement do not apply to part of the operations of the Issuer** will not be treated as an Event of Political Force Majeure).[501]

b) One can infer that when the lenders noted that "certain benefits of the Stability Agreement do not apply to part of the operations of [SMCV]," they were referring to SMCV's operations of the Concentrator Project. This follows because (i) SMCV's only operations at the time the Master Participation Agreement was signed were the operations of the Leaching Project, and the future operations of the Concentrator Project—so those were the only "operations" possibly at

[500] Exhibit CE-513, Master Participation Agreement, September 19, 2005, at p. 20 (of PDF) (emphasis added).

[501] Exhibit CE-513, Master Participation Agreement, September 19, 2005, at p. 180 (of PDF) (emphasis added).

issue;[502] and (ii) the 1998 Stabilization Agreement explicitly stabilized the activities of the Leaching Project, but the Agreement did not mention the Concentrator Project.

c) Given the above, the lenders probably included the language "that certain benefits of the Stability Agreement do not apply to part of the operations of [SMCV]" in the "Force Majeure" and the "No Material Dispute" Clauses in order to mitigate the risk to the lenders that the activities of the Concentrator Project (which was not mentioned in the 1998 Stabilization Agreement) would not benefit from the Agreement.

d) Also, Clause 12.05 of the Master Participation Agreement provides that "[e]ach of the Senior Facility Lenders hereby accepts and acknowledges that [SMCV] does not intend to seek any new or [to] amend [the] stability agreement or other agreement of a similar nature with respect to the Sulfide Project."[503] This probably means that (i) the lenders had realized that the 1998 Stabilization Agreement did not mention the Concentrator Project; and (ii) SMCV told the lenders that it did not intend to request a new mining stabilization agreement that explicitly referred to the Concentrator Project—probably because SMCV knew that if it requested another stabilization agreement, it would be acknowledging that the Concentrator Project would be subject to the Royalty Law and, thus, SMCV would have to pay royalties related to production from that Project.[504]

294. In conclusion on this first point, in September 2005, the lenders and SMCV knew that there was a very real possibility that "certain benefits of the Stability Agreement do not apply to part of the operations of [SMCV]"[505] (*i.e.*, that the Agreement does not cover the Concentrator Project). Moreover, that risk was so high that the lenders insisted that, if indeed stabilization benefits came to be denied, that denial could not be invoked as a force majeure event excusing the company's obligations to repay the lenders.[506] Evidently, the lenders were

[502] *See* Exhibit CE-561, SMCV, Financial Statements 2005-2006, February 9, 2007, at pp. 7, 9.

[503] Exhibit CE-513, Master Participation Agreement, September 19, 2005, at p. 47 (of PDF) (emphasis added).

[504] *See infra* at Sections II.E.3 and II.E.4(a).

[505] Exhibit CE-513, Master Participation Agreement, September 19, 2005, at pp. 20, 180 (of PDF) (emphasis added).

[506] *See* Exhibit CE-513, Master Participation Agreement, September 19, 2005, at p. 180 (of PDF).

not prepared to rely on SMCV's and Phelps Dodge's (Freeport's predecessor) finger-crossing approach to managing that risk.

295. *Second*, Mr. Morán argues in his second witness statement that Respondent's statement that the Master Participation Agreement reflects the fact that Phelps Dodge and SMCV understood there were risks associated with their interpretation of the scope of the 1998 Stabilization Agreement is "beside the point."[507] According to Mr. Morán, when Phelps Dodge and SMCV concluded the Master Participation Agreement, they were certain that the 1998 Stabilization Agreement covered the Concentrator Project and that such an understanding is reflected in the Master Participation Agreement. That is not correct.

296. In fact, none of the clauses in the Master Participation Agreement that Mr. Morán cites (*i.e.*, Clauses 6.21 and 12.05) confirm that the lenders and SMCV were certain, or even confident, that the 1998 Stabilization Agreement covered the Concentrator Project.[508] Clause 6.21 simply states that the "Stability Agreement [was] in full force and effect,"[509] and Clause 12.05 states that each party "had adequate opportunity to review [it],"[510] but neither of the clauses specify or even describe the scope of the Agreement. Clause 12.05 also states that "[SMCV did] not intend to seek any new or amended stability agreement"[511] with respect to the investment in the Concentrator, as just discussed above. This provision reflects the position that SMCV was taking regarding whether it would seek to negotiate a new stabilization agreement. It does not say anything about the scope of the existing 1998 Stabilization Agreement. As just noted above and explained further in Sections II.E.3 and II.E.4(a) below, the apparent reason why SMCV would not seek a new stabilization agreement was because, if it did that, it would be acknowledging that its new investment was subject to the new Royalty Law.[512]

297. *Finally*, during document production, Claimant agreed to produce in response to Document Request No. 17 the following documents discussing SMCV's conversations with the potential lenders listed in the Master Participation Agreement regarding the scope of the 1998 Stabilization Agreement:

---

[507] Exhibit CWS-19, Second Morán Statement at para. 19.

[508] *See* Exhibit CWS-19, Second Morán Statement at para. 19.

[509] Exhibit CE-513, Master Participation Agreement, September 19, 2005, Clause 6.21.

[510] Exhibit CE-513, Master Participation Agreement, September 19, 2005, Clause 12.05.

[511] Exhibit CE-513, Master Participation Agreement, September 19, 2005, Clause 12.05.

[512] *See infra* at Sections II.E.3 and II.E.4(a).

> Final minutes of meetings in 2005 and 2006 discussing or recording oral or written guidance or information about the scope of the 1998 Stabilization Agreement and whether the Concentrator would fall within the scope of that Agreement, exchanged between (on one side) SMCV, Phelps Dodge (Claimant's predecessor), or their advisors in the negotiations of the Participation Agreement and/or in the negotiations of the corporate bonds issuance program, and (on the other side) any of (i) the lenders that were interested in financing the Concentrator (including, but not limited to, the potential lenders listed in p. 1 of Exhibit CE-513) ("Interested Lenders"), or (ii) the legal entities involved in the corporate bonds issuance program for US $90 million issued in order to finance the Concentrator.[513]

298. Claimant did not produce a single document in response to Document Request No. 17, nor did it list having withheld any documents responsive to that request in its privilege log.[514] It is simply not credible that no emails, for example, were exchanged between SMCV and the lenders regarding the scope of the 1998 Stabilization Agreement. First, the transaction underlying the Master Participation Agreement (the "Transaction") involved top tier banks such as Sumitomo Mitsui Banking Corporation, the Bank of Tokyo-Mitsubishi, or the Royal Bank of Scotland.[515] In large financing operations such as the Transaction, the borrower and its advisors have lengthy due diligence discussions with the lenders and their respective legal and financial advisors. Second, in Claimant's words, the Transaction was at the time the "largest bank financing operation ever in Peru"[516] (*i.e.*, it was almost certainly subject to serious due diligence). Third, Mr. Morán, who was on the Finance Committee of Phelps Dodge's Board during the negotiations of the Master Participation Agreement, devotes almost half of his second witness statement describing the negotiations of the Master Participation Agreement, but somehow he fails to cite to a single email, memorandum, or document related to the negotiations where the scope of the 1998 Stabilization Agreement is discussed.[517] Mr. Morán should be in possession of the documents that Claimant voluntarily offered to produce, and that later the Tribunal ordered produced. Claimant should also have access (through SMCV or Phelps Dodge) to the documents exchanged between SMCV and the lenders during the two-year negotiation.

---

[513] Procedural Order No. 2, July 4, 2022, Appendix 2 - Respondent's Redfern Schedule at Document Request No. 17 at p. 88.

[514] *See* Exhibit RE-340, Claimant's Letter to Respondent transmitting Claimant's Voluntary Production, June 22, 2022; *see also* Exhibit RE-339, Claimant's Letter to Respondent transmitting Claimant's Ordered Production, July 25, 2022, at privilege log.

[515] *See* Exhibit CE-513, Master Participation Agreement, September 19, 2005, at p. 1.

[516] Claimant's Memorial at para. 122.

[517] *See* Exhibit CWS-19, Second Morán Statement at paras pp. 4-8.

Claimant's failure to submit any responsive documents is telling, and the Tribunal should draw adverse inferences that the documents exchanged between SMCV and the lenders would have showed that, at a minimum, SMCV knew that there was a significant risk that the Agreement did not cover the Concentrator Project.

299. In sum, this Section II.D has demonstrated that SMCV, Cyprus, Phelps Dodge, and Claimant failed to conduct any serious or adequate due diligence on the scope of the 1998 Stabilization Agreement and, more generally, on the scope of stability guarantees under the Mining Law. Moreover, evidence on the record shows that Phelps Dodge (Claimant's predecessor), SMCV, and Claimant did know or should have known that there was a significant risk that the 1998 Stabilization Agreement did not cover the Concentrator Project. However, Claimant evidently chose to ignore this risk and overlooked the lack of any written document from the government—even in the face of concerns regarding the scope of the Agreement that were expressed in Phelps Dodge's 10-K Forms and in SMCV's Master Participation Agreement. Perú should not be held liable for Claimant's risky (and incorrect) decision.

300. Even the most basic due diligence would have revealed that there was no assurance that the Concentrator Project would be covered by the 1998 Stabilization Agreement. To the contrary, as explained in the following sections, both before and after Claimant's investment in the Cerro Verde Mine, Perú consistently applied mining stabilization agreements exclusively to specific investment projects (and not to the entire mining unit). Claimant should have been aware of this practice.

E. MINEM HAS CONSISTENTLY APPLIED MINING STABILIZATION AGREEMENTS TO SPECIFIC INVESTMENT PROJECTS—IT DID NOT EXECUTE AN ABRUPT *VOLTE-FACE*

301. In its Counter-Memorial, Respondent explained that MINEM, MEF, and SUNAT have consistently understood—in accordance with the Mining Law—that the scope of mining stabilization agreements is limited to the investment project(s) identified in the relevant stabilization agreement.[518] In particular, Respondent showed that (i) Claimant knew or should have known that the 1998 Stabilization Agreement would not apply to the Concentrator Project, based on information that was publicly available as early as 2002;[519] (ii) Claimant's fanciful conspiracy theory that, due to political pressure, Perú changed its position in June 2006 on the

[518] *See* Respondent's Counter-Memorial at Sections II.D-F.

[519] *See* Respondent's Counter-Memorial at Sections II.D-F.

scope of mining stabilization agreements, and, in particular, SMCV's 1998 Stabilization Agreement, is entirely meritless;[520] and (iii) none of the documents submitted by Claimant support its position that mining stabilization agreements automatically or always apply to entire concessions; instead, the record confirms that the scope of mining stabilization agreements—and of SMCV's 1998 Stabilization Agreement in particular—is defined by the specific investment project(s) for which the stabilization agreements were signed.[521]

302. In its Reply, Claimant insists that MINEM, MEF, and SUNAT initially applied stability guarantees to entire concessions or "mining units" but later changed their position due to alleged political pressure from Congress.[522] There is no merit to Claimant's claim. Notably, it seems that Claimant cannot even decide when Perú had this supposed dramatic change of heart about the scope of mining stabilization agreements in general or the 1998 Stabilization Agreement specifically. In its Memorial, Claimant alleged that MINEM changed its position in June 2006, with Mr. Isasi's June 2006 Report.[523] In its Reply, however, Claimant comes up with additional unsupported theories and alleges instead that MINEM changed its position sometime either in mid or late 2005, or perhaps in May 2006.[524] The reality is that Claimant does not know when Perú allegedly executed that *volte-face*. The reason that Claimant struggles is simple: Respondent did not change its mind.

303. Moreover, in an attempt to support its baseless conspiracy theory, Claimant mischaracterizes the content of contemporaneous documents that instead demonstrate that MINEM, MEF, and SUNAT have consistently applied stability guarantees to the projects for which the agreements were signed. Claimant also fails to address Respondent's evidence, and relies on unsubstantiated and contradictory witness testimony to support its position. It is Claimant that bears the burden of proving that MINEM, MEF, or SUNAT acted inconsistently or arbitrarily in applying stability guarantees, and, once again, Claimant has failed to do so.

304. In this Section, Respondent demonstrates that, contrary to Claimant's allegations, MINEM—both before and after SMCV's decision to carry out the Concentrator Project and Claimant's investment in SMCV—consistently applied stability guarantees to specific

---

[520] *See* Respondent's Counter-Memorial at Sections II.D-F.

[521] *See* Respondent's Counter-Memorial at Sections II.D-F.

[522] *See*, *e.g.*, Claimant's Reply at paras. 62, 91.

[523] *See* Claimant's Memorial at para. 142; *see also* Claimant's Reply at para. 78(b).

[524] *See* Claimant's Reply at paras. 78(a), 150.

investments and not automatically to entire concessions or to entire so-called "mining units" (a construct invented by Claimant). Later, in Sections II.F and II.G below, Respondent also shows that MEF and SUNAT, respectively, have acted consistently with their long-held understanding that the scope of mining stabilization agreements is delineated by reference to the investment project(s) identified in the relevant feasibility study.

305. For ease of reference, Respondent summarizes the key events described in Sections II.E-G below, which occur in parallel. This timeline shows that Respondent acted consistently all along and that SMCV (and Claimant) at least should have known that the Concentrator Project was not covered by the 1998 Stabilization Agreement.

Table 1: Respondent Consistently Applied Mining Stabilization Agreements to Specific Investment Projects

Date	Event	Relevant Entity
September 23, 2002	SUNAT, Report No. 263-2002-SUNAT/K00000, stating 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."[525]	SUNAT
September 8, 2003	DGM sent a letter 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." [526]	MINEM

[525] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at p. 3 ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa.*") (emphasis added).

[526] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 4 ("*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8° del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado está otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato.*") (emphasis added).

Date	Event	Relevant Entity
March 11, 2004	Vice Minister Polo's 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 stabiliz[e] for that investment, for that development, not for the whole company."[527]	MINEM
December 9, 2004	DGM approved SMCV's request to use the profit reinvestment benefit to help finance the construction of the Concentrator Plant, stating that the profits that would benefit from the profit-reinvestment program had to be "exclusively generated by the 'Cerro Verde Leaching Project.'"[528]	MINEM
March 8, 2005	Mr. Tovar's meeting with Mr. Harry Conger (Phelps Dodge), where Mr. Tovar told Mr. Conger that it was clear that Cerro Verde would not pay royalties for the Leaching Project, but 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."[529]	MINEM

[527] Exhibit RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts), at timestamps 00:09:37 - 00:10:03 ("*Los contratos de estabilidad no se dan por empresa, eso es importante aclarar. Una empresa puede tener [un] contrato de estabilidad por un proyecto y no tenerlo por otro, o tener una actividad antigua que no tiene contrato de estabilidad y una nueva que sí lo tiene. Eso es así, no se da para toda la empresa. Se hace una inversión arriba de 20 millones o arriba de 50, según sea el caso, y eso da derecho a estabilidad por esa inversión, por ese desarrollo, no a toda la empresa*.") (emphasis added).

[528] Exhibit CE-23, MINEM, Ministerial Resolution No. 510-2004-MEM/DM, December 9, 2004, at Art. 1 ("*que deberán ser exclusivamente generadas por el Proyecto 'Lixiviación de Cerro Verde*.'").

[529] Exhibit RWS-10, Second Tovar Statement at para. 88 ("*estaba claro que Cerro Verde no pagaría regalías por el Proyecto de Lixiviación pero sí por el de la Concentradora de Sulfuros Primarios, pues éste no estaba cubierto por ningún contrato de estabilidad minero.*").

Date	Event	Relevant Entity
April 14, 2005	Mr. Isasi's 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 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."[530]	MINEM
June 8, 2005	Minister of Mines Glodomiro Sánchez and Mr. Isasi's presentation before the Energy and Mines Congressional Committee explaining the relationship between the Royalty Law and mining stabilization agreements, where the Minister stated that "Then, who pays royalties? All mining titleholders pay royalties, but not for all of their projects."[531] Mr. Isasi clarified that "the obliged subject	MINEM

[530] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (emphasis added, bold letters in the original) (internal footnote omitted)("*Debe ponerse énfasis en este último aspecto: La estabilidad que otorgan los contratos de Garantías y Medidas de Promoción a la Inversión garantizan el régimen jurídico referido a materia tributaria, cambiaria y administrativa, **del proyecto de inversión, al cual están referidos**. Si un titular minero tuviera unidades económicas administrativas, o concesiones mineras, que no forman parte del proyecto objeto de la estabilidad, la norma establece que dicho titular deberá mantener la contabilidad del proyecto en forma separada. En consecuencia, no es el titular minero (persona natural o jurídica) el que estará exento o no del pago de regalías, integralmente como empresa, sino que lo serán las concesiones mineras de las que es titular, dependiendo si estas integran o no un proyecto materia de contrato de estabilidad suscrito, antes de la vigencia de la Ley No. 28258. Así pues, únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía*.") (emphasis added).

[531] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 26 ("*Entonces, ¿quiénes pagan regalía? Todos los titulares mineros pagan, pero no por todos sus proyectos. Los titulares mineros que antes de la Ley de Regalía Minera celebraron contratos ley con estabilidad administrativa, excluirán de la base de cálculo de la regalía el valor de los concentrados o equivalentes,*

Date	Event	Relevant Entity
	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."[532]	
September 22, 2005	Mr. Isasi's Report answering Congressman Alejandro Oré's request to provide information about SMCV's 1998 Stabilization Agreement and MINEM's authorization for SMCV to reinvest undistributed profits in the Concentrator Project, which refers to the Concentrator as a "new" investment project and makes a clear distinction between the Leaching Project and the Concentrator Project.[533]	MINEM
October 3, 2005	Minister of Mines Sánchez's letter to Congressman Oré forwarding MINEM's September 22, 2005, report and explaining that the Concentrator Project—the new investment project in which the profits would be invested—"will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the	MINEM

proveniente del proyecto estabilizado.") (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at timestamp 08:54.

[532] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29 ("*no hay que confundir lo que es sujeto obligado, que es la empresa, con cuánto tiene que pagar; o sea, el sujeto obligado es una empresa minera pero al momento de determinar cuánto es lo que debe pagar la administración tributaria tiene que determinar cuál es la base de referencia, y para determinar cuál es la base de referencia tiene que determinar cuáles son los proyectos mineros estabilizados y cuáles son los proyectos no estabilizados*.") (emphasis added).

[533] Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, at paras. 3.2.1, 3.2.3 ("the undistributed income tax will be used in projects that ensure the implementation of new investment programs that guarantee the increase of the mining units involved . . . In this vein, by means of Ministerial Resolution No. 510-2004-MEM/DM, dated December 9, 2004, a copy of which is attached, the Investment Program submitted by Sociedad Minera Cerro Verde S.A. was approved . . . consisting of the installation of a Concentrator Plant for processing low-grade primary sulfide ores, which cannot be leached and are located at the Cerro Verde mine.") ("*la renta no distribuida será utilizada en proyectos que aseguren la ejecución de nuevos programas de inversiones los cuales garanticen el incremento de las unidades mineras involucradas . . . En este sentido, mediante Resolución Ministerial N° 510-2004-MEM/DM de fecha de 9 de diciembre de 2004, cuya copia anexamos, se aprobó el Programa de Inversión presentado por Sociedad Minera Cerro Verde S.A. . . . consistente en la instalación de una Planta Concentradora para el tratamiento de minerales de sulfuros primarios de baja ley, que no son posibles de lixiviar y se encuentran ubicados en la mina Cerro Verde.*").

Date	Event	Relevant Entity
	signing of [a Stabilization Agreement] has not been applied for."[534]	
November 8, 2005	Minister of Mines Sánchez's letter 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."[535]	MINEM
May 3, 2006	(1) Mr. Isasi's presentation before the Cerro Verde Working Group in Congress where 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 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."[536] (2) Mr. Isasi's intervention at the Energy and Mines Congressional Committee Session reiterating that stabilization agreements only cover specific investment	MINEM

[534] Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005 ("*no gozará del régimen de estabilidad tributaria, cambiaria y administrativa, toda vez que para dicho Proyecto no se ha solicitado la suscripción de un [Convenio de Estabilidad]*.").

[535] Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at para. 1 ("*En primer lugar hay que distinguir el tratamiento legal del proyecto de 'Lixiviación Cerro Verde' que está amparado por el Contrato de Garantías y de Medidas de Promoción a la Inversión del que corresponde al nuevo Proyecto de Sulfuros Primarios en el que se reinvertirán las utilidades provenientes del aquel antiguo Proyecto de Lixiviación. El proyecto de Sulfuros Primarios no goza de la protección en virtud de ningún contrato de Garantías o de Estabilidad*.") (emphasis added).

[536] Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, at slide 12 ("*El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaria ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción*.").

Date	Event	Relevant Entity
	projects: "One 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."[537] At that session the Minister of Economy and Finance supported the position explained by the Minister of Mines in his June 8, 2005 presentation.	
June 2006	Ms. Bedoya's report on the application of the SMCV 1998 Stabilization Agreement where 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."[538]	SUNAT

[537] Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 01:42:10 - 01:42:34 ("*[U]na cosa muy importante de precisar es que estos contratos no blindan a toda la empresa ni a todas las concesiones mineras. Eso debe quedar bien claro. Solamente lo que hace es garantizar un proyecto específico de inversión que está especificado en un estudio de factibilidad y que está volcado en un contrato*.") (emphasis added).

[538] Exhibit RE-179, 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, junio de 2006 ("SUNAT Informe Interno de 2006"), at p. 5 ("*[L]os beneficios conferidos mediante los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la LGM recaen en el titular de la actividad minera y, si bien estabilizan temporalmente el régimen tributario vigente a la fecha de aprobación del Estudio de Factibilidad, dichos beneficios sólo deben aplicarse a las actividades vinculadas a la inversión desarrollada en determinada concesión o Unidad Económica Administrativa, que haya sido objeto del*

Date	Event	Relevant Entity
June 16, 2006	Mr. Isasi's report concluding that the Concentrator Project was outside the scope of SMCV's 1998 Stabilization Agreement, and stating that "[i]t follows 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 subsequent legislative innovations."[539]	MINEM
June 23, 2006	MINEM's presentation during the Roundtable Discussions held by Proinversión's Congressional Committee to discuss the Cerro Verde Mine and in which SMCV representatives participated, reiterating MINEM's position that the Concentrator Project was not covered by the 1998 Stabilization Agreement: -"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.	MINEM

respectivo contrato, es decir, a la Inversión vinculada al proyecto respecto del cual se suscribió el contrato. . . . En tal sentido, y como quiera que el proyecto de ampliación de las operaciones actuales de SMCV a través de una planta concentradora de sulfuros primarios se refiere a una inversión completamente distinta al Proyecto de Lixiviación tal como fue aprobado a efecto de la suscripción del contrato de garantías, según la descripción detallada en el punto 1.2 del presente informe, podemos concluir que dicha ampliación no se encontraría dentro del ámbito de aplicación del contrato de garantías, toda vez que se trata de una inversión nueva no contemplada por las partes al momento de la suscripción del contrato.") (emphasis added).

[539] Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006, at para. 5.2 ("*De ello se colige que la estabilidad no se otorga de forma general a una empresa ni a favor de una concesión minera determinada, sino con relación a un proyecto específico, claramente delimitado y aprobado por el Ministerio de Energía y Minas, porque de lo que se trata es de conferir una seguridad jurídica al inversionista en el sentido que la tasa interna de retorno de su nueva inversión garantizada no se verá afectada por innovaciones legislativas ulteriores.*") (emphasis added).

Date	Event	Relevant Entity
	- In consequence, the sulfides project will pay royalties when it enters into production."[540]	
September 20, 2007	SUNAT report concluding that mining stabilization agreements apply only to the investment activities that are the subject matter of the agreements: "The 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."[541]	SUNAT
October 31, 2008	SUNAT's *Resolución de Intendencia No. 054-024-0000868-2008-SUNAT* dismissing Mr. Martínez's complaint alleging that SMCV was committing tax fraud and amending the terms of the 1998 Stabilization Agreement by using the profit reinvestment benefit to construct the Concentrator, thereby obtaining an undue income tax exemption. In that resolution SUNAT noted that its Auditor, Ms. Gabriela Bedoya, had prepared a June 2006 Report that concluded that the Concentrator was not covered by the 1998 Stabilization Agreement.[542]	SUNAT
October 14, 2011	Mr. Marco Camacho, MEF's General Director of Fiscal Policy, prepared a Report in response to a request from the then-Minister of Energy and Mines, who asked MEF to clarify whether "mining projects that [benefit from a]	MEF

[540] Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006, at slide 15 ("*El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaria ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción*.").

[541] Exhibit RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007, *available at* https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm ("*La estabilidad tributaria garantizada mediante contrato suscrito con el Estado al amparo del Título Noveno del Texto Único Ordenado de la Ley General de Minería, beneficia al titular de la actividad minera por el plazo de 15 años sólo por las inversiones realizadas que se encontraban previstas en el Estudio de Factibilidad, teniendo en cuenta el monto definitivo que demandó para su ejecución en determinada concesión o Unidad Económico-Administrativa*.") (emphasis added).

[542] *See* Exhibit RE-191, First Instance Administrative Court Decision, Judgment No. 69-2012, August 16, 2012, at p. 11 (of PDF).

Date	Event	Relevant Entity
	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."[543] 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."[544]	

306. In the next sub-sections, Respondent discusses in chronological order each of MINEM's actions that either Claimant has highlighted in its Memorial or its Reply, or that Respondent believes is relevant to show MINEM's consistent interpretation and application of the scope of mining stability guarantees.

1. Ever Since the Enactment of L.D. No. 708 in 1991, Perú Has Signed Mining Stabilization Agreements with Respect to Specific Investment Projects

307. In its Reply, Claimant relies on testimony from Mr. Flury (former Minister of Energy and Mines) and Ms. Chappuis to assert that stability guarantees necessarily apply to entire concessions or "mining units."[545] Mr. Flury and Ms. Chappuis allege that, when MINEM signed mining stabilization agreements, it always understood that the scope of the stability

[543] Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at Background, number 2 ("*los proyectos mineros que gozan del régimen jurídico estabilizado, además de encontrarse sujetos al pago del [GEM] pueden estar obligados a los regímenes tributarios relativos al [IEM], y a la Regalía Minera . . .*") (emphasis added).

[544] Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2, number 3 ("*[D]ebe señalarse que, sin perjuicio de su forma de aplicación concreta según las especificidades de cada caso, el nuevo esquema fiscal sobre la actividad minera establece un Gravamen Especial a la Minería aplicable en mérito de un Convenio a los sujetos de la actividad minera por aquello que resulte comprendido en la estabilidad de un Contrato de Garantías y Medidas de Promoción a la Inversión [Convenios de Estabilidad] de acuerdo con el Texto Único Ordenado de la Ley General de Minería; y un régimen general que considera un Impuesto Especial a la Minería y una Regalía Minera sobre aquello que no resulte comprendido dentro de los referidos Contratos.*") (emphasis added).

[545] *See* Claimant's Reply at para. 65; *see also* Exhibit CWS-3, First Chappuis Statement at para. 28; Exhibit CWS-14, Second Chappuis Statement at para. 26; Exhibit CWS-7, Witness Statement of Hans Flury, October 2019, 2021 ("First Flury Statement"), at para. 39.

applied to an entire "mining unit," concession, or EAU.[546] This is simply incorrect. As Respondent explained in its Counter-Memorial, mining stabilization agreements apply to the specific investment projects outlined in the applications and feasibility studies that are the bases of the agreements, not to the applicant's entire concession or "mining unit."[547] Evidence that this is true can be seen in mining concessions in Perú that have or have had both stabilized and non-stabilized projects within the same concession or "mining unit." This past practice alone heavily undermines Claimant's theory.

308. For example, Compañía Minera Yanacocha S.A. ("Yanacocha") has signed three mining stabilization agreements with respect to three different investment projects, which have been in force simultaneously: Project 1/Stabilization Agreement 1: "Cerro Yanacocha," signed on September 16, 1990 for a period of 15 years; Project 2/Stabilization Agreement 2: "Maqui," signed on May 10, 1994 for a period of 15 years; and Project 3/Stabilization Agreement 3: "La Quinua," signed on July 25, 2003 for a period of 15 years.[548] Two of these projects were developed within the same concession. Specifically, Projects 1 and 3 were both developed within Yanacocha's concession called "Chaupiloma 2."[549] If Claimant's theory were correct (it is not), Yanacocha would not have signed two different agreements with respect to two separate investment projects developed within the same concession. According to Claimant's theory, the first agreement would have been sufficient to cover any and all future investment, including for Project 3, in the concession that contained the project identified in the first agreement.

309. Southern Peru Copper Corporation ("Southern") also provides a relevant example. On July 12, 1994, Southern signed a mining stabilization agreement for a period of 15 years to develop the "*Proyecto de Lixiviación Electrowon*."[550] This project had the purpose of building a leaching plant to process low grade minerals from the Toquepala and Cuajone mines.[551] The

---

[546] *See* Exhibit CWS-14, Second Chappuis Statement at para. 26; Exhibit CWS-7, First Flury Statement at paras. 33-38; *see also* Claimant's Reply at para. 57.

[547] Respondent's Counter-Memorial at Section II.A.

[548] *See* Exhibit CE-919, Minera Yanacocha S.A. - Proyecto Cerro Yanacocha Stabilization Agreement, September 16, 1998; Exhibit CE-911, Compañía Minera Yanacocha S.A. - Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994; Exhibit RE-189, Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L - Project La Quinua Stabilization Agreement, July 25, 2003.

[549] Exhibit CE-919, Minera Yanacocha S.A. - Proyecto Cerro Yanacocha Stabilization Agreement, September 16, 1998, at Clause 1.1; Exhibit RE-189, Agreement of Guarantees and Measures for the Promotion of Investments, Compañía Minera Yanacocha S.R.L - Project La Quinua Stabilization Agreement, July 25, 2003, at Appendix No. I.

[550] Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at First Clause.

[551] *See* Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at First and Eighth Clause; *see also* Exhibit RWS-10, Second Tovar Statement at para. 65.

leaching project would operate under two separate beneficiation concessions, called "Planta de Lixiviación SX/EW Toquepala" and "Planta de Lixiviación SX/Cuajone," which respectively would process minerals originated from the Toquepala's and Cuajone's EAUs.[552] When Southern's stabilization agreement was signed, the primary sulfides obtained from the EAU Cuajone were process through a primary sulfide concentrator that operated under the beneficiation concession called "Botiflaca," and the primary sulfides obtained from the EAU Toquepala were process through another concentrator plant that operated in the beneficiation concession called "Concentradora Toquepala."[553] As a result, both within the EAU Toquepala and the EAU Cuajone, stabilized leaching activities (Proyecto de Lixiviación Electrowon) and non-stabilized concentration activities (in the primary sulfide plants) co-existed.[554]

310. If Claimant's theory regarding the scope of stabilization agreements were correct, then Southern's 1994 stabilization agreement would have covered both EAUs in which the activity occurred—that is, both the EAU Toquepala and the EAU Cuajone—and would have stabilized all activities related to those EAUs including the concentrator activities. It did not. And Southern, unlike SMCV in this case, understood that. After the 2004 Royalty Law was enacted, Southern started to pay royalties with respect to the minerals processed in its non-stabilized concentrator plants.[555] In other words, Southern understood that its 1994 stabilization agreement did not automatically cover the entire EAUs in which the original investment project was developed (and, thus, any investments within those EAUs) but rather covered only the specific project outlined in the stabilization agreement (*i.e.*, the "Proyecto de Lixiviación Electrowon").

311. Notably, Claimant's own witness Mr. Flury was the one who signed Southern's 1994 stabilization agreement.[556] At the time, he was the Vice President of Southern's legal

---

[552] Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clause 1.4; Exhibit RE-202, Mining Registry, SX/Cuajone Leaching Plant Concession, *prepared with data obtained from* https://geocatmin.ingemmet.gob.pe/geocatmin/; Exhibit RE-203, Mining Registry, SX/EW Toquepala Leaching Plant Concession, *prepared with data obtained from* https://geocatmin.ingemmet.gob.pe/geocatmin/. *See also* Exhibit RWS-10, Second Tovar Statement at para. 66.

[553] Exhibit RE-205, Mining Registry, Toquepala Concentrator Concession, *prepared with data obtained from* https://geocatmin.ingemmet.gob.pe/geocatmin/; *see also* Exhibit RWS-10, Second Tovar Statement at para. 64.

[554] *See* Exhibit RWS-10, Second Tovar Statement at para. 67.

[555] *See* Exhibit CE-962, MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission May 3, 2006, attached to email from Tovar Oswaldo to Chavez Riva Jamie (May 2006, 7:32 PM PET), at slide 25. *See also* Exhibit RWS-10, Second Tovar Statement at para. 68.

[556] *See* Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994 (including Mr. Flury's signature at p. 12).

department.[557] The provisions of the Mining Law regarding mining stabilization agreements in force in 2003-2004 (*i.e.*, during Mr. Flury's tenure as Minister of Energy and Mines) were exactly the same as in 1994 (when Mr. Flury signed Southern's Stabilization Agreement).[558] Thus, both in 1994 and 2003-2004, Mr. Flury must have understood that a company can have both stabilized and non-stabilized regimes within a single concession, EAU, or "mining unit," and that mining stabilization agreements do not automatically apply to the entire concession, EAU, or "mining unit" in which an investment project is carried out. Therefore, it is disingenuous for Ms. Flury to assert that, when serving as Minister of Energy and Mines, "he understood [that stabilization agreements] would apply to entire concessions or mining units."[559] Mr. Flury's testimony is simply not credible.

312. Similarly, Ms. Chappuis's testimony that she "d[oes] not recall any case in which the Government sought to apply different stability regimes to a company for additional investments performed in the same concession or mining unit"[560] is not credible. The Southern stabilization agreement was in force from 1994 to 2009,[561] which includes the three years during which Ms. Chappuis worked at MINEM as advisor to Vice Minister Polo.[562] Therefore, Ms. Chappuis should have known that the Southern stabilization agreement applied to a specific mining project and not to Southern's entire EAUs or "mining units."

313. In sum, Claimant's, Ms. Chappuis's, and Mr. Flury's arguments that a given mining concession, EAU, or "mining unit" cannot have multiple stabilization agreements, or cannot have both stabilized and non-stabilized activities, are meritless.

2. The 2001 Mining Council Resolution

314. In its Memorial, Claimant asserted that a November 2001 Mining Council resolution relating to the "Parcoy" mine (owned by Consorcio Minero Horizonte S.A.) (the "2001 Resolution") confirmed Claimant's understanding of the scope of SMCV's 1998

[557] *See* Exhibit CWS-7, First Flury Statement, at para. 5.

[558] *See generally* Exhibit CA-1, General Mining Law; Exhibit CA-2, Mining Regulations.

[559] Exhibit CWS-18, Reply Witness Statement of Hans Flury, September 13, 2022 ("Second Flury Statement"), at para. 15.

[560] Exhibit CWS-14, Second Chappuis Statement at para. 26.

[561] *See* Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clause 8.1.

[562] *See* Ms. Chappuis worked between 2001 and 2004 as advisor to Vice Minister Polo. *See* Exhibit CWS-14, Second Chappuis Statement at para. 6.

Stabilization Agreement.[563] In its Counter-Memorial, Respondent explained that nothing in the 2001 Resolution confirmed Claimant's view that stability benefits provided in the 1998 Stabilization Agreement extended to all investments in the Cerro Verde Mine for at least two reasons: (i) in the 2001 Resolution, the Council considered a different issue from the one discussed in this arbitration (the Consorcio Minero Horizonte requested the DGM to include other mining rights within the scope of an existing stabilized project—not to expand a stabilization agreement to include a new and separate project);[564] and (ii) in any event, the 2001 Resolution is applicable only to the parties involved in that dispute and, thus, it would not create any precedent that would bind Respondent as to the interpretation of SMCV's 1998 Stabilization Agreement.[565] Respondent also explained that, in any event, the content of the 2001 Resolution is irrelevant because Claimant does not assert in these proceedings that it relied on the 2001 Resolution when forming its understanding of the scope of the Agreement (*i.e.*, the content of the Resolution cannot have formed the basis of any expectation (legitimate or not) on the part of Claimant before making its investment).[566]

315. In its Reply, Claimant alleges that (i) Respondent does not contest Claimant's claims that the 2001 Resolution confirmed that stability guarantees apply to entire concessions, EAUs, or "mining units;"[567] and (ii) whether Claimant knew or not about the Resolution is irrelevant. These allegations, too, are without merit. Respondent rebuts each of Claimant's arguments below.

316. *First*, contrary to Claimant's premise, Respondent devoted two pages in its Counter-Memorial to explain why the 2001 Resolution does not confirm that stability guarantees apply to entire concessions or "mining units."[568] Respondent explained that nothing in the 2001 Resolution could be understood as confirming Claimant's view that stability benefits provided in the 1998 Stabilization Agreement necessarily extend to all investments in the Cerro Verde Mine. The Mining Council did not conclude that, in general, mining stabilization agreements cover all

[563] Claimant's Memorial at para. 316 (*citing* Exhibit CE-377, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, at p. 2).

[564] *See* Respondent's Counter-Memorial at paras. 134-35.

[565] *See* Respondent's Counter-Memorial at para. 136.

[566] *See* Respondent's Counter-Memorial at para. 133.

[567] *See* Claimant's Reply at para. 64.

[568] *See* Respondent's Counter-Memorial at paras. 131-36.

investment activities within the concession(s) in which an investment project described in the feasibility study attached to an agreement is carried out.

317. Also, as Respondent explained in its Counter-Memorial, the Parcoy Project case before the Mining Council was substantially different from that of Claimant's in this arbitration. In that case, the Mining Council did not consider whether a stabilization agreement automatically covered all investment projects within the same EAU or concession, whether or not they had been included in the feasibility study attached to an agreement. The Mining Council also did not consider whether additional investment projects carried out in the same EAU or concession in which the original investment project was made would benefit from the stabilization agreement. Instead, the Mining Council considered a quite different question: 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.[569] Accordingly, the Mining Council decision on the Parcoy Project does not support Claimant's interpretation of stabilization agreements, nor does it support Claimant's theory that Perú held one position on the scope of stabilization agreements before Claimant invested in SMCV and the Concentrator Plant and then suddenly changed its view thereafter as a result of alleged political pressure.

318. *Third*, Claimant claims that its contemporaneous knowledge, or its failure to take note of the lessons of the 2001 Resolution, when investing in SMCV has no bearing on the Resolution's relevance to this case.[570] This is incorrect. Respondent notes that in its Reply, Claimant does not deny the fact that it did not know of the 2001 Mining Council Resolution nor that it did not rely on the Resolution in making its investment decision in SMCV. That should be the end of the matter. If Claimant did not know of the Resolution nor rely on it, then its existence had no influence on Claimant's decision to invest in SMCV nor on SMCV's decision to invest in the Concentrator Plant and can, thus, be disregarded by the Tribunal.

3. The 2004 Royalty Law and Its Regulation

319. On June 23, 2004, Perú adopted a law that imposed a royalty on mining concession holders for the extraction of ore (the "2004 Royalty Law").[571] In its Memorial, Claimant argued that government officials made clear throughout the drafting and approval process of the new Royalty Law that the law would not apply to companies with stabilization

[569] *See* Respondent's Counter-Memorial at para. 135.

[570] *See* Claimant's Reply at para. 64(a).

[571] Respondent's Counter-Memorial at para. 169.

agreements.[572] In its Counter-Memorial, Respondent explained that Claimant erred when it took these statements as saying anything about the scope of the companies' stabilization agreements.[573] Government officials did not confirm that if a mining company had a stabilization agreement that was in force at the time the 2004 Royalty Law was enacted, the company—as a whole—did not have to pay any royalties on ore it extracted and processed. Instead, they simply confirmed in general terms that Perú would respect, on their terms, the stabilization agreements already in force at the time the 2004 Royalty Law was enacted.[574]

320. In its Reply, Claimant argues that the structure and the terms of the 2004 Royalty Law and its regulation dated November 15, 2004, (the "Royalty Law Regulation"), along with government officials' comments during the 2004 Royalty Law's initial implementation, support Claimant's view that stability guarantees applied to entire concessions rather than to investment projects, as Respondent argues.[575] As Respondent explains in this section, this was not the case, and Claimant's interpretation of the 2004 Mining Law is incorrect.

321. *First*, Claimant alleges that the 2004 Royalty Law and its regulation assigned the royalty obligation to "holders of mining concessions," and that, therefore, the reference base for the royalty calculations necessarily must be a "mining concession" (as opposed to a "mining project").[576] Claimant asserts that this concept constituted confirmation that "stability guarantees applied to entire concessions."[577] It does not.

322. As Respondent explained in its Counter-Memorial, the 2004 Royalty Law imposes a royalty on mining concession holders for the extraction of ore.[578] Thus, mining titleholders are the companies or individuals that are obliged to pay royalties. These individuals or companies are not obliged to pay royalties simply because they hold a mining title but, rather, because they hold a title to a concession that is being exploited (*e.g.,* ore is being extracted). Royalties are paid based on the value (in international markets) of ore concentrate produced from

[572] *See* Claimant's Memorial at paras. 97-10.

[573] *See* Respondent's Counter-Memorial at paras. 142-45.

[574] *See* Respondent's Counter-Memorial at para. 144.

[575] *See* Claimant's Reply at para. 68

[576] Claimant's Reply at para. 68(a).

[577] Claimant's Reply at para. 68.

[578] *See* Exhibit CA-6, Law No. 28258, Mining Royalty Law, June 24, 2004 ("Mining Royalty Law"), at Art. 3 (modified by Art. 2 of Law No. 29788, published on September 28, 2011).

a concession.[579] None of these provisions, however, indicates that royalties are necessarily paid based on the entire production of a concession. If a mining titleholder has developed one or more exploitation projects within a single concession, and one of those projects was covered by a mining stabilization agreement at the time the Royalty Law was enacted, then the concentrate produced out of the stabilized project would not be subject to royalties.[580] Thus, the fact that "holders of mining concessions" have the obligation to pay royalties under the 2004 Royalty Law does not imply—as Claimant wants this Tribunal to believe—that stabilization agreements grant guarantees to entire concessions rather than to specific investment projects.

323. *Second*, Claimant alleges that, during the process of enacting the 2004 Royalty Law, Peruvian government officials confirmed that stability guarantees applied to entire mining concessions.[581] In its Reply, Claimant focuses on a press report of a statement by the then-Minister of Economy and Finance, Mr. Kuczynski, who was quoted as stating that royalty payments would be paid by "a minority of companies, since most of the large mining projects are stabilized both in terms of taxes and fees."[582] Claimant's focus on this statement is misplaced. The statement does not support Claimant's interpretation of the scope of stabilization agreements. The statement is merely a single sentence from Mr. Kuczynski stating generally that most of the large mining projects were stabilized and, thus, would not be paying royalties. He was not analyzing the scope of stabilization agreements nor, obviously, SMCV's 1998 Stabilization Agreement in particular.

324. If anything, the statement supports Respondent's case. Mr. Kuczynski did not say that most of the large mining "companies" or most of the large "concessions" were stabilized; rather, he is quoted as saying most of the "large mining projects" were stabilized. Thus, rather than undermining Respondent, it supports Respondent's case that the government has consistently, even in 2004, interpreted stabilization agreements as applying to specific "projects" rather than mining companies, concessions, or EAUs. In any case, SMCV certainly could not have relied on such a statement (which it has not even alleged) to conclude that its Concentrator Project was included in the 1998 Stabilization Agreement.

---

[579] *See* Exhibit CA-6, Mining Royalty Law, Law No. 28258, June 23, 2004, at Art. 3.

[580] *See* Exhibit RER-3, First Bravo and Picón Report at Section IV.

[581] *See* Claimant's Reply at para. 68(b).

[582] Claimant's Reply at para. 68(b), n.233 (quoting from Exhibit CE-439, "Minister of Economy of Perú Against Mining Royalties," *Agence France Presse*, May 30, 2004, at p. 1) (emphasis added).

325. *Third,* the March 11, 2004, "Royalties Forum" (*Foro de Regalías*) further supports Respondent's position that, even in 2004, MINEM interpreted stabilization agreements as only applying to the specific investment project(s) for which the agreement was entered into. In the context of the debate on whether to adopt a royalty law in Perú, the Energy and Mines Commission of Perú's Congress decided to organize the Royalties Forum.[583] Vice Minister Polo attended the event on behalf of MINEM.[584]

326. In his presentation, Mr. Polo stressed that stabilization agreements only cover a "project" or a specific "investment:"

> 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.[585]

327. In his witness statement, Mr. Polo clarifies that, when he mentioned that a company could have a stabilization agreement for a "project" or an "investment" he was referring to the specific investment project outlined in the corresponding feasibility study of the agreement.[586]

328. In sum, neither the structure of the 2004 Royalty Law and its Regulation, nor the statements of government officials at the time the legislation was considered and enacted, confirm Claimant's understanding regarding the scope of SMCV's 1998 Stabilization Agreement.

---

[583] *See* Exhibit RE-219, Press Release from the Congress of Perú Regarding the Royalties Forum, March 11, 2004.

[584] *See generally* Exhibit RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts).

[585] Exhibit RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts), at timestamps 00:09:37 - 00:10:03 ("*Los contratos de estabilidad no se dan por empresa, eso es importante aclarar. Una empresa puede tener [un] contrato de estabilidad por un* ***proyecto*** *y no tenerlo por otro, o tener una actividad antigua que no tiene contrato de estabilidad y una nueva que sí lo tiene. Eso es así, no se da para toda la empresa. Se hace una inversión arriba de 20 millones o arriba de 50, según sea el caso, y eso da derecho a estabilidad por esa* ***inversión****, por ese desarrollo, no a toda la empresa*") (emphasis added).

[586] *See* Exhibit RWS-8, Second Polo Statement at para. 18.

4. MINEM Did Not Confirm to SMCV that the 1998 Stabilization Agreement Covered the Concentrator Project

329. In its Memorial, Claimant explained that, between 2002 and 2004, changes occurred in the area where the Leaching Plant was located that finally made it economical for SMCV to build a Concentrator Plant.[587] Accordingly, on August 27, 2004, SMCV submitted a request to expand the Beneficiation Concession to include the Concentrator Project.[588] In parallel, SMCV requested that MINEM approve SMCV's reinvestment of the Leaching Project's undistributed profits into the construction of the Concentrator.[589] Claimant alleges—without support—that MINEM's approvals of both requests confirmed that the Concentrator Project was included within the scope of the 1998 Stabilization Agreement.[590] They did not.

330. At the time that SMCV realized it was economically feasible to build the Concentrator, SMCV easily could have requested and signed a new stabilization agreement for the Concentrator Project. It did not take that approach for one simple reason: by the time SMCV was able to launch the Concentrator Project, Perú had already enacted the 2004 Royalty Law, which imposed a royalty on mining concession holders for the extraction of ore.[591] Had SMCV signed a new mining stabilization agreement for the Concentrator Project, it would have stabilized a legal regime that already included an obligation to pay royalties to Perú for the primary sulfides it would extract and process under the Concentrator Project. SMCV did not want to pay those royalties. Thus, SMCV had to get creative and try to find a way to include the Concentrator Project within the (royalty-free) scope of the 1998 Stabilization Agreement.

331. For this reason, Claimant insists in its Reply that it allegedly obtained confirmation from Perú that the Concentrator Project would be covered by the 1998 Stabilization Agreement indirectly, in the form of MINEM's approval of (i) the construction of the Concentrator Project and the extension of the Beneficiation Concession to cover the Concentrator Plant; and (ii) SMCV's request to use the profit reinvestment benefit to help

[587] *See* Claimant's Memorial at paras. 89-90.

[588] *See* Respondent's Counter-Memorial at para. 152; *see also* Exhibit CE-457, SMCV, Petition No. 1487019 to MINEM, August 27, 2004.

[589] *See* Respondent's Counter-Memorial at para. 152.

[590] *See* Claimant's Reply at Sections II.A.4(i); *see also id.* at para. 87.

[591] *See supra* at Section II.E.3.

finance the construction of the Concentrator Project.[592] No such meaning is attached to either MINEM approval, however.

a. MINEM's Approval of the Expansion of the Beneficiation Concession Did Not Indicate that the 1998 Stabilization Agreement Would Cover the Concentrator Project

332. Before deciding to proceed with the US $850 million investment in the Concentrator Project, SMCV understood that, if it wanted to avoid paying royalties on ore exploited through that Project, it should try to obtain a written agreement or statement from Perú's authorities that they would include the Concentrator Project within the scope of the 1998 Stabilization Agreement.[593] SMCV had to get creative. In the end, SMCV was never able to obtain such a statement—likely because that was not Perú's understanding of the Agreement. Nevertheless, SMCV (and Claimant's predecessor Phelps Dodge) decided to go ahead with its investment, necessarily now fully aware that there was a risk that the State would not consider the Concentrator Project as a stabilized investment project and, thus, that SMCV would have to pay the corresponding royalties.

333. In its Memorial, relying on the false premise that the 1998 Stabilization Agreement extended to the entire Cerro Verde "mining unit," Claimant argued that MINEM's approval of the expansion of the area and production capacity of the Beneficiation Concession (dated October 26, 2004) constituted written confirmation of the expansion of the scope of the Agreement to include the Concentrator Project.[594] In its Counter-Memorial, Respondent explained that no such significance can be drawn from MINEM's approval of the expansion of the Beneficiation Concession; the fact that the Beneficiation Concession's physical boundaries and production capacity were expanded to include the Concentrator Project had absolutely nothing to do with the scope of the 1998 Stabilization Agreement.[595] In particular, Respondent explained that (i) nothing in the resolution approving the expansion of the area of the concession indicates an expansion of the 1998 Stabilization Agreement—in fact, the resolution does not even discuss the Agreement; and (ii) Mr. Tovar, who analyzed and authorized the expansion of the area of the Beneficiation Concession, confirmed that the scope of the Agreement was never

[592] *See* Claimant's Reply at Section II.A.4(i); *see also id.* at para. 87.

[593] *See*, *e.g.*, Claimant's Reply at para. 90(a); *see also* Exhibit CWS-11, First Torreblanca Statement at para. 23; Exhibit CWS-21, Second Torreblanca Statement at para. 12; Exhibit CWS-5, First Davenport Statement at para. 35; Exhibit CWS-16, Second Davenport Statement at paras. 10-16.

[594] *See* Claimant's Memorial at para. 114.

[595] *See* Respondent's Counter-Memorial at paras. 152-58.

part of his analysis—the request to his office was exclusively to approve the construction of a new processing plant and to expand the Beneficiation Concession, not to expand (or not) the scope of the 1998 Stabilization Agreement.[596]

334. In its Reply, Claimant (i) cites to further, still-unsubstantiated witness testimony from Ms. Chappuis, Ms. Torreblanca, and Mr. Davenport, and to some irrelevant documentary evidence in an attempt to support its position that the approval of the expansion of the Beneficiation Concession served to confirm that the Agreement covered the Concentrator Project;[597] (ii) alleges that the arguments by Perú and Mr. Tovar to rebut Claimant's position are unpersuasive; and (iii) argues that its interpretation of the effects of the approval of the extension of the Beneficiation Concession on the scope of the 1998 Stabilization Agreement is in line with Perú's alleged recognition, since the 1970s, of Cerro Verde as a single mining unit.[598] Respondent next answers each of these in turn.

335. In particular, in its Reply, Claimant alleges that, during a series of meetings held during the second and third quarter of 2004, SMCV representatives (including Ms. Torreblanca and Mr. Davenport) obtained oral—not written—statements from Ms. Chappuis that the 1998 Stabilization Agreement would apply to any investment project that SMCV made in its concession throughout the life of the Agreement.[599] According to Ms. Torreblanca and Mr. Davenport, in July and August 2004, SMCV made several presentations to MINEM to explain their request to include the Concentrator Project within the scope of the 1998 Stabilization Agreement.[600] Claimant submits a copy of the presentations that were allegedly made.[601]

336. Notably, as Mr. Tovar explains in his second witness statement, the language in those presentations shows that, at the time, SMCV was requesting MINEM to amend the 1998

---

[596] *See* Respondent's Counter-Memorial at paras. 154-55.

[597] *See* Claimant's Reply at para. 90.

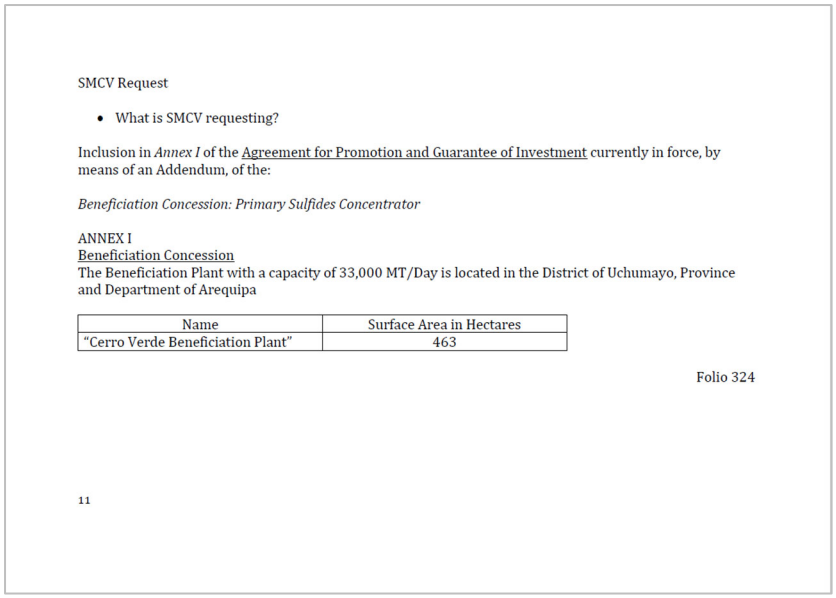
[598] *See* Claimant's Reply at paras. 94-95.

[599] *See* Claimant's Memorial at paras. 107-08; Claimant's Reply at para. 90; Exhibit CWS-14, Second Chappuis Statement at para. 37; Exhibit CWS-21, Second Torreblanca Statement at para. 13; Exhibit CWS-16, Second Davenport Statement at para. 16.

[600] *See* Exhibit CWS-16, Second Davenport Statement at para. 12; Exhibit CWS-21, Second Torreblanca Statement at para. 15.

[601] *See* Exhibit CE-450, Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future," July 8, 2004; Exhibit CE-453, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement, August 2004, at slide 11. *See also* Exhibit CWS-14, Second Chappuis Statement at para. 15; Exhibit CWS-16, Second Davenport Statement at para. 12.

Stabilization Agreement to include the Concentrator Project within the scope of the Agreement.[602] For example, in the presentation allegedly made in August 2004, SMCV stated:[603]



SMCV Request

- What is SMCV requesting?

Inclusion in *Annex I* of the Agreement for Promotion and Guarantee of Investment currently in force, by means of an Addendum, of the:

Beneficiation Concession: Primary Sulfides Concentrator

ANNEX I
Beneficiation Concession
The Beneficiation Plant with a capacity of 33,000 MT/Day is located in the District of Uchumayo, Province and Department of Arequipa

Name	Surface Area in Hectares
"Cerro Verde Beneficiation Plant"	463

Folio 324

11

SMCV's request is telling: SMCV evidently understood in 2004 that the Concentrator Project was not included in the 1998 Stabilization Agreement, and that the Agreement would need to be amended in order to bring the Concentrator Project under its coverage. This is very different from Claimant's contention now that the Concentrator Project was necessarily and already covered (*e.g.*, because the Agreement automatically covered the whole concession), and that all it wanted was "confirmation" from MINEM. That is not the case. In August 2004, SMCV was asking to change the 1998 Stabilization Agreement, not to merely "confirm" its extant scope.

337. According to Ms. Torreblanca, after these alleged meetings, SMCV convinced MINEM that it should approve an amendment to the Agreement to include the Concentrator Project within its scope. It did not. In his second witness statement, Mr. Tovar explains that such a request—had it actually been submitted to MINEM—would have been denied.[604] The 1998 Stabilization Agreement allowed SMCV to request the inclusion of additional "mining rights" to the Agreement to develop the Leaching Project, but the inclusion of those additional

[602] *See* Exhibit RWS-10, Second Tovar Statement at paras. 21-24; *see also* Exhibit CE-450, Sociedad Minera Cerro Verde S.A.A., "Past, Present, Future," July 8, 2004, at slide 45.

[603] Exhibit CE-453, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement, August 2004, at slide 11.

[604] *See* Exhibit RWS-10, Second Tovar Statement at paras. 28, 37.

rights needed to be related to the purpose of the originally stabilized project.[605] The Concentrator Project was an entirely separate and unrelated investment project; thus, it could not be included within the scope of a mining stabilization agreement that had been entered into to stabilize an entirely different project—*i.e*., the Leaching Project.[606]

338. SMCV, instead, should have asked MINEM to sign a new stabilization agreement for the Concentrator Project. As Mr. Tovar explains, "[T]he only possibility the company had for its Concentrator project to benefit from a stability regime was to sign a new [s]tabilization [a]greement."[607] Of course, SMCV did not make that request, because it would have meant accepting the obligation to pay royalties on the products of that project.

339. More importantly, if it were true that SMCV had persuaded MINEM to sign an amendment to the Agreement, then surely it would have actually submitted a request to do so, along with a proposed text for the amendment. It never did that. Ms. Torreblanca and Mr. Davenport do not claim that any such request was ever made. Instead, they assert that SMCV did not submit a request, in the end, because Ms. Chappuis allegedly stated to them that an amendment was unnecessary and that an expansion of the existing Beneficiation Concession would suffice to include the Concentrator Project within the scope of the 1998 Stabilization Agreement.[608] Ms. Torreblanca and Mr. Davenport's testimony is unconvincing. It is simply not credible that experienced and sophisticated companies, such as SMCV and Phelps Dodge, would have based their investment decisions on an oral suggestion from a government official. They would have to have been even more doubtful, given that the alleged advice was to not proceed with a direct request to explicitly amend the 1998 Stabilization Agreement and instead to try to surreptitiously include the new investment project in the Agreement, through a request and procedure that has nothing to do with the expanding the scope of the 1998 Stabilization Agreement.

340. Moreover, as Mr. Tovar explains in his second witness statement, it is unlikely that Ms. Chappuis made such a suggestion to SMCV and Phelps Dodge for several reasons.

---

[605] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clauses 3, 4.2; *see also* Exhibit RWS-3, First Tovar Statement at para. 27.

[606] *See* Exhibit RWS-10, Second Tovar Statement at paras. 27-28.

[607] Exhibit RWS-10, Second Tovar Statement at para. 29 ("*la única posibilidad que tenía la empresa para que su proyecto de la Concentradora se beneficiara de un régimen de estabilidad, era que suscribiera un nuevo Contrato de Estabilidad*.").

[608] *See* Exhibit CWS-14, Second Chappuis Statement at para. 36; Exhibit CWS-16, Second Davenport Statement at para. 16.

First, Ms. Chappuis was not certain whether SMCV could include the Concentrator Project within the 1998 Stabilization Agreement.[609] On June 11, 2004, Ms. Chappuis sent an email to her team (including Mr. Tovar) indicating that she did not know whether it was legal to consider that the Concentrator Project was covered by the 1998 Stabilization Agreement.[610]

From: Chappuis Maria (DG Mineria)
Sent: Friday, June 11, 2004 6:15 PM
To: Padilla Rosario (D Tec. Normativa); Chavez Riva Galvez Jaime; Tovar Oswaldo (D Promocion Minera); Saldarriaga Colona Luis; Panizo Luis (DG Asuntos Legales)
Subject: Meeting with Cerro Verde - New SA

Can you come to my office on Tuesday 15, at 11:00 am
Matter: Request for inclusion of the Sulfides Project in SA of [Cerro Verde]…is this legal?

Ing. Maria Chappuis
Directora General de Mineria
Ministerio de Energía y Minas
http://www.minem.gob.pe
Av. Las Artes 260, Lima 41 - Perú
Telf. 51.1.4750336, Fax 51.1.2258304
==========

==========

341. Mr. Tovar explains that, after that meeting, Ms. Chappuis never discussed with him the possibility of including the Concentrator Project in the Agreement by different means—namely, by expanding the area of the existing Beneficiation Concession.[611] Mr. Tovar was the person in charge of studying and approving the expansion of the Beneficiation Concession.[612] Thus, if Ms. Chappuis thought that that was the road for SMCV to be able to include the Concentrator Project within the scope of the 1998 Stabilization Agreement, she should and would have discussed it with Mr. Tovar. No such conversation transpired.

342. *Second*, Mr. Tovar, who attended most of the meetings between MINEM officials and SMCV representatives in 2004, confirms that MINEM officials never mentioned to SMCV's representatives that the expansion of the area of the Beneficiation Concession would signal or

[609] Exhibit RWS-10, Second Tovar Statement at para. 16.

[610] *See* Exhibit RE-198, 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," June 11, 2004 ("Can you come to my office on Tuesday 15, at 11:00 am Matter: Request for inclusion of the Sulfides Project in SA of [Cerro Verde]… is this legal?") ("*Podrían venir a mi oficina el martes 15, a las 11:00 am. Asunto Solicitud de inclusión de Proyecto Sulfuros en CET de [Cerro Verde]…esto es legal?*"); *see also* Exhibit RWS-10, Second Tovar Statement at para. 16.

[611] *See* Exhibit RWS-10, Second Tovar Statement at para. 17.

[612] *See* Exhibit RWS-10, Second Tovar Statement at para. 17.

would ensure that the Concentrator Project would be covered by the 1998 Stabilization Agreement.[613] Mr. Tovar reiterates in his second witness statement:

> I must reiterate that Ms. Chappuis never held such a position in the meetings that we held with the other DGM officials and Cerro Verde representatives. Therefore, it is unlikely that Ms. Chappuis acted in such a manner—completely isolated from her team at the Ministry. And if she did it, it was not correct.[614]

343. In any event, even if Ms. Chappuis did tell SMCV representatives that expanding the Beneficiation Concession would somehow also secure that the Concentrator Project would be covered by the Agreement (which certainly has not been proven), any such statement could not be understood as an adequate assurance from Perú that the Concentrator Project was entitled to stability under the 1998 Stabilization Agreement. As Mr. Tovar notes, an unsubstantiated oral statement from a government official (assuming it was, in fact, made at the time) cannot be taken as official confirmation from the State.[615] Normally, when MINEM communicates with an individual to express the Ministry's opinion, it sends an official letter accompanied by a report or memorandum from the division in charge of reviewing the matter.[616] Claimant's witnesses admit that they sought such a written assurance from the government.[617] However, in the end, they never obtained it.[618]

344. More importantly, as Mr. Tovar explains, if Ms. Chappuis did make the suggestion to SMCV to bring the Concentrator Project under the 1998 Stabilization Agreement by means of an unrelated procedure to expand the area of the Beneficiation Concession, she acted outside her powers:

> If it were true that Mrs. Chappuis suggested them to request the extension of the existing Beneficiation Concession in order to then

---

[613] *See* Exhibit RWS-10, Second Tovar Statement at para. 15.

[614] Exhibit RWS-10, Second Tovar Statement at para. 35 ("*[D]ebo reiterar que la señora Chappuis nunca sostuvo tal posición en las reuniones que sostuvimos con los demás funcionarios de la DGM y con los representantes de Cerro Verde. Por lo tanto, es poco probable que la señora Chappuis haya actuado de tal manera—completamente aislada de su equipo en el Ministerio. Y si lo hizo, no fue correcto*.").

[615] *See* Exhibit RWS-3, First Tovar Statement at para. 14; Exhibit RWS-10, Second Tovar Statement at para. 15.

[616] *See* Exhibit RWS-10, Second Tovar Statement at para. 37.

[617] *See* Claimant's Reply at paras. 90, 95(a); *see also* Claimant's Memorial at Section F.5. *See* Exhibit CWS-21, Second Torreblanca Statement at para. 17; *see also* Claimant's Reply at para. 101, n.467. Exhibit CWS-16, Second Davenport Statement at para. 16; *see also* Exhibit CWS-5, First Davenport Statement at para. 39.

[618] *See* Claimant's Reply at para. 90; *see also* Claimant's Memorial at Section F.5. *See* Exhibit CWS-21, Second Torreblanca Statement at para. 17; *see also* Claimant's Reply at para. 101, n.467. Exhibit CWS-16, Second Davenport Statement at para. 16; *see also* Exhibit CWS-5, First Davenport Statement at para. 39.

> include the Concentrator by means of an addendum to the Stabilization Contract, then Mrs. Chappuis' suggestion was not in line with procedures established by MINEM. In such case, Mrs. Chappuis would have acted outside of her duties, since she would have suggested to a private party to divert from the regular procedures to obtain the authorization that the company required in accordance with the law.[619]

345. Thus, SMCV (and Claimant) cannot credibly claim that the expansion of the Beneficiation Concession somehow confirmed that the Concentrator Project was included within the scope of the 1998 Stabilization Agreement.

346. In its Reply, Claimant cites to a handful of documents that it alleges confirm SMCV's understanding that the expansion of the Beneficiation Concession also had the effect of extending the scope of the 1998 Stabilization Agreement to the Concentrator Plant. However, none of the evidence that Claimant offers actually confirms that position.

- Claimant submits a copy of SMCV's Board of Directors meeting minutes (dated October 11, 2004, and March 7, 2005) and alleges that the minutes show that SMCV's Board "approved the investment conditionally, underscoring that its final approval of the investment was contingent upon receiving all required permits that were pending in Peru, including expansion of the Beneficiation Concession."[620] However, that statement in the meeting minutes only establishes that SMCV was waiting on the Beneficiation Concession approval. It does not mention SMCV's alleged understanding that the Concentrator Project would be swept into the scope of the 1998 Stabilization Agreement via the expansion of the area of the Beneficiation Concession.[621]

- Claimant also cites to Phelps Dodge's 10-K Form submitted to the SEC for fiscal year December 31, 2004, to support its argument that Phelps Dodge's (and SMCV's) investment decision was contingent on obtaining the expansion of the Beneficiation Concession.[622] As Respondent explained in Section II.D.5(a), Phelps Dodge's 10-K Form also states that "it is not clear what, if any, effect the new royalty law will have on [the] operations at Cerro Verde."[623] Thus, at a minimum, Phelps Dodge (Claimant's predecessor) and SMCV knew that there was a significant risk that the Agreement did not cover the Concentrator Project

[619] Exhibit RWS-10, Second Tovar Statement at para. 36 ("*Chappuis les sugirió solicitar la ampliación de la Concesión de Beneficio existente para así incluir la Concentradora en el Contrato de Concesión, en vez de solicitar la inclusión de ese proyecto mediante adenda, la sugerencia de la señora Chappuis no era correcta dentro de los procedimientos establecidos en el MINEM. En tal caso, la señora Chappuis habría actuado por fuera de sus funciones, pues le habría sugerido a un privado actuar por fuera de la vía regular para obtener la autorización que la empresa requería de conformidad con la ley*.") (emphasis added).

[620] Claimant's Reply at para. 101 (emphasis added).

[621] *See* Exhibit CE-470, SMCV, Board of Directors Meeting Minutes, October 11, 2004.

[622] *See* Claimant's Reply at para. 101, n.467.

[623] *See* Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 80 (emphasis added).

and that the expansion of the Beneficiation Concession did not necessarily expand the scope of the 1998 Stabilization Agreement.

- Claimant submits MINEM's formal approval to expand the area of the Beneficiation Concession, and claims that the approval in and of itself was a written assurance "that the Concentrator was part of the existing stabilized mining unit."[624] This is a circular argument and is without merit. MINEM's formal approval of the request to expand the Concentrator Project would have been useful to support Claimant's position only if Claimant had proven with relevant evidence that the expansion of the Beneficiation Concession was in fact an assurance that the 1998 Stabilization Agreement would include the Concentrator Project. It has not. Moreover, the document approving the expansion of the Beneficiation Concession does not contain any language indicating that, as a result of that expansion, the Concentrator Project would now be covered by the Stabilization Agreement. The document does not even mention the 1998 Stabilization Agreement.

- Finally, Claimant alleges that the fact that the government approved a request to expand the Beneficiation Concession to include a new US $15 million investment to enlarge SMCV's Pad 2 is a confirmation that an expansion of the Beneficiation Concession could, in turn, expand the scope of the 1998 Stabilization Agreement even without ever mentioning the Agreement as such.[625] However, this is incorrect. DGM's approval of the expansion of the Beneficiation Concession to include SMCV's enlarged Pad 2 concerned an expansion of the existing covered investment project—*i.e.,* the Leaching Project. It is not evidence that an expansion of the Beneficiation Concession could expand the scope of the 1998 Stabilization Agreement to include an entirely new project—*i.e*., the Concentrator Project.

347. Notably, SMCV also asserted before Perú's Supreme Court that the expansion of the Beneficiation Concession confirmed that the Concentrator Project had been included within the scope of the 1998 Stabilization Agreement. The Supreme Court found that SMCV's arguments were not persuasive and held that this expansion simply expanded the Beneficiation Concession and authorized the Primary Sulfides Plan to operate.[626]

348. *Finally*, Claimant asserts that the government's approval purportedly expanding the Beneficiation Concession to include the Concentrator Project and the alleged resulting (unstated and indirect) expansion of the scope of the 1998 Stabilization Agreement was consistent with the government's alleged longstanding understanding that stability guarantees

[624] Claimant's Reply at para. 102.

[625] *See* Claimant's Reply at para. 91(c).

[626] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 75-76.

would apply to the entirety of "Cerro Verde Mining Unit."[627] Claimant bases this allegation on the Heads of Agreement signed between Cyprus and Minero Perú on October 26, 1993 in the context of Cyprus' acquisition of SMCV.[628] The Heads of Agreement was used in negotiations leading up to the 1994 Share Purchase Agreement for the sale of the Cerro Verde assets during privatization of the Cerro Verde mine.[629] Claimant's argument is simply incorrect. Perú never considered the Concentrator Project as part of the so-called "Cerro Verde Mining Unit," nor did it promise at the time that mining stabilization agreements applied to a company's "mining unit."

349. First, as explained in Section II.C.2, the concentrator plant described in the 1994 Share Purchase Agreement was entirely different from the large Concentrator Project in which SMCV eventually invested.[630] Second, as Respondent explained in its Counter-Memorial, the Heads of Agreement did not specify that any stabilization agreement into which SMCV might enter would cover all investments in the Cerro Verde Mine.[631]

350. In sum, the fact that the Beneficiation Concession was expanded to include the Concentrator Project had nothing to do with the scope of the 1998 Stabilization Agreement.

b. MINEM's Approval of SMCV's Reinvestment of Profits of the Leaching Project Did Not Confirm that the 1998 Stabilization Agreement Covered the Concentrator Project

351. Parallel to its request to expand the area of the Beneficiation Concession to include the area where the Concentrator Plant would be built, SMCV also requested MINEM to approve SMCV's reinvestment of the Leaching Project's undistributed profits into the construction of the Concentrator Plant, free of tax. At the time the 1998 Stabilization Agreement was signed, Article 72(b) of the Mining Law and Article 10 of the 1993 Mining Regulation granted mining companies a reinvestment benefit: mining companies could reinvest their profits from a stabilized project, free of tax, into a new investment program if the new investment would guarantee an increase in the company's production levels.[632] That benefit was repealed in 2000, with the enactment of Law No. 27343.[633]

---

[627] *See* Claimant's Reply at paras. 93, 95.

[628] *See* Claimant's Reply at para. 95(a).

[629] *See* Claimant's Reply at para. 95(a).

[630] *See supra* at Section II.C.2

[631] *See* Respondent's Counter-Memorial at para. 70.

[632] *See* Exhibit CA-1, General Mining Law at Art. 72(b); *see also* Exhibit CA-2, Mining Regulations at Art. 10.

[633] *See* Exhibit CA-79, Stability Agreements with the State, Law No. 27343, September 5, 2000, at Art. 6.

352. In its Counter-Memorial, Respondent explained that contemporaneous evidence shows that nothing in the application process to obtain this benefit nor in the approval itself confirmed Claimant's understanding regarding the scope of the 1998 Stabilization Agreement.[634] To the contrary, Respondent showed that Reports Nos. 509-2003 and 510-2003, in which MINEM analyzed whether to grant SMCV the reinvestment benefit—signed by Claimant's own witness Ms. Chappuis—explicitly stated that the mining stabilization regime applied only to the initial investment (and not to the subsequent investments made with the reinvestment benefit).[635] Respondent also explained that MINEM's approval of the profit reinvestment benefit did not create some kind of waterfall effect whereby profits and stability benefits would spill over from the first project (the stabilized project) to the new project (the non-stabilized project), which would then become stabilized.[636] The fact that, as part of those benefits (for a time), the mining company had the option to reinvest its profits into some new and productive investment project does not mean that all of the activities related to the new investment project would also receive the stability benefits that were conferred upon the first project.[637]

353. In its Reply, Claimant alleges that nothing in Report Nos. 509-2003 and 510-2003 suggest that the stabilized regime was limited to the investment project included in the feasibility study[638] and that Perú's interpretation of the reports is contradicted by Ms. Chappuis' testimony.[639] Claimant's allegations are without merit.

354. On July 3, 2003, SMCV (through Claimant's witness Ms. Torreblanca) wrote to the General Mining Directorate to confirm that SMCV was entitled to apply for the profit reinvestment benefit as a result of the 1998 Stabilization Agreement (notwithstanding that reinvestment rule's 2000 repeal).[640] Importantly, in its inquiry, SMCV admitted—contrary to Claimant's allegations in this arbitration—that its new investment project (*i.e.*, the Concentrator

[634] *See* Respondent's Counter-Memorial at Section II.D.4.

[635] *See* Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003; Exhibit CE-399, MINEM, Report No. 510-2003-MEM-DGM-TNO, September 8, 2003.

[636] Respondent's Counter-Memorial at para. 161.

[637] Respondent's Counter-Memorial at para. 162.

[638] Claimant's Reply at para. 96 (b)-(c).

[639] Claimant's Reply at para. 96.

[640] *See* Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003.

Project) was not outlined or mentioned in the 1998 Stabilization Agreement nor was it related to the Leaching Project (the stabilized project).[641]

> As you are well aware, Sociedad Minera Cerro Verde S.A.A. is conducting a Feasibility Study of the Primary Sulfides Mining Project. The decision of whether or not to implement the project is directly related to my company's right to reinvest non-distributed profits back into the project in question . . . . 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 Program using Non-Distributed Profits to be submitted would be approved **regardless of the fact that it is not confined to the Leaching Project**.[642]

355. Moreover, in its request, SMCV was not asking whether the new project would be covered by the 1998 Stabilization Agreement; it was simply asking whether it could reinvest its undistributed Leaching Project profits into the new project free of tax. Thus, nothing in the application for the approval of the profit reinvestment benefit confirmed that the Concentrator Project—the new project that, in Claimant's own words, was not part of the Leaching Project[643]—was covered by the 1998 Stabilization Agreement.

356. On September 15, 2003, SMCV received two reports from MINEM's General Mining Directorate, signed by Claimant's own witness Ms. Chappuis. In the first report, Report No. 509-2003, the General Mining Directorate made abundantly clear to SMCV that the stabilized regime applied exclusively "to the Cerro Verde Leaching Project and not to [SMCV]" as a general matter:

---

[641] *See* Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1.

[642] Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1 ("*Que, conforme es de su conocimiento, Sociedad Minera Cerro Verde S.A.A. está desarrollando el Estudio de Factibilidad del Proyecto de Explotación de los Sulfuros Primarios. La decisión de ejecutar o no el proyecto, está directamente relacionada con la facultad de mi representada de reinvertir las utilidades no distribuidas en el proyecto en mención . . . Debido a que el contrato de estabilidad suscrito hace referencia en su tenor al Proyecto de Lixiviación y no al Proyecto Cerro Verde, que sí comprendía también al Proyecto de los Sulfuros Primarios, requerimos aclarar que el Programa de Inversión con cargo de Utilidades No Distribuidas a presentarse, sería aprobado* ***independientemente de no estar circunscrito al Proyecto de Lixiviación***.") (emphasis added).

[643] *See* Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1 ("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 Program using Non-Distributed Profits to be submitted would be approved regardless of the fact that it is not confined to the Leaching Project") ("*Debido a que el contrato de estabilidad suscrito hace referencia en su tenor al Proyecto de Lixiviación y no al Proyecto Cerro Verde, que sí comprendía también al Proyecto de los Sulfuros Primarios, requerimos aclarar que el Programa de Inversión con cargo de Utilidades No Distribuidas a presentarse, sería aprobado independientemente de no estar circunscrito al Proyecto de Lixiviación*.") (emphasis added).

> 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.[644]

357. Faced with this contemporaneous language, Ms. Chappuis alleges in her second witness statement that the report referred to the "Leaching Project" as a referential term used in the 1998 Stabilization Agreement, but that it did not mean to limit the scope of stability to the initial investment instead of recognizing that it extends to the concession in which the initial investment was made.[645] Ms. Chappuis's explanation is not credible. SMCV, in its own request to MINEM (written by Claimant's witness, Ms. Torreblanca), explained that the term "Leaching Project" was not merely referential. It was the project included and mentioned in the agreement, which did not include the Concentrator Project: "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 Program using Non-Distributed Profits to be submitted would be approved regardless of the fact that it is not confined to the Leaching Project."[646] The request could not have been more clear—SMCV (and, in turn, Ms. Torreblanca at the time) recognized that the Agreement only covered the "Leaching Project" and not the "Primary Sulfides Project" (*i.e.*, the Concentrator Project). In its response, MINEM (and, in particular, Ms. Chappuis) was confirming that the stabilized regime was granted only to the Leaching Project.

358. Ms. Chappuis also asserts in this arbitration that, because of her alleged experience, she was "keenly aware" that stability guarantees did not apply to a company as a whole, as Ms. Torreblanca alleged at the time, but that they did apply to the activities conducted in the concessions where the initial investment was made.[647] Ms. Chappuis's alleged

---

[644] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1 ("*A la pregunta que sí el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8 del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado está otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato.*") (emphasis added).

[645] *See* Exhibit CWS-14, Second Chappuis Statement at para. 33.

[646] Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1 ("*Debido a que el contrato de estabilidad suscrito hace referencia en su tenor al Proyecto de Lixiviación y no al Proyecto Cerro Verde, que sí comprendía también al Proyecto de los Sulfuros Primarios, requerimos aclarar que el Programa de Inversión con cargo de Utilidades No Distribuidas a presentarse, sería aprobado independientemente de no estar circunscrito al Proyecto de Lixiviación.*") (emphasis added).

[647] *See* Exhibit CWS-14, Second Chappuis Statement at para. 33.

understanding, however, is directly contradicted by her own response in Report No. 509 where she stated 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."[648] So, Ms. Chappuis recognized at that time, contrary to her current assertions, that (i) the stabilization regime applied to the "Cerro Verde Leaching Project" (and not to the activities conducted anywhere in the whole of the concession); and (ii) the stabilization regime was "described in the aforementioned agreement"—that is, the stabilization agreement—which only discusses the Leaching Project and not the Concentrator Project.

359. Ms. Chappuis's alleged current understanding is also contradicted by an email that she sent ten months after the issuance of Report No. 509, in which she admitted that she did not know whether it was legal to consider that the Concentrator Project was covered by the 1998 Stabilization Agreement.[649]

360. Had Ms. Chappuis been "keenly aware" that all the activities conducted within the concession in which the initial stabilized investment was made were already stabilized, she would not have needed to ask her team to discuss whether it was legal or not for SMCV to include the Concentrator Project in the 1998 Stabilization Agreement. The answer would have been obvious. But, it was not. At the time, Ms. Chappuis clearly did not think that the scope of the 1998 Stabilization Agreement automatically covered any and all investments in SMCV's concession, as she now claims to believe.

361. In the second report, Report No. 510-2003, also signed by Ms. Chappuis, the General Mining Directorate responded to SMCV's inquiry, stating that SMCV could apply to reinvest its profits in the Concentrator Project.[650] In other words, MINEM answered the question that SMCV asked. However, MINEM did not state that the Concentrator Project and all of its related activities would be covered by the stability benefits that had been granted to the Leaching Project, as Claimant wished (and wishes) it had.

---

[648] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1, para. 4 ("*la aplicación del Régimen Estabilizado esta otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato*.") (emphasis added).

[649] Exhibit RE-198, 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," June 11, 2004 ("*Can you come to my office on Tuesday 15, at 11:00 am Matter: Request for inclusion of the Sulfides Project in SA of [Cerro Verde]…is this legal?*") ("*Podrían venir a mi oficina el martes 15, a las 11:00 am. Asunto Solicitud de inclusión de Proyecto Sulfuros en CET de [Cerro Verde] . . . esto es legal?*").

[650] *See* Exhibit CE-399, MINEM, Report No. 510-2003-MEM-DGM-TNO, September 8, 2003, at p. 2.

362. Notably, this report also confirms that MINEM understood that the 1998 Stabilization Agreement did not "contemplate" the Concentrator Project: "The 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 project."[651] Thus, MINEM (including Claimant's witness Ms. Chappuis at the time) recognized that the 1998 Stabilization Agreement did not "contemplate" the Concentrator Project—and therefore did not already stabilize the Concentrator Project—consistent with Perú's understanding of the agreement in these arbitral proceedings. The government has not changed its mind as Claimant alleges.

363. On January 28, 2004, SMCV submitted a formal request to MINEM for permission to reinvest its undistributed profits from the (stabilized) Leaching Project to construct the (non-stabilized) Concentrator Project.[652] On November 30, 2004, Mr. Tovar recommended approval of the request,[653] and on December 9, 2004, the General Mining Directorate approved SMCV's request to use the profit reinvestment benefit to help finance the construction of the Concentrator Plant.[654]

364. Neither the report recommending the approval nor the resolution approving the request said that the 1998 Stabilization Agreement would extend the stability benefits to all the activities related to the new investment in the Concentrator Project. Mr. Tovar, who participated in the drafting of the reports, stresses in his second witness statement that he did not analyze whether the Concentrator Project would be covered by the 1998 Stabilization Agreement; he analyzed instead (and only) whether SMCV complied with the requirements to be granted the profit reinvestment benefit.[655] Moreover, the language of the resolution approving the profit reinvestment benefit stated that the profits to be used under that benefit had to be "exclusively generated by the '<u>Cerro Verde Leaching Project</u>.'"[656] The resolution, thus, made it clear that it was only the Leaching Project, and <u>not</u> the Concentrator Project, that enjoyed the stability benefits (such as the possibility of tax-free profit reinvestment).

---

[651] *See* Exhibit CE-399, MINEM, Report No. 510-2003-MEM-DGM-TNO, September 8, 2003, at p. 2.

[652] *See* Exhibit CE-421, SMCV, Petition No. 3616468 to MINEM, January 28, 2004.

[653] *See* Exhibit CE-479, MINEM, Report No. 841-2004-MEM/DGM/PDM, November 30, 2004, at p. 5.

[654] *See* Exhibit CE-23, MINEM, Ministerial Resolution No. 510-2004-MEM/DM, December 9, 2004, at Art. 1.

[655] *See* Exhibit RWS-10, Second Tovar Statement at paras. 70-71.

[656] Exhibit CE-23, MINEM, Ministerial Resolution No. 510-2004-MEM/DM, December 9, 2004, at Art. 1 (emphasis added).

365. Notably, the Supreme Court, in its 2008 Supreme Court Judgment, also found that MINEM's approval of SMCV's reinvestment of the Leaching Project's undistributed profits free of tax in the Concentrator Project did not expand the scope of the 1998 Stabilization Agreement.[657]

366. Therefore, MINEM's approval of SMCV's reinvestment of the Leaching Project's undistributed profits free of tax in the Concentrator Project did not, and could not, constitute any kind of confirmation that the Concentrator Project would receive the same stabilization benefits as the Leaching Project. Instead, the approval shows that the government has consistently understood that the 1998 Stabilization Agreement applies to the Leaching Project only and not to any and all investments made anywhere in SMCV's concession.

5. The March 2005 Meeting Between MINEM Officials and Phelps Dodge

367. In its Counter-Memorial, Respondent explained that in March 2005, Mr. Tovar met for lunch with Mr. Harry Conger (Phelps Dodge's Vice President at the time[658]), and Mr. Luis Carlos Rodrigo (Claimant's counsel in this arbitration) in Toronto during a meeting of the Prospectors & Developers Association of Canada ("PDAC").[659] Respondent and Mr. Tovar stated that at this meeting (i) he (for MINEM) explained that the Leaching Project would be exempt from royalty payments under the 1998 Stabilization Agreement but that royalties would have to be paid with respect to the Concentrator Project (as it would not be stabilized); and (ii) while Mr. Conger did not dispute MINEM's position, Mr. Rodrigo stated that this was a legal issue that would be discussed in the future—which is what Claimant is trying to do now in this arbitration. After the 2005 March meeting, SMCV never sent MINEM any communication requesting a clarification or a rectification of MINEM's position discussed at the meeting.[660]

368. In its Reply, Claimant argues (i) that the *aides-mémoires* on which Mr. Tovar relies to support his recounting of the meeting instead confirm Claimant's interpretation of the scope of mining stabilization agreements (and not Respondent's);[661] and (ii) that Mr. Tovar's

---

[657] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 75.

[658] *See* Exhibit RWS-10, Second Tovar Statement at para. 81.

[659] *See* Respondent's Counter-Memorial at para. 172.

[660] *See* Respondent's Counter-Memorial at paras. 172-73; *see also* Exhibit RWS-3, First Tovar Statement at paras. 54-55.

[661] *See* Claimant's Reply at paras. 73(a)-(b).

statements (which contradict SMCV's and Phelps Dodge's position regarding the scope of the Agreement) are highly unlikely to be correct, given that Mr. Conger made a presentation at the PDAC at the request of MINEM and that Mr. Conger allegedly stated in that presentation that after obtaining certainty that the 1998 Stabilization Agreement covered the Concentrator Project, SMCV and Phelps Dodge had decided to proceed with the project.[662] Yet it is Claimant's position that is difficult to credit, particularly given that Mr. Conger's witness testimony is notably missing from this arbitration, probably because he would corroborate Mr. Tovar's testimony.

369. *First*, Claimant takes out of context the text of the *aides-mémoires* that Mr. Tovar cited in his first witness statement. Claimant quotes the following paragraph of the *aide-mémoire* dated March 8, 2005, to support its position that MINEM's intention was to apply stability guarantees to entire concessions:

> [t]here are mining concessionaires that have signed administrative and tax stability agreements with the State regarding **specific mining projects** . . . 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.[663]

370. Claimant alleges that the term "mining project" in the *aide-mémoire* is used to refer to "mining unit" or "concession" and not to "investment project."[664] However, as explained in Section II.B.1(a) above and Section II.E.7 below, this is not the case. The term "mining projects" in the Mining Law is clearly used to refer to "investment projects."[665] Mr. Tovar also corroborates this conclusion and explains that MINEM understood "mining projects" to be "investment projects":

> When we prepared that document—as with other documents that we prepared at MINEM—we used the term "specific mining projects"

---

[662] *See* Claimant's Reply at para. 73(c).

[663] Exhibit RE-5, Email from César Zegarra to Oswaldo Tovar and César Polo, "Aide Memoire" (with attachment), March 8, 2005 ("*Existen concesionarios mineros que tienen suscritos convenios de estabilidad administrativa y tributaria con el Estado referidos a* ***proyectos mineros específicos*** *. . . corresponde que las empresas mineras hagan de conocimiento de la entidad encargada de la administración y recaudación de la regalía, los proyectos y concesiones mineras que estarían cubiertas con ellas.*") (emphasis in the original).

[664] *See* Claimant's Reply at para. 73(b).

[665] *See supra* at Section II.B.1(a) and *infra* at Section II.E.7; Exhibit RWS-10, Second Tovar Statement at para. 84; Exhibit RWS-9, Second Witness Statement of Felipe Isasi, November 3, 2022 ("Second Isasi Statement"), at para. 32.

> to refer to investment projects subject to mining stabilization agreements.[666]

371. *Second*, Claimant argues that Mr. Tovar's statements are highly unlikely to be correct, given that Mr. Conger attended the PDAC as a favor to MINEM to deliver a presentation titled "Peru and Phelps Dodge: Partners in Progress," and to assist in promoting Perú as an attractive destination for foreign investment.[667] In particular, Claimant's witness Ms. Torreblanca argues that "[i]t would not have made sense for Mr. Tovar to bring up such a shocking revelation—which clearly would have been viewed negatively by Phelps Dodge and SMCV—because Mr. Conger was there as a favor to MINEM and was scheduled to give his presentation the next day."[668] Claimant's argument presumes that government officials do not act in accordance with the law, but rather based on their own opportunistic interest. This is patently untrue. As Mr. Tovar explains in his second witness statement, public officials have to act in accordance with the law, and with transparency.[669] For him:

> the fact that Phelps Dodge saw the statements negatively is irrelevant, because as a public official I had the duty to be transparent and to abide by the law. My job was not to act in a preferential manner with a particular company, but in a way that complied with the provisions of the Contract and the law.[670]

Mr. Tovar also notes that MINEM invited SMCV (and its shareholder Phelps Dodge) to the PDAC for the straightforward reason that SMCV was one of the largest mining companies in Perú at the time.[671]

372. *Third,* Tovar notes that it is also unlikely that MS. Torreblanca does not recall hearing anything at the time about the discussion between Mr. Tovar, Mr. Conger, and Mr.

---

[666] Exhibit RWS-10, Second Tovar Statement at para. 84 ("*Cuando preparamos ese documento—al igual que con otros documentos que producíamos en MINEM—utilizamos el término "proyectos mineros específicos" para referirnos a los proyectos de inversión objeto de los contratos de estabilidad mineros*.").

[667] *See* Exhibit CWS-21, Second Torreblanca Statement at para. 26; Claimant's Reply at para. 73(c).

[668] Exhibit CWS-21, Second Torreblanca Statement at para. 26 ("*[n]o habría tenido sentido que el Sr. Tovar mencionara esa revelación tan impactante—que claramente habría sido vista negativamente por Phelps Dodge y SMCV—porque el Sr. Conger estaba allí como un favor al MINEM y tenía programado dar su presentación al día siguiente*.").

[669] *See* Exhibit RWS-10, Second Tovar Statement at para. 89.

[670] Exhibit RWS-10, Second Tovar Statement at para. 89 ("*El hecho de que las declaraciones fueran mal vistas por Phelps Dodge es irrelevante, pues como funcionario público yo tenía el deber de ser transparente y de ceñirme a la ley. Mi labor no era actuar de manera preferencial con una empresa particular, sino de manera tal que se cumpliera con lo previsto en el Contrato y la ley*.").

[671] *See* Exhibit RWS-10, Second Tovar Statement at para. 89.

Rodrigo.[672] Ms. Torreblanca's testimony is contradicted by contemporaneous documents. In fact, it was Ms. Torreblanca who arranged the meeting.[673] As Mr. Tovar explains in his second witness statement, Ms. Torreblanca organized the meeting between MINEM and Mr. Conger in Toronto, and she was probably in contact with Mr. Conger and Mr. Rodrigo during the PDAC. It is unlikely that no one (including Mr. Conger or Mr. Rodrigo) ever told her about what happened or what was said at the meetings that took place between MINEM officials, Mr. Conger, and Mr. Rodrigo.[674]

373. Mr. Tovar notes that it is also unlikely that Mr. Conger did not mention to Ms. Torreblanca the additional conversations that Mr. Tovar had with Mr. Conger on March 9, 2005, at Toronto's International Hotel, after Phelps Dodge made its presentation at the PDAC meeting.[675] Mr. Tovar explains in his second witness statement that Mr. Conger expressly asked him what the implications of SUNAT's February 2005 letter regarding SMCV's obligation to pay royalties were, to which Mr. Tovar responded, "it was clear that Cerro Verde would not pay royalties for the Leaching Project, but would pay royalties for the Primary Sulfides Concentrator Project, as this was not covered by any mining stabilization agreement."[676]

374. *Fourth,* Claimant's allegations that Mr. Tovar's statements are inconsistent with Mr. Conger's presentation in Toronto on March 9, 2005, are entirely misleading. Ms. Torreblanca alleges that in the March 9, 2005, presentation, Mr. Conger mentioned that the "'Stability [C]ontract provides certainty to make $850 million investment decision.'"[677] The

---

[672] *See* Exhibit CWS-21, Second Torreblanca Statement at para. 26.

[673] Exhibit RE-206, E-mail from Julia Torreblanca to Alicia Polo y La Borda Cavero, "Urgente," March 3, 2005, 10:38 p.m. (in Oswaldo Tovar's email chain dated on March 4, 2005) ("Mr. Red Conger and Mr. Minister, [Engineer] Polo, General Manager and Director of Promotion, Mr. Conger would also like to invite Luis Moran and Jorge Merino from Centromin. Please confirm me the place (address), the time of the lunch and if you can contact all the guests. Finally, let me know if you will introduce Mr. Conger, if you require his curriculum, time of his participation and all the other details that he must know in order not to have any mishap, Thank you, Julia") ("*Previo atento saludo, te ruego me confirmes el nombre del restaurante en que almorzarían en Canadá el día 8 de marzo el Sr. Red Conger y el Sr. Ministro, Ing. Polo, Director general y Director de Promoción, Al Sr. Conger le gustaría también invitar al Sr. Luis Moran y a Jorge Merino de Centromin. Por favor, confírmame el lugar (dirección), la hora del almuerzo y si puedes contactar a todos los invitados. Finalmente, avísame si Uds. presentaran al Sr. Conger, si requieren su curriculum, hora de su par[t]icipaci[ó]n y todos los otros detalles que [é]l debe conocer para no tener ningún percance, Gracias, Julia*"); *see also* Exhibit RWS-10, Second Tovar Statement at paras. 86-87.

[674] *See* Exhibit RWS-10, Second Tovar Statement at paras. 87-88.

[675] *See* Exhibit RWS-10, Second Tovar Statement at para. 88.

[676] Exhibit RWS-10, Second Tovar Statement at para. 88 ("*estaba claro que Cerro Verde no pagaría regalías por el Proyecto de Lixiviación pero sí por el de la Concentradora de Sulfuros Primarios, pues éste no estaba cubierto por ningún contrato de estabilidad minero.*").

[677] Exhibit CWS-21, Second Torreblanca Statement at para. 27.

slide deck of the presentation, however, does not affirmatively include such a statement (or anything remotely resembling it), and Mr. Tovar does not remember that Mr. Conger made such a clear statement in the presentation regarding his view about the scope of the 1998 Stabilization Agreement.[678] Mr. Conger's slides merely mention that Phelps Dodge would like to obtain "certainty of stability contract"[679] before making its investment in the Concentrator Project—but it does not state that Phelps Dodge had already obtained any such "certainty" from the government.

375. To the contrary, Mr. Conger's presentation makes an explicit reference to Phelps Dodge's most recent 10-K form filed before the SEC.[680] As discussed on Section II.D.5(a), on March 7, 2005 (two days before the presentation), Phelps Dodge had filed a 10-K form with the SEC, which provided that "it is not clear what, if any, effect the new royalty law will have on operations at Cerro Verde."[681] Phelps Dodge made a similar statement in its 10-Q form, filed with the SEC on October 27, 2005.[682] Thus, in March 2005, neither Phelps Dodge nor SMCV had any certainty regarding the stabilized status of the Concentrator Project or whether SMCV would have to pay royalties with respect to that project. In light of Phelps Dodge's representations in its SEC filings, it is highly unlikely that Mr. Conger said at the PDAC presentation that SMCV was certain about the scope of the 1998 Stabilization Agreement and, indeed, the slide deck he used in his presentation indicates that he did not.

376. In light of the above, in March 2005, SMCV and Phelps Dodge knew, at a minimum, that there was a risk that the Agreement did not cover the Concentrator Project. This doubt existed even after MINEM's approval of the expansion of the Beneficiation Concession (in October 2004) and of SMCV's reinvestment of profits from the Leaching Plant into the Concentrator Plant (in December 2004) after which point in time, according to Claimant in this arbitration, the Concentrator Plant was supposedly included in the scope of the 1998 Stabilization Agreement. Claimant's assertions are simply not credible in light of the contemporaneous evidence on the record.

---

[678] *See* Exhibit RWS-10, Second Tovar Statement at para. 91.

[679] *See* Exhibit CE-945, Phelps Dodge, "Peru and Phelps Dodge: Partners in Progress," March 9, 2005, at slide 12.

[680] *See* Exhibit CE-945, Phelps Dodge, "Peru and Phelps Dodge: Partners in Progress," March 9, 2005, at slide 2.

[681] Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 80 (emphasis added).

[682] *See* Exhibit CE-518, Phelps Dodge, SEC Form 10-Q, October 27, 2005, at p. 51 ("It is not clear what, if any effect the new royalty law will have on operations at Cerro Verde.").

6. The April 2005 Report from MINEM's Legal Affairs Directorate Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

377. The Constitutional Tribunal, in its 2005 judgment upholding the 2004 Royalty Law, held that all mining titleholders were obliged to pay royalties ("2005 Constitutional Tribunal Judgment"), as provided by law, but it did not specify the effect of the law on companies that had signed stabilization agreements with the State prior to the enactment of the 2004 Royalty Law.[683] In light of the 2005 Constitutional Tribunal Judgment, SUNAT had doubts regarding which mining companies would have to pay royalties under the Royalty Law. In this context, to clarify MINEM's position on the matter, and to respond to a consultation that SUNAT had sent MINEM about this issue,[684] Mr. Isasi (MINEM's Director General of Legal Affairs) prepared a report issued by MINEM's Legal Affairs Directorate on April 14, 2005 ("MINEM's April 2005 Report").[685]

378. In its Memorial, Claimant asserted that MINEM's April 2005 Report confirmed that the 2004 Royalty Law would not apply to companies with mining stabilization agreements and that stability guarantees applied to the entire concession in which an investment was made.[686] In its Counter-Memorial, Respondent explained, based on the language in the Report and testimony of Mr. Isasi (the author of MINEM's April 2005 Report), that (i) Claimant's reading of MINEM's April 2005 Report is at odds with both a comprehensive reading of the report and the context in which the report was issued;[687] and (ii) the report confirms that the 2004 Royalty Law would apply to non-stabilized mining projects.[688] In its Reply, Claimant insists that the text of the Report contradicts Respondent's interpretation of the 1998 Stabilization Agreement.

379. As a preliminary, though ultimately irrelevant, matter, Respondent rejects Claimant's inappropriate use of an obviously privileged communication—an isolated and *post*

[683] *See* Exhibit RWS-9, Second Isasi Statement at para. 11; Exhibit RWS-2, First Isasi Statement at para. 12; *see also* Respondent's Counter-Memorial at para. 183.

[684] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005.

[685] *See* Exhibit RWS-2, First Isasi Statement at para. 17; *see also generally* Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005.

[686] *See* Claimant's Memorial at paras. 128-29.

[687] *See* Respondent's Counter-Memorial at paras. 174-81.

[688] *See* Respondent's Counter-Memorial at paras. 174-81.

hoc email from Respondent's counsel, which was inadvertently disclosed[689]—in an attempt to support its reading of MINEM's April 2005 Report. The Tribunal should reject that unseemly litigation tactic and disregard the communication, which does not in any event bear the weight that Claimants try to put on it. The communication, which was necessarily preliminary (sent at least a year before Respondent filed it Counter-Memorial) and contains nothing but tentative terms, was making a risk-averse assessment of how the Report could be (mis)used in adversarial litigation. It does not state that the language of the Report objectively supports Claimant's allegations. To the contrary, as Respondent explains below, the Report does not support Claimant's legal arguments.

380. *First,* a comprehensive reading of the report shows that, in April 2005, MINEM understood that mining stabilization agreements cover only the investment projects for which the agreements were entered into, which are described and outlined in the feasibility study attached to the agreement. As Respondent explained in its Counter-Memorial, Mr. Isasi concluded in paragraph 17 of MINEM's April 2005 Report that companies with mining stabilization agreements would not have to pay royalties with respect to the "mining projects referred to in these agreements" (*i.e.*, Mr. Isasi confirmed that only the "projects" are stabilized under agreements). For the Tribunal's benefit, Respondent reproduces the relevant text of MINEM's April 2005 Report below:

> Emphasis should be placed on this last aspect: 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.[690]

[689] *See* Claimant's Reply at para. 74(d).

[690] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 ("*Debe ponerse énfasis en este último aspecto: La estabilidad que otorgan los contratos de Garantías y Medidas de Promoción a la*

381. Claimant focuses on the words "mining concessions" included in the paragraph above to allege that Mr. Isasi understood at the time that mining stabilization agreements applied to the whole of the concessions where any stabilized project was located (and not to the specific investment project).[691] Claimant also argues that the term "mining projects" in the report was referring to something like Claimant's invented label "mining units" rather than to investment projects like the Leaching Plant.[692] Mr. Isasi explains in his second witness statement that this is an incorrect reading of the report that he authored.[693] As Mr. Isasi explains:

> Now, if the term 'project' were equivalent to concession or 'mining unit,' as Claimant suggests, we would not have used that term in the Report. The emphasis in paragraph 17 is on the project that is the subject of the contract-the investment project. That project may vary depending on each company and the type of activities it wants to carry out with its investment.[694]

382. Also, MINEM's April 2005 Report makes an additional reference to "investment projects" to explain that the 2004 Royalty Law is not applicable to the "investment projects" covered by mining stabilization agreements which were signed prior to the Royalty Law coming into force:

> It is the opinion of this Office of the General Counsel that the mining royalty is not applicable to the investment projects of the titleholder of mining companies that prior to the royalty law [coming] into force, had entered into Agreements on Guarantees and Measures to

---

*Inversión garantizan el régimen jurídico referido a materia tributaria, cambiaria y administrativa, **del proyecto de inversión, al cual están referidos**. Si un titular minero tuviera unidades económicas administrativas, o concesiones mineras, que no forman parte del proyecto objeto de la estabilidad, la norma establece que dicho titular deberá mantener la contabilidad del proyecto en forma separada. En consecuencia, no es el titular minero (persona natural o jurídica) el que estará exento o no del pago de regalías, integralmente como empresa, sino que lo serán las concesiones mineras de las que es titular, dependiendo si estas integran o no, un proyecto materia de contrato de estabilidad suscrito, antes de la vigencia de la Ley No. 28258. Así pues, únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía*.") (citation omitted) (underlining emphasis added).

691 *See* Claimant's Reply at para. 74(b).

692 *See* Claimant's Reply at paras. 74(b)-(c).

693 *See* Exhibit RWS-9, Second Isasi Statement at paras. 18-25; *see also* Exhibit RWS-2, First Isasi Statement at para. 20.

694 Exhibit RWS-9, Second Isasi Statement at para. 21 ("*Ahora bien, si el término "proyecto" fuera equivalente a concesión o a "unidad minera," como sugiere la Demandante, no hubiéramos utilizado ese término en el Informe. El énfasis del párrafo 17 es en el proyecto materia del contrato—el proyecto de inversión. Ese proyecto puede variar dependiendo de cada compañía y del tipo de actividades que quiera realizar con su inversión*.") (emphasis added).

> Promote Investment in which Administrative Stability had been agreed upon in the terms expressed in this report.[695]

In an attempt to avoid the clear meaning of this text, Claimant argues that "in context," the references to "investment project" in MINEM's April 2005 Report confirm that stability guarantees are granted to concessions or mining units.[696] Claimant's allegations are without merit.

383. Claimant also contends that the statement in paragraph 16 of the report stating that the "royalty is not applicable to the mineral resources extracted from the concessions that form part of the contractually stabilized investment project"[697] allegedly signals that, although the report uses the term investment project, instead "it is the concessions that are entitled to stability and, particularly, that the mining royalty is not applicable to stabilized mining concessions."[698] As Mr. Isasi explains, however, the paragraph immediately after the statement that Claimant mentions (*i.e.*, paragraph 17 cited above), clarifies that investment projects are the object of mining stabilization agreements (and not entire concessions). Mr. Isasi explains:

> On that understanding, as I explained in my First Witness Statement, the sentence in paragraph 16 stating that 'the royalty is not applicable to the mineral resources extracted from the concessions that are part of a contractually stabilized investment project' cannot be read in the sense that Claimant intends. In fact, as noted in the Report, paragraph 17 immediately clarifies that the stability applies with respect to the investment project that is the subject of the agreement and not the concession where that project is [being] executed. Claimant is clearly playing with words to justify its misreading of the April 2005 Report. However, this does not change the fact that in MINEM we have always understood that the term investment project refers to the project that is subject of the mining stabilization agreement—set forth in the feasibility study.[699]

---

[695] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 19 ("*Es opinión de esta Oficina General de Asesoría Jurídica, que la regalía minera es inaplicable a los proyectos de inversión de los titulares mineros que con anterioridad a la vigencia de la ley de regalía, tuvieren celebrados contratos de Garantías y Medidas de Promoción a la Inversión en los que se hubiere pactado la Estabilidad Administrativa en los términos expresados en este informe.*") (emphasis added).

[696] *See* Claimant's Reply at para. 74(b).

[697] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 16 (emphasis omitted).

[698] Claimant's Reply at para. 74(b) (emphasis omitted).

[699] Exhibit RWS-9, Second Isasi Statement at para. 22 ("*Bajo ese entendido, como lo expliqué en mi Primera Declaración Testimonial, la frase del párrafo 16 que señala que "la regalía no es aplicable a los recursos minerales que se extraigan de las concesiones que hagan parte de un proyecto de inversión estabilizado contractualmente" tampoco puede ser leída en el sentido que pretende la Demandante. De hecho, como se observa*

Indeed, paragraph 17 of the report specifically states that "[t]he stability granted by [mining stabilization agreements] guarantee[s] the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer[,]" and the last sentence in that same paragraph states clearly that "only the mining projects referred to in these agreements will be excluded from the royalty calculation basis."[700] Therefore, contrary to Claimant's assertion, MINEM's April 2005 Report as a whole confirms that stabilization applies to the "projects" in a concession, not to the concession as such.

384. *Second,* Mr. Isasi's recollection of the meaning of the April 2005 Report and Respondent's reading of the report is in line with the wording of SUNAT's consultation to MINEM that prompted Mr. Isasi to prepare MINEM's April 2005 Report in the first place. In SUNAT's words, MINEM was asked whether "mining companies that at the date of enactment of Law No. 28258 [Mining Royalty Law] had signed the aforementioned contracts for the projects included therein, are obliged to pay the Mining Royalty."[701] As Mr. Isasi explains, "From SUNAT's question, [their] understanding at MINEM was that SUNAT was also clear that mining stability contracts protect only the projects for which they were entered into."[702]

385. *Third,* on April 14 2005, Mr. Isasi forwarded to the Minister the 2005 April Report to SUNAT along with a list of companies with mining stabilization agreements and their corresponding stabilized projects, and a draft response to SUNAT.[703] On April 20, 2005, MINEM sent a letter to SUNAT attaching the list of companies with mining stabilization agreements and their corresponding stabilized projects.[704] Mr. Isasi's recollection of the

---

en el Informe, el párrafo 17 aclara inmediatamente que la estabilidad es respecto del proyecto de inversión objeto del contrato y no de la concesión en donde se ejecuta ese proyecto. La Demandante claramente está jugando con las palabras para justificar su lectura equivocada del Informe de abril de 2005. No obstante, eso no cambia el hecho que en MINEM siempre entendimos que el término proyecto de inversión se refiere al proyecto materia del contrato de estabilidad minero—delimitado en el estudio de factibilidad.").

[700] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005 at para. 17 ("*La estabilidad que otorgan los contratos de [estabilidad] garantiz[a] el régimen jurídico referido a materia tributaria, cambiaria y administrativa, del proyecto de inversión, al cual están referidos . . . únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía*.").

[701] Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 15 (of PDF) ("*las empresas mineras que a la fecha de promulgación de la Ley N° 28258 [Ley de Regalía Minera] contaban con los referidos contratos suscritos, por los proyectos comprendidos en éstos, se encuentran obligadas a pagar la Regalía Minera*.") (emphasis added).

[702] Exhibit RWS-9, Second Isasi Statement at para. 15 ("*De la pregunta de SUNAT, en MINEM entendimos que la SUNAT también tenía claro que los contratos de estabilidad mineros protegen únicamente los proyectos para los cuales se suscribieron*.").

[703] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 10.

[704] *See* Exhibit RE-310, MINEM's Letter No. 608-2005-MEM/DM, April 20, 2005.

meaning of MINEM's April 2005 Report and Respondent's reading of the report is consistent with the list that was forwarded to SUNAT. The list that SUNAT forwarded together with its question to MINEM indicates in its first column the names of the companies that had signed mining stabilization agreements. Notably, the second column lists the names of the companies' projects (not their concessions or EAUs) that were covered by such agreements.[705] SMCV appears on the list as one of the companies with a mining stabilization agreement in force, indicating that it had a stabilized investment project ("*Lixiviación Cerro Verde*") which amounted to an investment of US $237,517,000.[706] Thus, as Mr. Isasi explains, the list attached to the MINEM's April 2005 Report confirms that MINEM: (i) understood that stability guarantees applied to specific investment projects; (ii) identified in 2005 the project(s) covered by the each mining stabilization agreement and the amounts that the investor had invested in each project; and, in particular, (iii) had identified the Leaching Project (with a value of US $237,517,000) as SMCV's only stabilized project.[707]

386. *Fourth*, an email between Vice Minister Polo and his team (including Mr. Isasi and Mr. Tovar), dated April 29, 2005 (*i.e.*, 15 days after MINEM's April 2005 Report was issued) confirms Respondent's reading of MINEM's April 2005 Report.[708] In the email, Vice Minister Polo sent Mr. Isasi a draft press release regarding MINEM's, MEF's, and SUNAT's interpretation of the 2004 Royalty Law in light of the 2005 Constitutional Tribunal Judgment. The draft press release, in line with MINEM's April 2005 Report, reflected MINEM's opinion that stability is granted exclusively to the investment projects set out in the relevant feasibility study that is attached to the mining stabilization agreement.[709] Specifically, the draft press release stated:

> The State, within the framework of Title IX of the Unified Text of the General Mining Law and its regulations, has signed agreements of Guarantees and Measures for the Promotion of Investments with mining companies, granting them tax, currency exchange and

[705] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 13 (of PDF).

[706] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 13 (of PDF).

[707] *See* Exhibit RWS-9, Second Isasi Statement at para. 24.

[708] *See generally* Exhibit CE-947, Email from Cesar Polo to Felipe Isasi (April 29, 2005, 8:41 PM PET).

[709] *See* Exhibit RWS-10, Second Tovar Statement at paras. 94-96.

administrative stability, exclusively for the investments covered by each of these agreements.[710]

387. In its Reply, Claimant hints that the fact that MINEM never actually issued this press release indicates that MINEM was not ready to give in to the political pressure at the time to limit the scope of mining stabilization agreements.[711] Claimant's assertion is purely speculative. As Mr. Tovar explains in his second witness statement, whether or not it was issued, the draft press release is a contemporaneous reflection of MINEM's longstanding and consistent understanding that mining stabilization agreements only cover the specific investment projects for which the agreements are entered into, as delineated in the feasibility study attached to those agreements.[712]

7. The June 2005 MINEM Presentation before Congress Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

388. On June 8, 2005, then-Minister of Mines Glodomiro Sánchez and MINEM's Legal Director, Mr. Isasi, made a presentation to the Energy and Mines Congressional Committee in which they explained the relationship between the Royalty Law and mining stabilization agreements. In its Counter-Memorial, Respondent explained that in the presentation—which was televised and thus available to SMCV—Minister Sánchez and Mr. Isasi unequivocally stated that mining companies would be exempt from paying royalties only with respect to projects that had been stabilized prior to the enactment of the 2004 Royalty Law.[713]

389. In its Reply, Claimant alleges that Respondent's description of the presentation is misleading because, according to its view of the presentation, (i) the draft slides from Minister Sánchez's presentation ("June 2005 Draft Presentation") do not confirm Respondent's position;[714] (ii) when Minister Sánchez and Mr. Isasi referred to a "mining project," they were

[710] Exhibit CE-947, Email from Cesar Polo to Felipe Isasi (April 29, 2005, 8:41 PM PET) ("*El Estado en el marco del Título IX del Texto Único Ordenado de la Ley General de Minería y sus normas reglamentarias ha suscrito contratos de Garantías y Medidas de Promoción a la Inversión con titulares mineros otorgándoles estabilidad tributaria, cambiaria y administrativa, de manera exclusiva a las Inversiones materia de cada uno de estos contratos*.") (emphasis added).

[711] *See* Claimant's Reply at paras. 150(x)-(xi).

[712] *See* Exhibit RWS-10, Second Tovar Statement at paras. 95-96.

[713] *See* Respondent's Counter-Memorial at para. 182, n.323.

[714] *See* Claimant's Reply at para. 75(b).

really meaning to refer to a "mining unit;"[715] and (iii) there is no proof that the presentation was televised.[716] Claimant's description of the facts is incorrect.

390. Claimant's arguments are weakened by the fact that they are based on a draft of the presentation that Minister Sánchez made, not the final version. Claimant compares the June 2005 Draft Presentation with a similar presentation that Vice Minister Rómulo Mucho made to Congress on May 6, 2006 (discussed below), and concludes that language that is missing from the draft presentation (but included in the Vice Minister's presentation in May 2006) shows that MINEM changed its position with respect to the scope of mining stabilization agreement somewhere along the road.[717] It did not.

391. In the course of preparing his second witness statement, Mr. Tovar found the final version of the presentation that he and the Minister delivered to the Congressional committee on June 8, 2005 ("June 2005 Final Presentation").[718] The June 2005 Final Presentation is practically identical to Vice Minister Mucho's May 2006 presentation. Importantly, in both presentations the Ministry stated that mining stabilization agreements grant stability guarantees only to the investment project(s) that are the subject matter of the agreement.[719]

[715] *See* Claimant's Reply at para. 75(a).

[716] *See* Claimant's Reply at para. 75(c).

[717] *See* Claimant's Reply at para. 75(b).

[718] *See* Exhibit RWS-10, Second Tovar Statement at para. 99.

[719] *See* Exhibit RE-207, Email from Oswaldo Tovar to Carlos García Álvarez, "Re: PPT Minister," June 8, 2005, 8:14 p.m., attaching file called Royalties Executive Proposal jun08.ppt, at slides 13 and 16.

June 8, 2005 Final Presentation	May 3, 2006 Presentation
What is a *Contrato-Ley*? • It is a contract by virtue of which the State undertakes to grant guarantees and assurances for a given investment. • Article 62 of the Political Constitution of 1993 states that "(...)By means of *contrato-ley*, the State can establish guarantees and grant assurances. Likewise, it is pointed out that they cannot be amended legislatively(...)" • Consequently, whoever enters into a *Contrato-Ley* with the State, protects its investment against modifications subsequent to the stabilized regime. 13	**What is a *Contrato-Ley*?** • It is a contract by virtue of which the State undertakes to grant guarantees and assurances for a given investment. • Article 62 of the Political Constitution of 1993 states that "(...) By means of *Contrato-Ley*, the State can establish guarantees and grant assurances. Likewise, it is pointed out that they cannot be amended legislatively . . ." • Consequently, whoever enters into a *Contrato-Ley* with the State, protects its investment against modifications subsequent to the stabilized regime. 14
Mining Royalties and Administrative Stability 1. The Constitutional Court has ruled that **the royalty is not a tax**; therefore, Agreements that **only** have tax stability are not shielded against the Royalty Law. 2. The Constitutional Court has also ruled that the royalty has the same retributive nature as the good standing fee (consideration); therefore, it is included within the Administrative Stability coverage of the *Contrato-Ley* of the mining sector. 3. Consequently, a *Contrato-Ley* with Administrative Stability, prior to the Royalty Law, protects against this new obligation **the investments set out in the contract.** 16	**Mining Royalties and Administrative Stability** 1. The Constitutional Court has ruled that **the royalty is not a tax**; therefore, Agreements that **only** have tax stability are not shielded against the Royalty Law. 2. The Constitutional Court has also ruled that the royalty has the same retributive nature as the good standing fee (consideration); therefore, it is included within the Administrative Stability coverage of the *Contrato-Ley* of the mining sector. 3. Consequently, a *Contrato-Ley* with Administrative Stability, prior to the Royalty Law, protects against this new obligation **the investments set out in the contract.** 18

392. Thus, there was never a change in MINEM's position with respect to the scope of mining stabilization agreements and certainly not the dramatic change that Claimant claims in its Reply submission.

393. With respect to the presentation, Claimant also argues that the slides repeatedly emphasize that the "stability guarantees are granted to mining investors but do not state that these guarantees apply only to the initial investment."[720] Claimant is playing with words and changing its own tactics. In the Memorial, Claimant tried to advance the theory that stability was granted to the investor. In its Reply, Claimant now alleges that stability is granted to the concession or the so-called "mining unit." It is neither. As the language in the presentation clearly indicates, mining stabilization agreements grant stability guarantees to the mining investor with respect to a mining investment project for which the agreement was signed.

[720] Claimant's Reply at para. 75(b).

394. Moreover, the content of the presentation is consistent with what Mr. Sánchez explained orally at the presentation and with Mr. Isasi's intervention during Minister's Sánchez presentation at Congress, according to the Committee's meeting minutes. To recall, Minister Sánchez explained:

> Then, who pays royalties? All mining titleholders pay royalties, but not for all of their projects. The mining titleholders that before the Mining Royalty Law entered into law-contracts with administrative stability, will exclude from the royalty calculation basis the value of concentrates or equivalents, derived from the **stabilized project.**[721]

395. Then, Mr. Isasi further explained to the Congressional Committee:

> [I]t must not be confused who is the obliged subject, which is the company, with how much it has to pay; that is, 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**.
>
> The **non-stabilized mining projects pay royalties, the stabilized projects do not pay royalties.** Stabilized, of course, before the royalty law because there are stability contracts that were entered into after, where it has been expressly indicated that royalties must be paid.[722]

396. Thus, both Minister Sánchez and Mr. Isasi unequivocally stated to Perú's Congress in June 2005 that mining companies would be exempt from paying royalties only with respect to the project(s) that had been stabilized prior to the enactment of the Royalty Law.

---

[721] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 26 ("*Entonces, ¿quiénes pagan regalía? Todos los titulares mineros pagan, pero no por todos sus proyectos. Los titulares mineros que antes de la Ley de Regalía Minera celebraron contratos ley con estabilidad administrativa, excluirán de la base de cálculo de la regalía el valor de los concentrados o equivalentes, proveniente del **proyecto estabilizado***") (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at timestamps 00:08:54 - 00:09:16.

[722] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29 ("*[N]o hay que confundir lo que es sujeto obligado, que es la empresa, con cuánto tiene que pagar; o sea, el sujeto obligado es una empresa minera pero al momento de determinar cuánto es lo que debe pagar la administración tributaria tiene que determinar cuál es la base de referencia, y para determinar cuál es la base de referencia **tiene que determinar cuáles son los proyectos mineros estabilizados y cuáles son los proyectos no estabilizados**. Los proyectos mineros no estabilizados pagan regalías, los proyectos mineros estabilizados no pagan regalías. Estabilizados, por supuesto, antes de la ley de regalías, porque hay contratos de estabilidad celebrados con posterioridad donde está ya expresamente señalado que se pague las regalías*.") (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at timestamps 00:25:28 - 00:26:16.

397. Claimant argues that the term "mining project" as used in the June 2005 Presentation should be understood to correspond to its preferred concept of a "mining unit," and not to the "investment project" set out in the relevant feasibility study. Claimant's assertion is absurd and shows that Claimant is desperate to find something to support its hopeful (but not correct) interpretation of mining stabilization agreements. As Mr. Isasi confirmed, MINEM consistently used the term "mining projects" in this context to refer to the specific investment projects covered by mining stabilization agreements. In any case, Minister Sánchez did not use the term "mining project" during his presentation; instead, throughout his presentation, Minister Sánchez repeatedly states that "projects" or "investments" were the subject of mining stabilization agreements.

- First, the Minister indicated in his presentation that "whoever enters into a *contrato-ley* with the State is protecting their investment against modifications to the stabilized regime[,]"[723] and he specified that "a *contrato-ley* with administrative stability predating to the Mining Royalty Law protects against this new obligation in the investments that are the subject matter of the contract"[724] (*i.e.*, he did not mention that concessions were the subject of the contract but rather "investment[t]").

- Second, as shown above, the Minister stated that although all mining titleholders could potentially pay royalties, they will only do so for their non-stabilized projects (*i.e.*, he did not say "non-stabilized concessions").

398. Mr. Isasi, who did use the term "mining project" during his presentation to define the scope of mining stabilization agreements, explains in his second witness statement that he was referring to the "investment projects" that are the object of such agreements.[725] In particular, Mr. Isasi explains:

> Taking into account that the Minister had just explained that the stability [guarantees] appl[y] to the investment project subject [matter] of stabilization agreements and that my intervention followed the Minister's presentation, it is only logical that I was

[723] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 25 (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at timestamps 00:05:55 - 00:06:04 (emphasis added) ("*quien celebra un contrato ley con el Estado está protegiendo su inversión contra las modificaciones al régimen estabilizado*.").

[724] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 25 (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at timestamps 00:08:00 - 00:08:09 ("*un contrato ley con estabilidad administrativa anterior a la Ley de Regalía, protege contra esta nueva obligación en las inversiones materia del contrato*.").

[725] *See* Exhibit RWS-9, Second Isasi Statement at para. 32.

> referring to the investment projects that are the subject of the stabilization agreements when I spoke of "stabilized mining projects." Whenever I spoke on the subject of mining stabilization agreements, when I used the term project (including mining project), I was referring to the investment projects—described in the feasibility studies and set forth in the stabilization agreements.[726]

399. Finally, as Respondent noted in its Counter-Memorial, the June 2005 presentation was televised, and therefore, in the public domain.[727] As explained in Section II.D.5, in June 2005, Claimant's predecessor Phelps Dodge was concerned about how the 2004 Royalty Law would be applied to the Concentrator Project.[728] A diligent investor would have been monitoring Congress's and MINEM's activities related to mining and mining stabilization agreements, and would have (or certainly should have) been aware of the MINEM presentation to the Congressional Committee which explained specifically the relationship between the Royalty Law and mining stabilization agreements (*i.e.*, Claimant's source of concern).

8. The September 2005 Report from MINEM's Legal Affairs Directorate Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

400. Following MINEM's approval of SMCV's request to reinvest its undistributed profits from the Leaching Project into the Concentrator Project, some Congressmen voiced concern. On September 15, 2005, Congressman Alejandro Oré asked the Minister of Energy and Mines (Mr. Glodomiro Sánchez at the time) to provide information about SMCV's 1998 Stabilization Agreement and MINEM's authorization to reinvest undistributed profits in the Concentrator Project.[729] In response to that request, Mr. Isasi prepared a report dated September 22, 2005 (the "September 2005 Report") and sent it to Congressman Oré on October 3, 2005.[730]

---

[726] Exhibit RWS-9, Second Isasi Statement at para. 32 ("*Teniendo en cuenta que el Ministro recién había explicado que la[s] [garantías de] estabilidad se aplica[n] al proyecto de inversión objeto de los contratos de estabilidad y que mi intervención siguió a la presentación del Ministro, es apenas lógico que me estaba refiriendo a los proyectos de inversión objeto de los contratos de estabilidad cuando hablé de los "proyectos mineros estabilizados." Siempre que yo exponía sobre el tema de los contratos de estabilidad mineros, cuando utilizaba el término proyecto (incluyendo proyecto minero), me refería a los proyectos de inversión—descritos en los estudios de factibilidad y delimitados en los contratos de estabilidad*.")

[727] *See* Respondent's Counter-Memorial at para. 185; *see also* Exhibit RWS-2, First Isasi Statement at para. 46.

[728] *See supra* at Section II.D.5.

[729] *See* Respondent's Counter-Memorial at para. 176; *see also* Exhibit RWS-9, Second Isasi Statement at para. 39. *See also* Exhibit CE-507, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía, September 15, 2005.

[730] *See* Exhibit RWS-2, First Isasi Statement at para. 23; *see also* Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005.

401. In its Memorial, Claimant asserted that, in the September 2005 Report, Mr. Isasi confirmed Claimant's interpretation of the scope of the 1998 Stabilization Agreement, among other things,[731] because the report allegedly made no distinction between SMCV's two projects (the Leaching Project and the Concentrator Project).[732] In its Counter-Memorial, Respondent demonstrated that the September 2005 Report does not support Claimant's interpretation of the Agreement. Respondent showed that: (i) the September 2005 Report explains the scope of the 1998 Stabilization Agreement as being limited exclusively to the Leaching Project, which was described in the 1996 Feasibility Study as being intended to increase the production of copper cathodes[733]; and (ii) the analysis in the report focuses on the scope of the stability applied to the Leaching Project—the report refers to the Concentrator Project, in contrast, as a "new" investment project.[734] The September 2005 Report, thus, drew a distinction between the Leaching Project (the existing investment project, which was stabilized) and the Concentrator Project (the new investment project).[735]

402. In its Reply, Claimant argues that nothing in Mr. Isasi's September 2005 Report supports Mr. Isasi's testimony that the Report "adopted the position that stabilization agreements only cover investment projects specifically described in each stabilization agreement."[736] Claimant's assertion is incorrect.

403. Claimant tries to take the September 2005 Report out of context. In particular, Claimant overlooks the fact that MINEM wrote the report in response to a request for information from Congressman Oré specifically regarding the approval of SMCV's profit reinvestment benefit in the Concentrator Project[737] (*i.e.*, whether SMCV could reinvest profits tax-free from the Leaching Project—the stabilized project—into a new investment project).

---

[731] *See* Claimant's Memorial at paras. 134-36.

[732] *See* Claimant's Memorial at paras. 134-36.

[733] *See* Respondent's Counter-Memorial at para. 189; Exhibit RWS-2, First Isasi Statement at paras. 24, 27-28; Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, at paras. 1, 2.2.1-2.2.2, 3.1.1.

[734] *See* Respondent's Counter-Memorial at para. 189.

[735] *See* Respondent's Counter-Memorial at para. 189. *See also* Exhibit RWS-2, First Isasi Statement at paras. 29-31; Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, at paras. 3.2.3 and III.

[736] Exhibit RWS-2, First Isasi Statement at para. 24; *see also* Claimant's Reply at para. 76(a).

[737] *See* Exhibit RWS-9, Second Isasi Statement at para. 41.

Congressman Oré did not make a specific inquiry about the scope of the 1998 Stabilization Agreement and whether its stability guarantees would cover the Concentrator Project.[738]

404. Thus, as Mr. Isasi explains in his second witness statement, the fact that the report does not expressly state that mining stabilization agreements protect only the investment projects for which the agreement was signed, as described in the underlying feasibility study, does not mean that MINEM was taking any different position in the September 2005 Report.[739] In fact, that position is (implicitly) in the Report. That understanding is the premise that guides MINEM's explanation to Congressman Oré as to why SMCV could take advantage of the profit reinvestment benefit using the profits from the Leaching Project (the stabilized project).

405. Moreover, as explained next below, the October 3, 2005 letter that forwarded the September 2005 Report to Congress ("October 2005 Letter")[740] corroborated this conclusion.

9. The October 2005 Letter to Congress Attaching the 2005 September Report Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

406. In the October 2005 Letter, which forwarded the September 2005 Report to Congress, Minister Sánchez explained to Congressman Oré that, although SMCV was entitled to use the profit reinvestment benefit under the 1998 Stabilization Agreement to deploy the Leaching Project's profits (*i.e.*, the stabilized project's profits) on the Concentrator Project, the Concentrator Project would not benefit from the 1998 Stabilization Agreement's stability guarantees, which applied only to the Leaching Project. Specifically, Minister Sánchez explained that "[u]nlike the Leaching Project that is covered by the February 13, 1998 Agreement," the Concentrator Project "w[ould] not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of [a Stabilization Agreement] has not been applied for."[741] Thus, this letter is yet another example demonstrating MINEM's consistent understanding that SMCV's stabilized regime was limited to SMCV's Leaching Project.[742]

---

[738] *See* Exhibit RWS-9, Second Isasi Statement at para. 41.

[739] *See* Exhibit RWS-9, Second Isasi Statement at paras. 41-43.

[740] *See* Respondent's Counter-Memorial at para. 190. *S*ee *also* Exhibit RWS-2, First Isasi Statement at paras. 35-36.

[741] Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005 ("*no gozará del régimen de estabilidad tributaria, cambiaria y administrativa, toda vez que para dicho Proyecto no se ha solicitado la suscripción de un [Convenio de Estabilidad]*") (emphasis added). *See also* Respondent's Counter-Memorial at para. 190.

[742] *See* Respondent's Counter-Memorial at para. 192.

407. In its Reply, Claimant argues that the October 2005 Letter's conclusions are unfounded and contrary to the language in the September 2005 Report.[743] They are not. Claimant also asserts that the October 2005 Letter (i) is one of the first "documents [that] demonstrate how the Government began seeking to justify action against SMCV as a result of political pressure once SMCV had started to construct the Concentrator"[744]; and (ii) demonstrates "a desire to impose royalties against SMCV's Concentrator—whatever the purported legal basis."[745] Claimant's assertions are misleading and contrary to reality.

408. *First*, Claimant's argument that the statement in the October 2005 Letter is contrary to the language of the September 2005 Report is absurd. The October 2005 Letter was accompanied by the Report, and Mr. Isasi included his stamp in both the September 2005 Report and the October 2005 Letter.[746] Mr. Isasi would not have put his stamp on the October 2005 Letter if its contents were contrary to what he had explained in the September 2005 Report. Moreover, Mr. Isasi confirms in his second witness statement that (i) he was the one who wrote the letter at the request of the Minister; and (ii) the content of the September 2005 Report and the content of the October 2005 Letter is consistent:

> [I] reiterate that it was I who drafted that letter at the request of the Minister and, in my capacity as General Director of the Legal Advisory, [Office] I endorsed it with my stamp and seal. Therefore, I can confirm that in writing that letter I based [my opinion] on what I had set out in the September 2005 Report.[747]

Thus, Claimant's story of the October 2005 Letter showing a response to political pressure (while somehow the September 2005 Report that it was forwarding did not) has no support and makes little sense. The actual explanation for MINEM's actions is much simpler: MINEM always understood that SMCV's 1998 Stabilization Agreement was limited to the Leaching Project.

---

[743] *See* Claimant's Reply at para. 76(b).

[744] Claimant's Reply at para. 76.

[745] Respondent's Counter-Memorial at para. 76(c).

[746] *See* Exhibit RWS-9, Second Isasi Statement at para. 46; *see also* Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005, at p. 1; Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, at p. 1.

[747] Exhibit RWS-9, Second Isasi Statement at para. 46 ("*[R]eitero que yo fui quien redactó esa carta a solicitud del Ministro y, en mi calidad de Director General de Asesoría Jurídica, la respaldé con mi sello y rúbrica. Por tanto, puedo confirmar que al escribir dicha carta [] basé [mi opinión] en lo que había expuesto en el Informe de septiembre de 2005.*").

409. *Second*, contrary to Claimant's allegations, the October 2005 Letter was substantiated. As Mr. Isasi explains, the September 2005 Report (attached to the October 2005 Letter) reached the conclusion that the Concentrator Project was a "new project," not covered by the Agreement, after providing a detailed interpretation of the 1998 Stabilization Agreement according to the Mining Law.[748] That same conclusion is reflected in the letter.

410. *Third*, Claimant's allegation that the October 2005 Letter reflected an improper goal of imposing royalties "whatever the purported legal basis"[749] is utterly wrong. As explained in below, when some Congressmen initially wanted to apply royalties to all mining investment projects—regardless of whether those projects had been stabilized or not—MINEM actually advocated for the rights of the mining companies and clarified that only non-stabilized projects should pay royalties.[750] MINEM's conclusion that SMCV had to pay royalties on the Concentrator Project is both appropriate and consistent with that position, which is in accordance with Peruvian law.

411. *Fourth*, this certainly was not the first time that MINEM had articulated this position. As explained in Section II.E.7 above, and as Mr. Isasi explains, in addition to MINEM's April 2005 Report, high-level officials of the Ministry (including Minister Sánchez and the Ministry's Legal Director, Mr. Isasi) had appeared before Congress's Energy and Mines Commission in June 2005 to explain the limited scope of mining stabilization agreements.[751] Thus, SMCV (and Phelps Dodge, Freeport's predecessor) certainly knew of MINEM's position regarding the scope of the 1998 Stabilization Agreement well before October 2005.

412. *Finally*, the fact that the October 2005 Letter expressly states that the Concentrator Project "will not enjoy the tax, exchange-rate, and administrative stability regime, since for said Project the signing of [a Stabilization Agreement] has not been applied for"[752] confirms that MINEM's position at the time regarding the scope of mining stabilization agreements was clear and consistent with its position in both the September 2005 Report and the April 2005 Report.

---

[748] *See* Exhibit RWS-2, First Isasi Statement at para. 36.

[749] Claimant's Reply at para. 76(c).

[750] *See infra* at Section II.K.

[751] *See supra* at Section II.E.7; *see also* Exhibit RWS-2, First Isasi Statement at paras. 46-51; Exhibit RWS-3, First Tovar Statement at paras. 60-61; Exhibit RWS-9, Second Isasi Statement at para. 69.

[752] Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005, at p. 1.

413. Consequently, the October 2005 Letter is yet one more piece of evidence where Perú maintained a consistent position on the scope of the 1998 Stabilization Agreement.

10. The November 2005 Letter from MINEM to Congress Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

414. On September 20, 2005, Minister Sánchez made some statements to the press insisting that SMCV would have to pay royalties on ore processed in the Concentrator Project.[753] Minister Sánchez's statements were consistent with MINEM's position on the matter, as reflected in his June 2005 presentation before Congress, his October 2005 letter to Congressman Oré, and Mr. Isasi's April and September 2005 Reports.[754] After Minister Sánchez's statements to the press, Congressman Diez Canseco wrote to Minister Sánchez, formally requesting information on MINEM's position regarding SMCV's payment of royalties in relation to the Leaching Project and the Concentrator Project.[755] On November 8, 2005, Minister Sánchez responded to Congressman Diez Canseco (the "November 2005 Letter").[756]

415. In its Counter-Memorial, Respondent stated that, in the November 2005 Letter, Minister Sánchez (i) explained that the Leaching Project (the stabilized project) would not be subject to the payment of royalties, but the Concentrator Project (the non-stabilized project) would have to pay royalties;[757] and (ii) reiterated that SMCV's profit reinvestment benefit was permitted but that it would apply only to profits generated from the Leaching Project.[758]

416. In its Reply, Claimant contends—without providing any explanation or support—that the November 2005 Letter "confirms Peru's *volte-face* in the face of political pressure targeted at MINEM and on Min. Sanchez Mejía in particular."[759] Claimant's argument is without merit.

---

[753] *See* Exhibit RE-2, Letter No. 0461-2005-JDC/CR, October 4, 2005.

[754] *See* Respondent's Counter-Memorial at para. 193.

[755] *See* Exhibit RE-2, Letter No. 0461-2005-JDC/CR, October 4, 2005.

[756] *See* Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005.

[757] *See* Respondent's Counter-Memorial at para. 195. *See also* Exhibit RWS-2, First Isasi Statement at para. 35; Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005.

[758] *See* Respondent's Counter-Memorial at para. 195. *See also* Exhibit RWS-2, First Isasi Statement at para. 35; Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005.

[759] Claimant's Reply at para. 77.

417. In most respects, Minister Sánchez's letter to Congressman Diaz Canseco merely repeated what had already been explained to Phelps Dodge in March 2005, in the April 2005 Report, to Congress in the June 2005 Presentation, in the September 2005 Report, and in the October 2005 Letter. In particular, after referring to the relevant law, the Minister explained that the Concentrator Project was not subject to the 1998 Stabilization Agreement (*i.e.*, it would not receive any stabilization benefits)[760] in the following terms:

> 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.[761]

418. In the letter, Minister Sánchez also explained the legal basis for MINEM's position. Minister Sánchez explained:

> The Agreements on Guarantees and Measures to Promote Investment entered into by the State . . . are Contract-Laws and, therefore, in principle, are protected by Article 62 of the Political Constitution of Peru with regard to the specific investment project contemplated by the agreement.
>
> . . .
>
> Administrative Stabilization excludes the assessment of the royalty against the stabilized project (not to the company in general) because the Constitutional Court has declared that this consideration has the same remunerative nature as the good standing fee. Consequently, if the good standing fee is included within the Administrative Stabilization, any payment of the same nature will likewise be included.
>
> In this vein, the Cerro Verde Leaching project falls within the regulatory spectrum of the Mining Royalty Law, but the resources extracted and commercialized directly linked to the specific investment project contemplated in the agreement (Leaching) will

[760] *See* Respondent's Counter-Memorial at para. 195.

[761] Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at para. 1 ("*En primer lugar hay que distinguir el tratamiento legal del proyecto de "Lixiviación Cerro Verde" que está amparado por el contrato de Garantías y de Medidas de Promoción a la Inversión del que corresponde al nuevo Proyecto de Sulfuros Primarios . . . . El proyecto de Sulfuros Primarios no goza de la protección en virtud de ningún contrato de Garantías o de Estabilidad.*").

not be considered within the calculation basis for the payment of this remuneration.[762]

419. Thus, Minister Sánchez's explanations were the same as had already been outlined in, *inter alia*, the April and September 2005 Reports.[763]

420. Notably, Claimant's allegation in its Reply, that this letter proves MINEM's alleged *volte-face* due to political pressure, highlights the unmoored nature of Claimant's shifting political conspiracy theory. In its Memorial, Claimant alleged that the alleged *volte face* was in June 2006 when MINEM allegedly succumbed to political pressure to charge royalties to SMCV.[764] In its Reply, Claimant has shifted that theory by nearly a year, alleging that the *volte-face* happened sometime in October or November 2005. The reason Claimant is having difficulties pinpointing exactly when this alleged *volte-face* occurred is because, as Respondent has demonstrated in its written submissions, no alleged *volte-face* ever occurred.

11. The January 2006 Report from MINEM's Legal Affairs Directorate Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

421. On January 16, 2006, Mr. Isasi sent an internal report to Minister Sánchez to address another request from Congressman Diez Canseco, this time seeking information on MINEM's actions to collect mining royalties (the "January 2006 Report").[765] In its Reply, Claimant tries to find meaning in the fact that (i) the January 2006 Report notes that the DGM will provide necessary support to SUNAT by providing a monthly list of the mining titleholders and their respective "production units," but (ii) the Report says nothing about providing information to SUNAT related to specific "investment projects."[766] According to Claimant,

---

[762] Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at paras. 4, 6-7 ("*Los contratos de Garantías y Medidas de Promoción a la Inversión celebrados por el Estado . . .son Contratos-Ley y, por ende, en principio, se encuentran protegidos por el artículo 62 de la Constitución Política del Perú en lo que respecta al proyecto de inversión especifico materia del contrato. . . . La Estabilidad Administrative excluye la aplicación de la regalía al proyecto estabilizado (no a la empresa en general) porque el Tribunal Constitucional ha declarado que esta contraprestación tiene la misma naturaleza retributiva que el derecho de vigencia. En consecuencia, si el derecho de vigencia se encuentra comprendido dentro de la Estabilidad Administrativa, lo estará también todo pago de la misma naturaleza. En este sentido, el proyecto de Lixiviación Cerro Verde, se encuentra dentro del espectro normativo de la Ley de Regalía Minera, pero no considerarán dentro de la base de cálculo para el pago de dicha retribución, los recursos extraídos y comercializados directamente vinculados al proyecto de inversión especifico materia del contrato (Lixiviación)*."). (emphasis added)

[763] *See* Exhibit RWS-9, Second Isasi Statement at para. 48.

[764] *See* Claimant's Memorial at para. 142.

[765] *See generally* Exhibit CE-957, MINEM, Report No. 015-2006-MEM/OGJ, January 16, 2006; *see also* Exhibit RWS-9, Second Isasi Statement at para. 55.

[766] *See* Claimant's Reply at para. 150(xxx).

because the January 2006 Report responds to an inquiry from a congressman, this Report shows the alleged political pressure on MINEM officials to change course and adopt a position regarding the scope of mining stabilization agreements that would disfavor SMCV.[767]

422. Mr. Isasi, the author of the January 2006 Report, rejects Claimant's characterizations in his second witness statement.[768] The term "production units" is used in the Report in the context of the collection of mining royalties, but its use does not have the significance that Claimant wants to attach to it. Its use does not imply that MINEM held a more generous view regarding the scope of mining stabilization agreements in January 2006, extending them to entire "production units," that were later changed to a more restrictive reading, limited to "investment projects" as a result of political pressure as Claimant asserts. Mr. Isasi clarifies this point in his second witness statement:

> [T]he fact that I referred to production units and not to investment projects in the January 2006 Report is not relevant. As I explain in the following section, the term production unit is used in the context of the collection of mining royalties, since it is a parameter used by SUNAT to organize how mining companies make their respective declarations for royalty payments. Consequently, the reference to production units in the January 2006 Report does not imply a change in MINEM's position . . . [769]

The terminology used in the January 2006 Report has no particular significance and does not advance Claimant's political conspiracy theory. Moreover, if Claimant's reading of the January 2006 Report were correct, it would be entirely anomalous. As just discussed above, MINEM's reports and correspondence in 2005 that preceded the January 2006 Report made clear that stabilization applied to investment projects, and according to Claimant, later reports and correspondence took that position as well. That would leave the January 2006 Report (as Claimant wishes to read it) as some kind of strange, one-time flip-flop by MINEM—which is even harder to believe, given that the same person, Mr. Isasi, authored it as well as many of the

[767] *See* Claimant's Reply at paras. 150 and 150(xxx).

[768] *See* Exhibit RWS-9, Second Isasi Statement at paras. 55-56.

[769] Exhibit RWS-9, Second Isasi Statement at para. 56 ("*[E]l hecho que me haya referido a las unidades de producción y no a los proyectos de inversión en el Informe de enero de 2006 no tiene ningún significado. Como lo explico en la siguiente sección, el término unidad de producción se utiliza en el ámbito del recaudo de las regalías mineras, pues es una figura que usa la SUNAT para organizar cómo las empresas mineras hacen sus respectivas declaraciones para el pago de regalías. En consecuencia, la referencia a las unidades de producción en el Informe de enero de 2006 no implica un cambio en la posición del MINEM . . .* ") (emphasis added).

2005 documents on this subject. On February 15, 2006, Minister Sánchez forwarded Mr. Isasi's report to Congressman Diez Canseco.[770]

12. The May 2006 Presentations before Congress Show that MINEM Has Consistently Understood that Mining Stabilization Agreements Are Granted to Specific Investment Projects

423. On May 6, 2006, high-level officials from MINEM, namely Vice Minister Rómulo Mucho and Legal Director Mr. Isasi, appeared before both (i) the full Energy and Mines Congressional Committee (Section a); and (ii) the Congressional Working Group for Cerro Verde Matters, a sub-group of the Energy and Mines Congressional Committee (the "Working Group") (Section b).[771] In these congressional meetings, Mr. Isasi and Vice Minister Mucho discussed SMCV's obligations to pay royalties with respect to the Concentrator Project as well as SMCV's right to reinvest undistributed profits from its stabilized Leaching Project into the Concentrator Project.[772] During these presentations, MINEM officials maintained the very same position that MINEM had taken in its earlier presentations and reports on the issue.

a. The Presentation before the Energy and Mines Congressional Committee

424. Vice Minister Mucho, Mr. Isasi, Ms. Hirsh (SUNAT's National Superintendent), and Mr. Zavala (Minister of Economy) appeared before a session of the Energy and Mines Congressional Committee on May 3, 2006.[773] The purpose of the Congressional Committee's session was to discuss MINEM's and SUNAT's roles with respect to the application of the 2004 Royalty Law and, in particular, to clarify whether royalties constituted an administrative charge (*i.e.*, a "non-tax concept") or a tax.[774] Notably, it was not the purpose of this session to discuss the scope of mining stabilization agreements.[775]

425. In its Reply, Claimant argues that, during the Congressional Committee's session, Minister Zavala and Ms. Hirsh made comments indicating that stability guarantees applied to

---

[770] *See* Exhibit CE-958, MINEM, Report No. 269-2006-MEM/DM, February 15, 2006.

[771] *See* Respondent's Counter-Memorial at para. 197.

[772] *See* Respondent's Counter-Memorial at para. 197.

[773] *See* Exhibit RWS-9, Second Isasi Statement at paras. 59-60.

[774] This issue was relevant for the Energy and Mines Congressional Committee because if royalty payments did not constitute a tax (but were instead an administrative charge) then SUNAT had no authority under Peruvian law to collect them and Perú would need to issue a separate law to grant SUNAT greater powers to audit and collect mining royalties. *See* Exhibit RWS-9, Second Isasi Statement at para. 62.

[775] *See* Exhibit RWS-9, Second Isasi Statement at para. 61.

entire "mining units."[776] Claimant mischaracterizes Ms. Hirsh's and Minister Zavala's statements. As Mr. Isasi explains in his second witness statement, the transcripts and the audio recording of the Congressional Committee's session demonstrate that Minister Zavala and Ms. Hirsh did not call into question or create any doubts about MINEM's position on the applicability of mining royalties or on the scope of mining stabilization agreements.[777] Indeed, they agreed with Mr. Isasi—a man whom they viewed as "one of the persons who knows the most about this subject"[778]—and effectively deferred to him on those matters. As Respondent explains in this section, none of the statements made by Ms. Hirsh or Minister Zavala support Claimant's assertions in this arbitration. To the contrary, they support Respondent's position.

426. *First*, Ms. Hirsh's presentation focused on the 2004 Royalty Law's lack of clarity with respect to SUNAT's newly assigned powers to collect royalties and audit the collection of royalties. During her presentation, Ms. Hirsh explained that even if the 2004 Royalty Law provided that SUNAT was supposed to collect royalties from mining companies, under the Tax Code, SUNAT had no legal basis to do so.[779] In that context (*i.e.*, about how SUNAT would collect royalties), Ms. Hirsh explained that (i) SUNAT collected royalties using a software program that divided all mining investments "by concession," and (ii) in order to make the payment of royalties for mining companies easier, SUNAT shared some information with mining companies, including the names of the "production units" (*i.e.*, the active mining projects) for which they had to pay royalties.[780] In its Reply, Claimant contends that these references to "concessions" and "production units" suggest that SUNAT understood that mining stabilization agreements covered entire concessions and "mining units" (and not only the specific investment projects(s) outlined in the relevant feasibility study). Claimant is taking Ms. Hirsh's statements out of context.

427. During the session, Ms. Hirsh was focused on describing how mining companies should go about paying mining royalties, *i.e.*, the way in which the mining companies who are

[776] *See* Claimant's Reply at paras. 69(b), 78(a), 159(b).

[777] *See* Exhibit RWS-9, Second Isasi Statement at paras. 61-62.

[778] Exhibit RWS-9, Second Isasi Statement at para. 68; *see also* Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at time stamps 01:10:2300 - 01:11:16.

[779] *See* Exhibit RWS-9, Second Isasi Statement at para. 63.

[780] *See* Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 00:19:42 - 00:21:59.

subject to paying royalties should present the information at the time the royalties are due to declare their royalty obligations. This is clear from the audio recording of the meeting:

> Following the collection line, we prepared this PDT and we also had to see what we were going to do when dealing with physical delivery, meaning, for those submissions that are made physically, we call them that because they're handing in the disks. SUNAT had to install certain receivers at banks to be able to receive all of this information and also at SUNAT agencies. All of this has been to make it convenient for debtor companies, but so that, especially, they know which units they will declare and pay the royalty on. This was the information that we provided and we put it, we post it on the website. This is information that, in turn, is provided to us by the Ministry of Energy and Mines and it mentions for us . . . for us the production units, specifically for purposes of the monthly declaration.[781]

Thus, the mere fact that Ms. Hirsh mentioned "production units" in her discussion of the filing process for mining companies to pay royalties cannot be extrapolated into a declaration about the legal question of whether mining stabilization agreements cover an entire concession or "mining unit," as Claimant asserts, or specific investment projects, as Respondent maintains.[782]

428. More importantly, during her presentation, Ms. Hirsh noted that there were mining companies that had signed mining stabilization agreements but that were also paying royalties. Ms. Hirsh explained that this was occurring because some companies did not have all of their operations stabilized. Ms. Hirsh referred to the Southern case as an example of this phenomenon, which Respondent discussed above in Section II.E.1.[783] To recall, at the time, Southern had two investment projects within the same EAU—one stabilized and the other not stabilized. Southern understood—as SMCV should have—that its stabilization agreement

[781] Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 00:21:24 - 00:22:19 ("*Siguiendo la línea de la recaudación, nosotros preparamos este PDT y también tuvimos que ver qué hacíamos cuando se trataba de la entrega física, o sea, para aquellas presentaciones realizadas físicamente le llamamos porque están entregando los disquetes. Es que la Sunat tuvo que instalar unos receptores en los bancos para poder recibir toda esta información y también en las dependencias de SUNAT. Todo esto ha sido para darle facilidades a las empresas obligadas, pero para que sobre todo, éstas sepan sobre qué unidades van a declarar y pagar la regalía. Esta fue una información que nosotros entregamos y la ponemos, la publicamos en la página web. Esta es una información que a su vez nos entrega el Ministerio de Energía y Minas y nos . . . nos menciona las unidades productivas, precisamente para efectos de la declaración mensual*.") (emphasis added); *see also* Exhibit RWS-9, Second Isasi Statement at para. 64.

[782] *See* Exhibit RWS-9, Second Isasi Statement at para. 66.

[783] *See* Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 00:31:31 – 00:33:17.

covered only the investment project for which the agreement was signed, which is why the company was paying royalties with respect to the non-stabilized project.

429. *Second*, in the context of discussing whether royalties should be classified as a tax or an administrative charge, as well as SUNAT's powers to collect royalty payments, Minister Zavala explained to the Congressional Committee that there was no provision in Perú's Civil Code or in Perú's Tax Code granting MEF and SUNAT authority to collect administrative charges such as the royalties to be paid in accordance with the 2004 Royalty Law.[784] Minister Zavala then concluded, as did Ms. Hirsh, that Congress needed to grant SUNAT greater powers to audit and collect mining royalties.[785]

430. Notably, after his presentation, Minister Zavala stated that MEF fully supported MINEM's interpretation of mining stabilization agreements, and he noted that Vice Minister Mucho had brought to the Congressional Committee's session a presentation about the scope of mining stabilization agreements:

> But let's say, we are talking about a General Mining Law that says Vice-Minister or minister . . . you sign these contracts with these clauses, etc. It is not the Ministry of Economy who signs it. If I sign it, I obviously interpret it. Here there is a position of the Ministry of Energy and Mines and I, as an executive party, let's say support the position of Energy and Mines, but I am not the one who finally interprets, but I believe that here I see the Vice-Minister Mucho who has viewed the issue, I see that he has an interesting presentation. Besides, I remember that Minister Glodomiro Sánchez himself came last year and explained the same subject. And I also see the legal advisor of the Ministry of Energy and Mines, who is one of the persons who knows the most about this subject, who I also think it would be worthwhile for . . . for him to speak . . . today. That is the substantive issue and the other [substantive issue] is auditing.[786]

---

[784] *See* Exhibit RWS-9, Second Isasi Statement at para. 67; *see also* Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 00:25:17 - 00:27:24 and 00:53:37 - 00:54:13.

[785] *See* Exhibit RWS-9, Second Isasi Statement at para. 67.

[786] Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at time stamps 01:10:23 - 01:11:16 ("*Pero digamos, estamos hablando de una Ley General de Minería que dice viceministro o Ministro. tú firmas esos contratos con estas cláusulas, etc. No es Ministerio Economía el que lo firma. Si yo lo firmo, yo obviamente lo interpreto. Acá hay una posición del Ministerio de Energía Minas y yo como ejecutivo parte, digamos respaldo la posición de Energía Minas, pero no soy yo el que finalmente interpreto, pero yo creo que acá veo al Viceministro [M]ucho que ha visto el tema, le veo que tiene una presentación interesante. Además, recuerdo que el mismo Ministro Glodomiro Sánchez vino el año pasado y explicó el mismo tema. Y también veo al asesor jurídico del Ministerio de Energía Minas, que es una de las personas que más conoce el tema,*

431. Claimant conveniently cites only a single sentence out of the entire transcript of Minister Zavala's comments to the Committee. In that sentence, Minister Zavala made a reference to the word "units." Claimant pounces on the use of that noun and implausibly claims, on that basis, that MEF's position regarding the scope of mining stabilization agreements was different from MINEM's position—that is, that MEF believed that mining stabilization agreements covered "mining units" rather than "investment projects." But Minister Zavala did not make any such declaration; at no point during the Committee session did Minister Zavala state that mining stabilization agreements covered entire "mining units."[787]

432. *Third*, Mr. Isasi's intervention during the Congressional Committee's session was consistent with the government's long-standing view that mining stabilization agreements apply to specific investments. Mr. Isasi spoke after Vice Minister Mucho's presentation and pointed out that mining stabilization agreements only protect investment projects and not entire concessions or mining units:

> One 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. Therefore, we could come to the conclusion that, in reality, all mining companies are required to declare and pay. However, with respect to mining titleholders who had stabilization agreements prior to the Mining Royalties Law, the only thing they must do is to exclude the concentrates extracted from the project that was stabilized from the basis of calculation of the royalty; but, the other projects, the other concessions, those must pay their mining royalties.[788]

433. In sum, during the May 6, 2006 Congressional Committee session, neither the Head of SUNAT nor the Minister of Economy and Finance questioned or contradicted MINEM's interpretation of the scope of mining stabilization agreements. To the contrary, MEF

---

que también creo que valdría la pena que . . . que se pronuncie él . . . el día de hoy. Ese es el tema de fondo y lo otro de fondo [es la] fiscalización.") (emphasis added).

[787] *See* Exhibit RWS-9, Second Isasi Statement at paras. 67-69 (describing Mr. Zavala's intervention).

[788] Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006, at timestamps 01:42:10 - 01:43:06 ("*Una cosa muy importante de precisar es que estos contratos no blindan a toda la empresa ni a todas las concesiones mineras, no. Eso debe quedar bien claro. O sea, solamente lo que hace es garantizar a un proyecto específico de inversión que está especificado en un estudio de factibilidad y que está volcado en un contrato. Por lo tanto, podríamos llegar a la conclusión de que todas las empresas mineras en realidad están obligadas a declarar y pagar, pero que los titulares mineros que tenían contratos de estabilidad anteriores a la Ley de Regalía Minera, lo único que deben hacer es excluir de la base de cálculo de la regalía los concentrados extraídos del proyecto, aquel que está estabilizado, pero por los demás proyectos, por las demás concesiones, tiene que pagar sus regalías mineras*.").

and SUNAT acknowledged that, given that mining royalties are an administrative charge, to assess the applicability of mining royalties or the scope of mining stabilization agreements, only MINEM's position was relevant. And MINEM was clear that such agreements only apply to investment projects for which the agreements were signed.

b. The Presentation before the Congressional Working Group Regarding Cerro Verde

434. On the same day, just after the Congressional Committee session described in Section II.E.12(a) above, the Committee's Working Group on Cerro Verde held a further session where Mr. Isasi gave a presentation regarding SMCV's profit reinvestment benefit with respect to the Leaching Plant and SMCV's obligation to pay royalties with respect to the Concentrator Project (the "May 2006 Presentation").[789] In its Counter-Memorial, Respondent described the content of the May 2006 Presentation and explained that the Presentation shows that Respondent consistently applied mining stability guarantees to investment project(s) specified in the corresponding feasibility study attached to the mining stabilization agreement.[790] For ease of reference, Respondent includes a summary of Mr. Isasi's May 2006 Presentation:

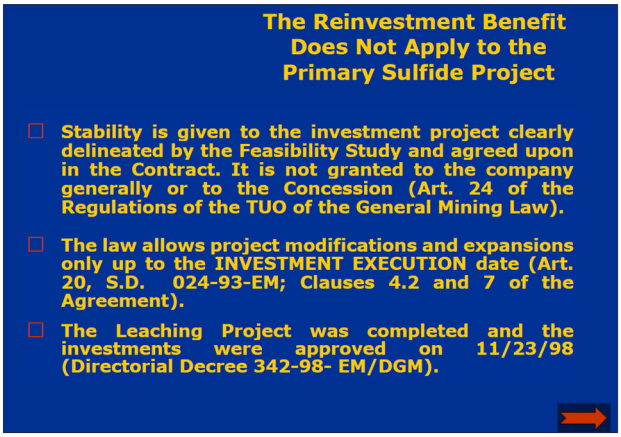
- With respect to the profit reinvestment benefit, Mr. Isasi explained why the reinvestment benefit did apply to the Leaching Project, but not to the Concentrator Project.[791] Specifically, the Presentation stated—in line with MINEM's long-standing position—that "[s]tability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract[;] [i]t is not granted to the company generally or to the Concession."[792]

[789] *See generally* Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006.

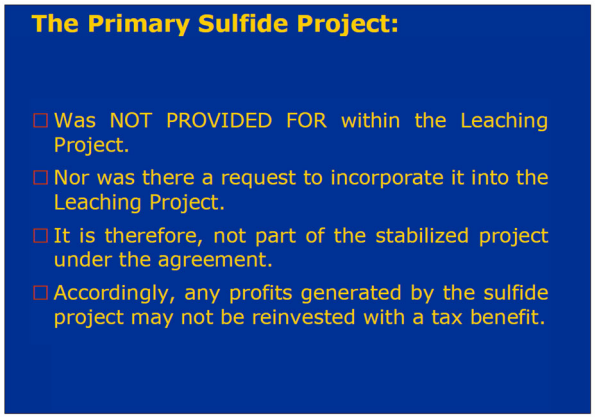
[790] *See* Respondent's Counter-Memorial at paras. 197-200.

[791] *See* Exhibit RWS-2, First Isasi Statement at paras. 48-49.

[792] Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, at slide 8 ("*La estabilidad se otorga al proyecto de inversión claramente delimitado por el Estudio de Factibilidad y pactado en el Contrato. No se otorga a la empresa de modo general ni a la Concesión* . . . .") (emphasis added); *see also* Respondent's Counter-Memorial at para. 198; Exhibit RWS-2, First Isasi Statement at paras. 49-51.



- With respect to the issue regarding the payment of royalties, Mr. Isasi explained that mining royalties did apply to the Concentrator Project, because the Project was not covered by the 1998 Stabilization Agreement.[793] As Respondent showed in its Counter-Memorial, slide 9 of the May 2006 Presentation explicitly mentioned that the Concentrator Project "is . . . not part of the stabilized project under the agreement" and, for this reason, it does not benefit from the stabilized regime subject of the 1998 Stabilization Agreement.[794]



435. In its Reply, Claimant does not deny that Mr. Isasi concluded that mining stabilization agreements covered only specific investment projects. Claimant responds to these clear statements of the government's position by characterizing the May 2006 Presentation as proof that, after months of political pressure, MINEM was ready to apply its supposedly "novel interpretation"[795] (*i.e.*, that mining stabilization agreements cover only specific investments outlined in the relevant feasibility study), in order to assess royalties against SMCV for the

[793] *See* Respondent's Counter-Memorial at para. 199.

[794] Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, at slide 9 (emphasis added).

[795] *See* Claimant's Reply at para. 78.

operations of the Concentrator Project.[796] As Mr. Isasi and Respondent have explained, Mr. Isasi's presentation was not "novel" or representative of any change in MINEM's position; it was simply a repetition of MINEM's long-standing position on the scope of the 1998 Stabilization Agreement.

436. As Mr. Isasi explains, he prepared the May 2006 Presentation using as a basis a draft presentation that he had prepared back in September 2005.[797] At that earlier time, on September 19, 2005, Mr. Isasi had sent his draft presentation to Minister Sánchez, along with a presentation that had been prepared by Congressman Diez Canseco.[798] Based on this email, Claimant comes up with a series of baseless conjectures to try to support its political conspiracy theory.

437. Specifically, Claimant alleges that a few days before Mr. Isasi sent the September 19, 2005 email with his draft presentation, Congressman Diez Canseco had allegedly threatened to impeach Minister Sánchez if he did not revoke SMCV's profit reinvestment benefit.[799] Claimant, thus, suggests that Mr. Isasi prepared the September 2005 draft presentation in response to Congressman Diez Canseco's pressure against Minister Sánchez.[800] Claimant's conjectures are simply incorrect.

438. First, Mr. Isasi explains in his second witness statement that he prepared the presentation because the Minister was scheduled to appear before Congress to discuss SMCV's tax benefits on September 28, 2005.[801] Second, Mr. Isasi also explains that this presentation was not made in response to any type of alleged political pressure as Claimant claims—the presentation reflected the same position the Ministry had discussed in the April 2005 Report and June 2005 Presentation, and it was the same position that MINEM would discuss in its September 2005 Report (issued three days later, as discussed in Section II.E.8 above), in its October 2005 Letter, in its November 2005 Letter, and in its May 2006 Presentation.[802] Thus, Mr. Isasi's September 19, 2005 draft presentation is additional evidence that, contrary to

[796] *See* Claimant's Reply at para. 78(b).

[797] *See* Exhibit RWS-9, Second Isasi Statement at para. 59.

[798] *See* Exhibit RWS-9, Second Isasi Statement at para. 50.

[799] *See* Claimant's Reply at para. 150(xvii).

[800] *See* Claimant's Reply at para. 150(xix).

[801] *See* Exhibit RWS-9, Second Isasi Statement at para. 50.

[802] *See* Exhibit RWS-9, Second Isasi Statement at paras. 52-53.

Claimant's allegations, MINEM held a consistent position regarding the scope of mining stabilization agreements, and it did not change that position sometime in 2005 or 2006, as Claimant alleges.

13. The June 2006 Report from MINEM's Legal Affairs Directorate Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

439. In its Memorial, Claimant asserted that, in June 2006, MINEM changed its position with respect to the 1998 Stabilization Agreement due to political pressure. At that time, MINEM issued a report stating that SMCV's Concentrator Project was outside the scope of the 1998 Stabilization Agreement (MINEM's "June 2006 Report").[803]

440. In its Counter-Memorial, Respondent explained why the June 2006 Report was consistent with MINEM's long-standing position regarding the scope of stabilization agreements under the Mining Law and, in particular, with MINEM's opinions (i) discussed with Phelps Dodge in March 2005; and (ii) discussed in the April 2005 Report, the September 2005 Report, the October 2005 Letter, the November 2005 Letter, and June 2006 Presentation.[804] Respondent also explained that whether or not Claimant received a copy of this report at the time is irrelevant because SMCV (and Claimant) knew or should have known of the Ministry's position at least since MINEM's meeting with Phelps Dodge in March 2005, Minister Sánchez's and Mr. Isasi's presentations made before Congress in June 2005 and May 2006, and in the June 2006 meetings with local authorities from Arequipa, where SMCV was present (described below).[805]

441. In its Reply, Claimant merely argues that the June 2006 Report "was thus the culmination of a year and a half of political pressure"[806] targeted at MINEM to come up with "a purported legal justification to assess royalties against SMCV for its Concentrator operations."[807] However, as Mr. Isasi states, in his capacity as the author of the June 2006 Report (and several others on the list above), this was not the case. To the contrary, as Mr. Isasi confirms, and as Respondent has explained in Sections II.E.1-12 above, MINEM has always held the same position regarding the scope of mining stabilization agreements and the payment of royalties.

---

[803] *See* Claimant's Memorial at paras. 142-44.

[804] *See* Respondent's Counter-Memorial at paras. 201-05.

[805] *See* Respondent's Counter-Memorial at para. 204.

[806] Claimant's Reply at para. 151.

[807] Claimant's Reply at para. 78(b).

14. The June 2006 Presentation During the Roundtable Discussions Organized by the Proinversión Congressional Committee Shows that Mining Stabilization Agreements Are Granted to Specific Investment Projects

442. In mid-2006, local Arequipa leaders voiced objections to MINEM's approval of SMCV's reinvestment of profits from the Leaching Project into the Concentrator Project, tax free.[808] As Mr. Isasi explains, Arequipa leaders were concerned because local government revenues are partly dependent on the taxes that mining companies pay, and SMCV's use of the profit reinvestment benefit under the 1998 Stabilization Agreement to redeploy the Leaching Project's profits on a pre-tax basis would reduce SMCV's tax payments into the national and local government coffers.[809]

443. In response, during June and July 2006, the Congressional Committee overseeing Proinversión (Perú's investment promotion agency) held a series of roundtable discussions with the local leaders from Arequipa, MINEM and MEF officials, and representatives of SMCV to address the Arequipa local leaders' concerns about the impact of SMCV's profit reinvestment benefit.[810] The discussions took place on June 23, June 29, and July 10, 2006[811] (the "Roundtable Discussions"). On August 2, 2006, the participants in the Roundtable Discussions reached an agreement: SMCV would contribute funds to Arequipa to construct a potable water plant and to invest in other social infrastructure projects (the "Roundtable Agreement").[812] Respondent discusses in detail the results of these discussions and the Roundtable Agreement in Section II.F.1 below.

---

[808] *See* Respondent's Counter-Memorial at para. 210; *see also* Exhibit CE-535, "Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000," *La República*, June 19, 2006; Exhibit RWS-3, First Tovar Statement at para. 65; Exhibit RWS-2, First Isasi Statement at paras. 60-61.

[809] *See* Exhibit RWS-2, First Isasi Statement at para. 61 ("Strictly speaking, mining companies pay an amount in income tax and 50% of the aforementioned income tax received by the Government is distributed by the Ministry of the Economy and Finance to regional and local governments, as well as to the universities of the province in which the mining investment is carried out, in the proportions stipulated by law.") ("*En rigor, las empresas mineras pagan un monto de impuesto a la renta y el 50% de dicho impuesto a la renta percibido por el Estado es distribuido por el Ministerio de Economía y Finanzas a los gobiernos regionales y locales, así como a las universidades del departamento en que se realiza la inversión minera, en las proporciones que fija le Ley.*").

[810] *See* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006; *see also* Respondent's Counter-Memorial at para. 206; Exhibit RWS-3, First Tovar Statement at para. 65.

[811] *See* Exhibit RE-51, Proinversión Congressional Committee, Meeting Minutes, June 29, 2006, at p. 1; Exhibit CE-541, "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay 13 Million," *El Heraldo*, July 10, 2006, at p. 1; *see also* Respondent's Counter-Memorial at para. 211.

[812] *See* Exhibit CE-544, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV, August 2, 2006, at pp. 1-3.

444. In its Memorial, Claimant—relying on testimony from Ms. Torreblanca, who attended just one session of the Roundtable Discussions—complains that during the Roundtable Discussions (i) no one from the government alerted SMCV about the MINEM June 2006 Report in which MINEM had adopted, allegedly for the first time, a novel and harmful-to-SMCV interpretation of the scope of the 1998 Stabilization Agreement;[813] and (ii) no one mentioned that SMCV would have to pay royalties on the Concentrator Plant (whose construction was underway at the time of the Roundtable Discussions[814]) in the coming years.[815] Section II.F.1 below takes up Claimant's allegation that SMCV was somehow misled into agreeing to make the payments set out in the Roundtable Agreement; we address here Claimant's allegations about MINEM's position on the scope of the 1998 Stabilization Agreement that was evident at the time of the Roundtable Discussions.

445. In its Counter-Memorial, Respondent disagreed with Claimant's description of the Roundtable Discussions and explained that on June 23, 2006, with SMCV officials present, MINEM specifically explained that "stability is given to the investment project clearly defined by the Feasibility Study and agreed upon in the Agreement [and] not granted to the company generally or the Concession"[816] ("June 2006 Presentation"). MINEM's explanation was consistent with the position it held in the April 2005 Report, June 2005 Presentation, September 2005 Report, October 2005 Letter, November 2005 Letter, January 2006 Report, and May 2006 Presentations. Thus, by June 2006 SMCV (and Phelps Dodge, Claimant's predecessor) undoubtedly knew or should have known that the Concentrator Project was not covered by the 1998 Stabilization Agreement and that SMCV would be required to pay royalties related to that Project.

446. In its Reply, Claimant alleges that there is no documentary evidence that demonstrates that MINEM shared the June 2006 Presentation with SMCV's representatives during the Roundtable Discussions.[817] Claimant asserts that contemporaneous documents and Ms. Torreblanca's testimony contradict Respondent's description of the Roundtable

---

[813] *See* Exhibit CWS-11, First Torreblanca Statement at paras. 52-53, 70; Claimant's Memorial at para. 145.

[814] *See* Exhibit CWS-1, First Aquiño Statement at para. 33.

[815] *See* Exhibit CWS-11, First Torreblanca Statement at para. 55; Claimant's Memorial at paras. 147-48.

[816] Exhibit RWS-3, First Tovar Statement at para. 67 (*citing* Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006, at slide 8).

[817] *See* Claimant's Reply at para. 158(g); *see also* Claimant's Memorial at para. 145; Exhibit CWS-11, First Torreblanca Statement at paras. 52-54; Exhibit CWS-21, Second Torreblanca Statement at paras. 25-27.

Discussions.[818] Claimant's telling of the events is simply incorrect. As Respondent explains in the following sub-sections, (i) contemporaneous documents, which Respondent produced to Claimant in document production and which Claimant has chosen to ignore, demonstrate that during the Roundtable Discussions, MINEM officials did explain to the public, and to SMCV in particular, that SMCV's (and Claimant's) interpretation of the 1998 Stabilization Agreement was incorrect (Subsection a); and (ii) Claimant's evidence to the contrary is misleading and irrelevant (Subsection b).

a. Contemporaneous Evidence from the June 23, 2006 Roundtable Discussion Proves that MINEM Explicitly Stated that the 1998 Stabilization Agreement Did Not Extend to the Concentrator Project

447. Multiple documents on the record here (including from Respondent's document production as well as an email that Mr. Isasi sent to Mr. Tovar on June 22, 2006) prove that Respondent's description of the June 23, 2006 Roundtable Discussion is accurate—and Claimant's description is incorrect.

448. *First*, Respondent produced to Claimant in the course of document production the case files of the November 2007 complaint filed by Arequipa activist Dante Martínez Palacios against SUNAT.[819] The documents produced show that in the course of those proceedings, the President of the *Frente de Defensa e Integración y Desarrollo del Cono Norte – FREDICON* (a local activist entity), Mr. Felipe Raymundo Dominguez, submitted an *amicus* brief in support of Mr. Martínez's complaint. FREDICON was part of the *Comité de Lucha por los Intereses de Arequipa* that participated in the Roundtable Discussions to defend Arequipa's local interests.[820] Notably, Mr. Dominguez attended the June 23 and June 29 sessions of the Roundtable Discussions.[821]

449. In his *amicus* brief, Mr. Dominguez explicitly stated that in the June 23 session of the Roundtable Discussions a PowerPoint was distributed to all the attending parties of the event stating that SMCV had a right to the reinvestment profit benefit, but that the Sulfide Project was

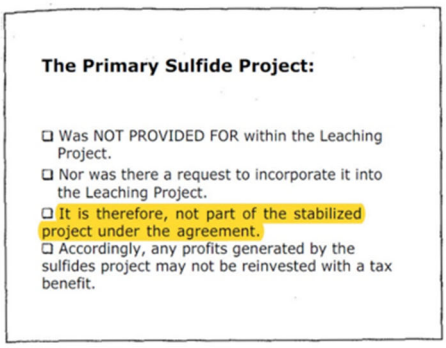
[818] *See* Claimant's Reply at paras. 157, 158(g).

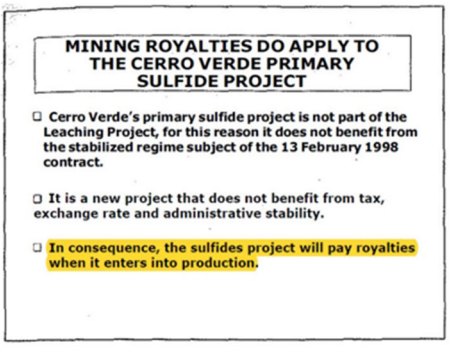
[819] *See* Procedural Order No. 2, July 4, 2022, Appendix 1 - Claimant's Redfern Schedule at Document Request No. 27, at p. 111.

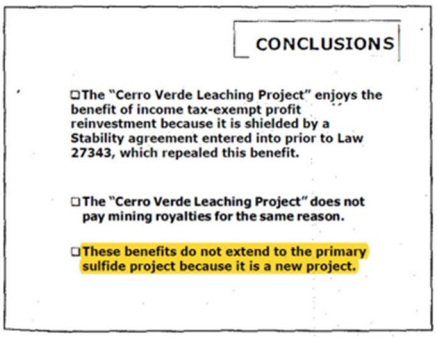
[820] *See* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006; Exhibit RE-51, Proinversión Congressional Committee, Meeting Minutes, June 29, 2006.

[821] *See* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006; Exhibit RE-51, Proinversión Congressional Committee, Meeting Minutes, June 29, 2006.

subject to the payment of royalties.[822] Mr. Dominguez attached as Exhibit A6 to his brief the PowerPoint presentation that he received at the June 23, 2006 Roundtable Discussion, which discusses SMCV's Leaching Project, the Concentrator Project, and the scope of the 1998 Stabilization Agreement.[823] The slides that Mr. Dominguez received during the June 23, 2006 Roundtable Discussion explicitly state that: (i) the Concentrator Project "is therefore, not part of the stabilized project under the agreement;"[824] (ii) "[as a] consequence, the sulfides project will pay royalties when it enters into production;"[825] and (iii) the reinvestment benefits "do not extend to the primary sulfide project because it is a new project."[826] Respondent reproduces the key slides below:







450. Mr. Dominguez's *amicus* brief, and the presentation that he attached to his submission, confirms Mr. Tovar's and Mr. Isasi's testimony and demonstrates that MINEM

[822] *See* Exhibit RE-233, FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT, May 21, 2008, at Annex A-6, p. 27 (of PDF).

[823] *See* Exhibit RE-233, FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT, May 21, 2008, at Annex A-6, pp. 24-27 (of PDF).

[824] *See* Exhibit RE-233, FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT, May 21, 2008, at Annex A-6, p. 24 (of PDF) ("*[e]n consecuencia, no forma parte del proyecto estabilizado por [el] contrato*").

[825] *See* Exhibit RE-233, FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT, May 21, 2008, at Annex A-6, p. 27 (of PDF) ("*[e]n consecuencia, el Proyecto de sulfuros sí pagará regalías cuando entre en producción*").

[826] *See* Exhibit RE-233, FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT, May 21, 2008, at Annex A-6, p. 27 (of PDF) ("*no son extensivos al proyecto de sulfuros primarios por tratarse de un nuevo proyecto*").

certainly did not keep the government's position a secret from SMCV during the Roundtable Discussions. To the contrary, MINEM hand-delivered the June 2006 presentation to the attendees of the June 23, 2006 session—including to Mr. Jorge Benavente, SMCV's Corporate Deputy Manager, who was present at that meeting.[827]

451. Notably, the presentation submitted by Mr. Dominguez is identical to the one that Mr. Tovar submitted with his first witness statement as Exhibit RE-107.[828] This presentation is also practically identical to the presentation made by Mr. Isasi before the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee on May 3, 2006, discussed in Section II.E.12(b) above.

452. *Second*, as Mr. Tovar explains in his second witness statement, on June 22, 2006 (*i.e.*, the day before the June 23, 2006 Roundtable Discussion), he received an email from Mr. Isasi attaching (i) the presentation that he had made at the Congressional Working Group on May 3, 2006, and (ii) the June 2006 Report.[829] Later that day, Mr. Isasi sent another email to Mr. Tovar indicating that he had made some adjustments to the May 2006 Presentation and was attaching a new version of the presentation. That new version, of course, again reflects MINEM's consistent position that the 1998 Stabilization Agreement did not cover the Concentrator Plant. The presentation attached to Mr. Isasi's email is identical to the presentation that Mr. Dominguez attached to his intervening brief in Mr. Martínez's proceeding.[830]

453. In his second witness statement, Mr. Tovar confirmed that the presentation he received from Mr. Isasi was the version of the presentation that MINEM distributed at the June 23, 2006 Roundtable Discussion.[831] Mr. Tovar explains in his witness statement that "it was common practice for us [MINEM] to bring at least 10 copies each time we made a presentation. So I probably printed out the presentation that Dr. Isasi sent me that day and brought [the copies] to the June 23 session."[832] Therefore, the presentation that Mr. Isasi sent to Mr. Tovar was the

---

[827] *See* Exhibit RWS-10, Second Tovar Statement at para. 105.

[828] *See* Exhibit RWS-3, First Tovar Statement at para. 67 (*citing* Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006).

[829] Exhibit RWS-10, Second Tovar Statement at para. 104.

[830] *See* Exhibit RE-233, FREDICON's *Amicus* in Dante Martínez's Complaint to SUNAT, May 21, 2008, at Annex A-6, pp. 24-27 (of PDF); *see also* Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006.

[831] *See* Exhibit RWS-10, Second Tovar Statement at para. 104.

[832] Exhibit RWS-10, Second Tovar Statement at para. 104 ("*era una práctica común que nosotros lleváramos copias—al menos 10—cada vez que hacíamos alguna presentación. De manera que yo seguramente mandé a imprimir la presentación que me envió el Dr. Isasi ese día y las llevé a la sesión del 23 de junio*.").

presentation distributed to all the attendees of the Roundtable Discussion, including to SMCV's representative Mr. Jorge Benavente.

454. No doubt remains, therefore, that, during the Roundtable Discussions, MINEM's position that the 1998 Stabilization Agreement did not extend to the Concentrator Project was openly discussed and presented, including to representatives of SMCV.

b. None of the Evidence Offered by Claimant or Its Witnesses Contradicts Respondent's Description of the June 23, 2006 Roundtable Discussion

455. In her second witness statement, Ms. Torreblanca asserts that she does not remember this presentation, nor was she ever informed of this presentation.[833] Ms. Torreblanca's testimony about the June 23, 2006 session is both mistaken and misleading.

456. Critically, Ms. Torreblanca did not attend the June 23, 2006 Roundtable Discussion—her description of the events at the meeting is hearsay.[834] Admitting that she did not attend the June 23, 2006 meeting, Ms. Torreblanca asserts that she was briefed by her colleagues who attended the meeting in person, and that her colleagues did not inform her of any presentation or statements by MINEM of the kind described by Mr. Tovar.[835] Whether Ms. Torreblanca was briefed or not on the presentation made by MINEM is irrelevant and certainly cannot contradict all of the documentation just discussed that proves that the presentation was indeed made.

457. In an attempt to support Ms. Torreblanca's testimony, Claimant and Ms. Torreblanca cite to a report from *El Haraldo* newspaper.[836] The press report, however, does not support Ms. Torreblanca's testimony. Claimant points out that the article notes that Arequipa leaders "also demanded that the Government order the payment of the mining royalties of Cerro Verde I and II,"[837] and that *El Heraldo* never reported that the Government would enforce

[833] *See* Exhibit CWS-21, Second Torreblanca Statement at paras. 34-36.

[834] *See* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006, at p. 1.

[835] *See* Claimant's Reply at para. 158(g).

[836] *See* Claimant's Reply at para. 158(g); Exhibit CE-540, "Arequipa and Cerro Verde Authorities Seek Solutions," *El Heraldo*, June 29, 2006, at p. 2; *see also* Exhibit CWS-11, First Torreblanca Statement at para. 53.

[837] *See* Exhibit CE-540, "Arequipa and Cerro Verde Authorities Seek Solutions," *El Heraldo*, June 29, 2006, at p. 2 ("*exigían, además, que el Gobierno dispusiera el pago de las regalías mineras de Cerro Verde I y II*"); Claimant's Reply at para. 158(g).

royalties on the Concentrator.[838] But whatever *El Heraldo* may have chosen to report or not, the presentation leaves no question that MINEM did voice its understanding of SMCV's obligation to pay royalties on the Concentrator Project.

458. *Third*, Claimant and Ms. Torreblanca allege that the minutes of the June 23, 2006 Roundtable Discussion indicate that the issue of mining royalties was not discussed at that meeting, but rather, was reserved for one of the later sessions in the Roundtable Discussions. That characterization of the minutes, however, is unsustainable. The subject of the meeting minutes for the June 23, 2006 meeting is "Sociedad Minera Cerro Verde: Income tax, royalty payments and reinvestment of profits."[839] In addition, the agenda for the meeting lists "[i]ncome tax, royalty payments and reinvestment of profits," and the minutes then state that "[a]fter listening to the interventions on the Agenda [], the attendees agreed to the following."[840] Clearly, the issue of royalties was discussed during the June 23, 2006 meeting.

459. In conclusion, it is clear that MINEM explained publicly (and specially, to SMCV) during the Roundtable Discussions that the Concentrator Project would not be covered by the Agreement.

* * *

460. In sum, contrary to Claimant's allegations in this arbitration, MINEM consistently held the understanding that the scope of mining stabilization agreements—and of the 1998 Stabilization Agreement in particular—is limited to the specific investment project for which the agreement was signed. Similarly, as Respondent explains in the next section, MEF consistently understood that the scope of mining stabilization agreements is delineated by reference to the investment project(s) identified in the relevant feasibility study.

---

[838] *See* Exhibit CE-540, "Arequipa and Cerro Verde Authorities Seek Solutions," *El Heraldo*, June 29, 2006, at p. 2; Claimant's Reply at para. 158(g).

[839] Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006, at p. 1 ("*Sociedad Minera Cerro Verde: El impuesto a la renta, el pago del canon y la reinversión de utilidades*") (emphasis added).

[840] Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006, at p. 1 ("*El impuesto a la renta, el pago del canon y la reinversión de utilidades*") ("*Luego de escuchar las intervenciones sobre el tema del Orden del Día, los asistentes acordaron lo siguiente . . .*").

F. SMCV MADE VOLUNTARY CONTRIBUTIONS WITH NO PROMISE FROM THE GOVERNMENT THAT ANY SUCH PAYMENTS WOULD EXEMPT SMCV FROM PAYING ROYALTIES ON THE CONCENTRATOR PROJECT

461. Between 2006 and 2012, SMCV agreed to pay voluntary contributions to the local government of Arequipa and to Perú's National Treasury under three special agreements: (i) the Roundtable Agreement executed on August 2, 2006 with MINEM, MEF, and the local leaders of Arequipa for the construction of a potable water plant and other infrastructure projects in Arequipa;[841] (ii) the Voluntary Contribution Agreement signed by SMCV and MINEM and MEF on January 18, 2007 under the Voluntary Contribution Program (*Programa Minero de Solidaridad con el Pueblo*) with the purpose of sharing a small percentage of profits to promote welfare and social development in the local communities in Arequipa (the "Voluntary Contribution Agreement");[842] and (iii) the agreement executed between SMCV and MINEM on February 28, 2012 under the Law Establishing GEM Legal Framework, Law No. 29790 ("GEM Law") to share at least 4% of SMCV's operating profits with the State (the "GEM Agreement").[843]

462. In its Memorial and again in its Reply, Claimant insists that SMCV committed to these contributions based on the premise that the Concentrator Project was covered by the 1998 Stabilization Agreement and that none of SMCV's ore production was subject to paying royalties for the duration of that Agreement.[844] According to Claimant, the Peruvian government did not disclose to SMCV its "novel interpretation" of the 1998 Stabilization Agreement or the applicable elements of the Mining Law and Regulations before or at the time the roundtable negotiations were taking place in June 2006.[845] Claimant asserts, without any basis, that Perú induced SMCV to agree to make contributions under the Roundtable Agreement (August 2006) and the Voluntary Contribution Agreement (January 2007).[846]

463. With respect to the GEM contributions (February 2012), Claimant maintains that it was induced to pay these contributions for its entire "mining unit," because government

---

[841] *See* Exhibit CE-544, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV, August 2, 2006.

[842] *See* Exhibit CE-27, SMCV, Voluntary Contribution Agreement, January 18, 2007.

[843] *See* Exhibit CE-64, GEM Agreement, Law No. 29790, February 28, 2012; Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Annex II.

[844] *See* Claimant's Reply at para. 160; *see also* Claimant's Memorial at paras. 12, 153-54, 187-95, 382(b).

[845] *See* Claimant's Reply at para. 160; *see also* Claimant's Memorial at paras. 12, 382(b).

[846] *See* Claimant's Reply at para. 160; *see also* Claimant's Memorial at paras. 12, 382(b).

officials assured SMCV that mining companies would only have to pay either (i) GEM or (ii) royalties and the Special Mining Tax ("SMT"), but not both.[847] According to Claimant, this understanding was also confirmed in writing in December 2011 by MEF via Report No. 206-2011-EF/61.01 ("MEF 2011 Report").[848] Claimant asserts that Respondent does not contest that SMCV "made hundreds of millions of dollars in 'voluntary' contributions and GEM payments that it should not have had to make if it had to pay royalties."[849] Claimant further complains that the government knew about this circumstance but decided to accept these payments and to not inform SMCV that it was overpaying.[850] Claimant's characterization of these voluntary programs is fundamentally misguided and factually incorrect.

464. Respondent demonstrated in its Counter-Memorial that Perú never induced SMCV to participate in the voluntary programs under a (false) promise that it was going to be exempt from paying royalties on all of its mining projects.[851] SMCV knew or should have known, at a minimum by March 2005, that under the Mining Law and according to the Peruvian authorities, it was obliged to pay royalties for the ore processed through the Concentrator Plant.[852] Respondent further explained in its Counter-Memorial that MEF never confirmed—nor could it have—that SMCV would only have to pay GEM payments.[853] SMCV could not have relied on the 2011 MEF Report to assume that its Concentrator Project was stabilized, as the report did not comment on the scope of the 1998 Stabilization Agreement.[854] To the contrary, the 2011 MEF Report confirmed that only stabilized projects would need to make GEM payments.[855] SMCV nonetheless made GEM contributions on all of its projects while aware of the government's understanding of the scope of the guarantees provided by the 1998 Stabilization Agreement.[856]

---

[847] *See* Claimant's Reply at para. 161; *see also* Claimant's Memorial at paras. 187-95.

[848] *See* Claimant's Reply at para. 161(c); *see also* Claimant's Memorial at paras. 192-93.

[849] *See* Claimant's Reply at para. 160.

[850] *See* Claimant's Reply at paras. 160-61.

[851] *See* Respondent's Counter-Memorial at paras. 206-42.

[852] *See* Respondent's Counter-Memorial at paras. 172-73. *See also supra* at Section II. E.5.

[853] *See* Respondent's Counter-Memorial at paras. 229-34.

[854] *See* Respondent's Counter-Memorial at paras. 229-34.

[855] *See* Respondent's Counter-Memorial at paras. 229-34.

[856] *See* Respondent's Counter-Memorial at paras. 206-42; Exhibit RWS-6, Witness Statement of Marco Camacho, April 18, 2022 ("First Camacho Statement"), at paras. 36-37.

465. Respondent also explained in its Counter-Memorial that if SMCV overpaid voluntary contributions, it has only itself to blame.[857] In Perú, every taxpayer has the duty to assess appropriately the amount of its tax obligations.[858] In this case, it was SMCV's responsibility to determine the value of its voluntary contributions and GEM payments under these agreements. Trying to blame the government for not divining and then proactively notifying SMCV that they were overpaying is absurd. In any case, if SMCV believed there were an overpayment, it had the right to petition SUNAT for a refund or an offset, provided that the request was in accordance with the current regulations.[859] SMCV failed to submit such a request on time, even after learning about the Supreme Court's judgment confirming that SMCV's interpretation of the scope of the 1998 Stabilization Agreement was incorrect and contrary to Peruvian law.

466. In the following subsections, Respondent will respond to Claimant's allegations with respect to each voluntary program to demonstrate that SMCV agreed to make voluntary contributions without any interference or inducement from MINEM or any other government entity claiming that SMCV should do so because it was somehow exempt from paying royalties with respect to all of its investments.

1. The Roundtable Agreement: SMCV Agreed to Make Voluntary Contributions to Arequipa to Address Arequipa's Social and Fiscal Concerns

467. As Respondent explained in its Counter-Memorial, the Roundtable Agreement was signed in response to roundtable discussions that intended to address Arequipa's local leaders' concerns regarding the region's fiscal shortfall that was caused when MINEM approved of SMCV's reinvestment of pre-tax profits from the Leaching Project into the development of the Concentrator Project.[860] Because Arequipa otherwise would have received a share of the

[857] *See* Respondent's Counter-Memorial at paras. 206-42.

[858] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 59 ("Article 59. ASSESSING THE TAX OBLIGATION By the act of assessing the tax obligation: a) The tax debtor verifies the accomplishment of the taxable event, indicates the tax base and the amount of the tax.").

[859] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 92 (Rights of the Subjects [*Administrados*] . . . b) . . . Demand the refund of what was unduly paid or paid in excess, in accordance with current regulations.").

[860] *See* Respondent's Counter-Memorial at paras. 209-11. *See also* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006; Exhibit RE-51, Proinversión Congressional Committee, Meeting Minutes, June 29, 2006; Exhibit CE-539, "Roundtable Discussion Initiated to Resolve Cerro Verde Case," *El Correo*, June 26, 2006; Exhibit CE-541, "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay 13 Million," *El Heraldo*, July 10, 2006.

(stabilized) taxes collected in connection with SMCV's Leaching Project, MINEM's approval permitting SMCV to reinvest the profits rather than be taxed on them reduced Arequipa's tax revenues.

468. As Respondent explains in Section II.E.14 above, in June 2006, MINEM and MEF officials, local leaders from Arequipa, and SMCV representatives convened roundtable discussions with all the relevant stakeholders in an effort to address the local leaders' concerns.[861] On August 2, 2006, the participants reached and signed the Roundtable Agreement as the culmination of the roundtable discussions. Under the Agreement, in an effort to quell social and political tensions with the local community, SMCV committed to finance the construction of a potable water plant and to cover the shortfall in Arequipa's public works budget from June 2006 until May 2007.[862]

469. According to Claimant, Perú somehow induced SMCV to make these payments by allegedly misleading SMCV to believe that it was and would continue to be entirely exempt from paying royalties under the 1998 Stabilization Agreement.[863] Claimant asserts that "[t]he explicit purpose of the Roundtable Discussions was to provide the Arequipa province with additional contributions to make up for the tax and royalty payments that SMCV did not have to make because of the Stability Agreement."[864] Claimant's description of the facts is incorrect.

470. *First,* nothing in the Roundtable Agreement indicates that SMCV was signing it because it would be exempt from paying royalties, or that the Roundtable contributions were to be made in order to somehow compensate for the 1998 Stabilization Agreement.[865] Claimant fails to point to any language in the Agreement that shows that SMCV agreed to the voluntary contributions only because it understood that it was exempt from paying royalties and other taxes with respect to the Concentrator Project. Moreover, it is very likely that SMCV would have entered into the Roundtable Agreement regardless of its "understanding" of the scope of the 1998 Stabilization Agreement, in order to maintain relations and avoid conflicts with its

[861] *See supra* at Section E.14. *See also* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006.

[862] *See* Exhibit CE-544, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV, August 2, 2006.

[863] *See* Claimant's Reply at para. 160.

[864] Claimant's Reply at para. 160(a) (emphasis in the original).

[865] *See* Exhibit CE-544, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV, August 2, 2006.

neighbors and stakeholders in Arequipa. SMCV has an internationally recognized responsibility as a mining company to secure and maintain a social license from the local communities that are affected by its activities. As Ms. Torreblanca explains in her first witness statement, SMCV agreed to make the Roundtable contributions because "[SMCV] concluded that it was important to maintain good relations with [their] community and, therefore, agreed to make these investments."[866] Thus, SMCV almost certainly would have decided to make the voluntary Roundtable contributions regardless of whatever "understanding" it did or did not hold regarding whether it would have to pay royalties on the Concentrator Project.

471. *Second*, SMCV was not induced to make the Roundtable contributions to the community of Arequipa under the premise that it was not going to pay royalties, as Claimant alleges. SMCV had to have been fully aware of MINEM's position on the scope of the 1998 Stabilization Agreement by the time the Roundtable Agreement was reached. As Respondent explained in Sections II.E.1-II.E.14, by mid-2006, SMCV (and Claimant) knew or should have known that the Concentrator Project was not covered by the 1998 Stabilization Agreement and that it would be subject to royalties related to that Project. MINEM's position was fully public and consistent long before June 2006.

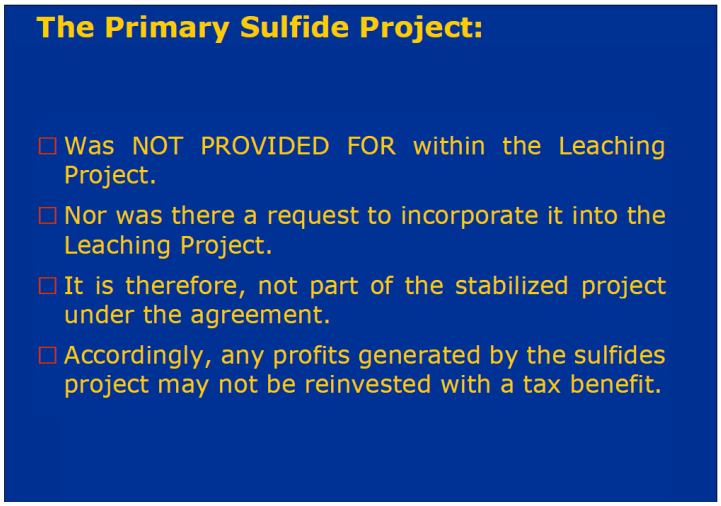
472. More importantly, even if SMCV did not know before June 2006 that the Concentrator Project was not covered by the 1998 Stabilization Agreement (it surely did), SMCV certainly became aware of that during the Roundtable Agreement negotiations. As Respondent explained above in Section II.E.14 and as Mr. Tovar explains in his second witness statement, during the first Roundtable session of June 23, 2006, MINEM officials made a presentation about SMCV's legal and fiscal regime and explained that the Concentrator Plant was not covered by the 1998 Stabilization Agreement.[867] The presentation replicated and expanded on an earlier presentation that Felipe Isasi had made to Congress on May 3, 2006.[868] In particular, MINEM officials explained that (i) the fact that SMCV had received approval to use the profit reinvestment benefit (*i.e.*, to reinvest profits from the Leaching Project into the Concentrator Project, free of taxes), did not mean that the Concentrator Project was covered by the 1998 Stabilization Agreement; and (ii) because the 1998 Stabilization Agreement did not

[866] Exhibit CWS-11, First Torreblanca Statement at para. 55.

[867] *See supra* at Section II.E.14. *See also* Exhibit RWS-10, Second Tovar Statement at paras. 102, 104.

[868] *See supra* at Section II.E.12. *See also* Exhibit RWS-10, Second Tovar Statement at para. 104.

cover the Concentrator Project, it did not shield SMCV from having to pay royalties with respect to that Project:[869]



473. SMCV participated in that session.[870] Thus, when SMCV signed the Roundtable Agreement two months later, in August 2006, it was on notice of the government's interpretation of the scope of the stabilization guarantees. SMCV could not have expected that the payments to which it agreed under the Roundtable Agreement would release it from paying royalties with respect to the Concentrator Project.

[869] *See* Exhibit RWS-3, First Tovar Statement at paras. 67-68; Exhibit RWS-10, Second Tovar Statement at para. 102; Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006, at slides 9, 15. *See also id.* at slides 4, 8, 16.

[870] *See supra* at paras. 443-45. *See also* Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006.

2. Voluntary Contribution Agreement: SMCV Agreed to Make Voluntary Contributions as Part of a Collective Negotiation by the Mining Industry

474. On January 18, 2007, as part of the Voluntary Contributions Program, SMCV, MINEM, and MEF signed a Voluntary Contribution Agreement in which SMCV agreed to pay 3% of its net profits to designated Local and Regional Mining Funds to be used for infrastructure and social investment projects in the communities in which SMCV developed its mining activities.[871] The purpose of this Program was to promote welfare and social development, and improve living conditions, in local communities where mining companies conducted mining activities.[872] The Program was intended to obtain funds both from mining companies that paid royalties and those that did not pay royalties. Companies that decided to contribute to the Voluntary Contribution Program and that were also required to pay mining royalties could pay a lower amount to the Program than companies that did not have to pay mining royalties.[873] Under the Program, companies would make their promised contributions for up to four years, starting in 2007.[874]

475. In its Reply, Claimant insists that the government induced SMCV to sign this agreement "on the premise that SMCV would not be subject to any royalty payments."[875] Claimant also asserts that Respondent allegedly has not contested (i) that SMCV was designated as "stabilized" during the negotiation process; (ii) that the amount of SMCV's voluntary contribution payments under the agreement was at a higher level, which reflected the assumption that SMCV would not be making any royalty payments; (iii) that the government never alerted SMCV that it would be overpaying its voluntary contributions, given that it would need to pay royalties with respect to the Concentrator; and (iv) that the government had promised that the payments SMCV had already made under the Roundtable Agreement would be deducted against

[871] *See* Exhibit CE-27, SMCV, Voluntary Contribution Agreement, January 18, 2007. This agreement was later finalized on August 10, 2007, at Clauses 3.1.2 and 3.1.5. *See also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clauses 3.1.2 and 3.1.5.

[872] *See* Exhibit RE-30, MINEM, "Mining Solidarity Program," *available at* http://www.minem.gob.pe/descripcion.php?idSector=3&idTitular=9508.

[873] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 3.1.2 of the Draft Agreement.

[874] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Considerations.

[875] Claimant's Reply at para. 160(b).

its required payments in the Voluntary Contribution plan, but then reneged on that promise.[876] Claimant's allegations are without merit.

476. *First*, nothing in the Voluntary Contribution Agreement indicates that Perú represented to SMCV that, by signing the agreement, SMCV was exempt from paying royalties, or that SMCV had such an understanding.[877] To the contrary, the agreement expressly provides that it does not change ("replace") any other fiscal or tax obligation of the mining company, including royalty payments:

> THE STATE DECLARES:
>
> . . .
>
> 6.2) That this AGREEMENT does not replace the obligations corresponding to the different government levels, being these National, Regional or Local, in terms of the distribution and investment of the resources from the "Mining Canon" and the "Mining Royalty", which shall be subject to the regulations applicable.[878]

Moreover, the Voluntary Contribution Program envisioned the possibility of companies having to pay royalties related to a portion of their mining activities, while making contributions under the Voluntary Contribution Program for another portion of their mining activities. Clause 3.1.2 of the Voluntary Contribution Agreement provided, for example, that companies could deduct a percentage of royalty payments made by a mining company from the amount to be contributed under the Voluntary Contribution Program by that same company.[879] If Claimant's allegation were correct (*i.e.*, that SMCV signed the Agreement under the understanding that it would not have to pay any royalties), SMCV would not have signed the Voluntary Contribution Agreement under the terms set out in the agreement, or at least it would have struck out all provisions having anything to do with royalty payments, since it (allegedly) expected not to have to make royalty payments.

---

[876] *See* Claimant's Reply at para. 160(b).

[877] *See generally* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007.

[878] Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 6.2. *See also* Exhibit CE-27, SMCV, Voluntary Contribution Agreement, January 18, 2007, at Clause 6.2.

[879] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 3.1.2 of the Draft Agreement; Exhibit CE-27, SMCV, Voluntary Contribution Agreement, January 18, 2007, at Clause 3.1.2.

477. *Second*, Claimant is distorting the background that led to the creation of the Voluntary Contribution Program and the subsequent signing of each company's Voluntary Contribution Agreement. Unlike the Roundtable Agreement, where there was a specific negotiation among SMCV, Arequipa's local leaders, and MINEM, the Voluntary Contribution Agreement was signed by SMCV as just one piece of the implementation of the national Voluntary Contribution Program, a program negotiated by the administration of Perú's President Alan García on one side and Perú's business association of mining companies, the National Society of Mining, Petroleum and Energy ("Mining Society"), on the other side.[880] As Mr. Marco Camacho explained in his first witness statement, the Voluntary Contribution Program intended that all mining companies—not only SMCV—would share with Perú a small portion of the extraordinary profits they were obtaining due to the rising commodity prices of metals.[881] Thus, as Claimant concedes, it was the Mining Society, on behalf of its stakeholders, and with the help of APOYO Consultoría ("APOYO"), who negotiated and structured the Voluntary Contribution Program and drafted the agreement that would later would be signed by SMCV (and each other mining company).[882]

478. The collective character of the negotiation of this Program is reflected in the "considerations" section at the opening of the Voluntary Contribution Agreement which explained that "[t]he mining companies in general, and the COMPANY in particular, have decided to create [a] private fund[] specified later on to which shall be credited economic contributions of a voluntary, extraordinary and provisional nature, . . . aimed at the execution of a '[Voluntary Contribution Program]' with the People."[883] This is also confirmed by the preamble of Supreme Decree No. 071-2006-EM, which approved the model voluntary

---

[880] *See* Exhibit CE-696, Cesar Flores Unzaga *et. al.*, T*ax Collection and Tax Benefits in the Mining Sector: The Las Bambas and Cerro Verde Cases*, July 2017, at p. 104 ("Finally, it should be noted that in 2006, SMCV was one of the signatory companies of the PMSP or Voluntary Mining Contribution, negotiated between the mining union and the government of Alan García, which replaced the tax on mining surpluses offered during the 2006 campaign.") ("*Finalmente, cabe señalar que en el 2006, SMCV fue una de las empresas firmantes del PMSP o Aporte Minero Voluntario, negociado entre el gremio minero y el gobierno de Alan García, que reemplazó el impuesto a las sobreganancias mineras que ofreciera durante la campaña del 2006*.") (emphasis added).

[881] *See* Exhibit RWS-6, First Camacho Statement at para. 13.

[882] *See* Claimant's Memorial at paras. 150-51 ("The Mining Society hired APOYO Consultoría ('APOYO'), a leading consulting firm in Lima, to design a system that would allow the Government to increase revenue collection while respecting the Stability Agreements in force. . . . On 21 December 2006, President García accepted APOYO's proposal and published the standard form contract that both stabilized and non-stabilized mining companies would sign to enroll in the Mining Program of Solidarity with the People (the 'PMSP').").

[883] Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 1.1 (emphasis added).

contribution agreement and which stated: "the mining companies have committed themselves vis-à-vis the Peruvian State to allocate a percentage of their available profits."[884] The circumstances under which the Voluntary Contribution Agreement was signed disprove Claimant's theory that the government somehow targeted SMCV and induced it to enroll in this voluntary program with a promise that it would not pay royalties. Furthermore, the fact that the Voluntary Contribution Program was negotiated collectively confirms that the government did not analyze or tailor any aspect of the program to the particular situation of each mining company when structuring this Voluntary Contribution Program.

479. *Third*, Claimant's allegation is misplaced in its reliance on certain financial projections prepared by APOYO for the Voluntary Contributions Program to assert that SMCV's Concentrator was to be exempt from paying royalties. To recall, APOYO was hired by the Mining Society to support the Society's negotiations with the State about establishing the Voluntary Contribution Program.[885] Claimant tries to attach great significance to the fact that, in its economic modeling, APOYO classified SMCV as a "stabilized company" and the government did not contest that classification. Claimant maintains that that economic modeling demonstrates that the government understood that SMCV's Concentrator Project was exempt from paying royalties.[886] No such meaning can be found in APOYO's calculations.

480. As Respondent explained in its Counter-Memorial, a third-party consultant's classification of SMCV as stabilized or not stabilized is irrelevant for the purposes of determining whether the company was, in fact, required by law to pay royalties on any or all of its activities. That classification—made by a private entity that was engaged by the Mining Society, not the government—says nothing at all about the government's understanding of the scope of stabilization agreements generally or the scope of SMCV's 1998 Stabilization Agreement in particular.[887] Mr. Camacho explained in his first witness statement that the categories created by APOYO were at best imprecise, because there was no middle category to capture "partially stabilized" companies like SMCV that had some of their projects covered by stabilization agreements and other projects governed by the general legal regime.[888]

---

[884] Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at p. 1 (emphasis added).

[885] *See* Exhibit RWS-6, First Camacho Statement at para. 14.

[886] *See* Claimant's Reply at paras. 160(b)-(c). *See also* Claimant's Memorial at para. 151.

[887] *See* Respondent's Counter-Memorial at paras. 22-24.

[888] *See* Exhibit RWS-6, First Camacho Statement at para. 17; Respondent's Counter-Memorial at para. 222.

481. Moreover, as Mr. Camacho explains in his second witness statement, these types of projections are prepared to measure the impact of fiscal policies broadly without examining the details and specific situation of each company, as MEF does not have the faculty or the need to do that.[889] Specifically, Mr. Camacho points out that "the fact that the Ministry did not object to a given assumption in a macro fiscal projection that accompanies a tax policy measure, in no way could grant rights or allow inferring a normative position on the part of the Government with respect to any of the companies included in said projection of income."[890] SMCV could not reasonably have relied on a classification made by a consultant for the Mining Society to "confirm" SMCV's understanding of how the State interpreted the scope of the 1998 Stabilization Agreement.

482. *Fourth*, Claimant's allegation that the amount of SMCV's voluntary payments reflected the company's assumption that it would not make any royalty payments is misleading.[891] Even if true, Perú had no role in calculating or verifying those amounts, so any such "assumption" by SMCV or the entity calculating its Voluntary Contribution payments cannot be projected onto the State. The Peruvian authorities were not involved in determining the amount that each company would contribute to the Program—the amount was not specifically defined in SMCV's (or any other mining company's) Voluntary Contribution Agreement. In other words, the agreement only indicated how each company had to calculate the amount to be contributed. In accordance with the Voluntary Contribution Agreement, a company that signed the agreement agreed to set up two private funds called Local Mining Fund XX [Name of the Company] ("*Fondo Minero Local XX [Nombre de la Empresa]*") and Regional Mining Fund XX [Name of the Company] ("*Fondo Minero Regional XX [Nombre de la Empresa]*").[892] The resources collected through those funds would be directed to develop social projects to meet the most pressing needs of the regions in which the mining company conducted activities.[893] The funds would be managed by a private entity, as selected by the mining

[889] *See* Exhibit RWS-13, Second Witness Statement of Marco Camacho, November 3, 2022 ("Second Camacho Statement"), at para. 6.

[890] Exhibit RWS-13, Second Camacho Statement at para. 11.

[891] *See* Claimant's Reply at para. 160(b)(ii).

[892] Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 2.2; *see also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 2.2.

[893] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 2.4; *see also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 2.4.

company.[894] The mining company would also set up one or more committees to help identify and manage the projects that were to be completed with the collected funds.[895] The company would make its contributions to the private funds—not to the State—on a yearly basis based on the company's annual net income.[896] The company—not the State—would calculate this amount, deducting the applicable amounts (as instructed in the agreement) based on its own financial information. The company's contributions and the execution of the social projects would be audited by an auditing company selected by the State—they were not subject to Perú's national comptroller's auditing powers.[897] As the agreement provides:

> The parties declare and agree that the FUND(S) has a private nature and that the purposes to which their resources are destined do not change its juridical nature. Consequently, the CONTRIBUTION(S) does not constitute a state-owned, fiscal, regional, municipal or local resource and, therefore, it is not subject to the Control National System, being exclusively subject to the auditing stipulated in the Seventh Clause of this AGREEMENT.[898]

483. Therefore, the way in which SMCV then calculated its Voluntary Contributions shows only its own (or perhaps the hired fund manager's) understanding of the scope of the 1998 Stabilization Agreement— those calculations do not say or reflect in any way anything about the State's understanding. The fact that SMCV "overpaid" voluntary contributions under the Voluntary Contribution Agreement, because it failed to deduct or otherwise take into account the

---

[894] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clauses 3.6 and 4.5; *see also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clauses 3.6 and 4.5.

[895] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 5.1; *see also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 5.1.

[896] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 2.2; *see also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 2.2 ("During the effectiveness of this AGREEMENT the COMPANY shall create two (2) private funds, hereinafter FUND(S), to which shall credit the CONTRIBUTION(S). The FUNDS shall be called: 2.2.1) 'LOCAL MINING FUND SOCIEDAD MINERA CERRO VERDE' 2.2.2) 'REGIONAL MINING FUND SOCIEDAD MINERA CERRO VERDE'.").

[897] *See* Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clauses 3.3 and 7; *see also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clauses 3.3 and 7.

[898] Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 3.5; ("*Las partes declaran y convienen que el FONDO(S) es de carácter privado y que los fines a los que se destinan sus recursos no varían su naturaleza jurídica. En consecuencia, el APORTE(S) no constituye recurso estatal, fiscal, regional, municipal o local y, por tanto, no esté sujeto al Sistema Nacional de Control, quedando sometido exclusivamente a la auditoria prevista en la Cláusula Séptima del presente CONVENIO*"). *See also* Exhibit CE-560, Executed Voluntary Contribution Agreement between SMCV and Peru, August 10, 2007, at Clause 3.5.

amount of royalties it was supposed to pay for the Concentrator Project, is in no way Respondent's fault. More importantly, it certainly was not Perú's obligation to alert SMCV that it might be overpaying its contributions, particularly given that the collected funds were never Perú's responsibility nor under its control.

484. *Finally,* Claimant alleges that the government guaranteed SMCV that the payments SMCV made under the Roundtable Agreement would be deductible from the Voluntary Contribution Program but then reneged on that promise.[899] Claimant's allegation is meritless. Claimant has failed to submit any evidence proving that the State actually made such a promise.[900] In its Memorial, Claimant asserts: "As these conversations occurred, Ms. Torreblanca confirmed to Phelps Dodge that the Government had guaranteed that the Roundtable Discussion Agreement met President García's requirements for the voluntary contribution of the mining industry, for which SMCV could deduct those amounts from any 'voluntary contributions' program created."[901] Moreover, the document that Claimant submits in support for this assertion (SMCV's 2006 Financial Statements), also does not prove that such a promise was made. To the contrary, the document indicates 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.[902]

There is no mention of a promise or undertaking from Perú. To the contrary, the Financial Statement reports that it was SMCV's Management's "opinion" that the company's contributions under the Roundtable Agreement would be credited against the Local Fund amounts due under the Voluntary Contribution Agreement. Claimant's claim is unsupported at best.

3. The GEM Agreement – GEM Payments Did Not Release SMCV from Its Obligation to Pay Royalties for the Concentrator Project

485. In its Counter-Memorial, Respondent explained that after the Voluntary Contribution Program came to an end in December 2010, Perú adopted changes to its fiscal

[899] *See* Claimant's Reply at para. 160(b)(iv).

[900] *See* Claimant's Memorial at para. 150.

[901] Claimant's Memorial at para. 150.

[902] Exhibit CE-561, SMCV, Financial Statements 2005-2006, February 9, 2007, at p. 31 (emphasis added).

policy with respect to the mining sector in September 2011. Specifically, Perú created another voluntary contribution program called the Special Mining Contribution (*Gravamen Especial a la Minería* or "GEM").[903] The GEM is a voluntary contribution program for mining companies that have signed mining stabilization agreements with the State, "with respect to the projects for which the [mining stabilization agreements] remain in force."[904] Under this new voluntary contribution program, the mining companies that agreed to make contributions would sign an agreement committing to contribute 4% of the stabilized project's operating profits ("GEM Agreement").[905] Similar to the Voluntary Contribution Program, companies were allowed to deduct any royalty payments (which would correspond to non-stabilized projects or activities) in order to determine the amount that would be paid under the GEM.[906] At the same time, Perú also created a Special Mining Tax (*Impuesto Especial a la Minería* or "IEM") that is imposed only on profits derived from mining activities that were not covered by mining stabilization agreements at the time the tax was created.[907] Thus, according to this new tax scheme, companies would pay GEM contributions with respect to stabilized projects, while they would pay mining royalties and IEM with respect to non-stabilized projects.[908]

486. On February 28, 2012, SMCV signed its GEM Agreement committing to make payments from the fourth quarter of 2011 until the end of 2013. Notably, SMCV signed the

---

[903] *See* Respondent's Counter-Memorial at paras. 225-42. *See also* Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011; Exhibit CA-182, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF, September 29, 2011, at Model Agreement, Clause 2.1.

[904] Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 2 ("*El Gravamen es un recurso público originario proveniente de la explotación de recursos naturales no renovables que, de conformidad con la presente Ley, se hace aplicable a los sujetos de la actividad minera en mérito y a partir de la suscripción de convenios con el Estado, respecto de proyectos por los que se mantienen vigentes Contratos de Garantías y Medidas de Promoción a la Inversión de conformidad con el Texto Único Ordenado de la Ley General de Minería, aprobado por el Decreto Supremo 014-92-EM y normas modificatorias*.") (emphasis added); *see also id.* at Arts. 1-2, 7; Exhibit RWS-6, First Camacho Statement at para. 21.

[905] *See* Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Arts. 2, 7, and Annex II; Exhibit CA-182, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF, September 29, 2011, at Whereas and Model Agreement; *see id.* at Art. 3 ("The calculation basis for the *Gravamen* shall be determined for each of the Agreements of Guarantees entered into by the parties involved in mining activities.").

[906] *See* Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 3.

[907] *See* Exhibit RWS-6, First Camacho Statement at para. 21; Exhibit CA-180, Law Creating the Special Mining Tax, Law No. 29789, September 28, 2011, at Art. 1.

[908] *See* Exhibit RWS-6, First Camacho Statement at paras. 23, 36. *See also* Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2, numeral 3 ("[I]t should be noted 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 a[n IEM] and a Mining Royalty on that which is not included in the aforementioned Agreements.").

GEM Agreement after it had received SUNAT's 2006-2007, 2008, and 2009 Royalty Assessments.[909] Thus, SMCV knew when it signed the GEM Agreement that, according to Perú (SUNAT), the Concentrator Project was not covered under the 1998 Stabilization Agreement.

487. Respondent also explained in its Counter-Memorial that, in December 2017, after the Supreme Court of Perú rejected SMCV's (and Claimant's) interpretation of the scope of the 1998 Stabilization Agreement and confirmed the legality of the 2008 Royalty Assessment, SMCV requested SUNAT to refund only a portion of the GEM payments that it had made in connection with the Concentrator Project. In particular, SMCV requested a refund corresponding to Q4 2012 through Q4 2013, which SUNAT granted.[910] Notably, SMCV did not request a refund corresponding to its earlier GEM payments, which were made for Q4 2011 to Q3 2012.[911] It was not until December 2018 (*i.e.*, a year after the issuance of the Supreme Court's judgment) that SMCV requested a refund of the GEM payments made from Q4 2011 to Q3 2012. By that time, however, the statute of limitations to submit a refund request had expired for those quarters' payments. In accordance with Peruvian law, SUNAT denied the requests as untimely.[912]

488. In its Reply, Claimant tries to find support in the propositions (i) that Perú does not contest that SMCV made GEM payments after the government "explicit[ly]" confirmed that SMCV would pay either GEM or royalties-plus-IEM, but not both;[913] (ii) that the projections used for the creation of the GEM assumed SMCV was completely stabilized and the government did not suggest the projections were defective;[914] (iii) that the GEM Regulations and the GEM model agreement confirm that GEM payments were calculated based on the operating profits of the concession;[915] (iv) that Perú accepted SMCV's GEM payments and never informed SMCV

[909] *See* Exhibit CE-64, GEM Agreement, Law No. 29790, February 28, 2012. *See infra* at Resubmitted Annex A.

[910] *See* Exhibit CE-746, SUNAT, Resolution No. 012 180 0018113/SUNAT (GEM for Q4 2012), December 18, 2018; Exhibit CE-747, SUNAT, Resolution No. 012 180 0018114/SUNAT (GEM for 2013), December 18, 2018.

[911] *See* Respondent's Counter-Memorial at paras. 239-40.

[912] *See* Respondent's Counter-Memorial at para. 240.

[913] *See* Claimant's Reply at para. 161.

[914] *See* Claimant's Reply at para. 161(d).

[915] *See* Claimant's Reply at paras. 161(e)-(g).

that it was "significantly overpaying";[916] and (v) that SUNAT arbitrarily refused to reimburse SMCV's GEM overpayments on the spurious ground that SMCV's requests were time-barred.[917]

489. In the following subsections, Respondent rebuts the substance and/or significance of each of those propositions in turn. Respondent will explain first that Perú never confirmed to SMCV that GEM contributions would exempt the Concentrator Project from paying royalties (Section a). Respondent will then explain that, as with the Voluntary Contribution Program, SMCV's classification as a stabilized company in APOYO's projections is irrelevant and does not constitute any sort of confirmation from the government about the scope of the 1998 Stabilization Agreement (Section b). Respondent will next explain that, likewise, the language contained in the GEM Agreement and its regulation do not support Claimant's theory that the Concentrator Project was stabilized (Section c). More importantly, in the subsequent section, Respondent explains that it was SMCV's responsibility (not Perú's) to calculate appropriately the value of its voluntary contributions (Section d). Finally, Respondent will explain that SUNAT rejected SMCV's request to refund its GEM payments corresponding to Q4 2011 to Q3 2012 entirely in accordance with Peruvian law (Section e).

a. Perú Did Not Confirm to SMCV that It Did Not Have to Pay Royalties If It Paid GEM Contributions

490. Respondent demonstrated in its Counter-Memorial that Perú never confirmed to SMCV that the Concentrator Project would not be subject to the payment of royalties when implementing the GEM Law.[918] Specifically, Respondent explained that SMCV could not have relied on Report No. 206-2011-EF/61.01 prepared by MEF in October 2011 ("MEF's 2011 Report") to conclude that SMCV only had to make GEM payments (and not royalty or IEM payments), because MEF's 2011 Report did not comment on the specific scope of the SMCV 1998 Stabilization Agreement.[919] To the contrary, the report commented on the scope of mining stabilization agreements, and on their relationship with a company's obligation to pay GEM, royalties, and the IEM, only in general terms. As explained by Mr. Camacho, who authored MEF's 2011 Report, the report concluded that GEM applied only to stabilized "mining projects"

[916] *See* Claimant's Reply at para. 161(a) (emphasis omitted).

[917] *See* Claimant's Reply at paras. 193-97.

[918] *See* Respondent's Counter-Memorial at paras. 229-33.

[919] *See* Respondent's Counter-Memorial at para. 230.

(not concessions) and that companies that had both stabilized and non-stabilized mining projects would pay GEM for the former and royalties and IEM for latter.[920]

491. In its Reply, Claimant does not contradict Mr. Camacho's testimony with respect to the scope and interpretation of MEF's 2011 Report. Instead, Claimant contends that SMCV signed the GEM Agreement after MEF's Vice-Minister of Economy, Ms. Laura Calderón, and MINEM's Director of Legal Affairs, José Manuel Pando "assured Ms. Torreblanca that SMCV would not pay both GEM and royalties."[921] In support of its allegation, Claimant offers just three internal emails exchanged between Ms. Torreblanca and SMCV directors that relate to meetings she held with officials from MEF and MINEM.[922] None of these communications, however, shows any such confirmation from the Peruvian authorities. At best, the emails highlight SMCV's intention to obtain confirmation from the government that SMCV would pay only GEM with respect to the Concentrator instead of royalties, but they had not yet been able to obtain one.[923] As Mr. Camacho explains in his second witness statement, in fact, SMCV never received any such confirmation.[924]

492. In particular, an email sent by Ms. Torreblanca on October 11, 2011 shows that:

- Mr. Camacho was present at the meeting held on October 11, 2011 between SMCV and MEF officials, where Ms. Calderón allegedly confirmed SMCV's understanding (she did not).[925]

- MEF could not have confirmed to SMCV that it would only pay GEM contributions with respect to the Concentrator, as MEF did not have the

---

[920] *See* Respondent's Counter-Memorial at para. 233; Exhibit RWS-6, First Camacho Statement at paras. 36-37. *See also* Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2.

[921] Claimant's Reply at para. 161(b).

[922] *See* Exhibit CE-1052, Emails exchanged between Julia Torreblanca, *et al.* (October 11, 2011, 1:05 AM PET); Exhibit CE-1050, Emails exchanged between Julia Torreblanca, *et al.* (October 12, 2011, 1:26 PM PET); Exhibit CE-1049, Emails exchanged between Julia Torreblanca, *et al.* (October 12, 2011, 2:15 PM PET) (subsequent email in the thread reacting to Ms. Torreblanca's email); Exhibit CE-1054, Emails exchanged between Julia Torreblanca, *et al.* (October 3-13, 2011, 3:35 PM PET).

[923] *See* Exhibit CE-1054, Emails exchanged between Julia Torreblanca, *et al.* (October 3-13, 2011, 3:35 PM PET) ("We are still in the process of getting some kind of written confirmation from the Government regarding GEM application to our operations, and the non/applicability of the IEM and royalties until 2014.") (emphasis added). *See also* Exhibit CE-1052, Emails exchanged between Julia Torreblanca, *et al.* (October 11, 2011, 1:05 AM PET) ("All of them understood our position, and reassured that no one wants Cerro Verde nor any other company to pay double. …At this point, we requested them to respond the letter Energy and Mines was to release asking them to confirm that in writing.") (emphasis added).

[924] *See* Exhibit RWS-13, Second Camacho Statement at para. 19.

[925] Exhibit CE-1052, Emails exchanged between Julia Torreblanca, *et al.* (October 11, 2011, 1:05 AM PET) ("Luis Carlos and I met the Viceminister of Economy, Laura Calderon, SUNAT functionary Marco Camacho, momentarily supporting Economy and Finance, and Dr. Pando from Energy and Mines Legal Office.") (emphasis added).

authority to assess the circumstances of a particular mining company.[926] As Ms. Torreblanca states in the email: "VM stated that such response was a task of Energy and Mines, not MEF's."[927]

- At that time, MEF officials were well aware of the ongoing dispute between SUNAT and SMCV regarding the scope of the 1998 Stabilization Agreement. In fact, Ms. Torreblanca indicates in her email that the situation was discussed during the meeting: "We explained the royalty-case antecedents. . . ."[928] As Mr. Camacho explains in his witness statement, the government officials in the meeting were, thus, very mindful that they could not give assurances to SMCV on the matter. It was a matter to be resolved by the competent authorities or the courts.[929]

493. Mr. Camacho further explains in his second witness statement that MEF's alleged statement that a company would not pay both GEM and IEM plus royalties has been taken out of context. Specifically, he explains that it is indeed correct that a company would not pay both charges <u>on the same project</u>. But a company could find itself paying both charges, just with respect to different projects: GEM for its stabilized projects and IEM plus royalties for its non-stabilized projects.[930] That is precisely what Mr. Camacho later explained in MEF's 2011 Report. Specifically, Mr. Camacho explained in the report that:

> [i]n relation to the second query, it should be noted that, without prejudice to its concrete application according to the specificities of each case, <u>the new tax scheme on [] mining activity establishes a [GEM]</u> applicable by virtue of an Agreement <u>to those engaged in mining activity for that which is covered by the stability of</u> [a mining stabilization agreement] <u>and a general regime that considers a[n IEM] and a Mining Royalty on that which is not included in the aforementioned Agreements</u>.[931]

[926] *See* Exhibit RWS-13, Second Camacho Statement at paras. 16, 19.

[927] Exhibit CE-1052, Emails exchanged between Julia Torreblanca, *et al.* (October 11, 2011, 1:05 AM PET).

[928] Exhibit CE-1052, Emails exchanged between Julia Torreblanca, *et al.* (October 11, 2011, 1:05 AM PET).

[929] *See* Exhibit RWS-13, Second Camacho Statement at para. 16.

[930] *See* Exhibit RWS-13, Second Camacho Statement at paras. 17-18.

[931] Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2, numeral 3 ("*En relación con la segunda consulta, debe señalarse que, sin perjuicio de su forma de aplicación concreta según las especificidades de cada caso, <u>el nuevo esquema fiscal sobre la actividad minera establece un Gravamen Especial a la Minería aplicable</u> en mérito de un Convenio <u>a los sujetos de la actividad minera por aquello que resulte comprendido en la estabilidad</u> de un Contrato de Garantías y Medidas de Promoción a la Inversión [Convenios de Estabilidad] de acuerdo con el Texto Único Ordenado de la Ley General de Minería; y <u>un régimen general que considera un Impuesto Especial a la Minería y una Regalía Minera sobre aquello que no resulte comprendido dentro de los referidos Contratos</u>.") (emphasis added).

494. Thus, as the 2011 Report explains, a single company could have to pay GEM on some of its projects (the stabilized projects) and royalties and IEM on others (the non-stabilized projects). In other words, contrary to Claimant's assertions, the 2011 Report did not confirm that paying GEM meant that all of a company's activities must be fully covered by a stabilization agreement. Nor did it mean that SMCV, in particular, could pay GEM on all of its activities and somehow use that GEM payment as proof that it should be exempt from paying royalties on activities related to the Concentrator Project.

495. In its Reply, Claimant also alleges that MINEM and MEF ignored SMCV's letters seeking clarity with respect to the scope of the GEM Agreement and its relation to the 1998 Stabilization Agreement.[932] Claimant's allegation is incorrect. Notably, Claimant's allegation contradicts Claimant's own (mistaken) assertion that Perú confirmed SMCV's understanding regarding the relation between the GEM Agreement and the 1998 Stabilization Agreement. Either Perú ignored SMCV's request, in which case it could not have confirmed SMCV's understanding, or Perú confirmed SMCV's understanding, in which case Perú must not have ignored SMCV's request for clarification. In any case, both arguments are without merit.

496. As indicated above, Perú did not confirm SMCV's understanding. To the contrary, Perú responded to SMCV's request with MEF's 2011 Report, which rejects SMCV's understanding. On October 13, 2011, after receiving SMCV's request, MINEM asked MEF to provide an opinion on whether a company benefitting 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 the Mining Royalty. . . ."[933]

497. In response, MEF issued its 2011 Report.[934] MINEM later forwarded MEF's 2011 Report to SMCV.[935] As noted above, the report concluded that mining companies could face paying both GEM and IEM plus royalties, depending on the situation of their projects.[936] Thus, Perú neither ignored SMCV's letters nor confirmed SMCV's understanding that if it paid

[932] Claimant's Reply at para. 161(a)(i).

[933] Exhibit CE-986, MINEM, Communication No. 096-2011-EF/DM, October 13, 2011.

[934] *See* Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011.

[935] *See* Exhibit CE-632, MINEM, Letter No. 1333-2011-MEM/DGM, December 28, 2011. *See also* Exhibit CWS-11, First Torreblanca Statement at para. 89.

[936] *See* Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2.

GEM it would be exempt from paying royalties plus IEM with respect to all of its mining activities.

b. APOYO's Classification of SMCV Was Irrelevant to MEF

498. Claimant reiterates in its Reply that, during the discussions that led to the creation of the GEM Law, the government was provided and considered financial modeling and projections made by APOYO that reflected an assumption that all of SMCV's operations were stabilized.[937] Claimant complains that there is no evidence that anyone from the government pointed out APOYO's imprecise classification or indicated that these projections were mistaken.[938] Claimant's focus on APOYO's projections is misguided.

499. *First*, as Respondent explained above, the fact that SMCV was labeled a "stabilized company" by a consultant preparing high-level financial projections of the GEM program's fiscal impact has no possible legal significance. It certainly cannot be understood to mean that the government endorsed that classification or believed that SMCV was exempt from paying royalties. All it likely meant to Perú was that the listed companies had at least one stabilization agreement in force—which was indeed true for SMCV.

500. *Second*, and more importantly, Claimant's witness, Mr. Hugo Santa María, concedes in his second witness statement that, during the discussion of the projections, MEF and APOYO did not analyze the scope of SMCV's 1998 Stabilization Agreement: "it is true that APOYO Consultoría and the Government did not expressly discuss the scope of SMCV's stability agreement as such . . . ."[939] Thus, there is no credible basis for Claimant to assert that SMCV understood from APOYO's projections that the government believed that the Concentrator was stabilized by the 1998 Stabilization Agreement.

501. *Third*, the fact that SMCV was classified as a stabilized company by APOYO was entirely irrelevant for MEF. Mr. Camacho explains in both of his witness statements that the APOYO projections were intended to measure the impact of the tax scheme from a high-level, macro-fiscal perspective.[940] He further clarifies that it was essentially irrelevant for projection purposes whether SMCV was treated as fully stabilized or not, because of the way MEF was

[937] *See* Claimant's Reply at para. 161(d).

[938] *See* Claimant's Reply at para. 161(d).

[939] Exhibit CWS-20, Second Santa María Statement at para. 8.

[940] *See* Exhibit RWS-6, First Camacho Statement at para. 28; Exhibit RWS-13, Second Camacho Statement at para. 6.

structuring the new fiscal regime for the mining sector. In macro terms, the State would either receive the GEM contributions (on stabilized projects) or receive royalties and IEM (on non-stabilized projects).[941] Thus, it was largely irrelevant, for purposes of the macro projection, whether a company was classified as stabilized or not or if some portion of a company that was classified as stabilized actually was not. In the end, any such mistaken assumption would have implied at most a minor change in the expected overall collections for the government from the GEM/IEM program, which was the object of APOYO's modeling.[942]

c. The GEM Agreement and Its Regulation Do Not Support Claimant's Interpretation

502. Claimant insists that, based on the language of the GEM Agreement, SMCV agreed to pay GEM for all of its activities carried out in its Mining and Beneficiation Concessions, which included the Concentrator Project, and that should be taken as evidence that the Concentrator Project was understood to be stabilized.[943] In support of its assertion, Claimant relies on language in Article 2.1 of the GEM Agreement, which provides that companies were to calculate GEM payments based on profits from the "concessions" included in each one of the stabilization agreements entered into by a particular company.[944]

503. In its Counter-Memorial, Respondent explained that Article 2.1 of the GEM Agreement had to be interpreted in accordance with the GEM Law, which explicitly provided that GEM would apply with respect to "projects" covered by stabilization agreements:

> The [GEM] is an original public resource arising from the extraction of non-renewable natural resources that . . . is applicable to entities engaging in a mining activity with regard to and based on the agreements entered into with the State with respect to the projects for which the [mining stabilization agreements] remain in force . . . .[945]

[941] *See* Exhibit RWS-13, Second Camacho Statement at paras. 8-9.

[942] *See* Exhibit RWS-13, Second Camacho Statement at para. 9.

[943] *See* Claimant's Memorial at paras. 193-95; Claimant's Reply at para. 161(g).

[944] Exhibit CE-64, GEM Agreement, Law No. 29790, February 28, 2012, at Clause 2.1.

[945] Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 2.1 ("*El Gravamen es un recurso público originario proveniente de la explotación de recursos naturales no renovables que, de conformidad con la presente Ley, se hace aplicable a los sujetos de la actividad minera en mérito y a partir de la suscripción de convenios con el Estado, respecto de* ***proyectos*** *por los que se mantienen vigentes Contratos de Garantías y Medidas de Promoción a la Inversión de conformidad con el Texto Único Ordenado de la Ley General de Minería, aprobado por el Decreto Supremo 014-92-EM y normas modificatorias.*") (emphasis added). Respondent has provided a corrected translation of this Article above.

504. In its Reply, Claimant alleges that the term "projects" in the GEM Law "refers to 'mining projects' or 'mining units,' which is consistent with the Government's usage of the term."[946] According to Claimant, neither the GEM Law nor its regulations provided a mechanism that would have allowed the companies to distinguish between stabilized and non-stabilized investment projects.[947] Claimant's assertions are unfounded.

505. Mr. Camacho, who participated in the drafting of the GEM Law, corroborates in his second witness statement that the term "projects" is meant to refer to "investment projects" to be consistent with the Mining Law, the Mining Regulations, and SUNAT's reports.[948] Mr. Camacho clarifies that the GEM Law was limited to the then-existing legal regime and did not intend to modify or repeal the scope of mining stabilization agreements.[949] According to Mr. Camacho, the reason why the GEM Agreement refers to concessions is mainly due to the fact that mining activities are carried out within mining concessions.[950] However, usage of the term "concession" does not, and could not, imply an amendment to the scope of stabilization agreements.[951]

d. <u>It Was SMCV's Responsibility to Assess Appropriately the Value of Its GEM Payments</u>

506. Claimant complains that, despite having various opportunities, the government never stated to SMCV that it was not obliged to pay GEM for the Concentrator Project.[952] Claimant also complains that the government accepted SMCV's GEM payments that included the Concentrator Project and never informed SMCV that it was "significantly overpaying" under the GEM Agreement.[953] Claimant is wrong both with respect to the facts and the law.

507. *First*, by the time the GEM Law was enacted in September 2011, Claimant was well aware of its obligation to pay royalties and other taxes on the ore processed from the Concentrator Plant. At that point in time, SMCV had already received SUNAT's 2006-2007,

[946] Claimant's Reply at para. 161(e).

[947] *See* Claimant's Reply at para. 161(e).

[948] *See* Exhibit RWS-13, Second Camacho Statement at paras. 25-27.

[949] *See* Exhibit RWS-13, Second Camacho Statement at para. 28.

[950] *See* Exhibit RWS-13, Second Camacho Statement at para. 29.

[951] *See* Exhibit RWS-13, Second Camacho Statement at para. 29.

[952] *See* Claimant's Reply at para. 161(a)(ii).

[953] *See* Claimant's Reply at para. 161(a)(vi) (emphasis omitted).

2008, and 2009 Royalty Assessments.[954] Notwithstanding this knowledge, SMCV decided to pay GEM contributions with respect to the Concentrator Project. Whether SMCV did so hoping the government would never notice, or would change its mind about those royalty and tax obligations is unknown. What is known, however, is that SMCV made the GEM payments it did at its own risk. Perú should not be held liable for SMCV's own mistakes—including, most significantly, SMCV's mistake of not making a timely refund request when the Supreme Court decision established definitively that the GEM payments for the Concentrator Plant were mistaken (because royalties—and IEM—were owed on it instead).

508. *Second*, it was SMCV's responsibility to calculate its own GEM payments.[955] As Mr. Camacho explains, it is not for the government to correct or amend taxpayers' errors in their assessments of their own fiscal obligations.[956] Not only in Perú but in other jurisdictions, it is the taxpayer's duty to appropriately calculate its tax obligations.[957] In any case, the government allows taxpayers to ask for refunds in case they make a mistake, provided any such request is made in accordance with Peruvian law.[958] As Respondent shows in the next sub-section, the government did indeed refund SMCV's mistaken GEM payments when SMCV made proper requests; it is no fault of Perú, though, that SMCV failed to invoke its rights with respect to its 2011 and 2012 GEM payments in a timely manner.

e. SUNAT Is Not Obliged to Refund SMCV for Its 2011 and 2012 GEM Payments

509. Respondent explained in its Counter-Memorial that on March 4, 2019, SUNAT rejected SMCV's request for reimbursement of the GEM payments made for profits earned from Q4 2011 to Q3 2012 because the request was time-barred according to the 4-year statute of limitations established in Articles 43.3 and 44.5 of the Tax Code.[959] SMCV made those GEM payments in 2012; thus, the statute of limitations started to run on January 1, 2013 and expired

[954] *See infra* at Resubmitted Annex A.

[955] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 59 ("Article 59. ASSESSING THE TAX OBLIGATION By the act of assessing the tax obligation: a) The tax debtor verifies the accomplishment of the taxable event, indicates the tax base and the amount of the tax.").

[956] *See* Exhibit RWS-13, Second Camacho Statement at para. 31.

[957] *See* Exhibit RWS-13, Second Camacho Statement at para. 31.

[958] *See* Respondent's Counter-Memorial at paras. 240-41; *see also* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 92 (Rights of the [*Administrados*] . . . b) . . . Demand the refund of what was unduly paid or paid in excess, in accordance with current regulations.").

[959] *See* Respondent's Counter-Memorial at paras. 240-41; Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019), at p. 4.

on January 1, 2017.[960] SMCV did not request refunds for those payments until December 2018, nearly two years after the statute of limitations for filing such requests had expired.[961]

510. In its Reply, Claimant alleges that SUNAT arbitrarily refused to reimburse SMCV's GEM overpayments "on the spurious ground that SMCV's reimbursement requests were time-barred even though they clearly were not."[962] According to Claimant and its civil law expert, Mr. Bullard, the statute of limitations applicable for the reimbursement of the GEM payments is instead the 5-year period provided in the Civil Code because: (i) GEM is not a tax; (ii) the signing of a contract was required to implement GEM; and (iii) the Civil Code is applicable to all contractual relationships unless preempted by another law.[963] According to Claimant, given the contractual nature of GEM, SUNAT should have applied the 5-year limitations period set forth in Article 1274 of the Civil Code instead of the 4-year limitations period found in the Tax Code.[964] In addition, Claimant contends that the 5-year limitation period started to run at the very earliest on April 13, 2016, when SUNAT notified SMCV of the 2010-2011 Royalty Assessments, as that was the date on which SMCV became aware that SUNAT believed that SMCV was obliged to pay royalties for the 2011 fiscal year.[965] Claimant's allegations border on the absurd.

511. Claimant's theory on the applicable statute of limitations has a fundamental flaw. It disregards the terms of the GEM Agreement. Claimant and Mr. Bullard fail to mention that the GEM Agreement expressly provides in Clause 3 that it is governed "in accordance with the legal framework approved by [the GEM Law] and the Regulations thereof."[966] In turn, Article 5 of the GEM Law provides that provisions of Law No. 28969, which authorizes SUNAT to enforce rules to facilitate the administration of mining royalties, apply.[967] Finally, in turn, Law

---

[960] *See* Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019), at p. 4.

[961] *See* Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019), at p. 4 ("[T]herefore, on December 28, 2018, the date on which the refund requests were submitted, the deadline had already expired. . . .").

[962] Claimant's Reply at para. 203.

[963] *See* Claimant's Reply at paras. 207(a)-(b); Exhibit CER-7, Second Bullard Report at paras. 89-97.

[964] *See* Claimant's Reply at para. 207.

[965] *See* Claimant's Reply at para. 208.

[966] Exhibit CE-64, GEM Agreement, Law No. 29790, February 28, 2012, at Third Clause.

[967] *See* Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 3 (For the performance by SUNAT of the functions associated with the payment of the Tax, the provisions of Law No. 28969, which authorizes the Superintendency of the

No. 28969 sets forth the applicability of, among others, Article 43 from the First Book of the Tax Code,[968] which states that "[a]ctions aimed at requesting compensation or making compensation, as well as actions involving request for refunds, expire after four (4) years."[969] Thus, the GEM Agreement is governed by special provisions, in this case provisions from the Tax Code, that do indeed preempt the application of the Civil Code.[970]

512. Moreover, even if the 5-year statute of limitations from the Civil Code were applicable (it is not), Claimant is wrong with respect to the date on which the five years started to run. According to Article 1274 of the Civil Code, statutes of limitations start to run after payment is made.[971] However, Claimant's own expert, Mr. Bullard, clarifies that according to doctrine and case-law, the limitations period actually should be deemed to run from the moment the party becomes aware of the undue payment.[972] Respondent has demonstrated that SMCV made all of the GEM payments while possessing the knowledge that SMCV was supposed to pay royalties for the Concentrator Project. As discussed above, by the time SMCV signed the GEM Agreement, it had already been notified of SUNAT's 2006-2007, 2008, and 2009 Royalty Assessments. Thus, SMCV was entirely aware that the Concentrator Project was not covered by the 1998 Stabilization Agreement and that it had to pay royalties with respect to that project.

513. Consequently, even under the statute of limitations set forth in the Civil Code, SMCV's time to file a reimbursement request would have expired on February 29, 2017; May 31, 2017; August 31, 2017; and November 31, 2017, respectively—that is, the statute of limitations would have run from the moment SMCV made the GEM payments at issue (*i.e.*, on February 29, 2012; May 31, 2012; August 31, 2012; and November 31, 2012, respectively). As already noted, SMCV made that request in December 2018, nearly two years after the statute of limitations expired for the first payment. Thus, SMCV's request would have been time-barred in

National Customs and Tax Administration (SUNAT) to enforce rules to facilitate the administration of mining royalties, including the provisions in Article 33 of the Consolidated Uniform Text of the Tax Code, approved by Supreme Decree No. 135-99-EF, apply.).

[968] *See* Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 3(a)(ii).

[969] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 43.

[970] *See* Exhibit RER-8, Second Expert Report of Jorge Bravo and Jorge Picón, November 3, 2022 ("Second Bravo and Picón Report"), at paras. 217-18.

[971] *See* Exhibit CA-39, Peruvian Civil Code, Legislative Decree No. 295, July 24, 1984, at Art. 1274 ("The statute of limitations to recover what was unduly paid runs out five years after the payment has been made.").

[972] *See* Exhibit CER-7, Second Bullard Report at para. 95.

any event. As Respondent's Peruvian tax law experts, Drs. Bravo and Picón, state in their reports, SUNAT's denial was in accordance with Peruvian law.[973]

514. Claimant tries to avoid the aforementioned outcome by arguing that SUNAT had not yet issued its Assessment for the 2010-2011 Royalties by April 13, 2016, when SMCV "became aware that the payment was unduly imposed."[974] Claimant's proposition that only at that moment SMCV knew it was not supposed to make GEM payments for the Concentrator is unavailing. Claimant does not deny that SUNAT's Assessments for the 2006-2009 Royalties had already been issued by July 2011 nor that the 2006-2009 Royalty Assessments and the 2010-2011 Royalty Assessments were based on the same interpretation of the scope of the 1998 Stabilization Agreement.[975] SMCV, thus, could not have reasonably expected that SUNAT was going to change its position when issuing the 2010-2011 Royalty Assessment (as, in fact, it did not).

515. Moreover, Claimant's argument is contradicted by SMCV's own actions. If it were true that SMCV was waiting for SUNAT's 2011 Royalty Assessment in order to request GEM refunds for that year, SMCV would have taken that approach consistently. However, SMCV acted differently with respect to the Q4 2012 to Q4 2013 GEM payments. There, SMCV requested a refund for GEM payments made for 2012 and 2013 before receiving SUNAT's Royalty Assessments for those fiscal years. Indeed, SMCV requested the GEM refund more than one year before receiving the corresponding Assessments.[976] This argument from Claimant must be a litigation-driven invention, because it is not consistent with SMCV's actual practice.

516. In sum, Claimant has failed to demonstrate any kind of inducement from Respondent to participate in the voluntary contribution programs implemented between 2006-2011 under the alleged promise that the Concentrator would be exempt from payment of royalties. Respondent has shown that (i) SMCV made those voluntary payments while well-aware (or while it should have been aware) of the government's understanding that the 1998 Stabilization Agreement covered only the Leaching Project; and (ii) SMCV itself failed to timely request the reimbursement of GEM payments.

---

[973] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 219.

[974] Claimant's Reply at para. 208.

[975] *See* Claimant's Memorial at paras. 170-79. *See also infra* at Resubmitted Annex A.

[976] SUNAT issued the 2012 and 2013 Royalty Assessments in March and September of 2018. *See infra* at Resubmitted Annex A. SMCV requested the refund for GEM payments made from Q4 2012 to Q4 2013 in December 2017. *See* Claimant's Memorial at para. 264.

G. SUNAT'S ASSESSMENTS ON SMCV'S CONCENTRATOR PLANT WERE IN ACCORDANCE WITH PERUVIAN LAW AND CONSISTENT WITH SUNAT'S POSITION ON THE SCOPE OF STABILIZATION AGREEMENTS

517. In its Memorial, Claimant complained that the Peruvian tax authority, SUNAT, wrongly assessed royalties, taxes, penalties, and interest against SMCV on the sale of copper ore from its Concentrator Plant for the 2006-2013 tax period.[977] In response, Respondent explained that SUNAT's audit and assessments against SMCV were well-founded, a legitimate exercise of its administrative powers, and executed in accordance with Peruvian law.[978] SMCV's Concentrator Plant was not covered by its 1998 Stabilization Agreement and, thus, did not benefit from the 1998 Stabilization Agreement's guarantees that would have precluded the Royalty Assessments.

518. In its Reply, Claimant alleges that SUNAT's Royalty Assessments against SMCV were unfair, because they were the result of "sustained political pressure" on MINEM to extract money from SMCV.[979] According to Claimant's theory, SUNAT had been consistently interpreting stability guarantees as applying to entire concessions or mining units until 2008, when it received MINEM's June 2006 Report, which presented MINEM's allegedly novel interpretation of stability guarantees as limited to investment projects, rather than concessions or mining units.[980] Claimant alleges that, in response to MINEM's June 2006 Report, SUNAT changed its approach and initiated an audit of SMCV and assessed royalties on the basis of the government's supposed "novel and restrictive interpretation" that stability guarantees applied only to specific investment projects.[981] Claimant's allegations are not consistent with the facts.

519. As demonstrated in the following sections, SUNAT's assessment of royalties on SMCV's Concentrator Project was in accordance with Peruvian law, and it was also consistent with SUNAT's long-held understanding that the scope of mining stabilization agreements is limited to the investment project that was the basis for obtaining the relevant stabilization agreement. In particular, Respondent demonstrates that: (i) Claimant does not dispute that the Royalty Assessments were lawful (Section 1); (ii) SUNAT's Royalty Assessments were not

[977] *See* Claimant's Memorial at paras. 170-79, 240-42.

[978] *See* Respondent's Counter-Memorial at paras. 243-79.

[979] *See* Claimant's Reply at para. 153.

[980] *See* Claimant's Reply at paras. 70-72, 153.

[981] *See* Claimant's Reply at paras. 151-52.

politically motivated (Section 2); and (iii) SUNAT's position on the scope of stability guarantees has been consistent over time (Section 3).

1. Claimant Does Not Dispute that SUNAT Initiated Audit Proceedings and Assessed Royalties Owed by SMCV in Accordance with Peruvian Law

520. As Respondent explained in its Counter-Memorial, SUNAT, as part of its oversight duties, initiated an audit of SMCV in June 2008, because SMCV had not filed the required documents related to the payment of royalties for the sale of copper ore from the Concentrator in 2006-2007.[982] Building on a thorough analysis of the scope of SMCV's 1998 Stabilization Agreement that had begun years earlier, SUNAT's audit resulted in the assessment of royalties on the 2006-2007 sales of ore processed by the Concentrator Plant (the "2006-2007 Royalty Assessment") because the Concentrator Project was not shielded by the 1998 Stabilization Agreement.[983] SMCV challenged the 2006-2007 Royalty Assessment before SUNAT's Claims Division on the same grounds that it raises in this arbitration, but the Claims Division confirmed the assessment.[984] SUNAT also issued Royalty Assessments for the years 2008, 2009, 2010-2011, Q4 2011, 2012, and 2013, which SMCV also challenged before SUNAT's Claims Division, unsuccessfully.[985] SMCV then appealed its challenges of the 2006 – Q4 2011 assessments to the Tax Tribunal (as discussed in Section II.H below), and lost again.[986]

521. Respondent demonstrated in its Counter-Memorial that SUNAT acted both reasonably and in accordance with Peruvian law when it audited and assessed the royalties owed by SMCV. In particular, Respondent demonstrated that:

- SUNAT acted pursuant to the 2004 Royalty Law, which mandates the assessment and collection of royalties from mining companies that fail to comply with their obligations.[987]

---

[982] *See* Respondent's Counter-Memorial at paras. 256, 260.

[983] *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009); *see also* Respondent's Counter-Memorial at para. 260.

[984] *See* Respondent's Counter-Memorial at paras. 261, 263; Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments (received by SUNAT on September 15, 2009), at pp. 9-25.

[985] *See infra* at Resubmitted Annex A.

[986] *See* Respondent's Counter-Memorial at paras. 280-347.

[987] *See* Respondent's Counter-Memorial at paras. 280-347; Exhibit RER-3, First Bravo and Picón Report at paras. 47-57; *see also* Exhibit CA-6, Mining Royalty Law, Law No. 28258, June 23, 2004, at Art. 7; Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 1.

- SUNAT's Royalty Assessments were procedurally sound.[988] SMCV had—and fully availed itself of—the right to challenge SUNAT's assessments before SUNAT, the Tax Tribunal, and the Peruvian Courts.[989]
- SUNAT's Claims Division confirmed the legitimacy of all of SUNAT's Royalty Assessments on SMCV in response to SMCV's administrative challenges (*recursos de reclamación*).[990]
- The Tax Tribunal confirmed the legitimacy of all of SUNAT's Royalty Assessments on SMCV.[991]
- The Peruvian courts, up to and including Perú's Supreme Court for the 2008 Royalty Assessment, confirmed the legitimacy of SUNAT's 2006-2007 and 2008 Royalty Assessments.[992]

522. Claimant did not contest these points in its Reply. Respondent's position that SUNAT's Royalty Assessments were imposed on SMCV in full compliance with Peruvian law is therefore undisputed. Claimant of course takes issue with the underlying legal reasoning behind the Assessments, but has no other complaint about the process by which they were imposed.

[988] *See* Respondent's Counter-Memorial at paras. 247, 255-79.

[989] *See* Respondent's Counter-Memorial at para. 247; *see also* Claimant's Memorial at paras. 172, 175, 178-79, 196-97, 217, 223, 225, 231, 233, 241-42, 258-60, 262-63.

[990] *See* Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010); Exhibit CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011 (notified to SMCV on February 17, 2011); Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011); Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016 (notified to SMCV on March 1, 2017); Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018); Exhibit CE-215, SUNAT Resolution No. 0150140014560 (2012 Royalty Assessment), January 11, 2019 (notified to SMCV on January 23, 2019); Exhibit CE-220, SUNAT Resolution No. 0150140014816 (2013 Royalty Assessment), May 28, 2019.

[991] The Tax Tribunal decided the appeals filed by SMCV against the 2006- Q4 2011 Royalty Assessments confirming the legitimacy of SUNAT's Assessments. *See* Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013 (2006/07 Royalty Assessment), May 30, 2013 (notified to SMCV on June 20, 2013); Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013 (2008 Royalty Assessment), May 21, 2013 (notified to SMCV on June 20, 2013); Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019. SMCV did not appeal the 2012 and 2013 Royalty Assessments to the Tax Tribunal. Rather, SMCV filed requests for deferral and installment plans to pay them under protest. *See* Exhibit CE-751, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans (2012 Royalty Assessments), February 19, 2019; Exhibit CE-763, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans (2013 Royalty Assessments), June 25, 2019; *see also* Claimant's Memorial at para. 263.

[992] *See* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016; Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017; Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016; Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017.

2. SUNAT's Assessments on Sales from SMCV's Concentrator Plant Were Not Politically Motivated

523. Claimant tries to characterize SUNAT's initiation of the audit process and its resulting assessment of royalties on SMCV as part of a politically-motivated government campaign against SMCV. Specifically, Claimant alleges that SUNAT audited and assessed SMCV under instructions from MINEM, which had communicated those instructions by sending SUNAT MINEM's June 2006 Report containing MINEM's allegedly novel interpretation of SMCV's 1998 Stabilization Agreement.[993] At the same time, Claimant alleges that SUNAT's audit was also motivated by a complaint regarding SMCV's evasion of royalties filed with SUNAT by Mr. Dante Martínez, a local activist from Arequipa, in July 2006.[994] Claimant is mistaken on both fronts.

524. As discussed in greater detail below, SUNAT concluded independently from MINEM that stability guarantees are limited to specific investment projects, and it did so far earlier than Claimant alleges (Section a). In fact, long before it received MINEM's June 2006 Report in January 2008 and even before Mr. Martínez filed his complaint in July 2006, SUNAT was already internally reviewing the scope of SMCV's 1998 Stabilization Agreement (Section b).[995] Thus, SUNAT's audit of SMCV's payments was not conducted as a result of any supposed instructions from MINEM nor as a result of Mr. Martínez's complaint. In short, SUNAT's audit was not politically motivated as Claimant asserts.

a. SUNAT Analyzed SMCV's Case Internally Before It Initiated the Audit Proceedings in 2008

525. 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.[996] On March 4, 2005, SMCV asserted in response that it was not obliged to pay royalties because it was exempted by the 1998 Stabilization Agreement.[997] Shortly thereafter, SMCV's Legal and Environmental Director, Ms. Torreblanca, met with Mr. Cruz to communicate SMCV's

[993] *See* Claimant's Reply at paras. 150-51, 153.

[994] *See* Claimant's Reply at para. 152(i).

[995] *See* Exhibit RWS-14, Second Witness Statement of Haraldo Cruz, November 3, 2022 ("Second Cruz Statement"), at para. 28; Exhibit RWS-11, Second Witness Statement of Gabriela Bedoya, November 3, 2022 ("Second Bedoya Statement"), at paras. 8-17; Exhibit RE-179, SUNAT June 2006 Internal Report.

[996] *See* Exhibit CE-482, Letter from SUNAT to SMCV, February 17, 2005.

[997] *See* Exhibit CE-486, Letter from SMCV to SUNAT, Letter No. SMCV-AL-279/2005, March 4, 2005.

understanding of the 1998 Stabilization Agreement.[998] As Mr. Cruz explained in his two witness statements, and contrary to Claimant's allegations, Mr. Cruz did not (and could not) confirm to Ms. Torreblanca at the time that SMCV's interpretation was correct.[999] Mr. Cruz further explained in his second witness statement, in mid-2006, SUNAT's Regional Office for Arequipa decided to examine SMCV's 1998 Stabilization Agreement to better understand SMCV's tax and royalty obligations.[1000] In the course of that examination, SUNAT's Regional Office for Arequipa requested comprehensive information from SMCV related to the Concentrator Project, including the Investment Program for the Primary Sulfides Project, as well as all of the resolutions from MINEM's General Mining Directorate concerning the Project.[1001]

526. In June 2006, Ms. Bedoya prepared an *Informe sobre la Aplicación del Contrato de Garantías y Medidas de Protección a la Inversión y la Regalía Minera* ("SUNAT's June 2006 Report"), in which she explained the conclusion of SUNAT's examination: namely, that the 1998 Stabilization Agreement did not cover the Concentrator Project.[1002] The report specifically found that:

> the benefits conferred through the Tax Stability 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, these benefits should only be applied to activities related to the investment carried out in a given concession or Administrative Economic Unit, that was the subject of the 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 section 1.2 of this report, we can conclude that such an 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. . . .

[998] *See* Exhibit RWS-14, Second Cruz Statement at para. 22.

[999] *See* Exhibit RWS-7, Witness Statement of Haraldo Cruz, April 18, 2022 ("First Cruz Statement"), at paras. 19-20; Exhibit RWS-14, Second Cruz Statement at paras. 22-26, 30.

[1000] *See* Exhibit RWS-14, Second Cruz Statement at para. 28.

[1001] *See* Exhibit RWS-11, Second Bedoya Statement at para. 9.

[1002] *See* Exhibit RE-179, SUNAT June 2006 Internal Report at pp. 5-9.

> Therefore, the "Expansion of Cerro Verde's Current Operations - Primary Sulfides Project," would not be stabilized as indicated in the previous paragraphs, so the tax implications would be as follows: . . . 5) once the sale of the minerals produced by the Concentrator Plant begins, it must pay the appropriate mining royalties.[1003]

The report explained that the benefits of the Stabilization Agreement extended only to the investment project for which the Agreement was entered into, *i.e.*, the Leaching Project. Because SMCV's Concentrator Project was a new investment, separate from the Leaching Project, that was not identified in the 1998 Stabilization Agreement, it was not covered by the Agreement. SMCV was therefore obligated to pay royalties on the Concentrator Project.

527. Ms. Bedoya attests that, at the time she prepared SUNAT's June 2006 Report, neither she nor SUNAT more generally had knowledge of MINEM's June 2006 Report.[1004] As Claimant admits, SUNAT, through its Regional Office for Arequipa, did not receive MINEM's June 2006 Report until January 29, 2008.[1005] Thus, SUNAT's own June 2006 Report demonstrates that the tax authorities came to the conclusion that SMCV owed royalties on the Concentrator Project based on SUNAT's own independent analysis, and that SUNAT reached that conclusion at the latest in 2006, two years before SUNAT received MINEM's June 2006 Report.

528. The lack of any connection between SUNAT's decision to initiate audit proceedings of SMCV and MINEM's June 2006 Report is further corroborated by a 2010 report from SUNAT's Operational Programming Division (*División de Programación Operativa*), the

---

[1003] Exhibit RE-179, SUNAT June 2006 Internal Report at pp. 5, 7 ("*[L]os beneficios conferidos mediante los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la LGM recaen en el titular de la actividad minera y, si bien estabilizan temporalmente el régimen tributario vigente a la fecha de aprobación del Estudio de Factibilidad, dichos beneficios solo deben aplicarse a las actividades vinculadas a la inversión desarrollada en determinada concesión o Unidad Económica Administrativa, que haya sido objeto del respectivo contrato, es decir, a la inversión vinculada al proyecto respecto del cual se suscribió el contrato. . . . En tal sentido, y como quiera que el proyecto de ampliación de las operaciones actuales de SMCV a través de una planta concentradora de sulfuros primarios se refiere a una inversión completamente distinta al Proyecto de Lixiviación tal como fue aprobado a efecto de la suscripción del contrato de garantías, según la descripción detallada en el punto 1.2 del presente informe, podemos concluir que dicha ampliación no se encontraría dentro del ámbito de aplicación del contrato de garantías, toda vez que se trata de una inversión nueva no contemplada por las partes al momento de la suscripción del contrato. . . . Así las cosas, la 'Ampliación de las Operaciones Actuales de Cerro Verde – Proyecto de Sulfuros Primarios,' no se encontraría estabilizada según lo señalado en los párrafos anteriores, por lo que las implicancias tributarias serían las siguientes: . . . . 5) una vez iniciada la comercialización de los minerales obtenidos por la Planta Concentradora, deberá pagar las regalías mineras correspondientes*.").

[1004] *See* Exhibit RWS-11, Second Bedoya Statement at para. 14.

[1005] *See* Claimant's Reply at para. 152(*iv*).

division in charge of planning, selecting, and scheduling the audits that SUNAT performs.[1006] On February 9, 2010, this division issued Report No. 221-2010-OTR/SUNAT-2J0200, in which it describes all of the audits that SUNAT initiated of SMCV.[1007] With respect to the 2008 audit of SMCV, the report notes that, based on SUNAT's June 2006 Report, the Auditing Division of SUNAT's Regional Office for Arequipa scheduled an audit of SMCV to ensure that it was complying with its obligation to pay royalties.[1008] There is no mention at all of MINEM's June 2006 Report in this contemporaneous summary of SUNAT's audits.

529. Consequently, SUNAT's audit and assessments against SMCV were not a response to MINEM's June 2006 Report, but, rather, were based on SUNAT's own June 2006 Report.[1009] The existence of SUNAT's June 2006 Report, and the absence of any evidence that SUNAT even knew of the existence of the MINEM June 2006 Report until much later, is fatal to Claimant's argument that SUNAT acted on MINEM's instructions.

b. SUNAT's Response to Mr. Martínez's Complaint Confirms that SUNAT Independently Concluded that the Concentrator Project Was Not Covered by the 1998 Stabilization Agreement Well Before Mr. Martínez Filed His Complaint

530. The contemporaneous record of SUNAT's dismissal of the complaint filed by Mr. Martínez against SMCV also confirms that SUNAT arrived at its interpretation of the scope of SMCV's 1998 Stabilization Agreement independently from other parts of the government, and did so before it received either MINEM's June 2006 Report or Mr. Martínez's complaint.[1010]

[1006] *See* Exhibit RE-181, Provisional Document on the Organization and Functions of the National Superintendence of Customs and Tax Administration – SUNAT, at Art. 472.

[1007] *See* Exhibit RE-190, SUNAT, Report No. 221-2010-OTR/SUNAT-2J0200.

[1008] *See* Exhibit RE-190, SUNAT, Report No. 221-2010-OTR/SUNAT-2J0200, at p. 1 ("With respect to AO 080051209420, it should be noted that the scheduling carried out originates from the Report prepared by the Audit Division staff in June 2006 regarding mining royalties."). *See also* Exhibit RE-180, SUNAT, Audit Order No. 080051209420, April 2, 2008.

[1009] In fact, on April 30, 2008, when SUNAT formally initiated the audit of SMCV's Concentrator operations, SUNAT asked MINEM to confirm that MINEM agreed with SUNAT's interpretation of the 1998 Stabilization Agreement. SUNAT sent a letter to MINEM expressly noting "that in accordance with the provisions of the penultimate paragraph of Article 83 of the [Mining Law] 'the effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made' and, that according to the provisions of the first paragraph of Article 22 of [the Mining Regulations] 'the contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units'; investment being understood as that linked to the project for which the Contract was signed, that is, only to the 'Cerro Verde Leaching Project' and not to the 'Expansion of Current Operations of Cerro Verde – Primary Sulfides Project'." *See* Exhibit RE-220, Letter No. 015-2008-SUNAT/2J0000, April 30, 2008, at p. 2 (emphasis added).

[1010] *See* Exhibit RWS-11, Second Bedoya Statement at paras. 16-17.

531. On July 20, 2006, Mr. Martínez, an activist in the Arequipa region, filed a complaint with SUNAT alleging that SMCV was (i) committing tax fraud by evading the payment of US $240 million in income taxes by claiming that its Primary Sulfide Project was covered under the 1998 Stabilization Agreement; and (ii) amending the terms of the 1998 Stabilization Agreement by using the profit reinvestment benefit to construct the Concentrator, thereby obtaining an undue income tax exemption.[1011] Mr. Martínez's complaint was filed pursuant to Legislative Decree No. 815 of April 19, 1996, which established a financial reward scheme for citizens who denounce tax infractions.[1012]

532. On October 31, 2008, SUNAT issued the *Resolución de Intendencia No. 054-024-0000868-2008-SUNAT* dismissing Mr. Martínez's complaint. SUNAT concluded that (i) SUNAT was already aware of the facts denounced by Mr. Martínez, and it had already requested information from SMCV on May 23, 2006 (*Requerimiento* No. 3610-00312320) in order to initiate an audit; (ii) the facts presented by Mr. Martínez were already a matter of public knowledge, as they had been reported by the press and rating risks agencies; and (iii) SUNAT's Auditor, Ms. Gabriela Bedoya, had already prepared SUNAT's June 2006 Report, which concluded that the Concentrator was not covered by the 1998 Stabilization Agreement.[1013] Therefore, there were no grounds for Mr. Martínez to receive the reward he sought.[1014]

533. On November 12, 2007, Mr. Martínez filed a second complaint alleging that SMCV had committed fraud in the payment of royalties by fraudulently applying for the profit reinvestment benefit. Mr. Martínez again requested the economic reward and insisted that SMCV face consequences.[1015] SUNAT did not respond to Mr. Martínez's second complaint. Thus, under Peruvian administrative law, the decision was presumed to be denied.[1016]

534. Mr. Martínez next challenged SUNAT's decisions that dismissed his complaints before the administrative courts, requesting that they be set aside and, in turn, that he should be

[1011] *See* Exhibit RE-191, First Instance Administrative Court Decision, Judgment No. 69-2012, August 16, 2012, at p. 8 (of PDF); *see also* Exhibit CE-1040, Dante Martinez, Complaint to SUNAT No. 016278, July 25, 2006, at p. 1.

[1012] *See* Exhibit RE-321, Law of Exclusion or Reduction of Sanction, Complaints and Rewards in Cases of Crime and Tax Violation, Legislative Decree No. 815, April 19, 1996, Arts. 11, 14 and 15.

[1013] *See* Exhibit RE-191, First Instance Administrative Court Decision, Judgment No. 69-2012, August 16, 2012, at p. 11 (of PDF).

[1014] *See* Exhibit RE-191, First Instance Administrative Court Decision, Judgment No. 69-2012, August 16, 2012, at pp. 12-14, 17 (of PDF).

[1015] *See* Exhibit CE-1041, Dante Martínez, Complaint to SUNAT, November 12, 2007.

[1016] *See* Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Art. 195.

awarded the economic reward and that SMCV should be subject to assessment by SUNAT. The administrative courts in the first and second instances denied Mr. Martínez's request on the basis, *inter alia*, that SUNAT had been preparing to audit SMCV for months before Mr. Martínez filed his complaint.[1017]

535. The key points for the present discussion are that, as SUNAT explicitly noted in the Martínez administrative case file, SUNAT had formed an opinion on the 1998 Stabilization Agreement at the latest in June 2006. SUNAT interpreted the 1998 Stabilization Agreement in SUNAT's 2006 June Report, which was issued before Mr. Martínez filed his complaint in July 2006. Furthermore, there is no mention anywhere in the Martínez case file of MINEM's June 2006 Report having played any role in SUNAT's activities. SUNAT's interpretation of the 1998 Stabilization Agreement therefore could not have been influenced by either the Martínez complaint or MINEM's June 2006 Report, and its audit of SMCV could not have been carried out in response to MINEM's June 2006 Report. Claimant's theory that SUNAT assessed royalties on SMCV because it was instructed to do so by MINEM, which was allegedly being pressured by local and national politicians to attack SMCV, is factually incorrect.

3. SUNAT Has Consistently Interpreted Stabilization Agreements to Be Limited to the Investment Projects That Gave Rise to the Agreements

536. SUNAT has been consistent in its interpretation of the scope of stabilization agreements. In this case, as well as in others, SUNAT has applied stabilization agreements to specific investment projects rather than to concessions or EAUs as a whole. As Respondent explained in its Counter-Memorial, in September 2002—long before SMCV decided to proceed with the construction of the Concentrator—SUNAT issued a report in response to a public consultation in which it explained the scope of stabilization agreements (the "2002 SUNAT Report").[1018] In that report, SUNAT 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

[1017] *See* Exhibit RE-191, First Instance Administrative Court Decision, Judgment No. 69-2012, August 16, 2012; Exhibit RE-192, Superior Court of Arequipa, Appellate Decision, Judgment No. 135-2012, May 31, 2013.

[1018] *See* Respondent's Counter-Memorial at paras. 138-41; *see also* Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución endeterminada concesión o Unidad Económica Administrativa*.").

execution in [a] determined concession or an Administrative-Economic Unit."[1019] In addition, Ms. Bedoya, who prepared SUNAT's June 2006 Report and was part of the Claims Division that reviewed and confirmed the 2006-2007 and 2008 Royalty Assessments, explained in her first witness statement that there were other mining companies, like Yanacocha, that had multiple stabilization agreements applicable to the same concession, which demonstrates that, contrary to Claimant's assertions in these proceedings, it is not concessions, *per se*, that are stabilized.[1020]

537. Claimant nevertheless alleges in its Reply that there is no evidence of SUNAT's application of stabilization agreements to specific "investment projects."[1021] According to Claimant, the 2002 SUNAT Report and the example of Yanacocha do not support the conclusion that SUNAT has been consistent in its interpretation of the scope of stabilization agreements.[1022] Furthermore, Claimant relies on a series of unrelated reports and communications to allege that SUNAT acknowledged that, pursuant to the Mining Law and the Regulations, stability guarantees applied to "concessions and mining units" and not to investment projects within concessions or "mining units."[1023] Specifically, Claimants refers to: (i) a report issued by SUNAT in September 2012 about the consolidation of financial statements ("SUNAT's Report No. 084-2012"); (ii) a letter sent in February 2005 by Mr. Cruz as Regional Intendent for Arequipa to mining companies with instructions on how determine royalty payments; and (iii) the resolution issued by SUNAT in December 2006 approving the form to file income tax returns.[1024] However, on closer review, those documents do not support Claimant's position, as explained in the following sections.

538. In the sections that follow, Respondent first demonstrates that the 2002 SUNAT Report is unequivocal in its statement that stability guarantees are applicable to the activities and investments that served as the basis for the relevant stabilization agreement. Of course, an investment that was not even planned at the time a stabilization agreement was requested (like

---

[1019] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa*.").

[1020] *See* Exhibit RWS-4, Witness Statement of Gabriela Bedoya, April 18, 2022 ("First Bedoya Statement"), at paras. 28-29.

[1021] *See* Claimant's Reply at paras. 70, 72.

[1022] *See* Claimant's Reply at paras. 67(d), 70, 72.

[1023] *See* Claimant's Reply at paras. 69, 72.

[1024] *See* Claimant's Reply at paras. 69(a), 69(c).

SMCV's Concentrator Plant) cannot possibly have served as the basis for that agreement (Section a). Respondent next discusses cases of other mining companies with multiple stabilization agreements applying to different elements of the same concession, which confirm that SUNAT has consistently interpreted stabilization agreements as applying to specific investment projects, rather than to concessions as a whole (Section b). Respondent subsequently explains that Claimant's reliance on the report issued by SUNAT in 2012 is misplaced, as the report does not support Claimant's allegations (Section c). Finally, Respondent shows that SUNAT's February 2005 letter and the December 2006 resolution that SUNAT issued approving the electronic form for the income tax return do not establish that SUNAT applied stabilization guarantees to concessions or "mining units" (Section d).

a. The 2002 SUNAT Report Is Consistent with SUNAT's Interpretation That the Scope of Stabilization Agreements Is Limited to the Investment Projects That Give Rise to Those Agreements

539. The 2002 SUNAT Report responds to an inquiry from a taxpayer (known as a "consultation") regarding how a mining company should calculate a certain worker's benefits contribution payment in light of an additional new contribution requirement, considering that certain of its activities were stabilized through a stabilization agreement.[1025] In response to that consultation, SUNAT confirmed that, under Articles 79 and 83 of the Mining Law and Article 22 of the Mining Regulations, stabilization benefits "must only apply to the activities involved in the investment made in a given concession or [EAU]."[1026] SUNAT explained that therefore the mining company would continue to pay only the "stabilized contribution" for its workers who performed activities related to the stabilized plant, but would have to pay the new contribution for its other workers who performed non-stabilized activities.[1027] SUNAT further explained that "if the taxpayer engages in other activities, said activities will be subject to taxation in accordance with new developments in the regular tax laws (unless said activities also have their own stability benefit), in which case they will be taxed simultaneously with the activities for

[1025] *See* Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm.

[1026] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at para. 5 (emphasis added).

[1027] *See* Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at paras. 5-8.

which stability exists, as long as said stability remains in effect."[1028] This, of course, is exactly the same distinction that SUNAT drew in 2006 with respect to SMCV's royalty obligations—*i.e.*, SMCV did not need to pay the new royalties on activities (sales) related to its stabilized Leaching Plant, but it did need to pay the new royalties on all its other activities (sales) such as those derived from the Concentrator Plant.

540. Claimant attempts to downplay the fact that this 2002 Report reflects SUNAT's consistent position on the scope of stabilization agreements by focusing on out-of-context excerpts of the Report. According to Claimant, the Report indicates that stability guarantees apply to concessions or units, rather than investment projects, because it notes that, pursuant to Article 2 of the Mining Regulations, "'when the individual or legal entity is the mining titleholder of several concessions or Administrative Economic Units, the qualification shall only be effective for those concessions or units that are supported, among others, by the agreement referred to by said Article.'"[1029] In addition, Claimant alleges that nowhere in the conclusions of the report does SUNAT use the term "investment projects" or refer to the "specific investment in the feasibility study"; instead, the Report uses the term "investment activities," which, according to Claimant, means that the Report does not support Respondent's position.[1030] Claimant's arguments fail for several reasons.

541. *First*, SUNAT's discussion of Article 2 of the Mining Regulation, just quoted above, set out to establish in broad terms who is entitled to the benefits established in Articles 78 and 82 of the Mining Law—it said nothing about whether all or only some of the activities within a given concession might receive those benefits. Moreover, in the four paragraphs following the sentence that Claimant quotes, SUNAT concludes that the stability benefits apply to the "investments" or to the mining company's "activities involved in the investment made."[1031] Thus, the single sentence that Claimant excerpts from the Report does not at all

[1028] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at para. 5 (emphasis added).

[1029] Claimant's Reply at para. 72(a) (quoting Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at p. 2 (emphasis omitted)).

[1030] Claimant's Reply at para. 72(b).

[1031] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at paras. 3 and 5, respectively (emphasis added). ("3. Now, according to the second paragraph of Article 79 and the fourth paragraph of Article 83 of the

conflict with SUNAT's position in the SMCV Royalty Assessments that the scope of stabilization agreements is limited to the investment projects underlying such agreements.

542. *Second*, the 2002 SUNAT Report does refer to investment projects in its conclusion. Specifically, the report states: "[S]aid stability shall only operate in relation to the workers who were employed in the activities involved in the project with respect to which the contract was signed."[1032] While the term "project" is used rather than "investment project," the meaning is obviously the same—and the Report's conclusion is clear: the contract (*i.e.*, the taxpayer's stabilization agreement) was signed with respect to a particular project, and so only payment obligations arising out of activities involved in that project were stabilized by that agreement.

543. *Third*, Claimant's claim in this arbitration that the 2002 SUNAT Report interprets stabilization agreements as applying to concessions as a whole is contradicted by SMCV's own arguments in its administrative challenges to the 2006-2007 and 2008 Royalty Assessments. As Ms. Bedoya explains in her second witness statement, in the course of its administrative challenges, SMCV alleged that the 2002 SUNAT Report was irrelevant, but also argued in the alternative that even if the 2002 SUNAT Report were applicable, the Concentrator was one of the activities for which the 1998 Stabilization Agreement was signed.[1033] SUNAT confirmed that the 2002 SUNAT Report was relevant for the case and rejected SMCV's argument, because SUNAT concluded that the activities stabilized under the 1998 Stabilization Agreement were

---

TUO of the General Mining Law, the effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made.

4. On the other hand, Article 22 of the TUO of the General Mining Law Regulation provides that the contractual guarantees shall benefit the mining titleholder exclusively for the investments it makes in the concessions or Administrative Economic Units.

5. As can be seen in the above-mentioned provisions, the benefits granted through the Tax Stability Contracts entered into pursuant to Title Nine of the TUO of the General Mining Law apply to the mining titleholders and, even though they temporarily stabilize the tax regime in effect as of the date of approval of the investment program, said benefits must only apply to the activities involved in the investment made in a given concession or Administrative Economic Unit that was the subject matter of the respective agreement.

In such regard, if the taxpayer engages in other activities, said activities will be subject to taxation in accordance with new developments in the regular tax laws (unless said activities also have their own stability benefit), in which case they will be taxed simultaneously with the activities for which stability exists, as long as said stability remains in effect.") (emphasis in the original).

[1032] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at para. 8 (emphasis added).

[1033] *See* Exhibit RWS-11, Second Bedoya Statement at para. 26.

only those related to the Leaching Project.[1034] Nevertheless, contrary to Claimant's assertions in this arbitration, SMCV's argument in 2010 demonstrates that SMCV understood at that time that the 2002 SUNAT Report interpreted stabilization agreements as applying to investment projects, not entire concessions.[1035]

544. *Fourth*, Claimant suggests in its Reply that the 2002 SUNAT Report cannot support Respondent's position, because Mr. Cruz stated in his first witness statement that SUNAT had no power to establish or interpret the scope of the 1998 Stabilization Agreement.[1036] Claimant is incorrect for several reasons. First, Mr. Cruz did not deny SUNAT's faculty to interpret stabilization agreements in the exercise of its oversight powers. As Mr. Cruz explained in his second witness statement, SUNAT has the authority to interpret the law and the 1998 Stabilization Agreement when it is determining whether a taxpayer is complying with its fiscal obligations.[1037] Second, the 2002 SUNAT Report does not interpret any specific stabilization agreement, let alone the 1998 Stabilization Agreement. SUNAT issued the Report in response to a general consultation from a taxpayer.

545. *Finally*, the SUNAT 2002 Report was not the only time that SUNAT explained its interpretation of stabilization agreements in response to a public consultation. On September 20, 2007, in Report No. 166-2007-SUNAT/2B0000SUNAT, SUNAT reiterated that mining stabilization agreements apply only to the investment activities that are the subject matter of the agreements.[1038] The consultation to which this Report responded concerned whether the contractual benefit established in Article 83 of the Mining Law applied only to the amount of the investment approved. Based on its interpretation of the Mining Law and the Mining Regulations, SUNAT concluded that mining stabilization agreements "benefit[ed] the mining activity title holder . . . only for the investment activities that are the subject matter of the

[1034] *See* Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010), at pp. 19, 47-49.

[1035] *See* Exhibit RWS-11, Second Bedoya Statement at paras. 26-27; *see also* Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010), at p. 51; Exhibit CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011 (notified to SMCV on February 17, 2011), at p. 48.

[1036] *See* Claimant's Reply at para. 72(b).

[1037] *See* Exhibit RWS-14, Second Cruz Statement at paras. 27-28.

[1038] *See* Exhibit RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007, *available at* https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm, at p. 6.

agreements and that were indicated in the Feasibility Study. . . ."[1039] Unsurprisingly, Claimant does not discuss this report in its Reply, as it is indisputable evidence of SUNAT's long-held understanding of the scope of stabilization agreements.

546. These SUNAT Reports thus establish that SUNAT has consistently interpreted—prior to the construction of the Concentrator and any alleged *volte-face*—that stabilization agreements apply to activities related to specific investment projects, rather than to concessions or EAUs as a whole.

b. The Stabilization Agreements Concluded by Other Mining Companies Confirm that Stabilization Agreements Are Granted to the Specific Investment Projects That Are the Bases for Those Agreements

547. Claimant's claims are based on the incorrect assumption that the Mining Law and Regulations conferred stabilization benefits through stabilization agreements to entire mining concessions or EAUs rather than to specific investment projects, which may involve only portions of a given concession or EAU. There are several examples of cases where mining companies in Perú entered into multiple stabilization agreements for a single concession or a "mining unit," which necessarily contradicts Claimant's assumption. These cases demonstrate that Peruvian authorities have understood from the beginning that the Mining Law and Regulations provided for stabilization agreements to grant stabilization benefits to specific investments. There would not exist any cases of mining companies with multiple stabilization agreements concerning investments in the same concession or EAU if Peruvian authorities did not have this understanding of the Mining Law and Regulations.[1040]

548. One example of a mining company whose stabilization agreements contradict Claimant's assumption is Yanacocha, as described above in Section II.E.1. In addition to the example described in Section II.E.1, Yanacocha signed a stabilization agreement for the "Project Yanacocha–Carachugo Sur" in 1994 and another for the "Project Cerro Yanacocha" in 1998.[1041] Both projects encompassed multiple concessions. Project Yanacocha-Carachugo Sur

[1039] Exhibit RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007, *available at* https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm, at p. 6.

[1040] *See* Exhibit RWS-4, First Bedoya Statement at para 28; *see also* Exhibit RWS-11, Second Bedoya Statement at para. 35.

[1041] *See* Exhibit CE-911, Compañía Minera Yanacocha S.A. - Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994; Exhibit CE-919, Minera Yanacocha S.A. - Proyecto Cerro Yanacocha Stabilization Agreement, September 16, 1998.

encompassed the concessions of "*Chaupiloma Tres,*" "*Chaupiloma Cuatro,*" and "*Chaupiloma Cinco,*" which in turn comprise the EAU that is known as *Chaupiloma Sur*.[1042] Project Cerro Yanacocha included the concessions of "*Chaupiloma Uno,*" "*Chaupiloma Dos,*" and *"Parte del Derecho of Chaupiloma Tres,*" which in turn comprise the EAU that is known as *Carachugo Sur*.[1043] Both projects used the *Chaupiloma Tres* concession, but for different activities. The feasibility study for each stabilization agreement defined those activities.[1044]

549. Yanacocha would not have entered into multiple stabilization agreements if Claimant's interpretation of the Mining Law and Regulations were correct. If a stabilization agreement stabilized all activities in a concession *per se* as Claimant contends (and not an investment project *per se*, as Respondent affirms), Yanacocha would not have needed to execute the second stabilization agreement with respect to *Chaupiloma Tres* in 1998 because its 1994 agreement would have already stabilized the entirety of the *Chaupiloma Tres* concession.[1045] The example of Yanacocha is fatal to Claimant's case.

550. Claimant attempts to salvage its case by arguing that the Yanacocha case in fact supports Claimant's position, because each of Yanacocha's stabilization agreements corresponded to separate EAUs. Claimant says this shows that Perú granted stability to different "mining units" as a whole, with all activities within a given mining unit being stabilized by the applicable agreement.[1046] As alleged support for its argument, Claimant points to a report from the Mining Directorate of MINEM from 1998 that discusses the possibility of a mining titleholder obtaining more than one stabilization agreement.[1047] Claimant's arguments are without merit.

551. *First*, it is irrelevant whether Yanacocha's two stabilization agreements happened to correspond to two separate EAUs. As explained by Ms. Bedoya in her first witness statement,

---

[1042] *See* Exhibit CE-911, Compañía Minera Yanacocha S.A. - Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994; *see also* Exhibit RWS-11, Second Bedoya Statement at para. 33.

[1043] *See* Exhibit CE-919, Minera Yanacocha S.A. - Proyecto Cerro Yanacocha Stabilization Agreement, September 16, 1998; *see also* Exhibit RWS-11, Second Bedoya Statement at para. 33.

[1044] *See* Exhibit CE-919, Minera Yanacocha S.A. - Proyecto Cerro Yanacocha Stabilization Agreement, September 16, 1998; Exhibit CE-911, Compañía Minera Yanacocha S.A. - Proyecto Yanacocha Carachugo Sur Stabilization Agreement, May 19, 1994.

[1045] *See* Exhibit RWS-11, Second Bedoya Statement at para. 35.

[1046] Claimant's Reply at para. 67(d).

[1047] *See* Claimant's Reply at para. 67(d).

the classification of an EAU does not determine the scope of a stabilization agreement.[1048] Furthermore, the Tribunal should take note of the fact that, despite making these arguments, Claimant does not quite dare to state a definitive position that EAUs are the proper delineations of the scope of stability guarantees. That is presumably because Claimant cannot establish that SMCV followed the proper procedures to declare its concessions as an EAU, and it is therefore hesitant to argue that SMCV's Stabilization Agreement stabilized its "EAU." It is likely for this reason that Claimant introduces the vaguely analogous concept of "mining units" and asserts that Yanacocha's agreements stabilized its "mining units."[1049] However, the concept of "mining units" is not defined anywhere in the Mining Law or Regulations.[1050] To be clear, Respondent rejects Claimant's argument whether it is stated *vis-à-vis* EAUs or the undefined "mining units." But it is worth noting the fine line that Claimant is obliged to walk—and noting that there are no grounds to suggest that stability guarantees are limited to "mining units" rather than investment projects, either in Yanacocha's case or in SMCV's.

552. *Second*, the MINEM report from August of 1998 on which Claimant relies in fact supports Respondent's position. The report discusses whether a mining company may obtain more than one stabilization agreement per concession, and MINEM concluded that it could do so.[1051] Claimant nonetheless argues that the report supports Claimant's interpretation of the scope of stability guarantees because the report states that "'benefits set forth in the Tax Stabilization Agreement are for the investments made in the concessions or Economic-Administrative Units included in the application, so that each agreement has its corresponding concessions.'"[1052] Claimant focuses on the last word "concessions" while ignoring the rest of the sentence.[1053] The beginning of the sentence could not be clearer that "benefits are for the investments." Thus, contrary to Claimant's assertion, this statement, and the report as a whole,

[1048] *See* Exhibit RWS-4, First Bedoya Statement at para. 50.

[1049] *See* Claimant's Reply at para. 67(d); Respondent's Counter-Memorial at para. 43.

[1050] *See supra* at Section II.B.1.

[1051] *See* Exhibit CE-918, MINEM, Report No. 487-98-EM-DGM/DPDM, August 18, 1998.

[1052] Claimant's Reply at para. 67(d) (*citing* Exhibit CE-918, MINEM, Report No. 487-98-EM-DGM/DPDM, August 18, 1998) (emphasis in Claimant's Reply omitted).

[1053] *See* Claimant's Reply at para. 67(d) ("This is further confirmed by a 1998 DGM Report regarding Yanacocha's stability agreements, which concluded that Yanacocha could sign more than one stability agreement, because "'[t]he benefits set forth in the Tax Stabilization Agreement *are for the investments made in the concessions or Economic-Administrative Units included in the application, so that each agreement has its corresponding concessions*.'. . . The Yanacocha case thus confirms that Peru did not grant stability guarantees to specific investments, but rather to specific mining units.") (emphasis added in Claimant's Reply).

confirms that stabilization applies to the "investments" in a concession, whether or not the concession would also be reflected in the corresponding agreement.[1054]

553. *Third*, MINEM's communications (including the report from August 1998) refer to Yanacocha's agreements by the names of the projects, not by the names of the EAUs. For example, the list of mining companies with stabilization agreements that MINEM attached to its June 2006 Report that it forwarded to SUNAT in January 2008 included a column with the names of the companies' stabilized projects.[1055] The list does not contain any reference to Yanacocha's EAUs.[1056] (Noticeably, Claimant failed to include this list when it submitted a copy of MINEM's June 2006 Report with its Memorial,[1057] perhaps because it recognized that the list supported Respondent's rather than Claimant's interpretation of the Stabilization Agreement.) The practice of referring to the investment projects that are stabilized by stabilization agreements (rather than to the EAUs or concessions in which those projects are located) supports Respondent's position that stabilization is granted to investment projects, not to concessions, EAUs, or any other ambiguous construct such as "mining units."[1058]

554. Yanacocha is not the only example that disproves Claimant's case. As Respondent showed in Section II.E.1 above, the tax treatment of the mining company Southern is another example of the fact that neither EAUs nor "mining units" delineate the scope of stabilization agreements. Mr. Tovar, MINEM's former Director of Mining Promotion and Development, explains in his second witness statement that Southern had two EAUs: Cuajone and Toquepala.[1059] Primary sulfides from each of these EAUs were processed through separate corresponding concentrator plants (*i.e.*, the primary sulfides obtained from the EAU Cuajone

---

[1054] Exhibit CE-918, MINEM, Report No. 487-98-EM-DGM/DPDM, August 18, 1998.

[1055] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 13 (of PDF) (Next to the company name Yanacocha are investment project titles "Carachugo," "Maqui-Maqui," "Cerro Yanacocha, " and "La Quinua." Another company on the list, B.H.P. Billinton Tintaya S.A., has stabilization agreements for its investment projects "Planta de Óxidos" and "Planta Sulfuros").

[1056] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 13 (of PDF).

[1057] *See* Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006. Claimant did this even though in its Reply submission it recognized that the list is an integral part of MINEM's report. *See* Claimant's Reply at para. 152(vi) ("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 novel position on the scope of stability guarantees.").

[1058] *See* Exhibit RE-175, Administrative File of Report No. 153-2005-MEM/OGAJ, April 14, 2005; Exhibit RE-31, MINEM, "Investment Promotion and Guarantee Contracts," *available at* http://www.minem.gob.pe/descripcion.php?idSector=1&idTitular=188&idMenu=sub154&idCateg=188.

[1059] *See* Exhibit RWS-10, Second Tovar Statement at para. 64.

were processed through a primary sulfide concentrator that operated under the beneficiation concession called "Botiflaca," and the primary sulfides obtained from the EAU Toquepala were processed through another concentrator plant that operated in the beneficiation concession called "Concentradora Toquepala").[1060] In July 1994, Southern entered into a stabilization agreement to develop the "Electrowon Leaching Project."[1061] The project consisted of the construction of a leaching plant that would process the minerals extracted from both the Cuajone and Toquepala EAUs.[1062] Southern obtained a stabilization agreement for the project, which stabilized only the activities of the leaching plant described in the feasibility study.[1063] The agreement did not stabilize the concentrator plants that processed the corresponding minerals from each of the Toquepala and Cuajone EAUs. This meant that the Toquepala and Cuajone EAUs would have both stabilized and non-stabilized activities within each EAU. Like the Cerro Verde Mine, the leaching activities would be stabilized while the concentrator activities would not benefit from stabilization. As Mr. Tovar attests, Southern understood the different tax regimes applicable to its investment activities, and based on this understanding, it paid royalties on the primary sulfides processed in its concentrator plants in accordance with the 2004 Royalty Law.[1064]

555. The Southern case refutes Claimant's assertion that entire EAUs or "mining units" are the stabilized constructs rather than specific investment projects. If Claimant's assertion were true, Southern's stabilization agreement would have stabilized both of Southern's EAUs in their entirety and would have exempted Southern from paying royalties on the products of its two concentrator plants as well as the products of its new leaching plant. But that is not what happened. Southern paid royalties for the minerals it processed in its concentrator plants in both EAUs in 2005 and 2006.[1065]

[1060] *See* Exhibit RWS-10, Second Tovar Statement at para. 64.

[1061] *See* Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clause 1.3.

[1062] *See* Exhibit RWS-10, Second Tovar Statement at paras. 64-66.

[1063] *See* Exhibit CE-912, Southern Peru Copper Corp. Stabilization Agreement, July 12, 1994, at Clause 4.

[1064] *See* Exhibit RWS-10, Second Tovar Statement at paras. 67-68.

[1065] *See* Exhibit RWS-10, Second Tovar Statement at paras. 67-68.

c. SUNAT's Report No. 084-2012 Shows that SUNAT Has Been Consistent in Its Interpretation of the Scope of Stabilization Agreements as Limited to the Investment Projects That Are the Bases for Those Agreements

556. Notwithstanding Claimant's allegation that SUNAT changed its position regarding the scope of stabilization agreements in 2008 when it received MINEM's June 2006 Report, Claimant also contends that, even after that alleged "*volte-face*," SUNAT still held the (now contrary) opinion that the scope of stabilization agreements was coterminous with concessions or "mining units." Claimant points to SUNAT's Report No. 084-2012 from September 2012 as evidence of SUNAT's supposed inconsistency.[1066] This report does not contradict SUNAT's position that stabilization agreements grant stability to specific investment projects, and, in any case, it is irrelevant to Claimant's arguments.

557. As explained by Ms. Bedoya in her second witness statement, Report No. 084-2012 analyzes whether it is possible to consolidate losses between EAUs and concessions for the purpose of calculating income tax, and whether it is possible to apply positive balances between EAUs and concessions for the purpose of calculating General Sales Tax.[1067] The report does not discuss the treatment of stabilized and non-stabilized activities. Claimant makes much of the fact that, in the course of explaining Article 22 of the Mining Regulations (which deals with the keeping of separate accounts), the report refers to "stabilized laws to be applied to each of the concessions or economic-administrative units." That reference, however, is not a confirmation that SUNAT shared Claimant's interpretation of the scope of the stabilization benefits, as Claimant alleges.[1068] As Ms. Bedoya explains in her second witness statement, the reason that the report refers to "concessions and EAUs" when discussing stabilization is not because stabilization applies only or entirely to such units, but rather because that was the phrasing that was used in the taxpayer inquiry (consultation) to which the report is responding.[1069]

[1066] *See* Claimant's Reply at para. 69(e) (emphasis omitted).

[1067] *See* Exhibit RWS-11, Second Bedoya Statement at paras. 29-30.

[1068] *See* Exhibit CE-883, SUNAT, Report No. 084-2012-SUNAT/4B0000, September 13, 2012; *see also* Claimant's Reply at para. 69(e).

[1069] *See* Exhibit RWS-11, Second Bedoya Statement at para. 31. *See also* Exhibit CE-883, SUNAT, Report No. 084-2012-SUNAT/4B0000, September 13, 2012 ("With respect to mining-activity owners that have signed Agreements on Guarantees and Measures for the Promotion of Investments with the Peruvian government, for one or more of their concessions or economic-administrative units, as provided for under the Single Unified Text of the General Mining Law, the following questions have been asked: 1. When determining income tax, can tax losses from one or more of its economic-administrative units be offset against the profits of the others? . . . 3. When determining the General Sales Tax (GST), can a positive balance from one or more of the concessions or economic-administrative units be used to offset the tax owed by the rest?") (emphasis added).

d. SUNAT's Letters and Resolution Approving Tax Filing Forms Do Not Communicate SUNAT's Interpretation of the Scope of the Stabilization Agreements

558. SUNAT's Regional Intendent for Arequipa, Mr. Haraldo Cruz, explained in his first witness statement that the letter SUNAT sent in February 2005 to all mining companies in Arequipa with instructions on how to pay royalties under the 2004 Royalty Law was not meant to, and did not, communicate SUNAT's interpretation of the scope of stabilization agreements.[1070] Notwithstanding that clarification by the author of the letter, Claimant continues to insist that the reference to "concessions or mining units" or "production units" in the letter confirms that SUNAT believed that those were the relevant delineations for purposes of stabilization.[1071] Claimant is incorrect.

559. As Mr. Cruz reiterates in his second witness statement:

> [T]he fact that the communication made reference to "concession holders" or to "Production Units" does not (and should not) give any indications about the scope of the mining stabilization agreements. Reference is made to "mining concession holders" because it is the concession holders who are responsible for the payment of royalties. However, this concept has no bearing on the determination of the scope of a stabilization agreement—the same concession holder may have to pay royalties for a portion of the minerals exploited in the concession, and not pay for the other portion. Additionally, the reference to "Production Units" does not indicate the scope of the specific mining stabilization agreements.[1072]

Thus, as the author of the letter, Mr. Cruz confirms that neither the intent nor the text of the letter had anything to do with SUNAT's understanding of the scope of stabilization agreements.

560. The same conclusion can be reached with respect to Resolution No. 235-2006-SUNAT, by which SUNAT approved the form that mining companies had to use to file their

[1070] *See* Exhibit RWS-7, First Cruz Statement at paras. 12-14.

[1071] *See* Claimant's Reply at para. 69(a).

[1072] Exhibit RWS-14, Second Cruz Statement at para. 17 ("*[El] hecho que la comunicación hiciera referencia a "titulares de concesiones" o a "Unidades de Producción" tampoco da (ni debe dar) indicaciones sobre los alcances de los convenios de estabilidad minera. Se hace referencia a "titulares de concesiones mineras" porque son los titulares de las concesiones quienes son responsables del pago de las regalías. Sin embargo, este concepto no tiene relación alguna con la determinación del alcance de un convenio de estabilidad—el mismo titular de una concesión puede tener que pagar regalías por una porción de los minerales explotados en la concesión, y no pagar por la otra porción. Adicionalmente, la referencia a "Unidades de Producción" tampoco indica cuál es el alcance de convenios de estabilidad minera específicos*.").

income tax returns for the 2006 period.[1073] Claimant argues that because the tax form that SUNAT approved contains an entry for "concession" or "EAU," SUNAT must have understood stabilization agreements to be defined by concessions rather than investment projects.[1074] Claimant's assumption about the format of a single electronic form lies in contradiction to the many examples of SUNAT's reports and actions that confirm that SUNAT has consistently interpreted stabilization agreements to apply to investment projects. The naming convention of electronic forms is not the manner by which SUNAT communicates its position on stabilization agreements. The taxpayer has the responsibility to determine its tax obligations according to the tax regulations and SUNAT's application of the same.[1075] As explained below and elsewhere in this brief, it was clear from the regulations and SUNAT's reports and actions that SUNAT understood that stabilization agreements applied to investments projects, and, thus, SMCV was required to provide information regarding its stabilized investment project with its 2006 income tax return.[1076]

* * *

561. In sum, SUNAT has been consistent in its interpretation of the scope of stabilization agreements. As demonstrated above, since at least 2002, well before SMCV invested in the Concentrator, SUNAT has interpreted the Mining Law and Regulations to confer stability through stabilization agreements on the investment projects that are outlined and planned in the feasibility studies that served as the bases of the agreements.[1077] Based on this long-held understanding of the scope of stabilization agreements, SUNAT audited, assessed, and confirmed royalties on SMCV for the sale of copper ore from the Concentrator in accordance with Peruvian law.

[1073] *See* Exhibit CE-966, SUNAT, Resolution No. 235-2006-SUNAT, December 28, 2006, at Approval of provisions and forms for the annual sworn income tax return and financial transaction tax returns for the 2006 tax year, Art. 14.

[1074] Claimant's Reply at para. 69(c).

[1075] *See* Exhibit RWS-14, Second Cruz Statement at para. 6.

[1076] *See* Exhibit RER-3, First Bravo and Picón Report at para. 180 ("As noted in the aforementioned regulations, it is clear that SMCV, as titleholder of the mining activity and payer of the Income Tax, had the obligation to maintain independent accounts for each investment plan: Leaching Project and Primary Sulfides Project.").

[1077] *See* Exhibit RWS-11, Second Bedoya Statement at para. 40.

H. THE TAX TRIBUNAL'S DECISIONS REGARDING SMCV'S ROYALTY ASSESSMENTS WERE PROCEDURALLY SOUND AND PROVIDED DUE PROCESS TO SMCV

562. Whatever (unfounded) accusations of improper political motivations Claimant may level at MEF, MINEM, and SUNAT, it is worth noting that Claimant mounts no such attack on the Tax Tribunal. Despite some vague insinuations, Claimant does not—indeed, cannot credibly—allege that the Tax Tribunal's dismissals of SMCV's challenges to SUNAT's assessments were politically motivated. Claimant complains of "egregious" procedural irregularities in the Tax Tribunal's review of SMCV's cases, yet offers zero evidence of actual such irregularities nor any motivation for supposedly "shocking" behavior. Claimant's criticisms of the Tax Tribunal seem to rely entirely on the testimony of Mr. Estrada, a former employee of the Tax Tribunal who had no involvement in any of the cases that decided SMCV's appeals against the Royalty Assessments that SUNAT imposed, and who never worked either directly or indirectly with the President of the Tax Tribunal, Ms. Zoraida Olano. As Respondent demonstrated in its Counter-Memorial, the Tax Tribunal's review of SMCV's challenges to SUNAT's Royalty Assessments was appropriate, consistent with Peruvian law, and respected SMCV's due process rights.[1078]

563. Respondent addresses each of Claimant's complaints about the actions of the Tax Tribunal in the following sections. First, Respondent demonstrates that 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 (Section 1). Second, Respondent explains that, contrary to Claimant's accusations, 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 (Section 2). Third, Respondent demonstrates that the Tax Tribunal did not violate SMCV's due process rights by allowing Mr. Mejía Ninacondor to participate as a *vocal* in the 2010-2011 Royalty Case (Section 3). Finally, Respondent explains that the Tax Tribunal acted reasonably in assigning Ms. Villanueva as *vocal ponente* in the Q4 2011 Royalty Case (Section 4).

[1078] *See* Respondent's Counter-Memorial at paras. 297-347.

1. Ms. Olano Did Not Interfere in the Tax Tribunal's Review of the 2008 Royalty Assessment

564. Claimant alleges that Ms. Olano improperly intervened in the Tax Tribunal's resolution of SMCV's challenge to the 2008 Royalty Assessment so that the case would be decided against SMCV and in order to pressure the other Chambers reviewing SMCV's other challenges to also decide those cases against SMCV.[1079] Ms. Olano did no such thing. Claimant's allegations regarding purported procedural irregularities related to Ms. Olano and her imagined campaign against SMCV are false.

565. *First*, there was nothing inappropriate about Ms. Olano's appointment of Ms. Villanueva as a temporary advisor (*asesor*) or, as Claimant refers to it, "*asesor suplente*," *or "substitute law clerk,"* to Chamber No. 1 for its deliberations in the 2008 Royalty Case. According to Claimant, it is not within the functions of the Tax Tribunal President to appoint "substitute law clerks."[1080] Specifically, Claimant contends that there is no provision in the Manual of Operations and Functions of the Tax Tribunal (the "MOF"), which lists the powers of the President of the Tax Tribunal, that would allow Ms. Villanueva's appointment.[1081] That is not true.

566. The appointment of temporary advisors to Chambers of the Tax Tribunal is well within the bounds of the President's managerial functions. The President has a duty to allocate the Tribunal's resources in an efficient manner. As expressly stated in the Tax Tribunal's MOF, the President shall "[d]irect, coordinate, and supervise the technical and administrative work developed by Tax Tribunal agencies in accordance with the indicators and mechanisms that contribute to ensure the levels of transparency, efficiency, and quality."[1082] Ms. Olano explains in her witness statements that the Tax Tribunal President is empowered to appoint advisors or *vocales,* as needed, in her fulfillment of this responsibility.[1083] When a Chamber experiences a staff shortage due to vacations or illness, for example, or when a Chamber has a particularly large and complex case, the President ensures that the Chamber is still able to operate efficiently

[1079] *See* Claimant's Reply at para. 165.

[1080] *See* Claimant's Reply at para. 166(a).

[1081] *See* Claimant's Reply at para. 166(a).

[1082] Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 12 (emphasis added).

[1083] *See* Exhibit RWS-12, Second Witness Statement of Zoraida Olano, November 3, 2022 ("Second Olano Statement"), at paras. 8-9; Exhibit RWS-5, Witness Statement of Zoraida Olano, April 18, 2021 ("First Olano Statement"), at paras. 46-48.

by assigning an advisor or advisors to the Chamber in need. Mr. Jorge Sarmiento, a veteran *vocal* of the Tax Tribunal for more than ten years, confirms that this managerial allocation of resources by the Tribunal President has always been normal and expected.[1084] Ms. Olano's assignment of Ms. Villanueva to assist Chamber No. 1 with the 2008 Royalty Case was consistent with the President's actions *vis-à-vis* other Chambers and other cases.[1085] The 2008 Royalty Case was especially large and complicated, such that Chamber No. 1 needed help with its caseload. Ms. Olano thus assigned Ms. Villanueva to assist Chamber No. 1 temporarily.

567. Ms. Villanueva was an appropriate choice to assist Chamber No. 1. While she was, at that time, an administrative advisor to the President, she had many years of experience working as an *asesora* in the Tax Tribunal. In addition, she had previously been Head of the Technical Office, the division of the Tax Tribunal charged with reviewing resolutions issued by the Chambers to ensure consistency, among other important tasks.[1086] Assisting a Chamber was therefore not an unfamiliar job for Ms. Villanueva.[1087] It was because of Ms. Villanueva's experience as an *asesora* and her previous role at the Technical Office that Ms. Olano chose to appoint her as a temporary advisor to Chamber No. 1.[1088] This was not any kind of scheme to place "her" administrative advisor in Chamber No. 1 to manipulate the results of the 2008 Royalty Case, as Claimant alleges.[1089] Furthermore, a temporary advisor is neither an official *asesor* nor an administrative advisor. Thus, Claimant's argument that the appointment procedures for *asesores* and administrative advisors are different[1090] (even if true) is irrelevant.

[1084] *See* Exhibit RWS-15, Witness Statement of Jorge Sarmiento, October 26, 2022 ("Sarmiento Statement"), at para. 19 ("[President Olano] appoints advisors on a temporary basis to those chambers that are short of staff, either because officials are absent or simply because certain cases are large and complex. The *vocales* are in constant communication with the President of the Tribunal, specially to elucidate administrative matters, such as, for example, the lack of personnel or the Chamber's productivity") ("[*La Presidente Olano] asigna asesores en forma temporal a aquellas Salas que estén cortos de personal, sea porque funcionarios están ausentes o simplemente porque ciertos casos son voluminosos y complejos. Los vocales están en permanente comunicación con la Presidente del Tribunal, especialmente para dilucidar temas administrativos, como por ejemplo, la falta de personal o la productividad de las Salas*."); *see also* Exhibit RWS-5, First Olano Statement at para. 46.

[1085] *See* Exhibit RWS-5, First Olano Statement at para. 46; *see also* Respondent's Counter-Memorial at paras. 302-03.

[1086] *See* Exhibit RWS-12, Second Olano Statement at paras. 9-10; Exhibit RWS-5, First Olano Statement at para. 19.

[1087] *See* Exhibit RWS-12, Second Olano Statement at para. 10.

[1088] *See* Exhibit RWS-5, First Olano Statement at para. 46.

[1089] *See* Claimant's Reply at para. 166(a).

[1090] *See* Claimant's Reply at para. 166(a).

568. Claimant's expert and witness nevertheless allege that, even assuming the President of the Tax Tribunal had the authority to appoint "temporary law clerks," Ms. Villanueva's assignment was flawed, because it was not formalized in writing.[1091] Claimant's allegation is unfounded. There is no law that requires the President of the Tribunal to make temporary staffing assignments formally or in writing.[1092] As noted above, the role of a temporary clerk/advisor is not an official job or position in the Tax Tribunal; it is a temporary stop-gap measure in cases of human resource challenges.[1093] Therefore, there is no official procedure for the appointment of a temporary advisor. As a result, Claimant's formalistic complaints about the purported lack of a process for the appointment of an "*asesor suplente*" are also irrelevant.[1094]

569. Ms. Olano frequently needed to engage in administrative coordination so that the Chambers had sufficient advisors to handle their caseloads. There was nothing out of the ordinary or inappropriate about Ms. Olano's assignment of Ms. Villanueva to assist Chamber No. 1 with its cases, including the 2008 Royalty Assessment Case.

570. *Second*, and more importantly, Ms. Olano did not manipulate Chamber No. 1's decision in the 2008 Royalty Case through Ms. Villanueva. According to Claimant, having assistance in a case from a "law clerk" who in other aspects of her work reports directly to the Tax Tribunal President is the same as the President personally interfering in that case.[1095] Claimant's argument suffers from a fundamental flaw: the decision makers for a given case are the *vocales* of the relevant Chamber, not their advisors. Temporary advisors—as well as permanent advisors—may assist in writing drafts of the resolutions of the Chambers with which they work.[1096] A draft of a resolution, however, is precisely that: a draft. The decision makers—

[1091] *See* Exhibit CER-8, Second Hernández Report at para. 41; Exhibit CWS-17, Reply Witness Statement of Leonel Estrada Gonzales, September 13, 2022 ("Second Estrada Statement"), at para. 30.

[1092] *See* Exhibit RWS-12, Second Olano Statement at para. 11.

[1093] *See* Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at pp. 9-10.

[1094] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 224-25; Exhibit RWS-12, Second Olano Statement at paras. 9-12.

[1095] *See* Claimant's Reply at para. 166 (a).

[1096] *See* Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 86 ("[Advisors] Job Functions . . . a) Studying cases he/she is asked to do by the Reporting *Vocales*, proposing the solution to the dispute presented…. e) Preparing the resolution draft for each case assigned for study.").

i.e., the *vocales*—only sign and issue resolutions with which they agree.[1097] Thus, the final, signed resolution is the only version that matters. It was the three *vocales* of Chamber No. 1—not Ms. Villanueva, and not Ms. Olano through Ms. Villanueva—who decided the 2008 Royalty Case, just like every other case before that Chamber.[1098]

571. Additionally, the fact that Ms. Villanueva was formally employed as an advisor to the President does not mean that she reported to the President in her temporary role as advisor to Chamber No. 1. Claimant's hierarchical-reporting argument is unavailing, because it leads to untenable or illogical propositions about the workings of the Tax Tribunal. By Claimant's logic, Ms. Villanueva should be deemed a proxy for Ms. Olano in all circumstances, merely because she (in her full-time position) reported directly to Ms. Olano. But by that same logic, all of the Specialized Chambers of the Tax Tribunal and their presiding *vocales* should also be deemed to be proxies for Ms. Olano. Pursuant to the Tax Tribunal's MOF, the presiding *vocales* of each Chamber report directly to the Tax Tribunal President, Ms. Olano.[1099] Of course, the Chambers of the Tax Tribunal are not the playthings of its President. As discussed in the Counter-Memorial, the Tax Tribunal is a court that provides taxpayers with due process, which is meted out in accordance with procedural checks and balances and the fair application of the tax laws.[1100]

572. Claimant's allegation that Ms. Olano's interference in the 2008 Royalty Case is evidenced by Ms. Villanueva's email signature block is particularly absurd. Claimant decries the fact that Ms. Villanueva's email signature block included the title Advisor to the President ("*Asesor de Presidencia*") rather than the title "temporary law-clerk" or "*asesor suplente*" to Chamber No. 1, and especially complains that Ms. Villanueva sent an email (with her automatic signature block) to Ms. Bedoya at SUNAT requesting a copy of the stabilization agreement that SMCV signed in 1994.[1101] But it is unreasonable to attach any significance to whether Ms. Villanueva did or did not, or to assume that she was obliged to, change her email signature block

[1097] *See* Exhibit RWS-15, Sarmiento Statement at para. 23 ("We only sign the resolutions we are in agreement with, and based on our own independent analysis and conclusions.") ("*Solamente firmamos resoluciones con las que estamos de acuerdo, y con base en nuestros propios análisis y opiniones independientes*.").

[1098] *See* Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013 (2008 Royalty Assessment), May 21, 2013 (notified to SMCV on June 20, 2013).

[1099] *See* Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 76.

[1100] *See* Respondent's Counter-Memorial at paras. 254-55.

[1101] *See* Claimant's Reply at para. 166(a), n.837; *see also* Exhibit CE-81, Emails between Úrsula Villanueva Arias and Gabriela Bedoya, April 24, 2013 (requesting and receiving from SUNAT Arequipa a copy of the 1994 Stabilization Agreement).

to reflect a title for an unofficial and temporary position. Furthermore, there was nothing otherwise problematic about the email that Claimant highlights. As Respondent demonstrated in its Counter-Memorial, in her email to Ms. Bedoya, Ms. Villanueva was requesting a document from Ms. Bedoya that is available to the public; moreover, at any rate, SUNAT and the Tax Tribunal have a collaboration agreement that authorizes the exchange of information between them.[1102] Claimant did not contest these facts. Thus, the propriety of Ms. Villanueva's communication stands.

573. The only remaining interaction that Claimant points to in an attempt to support its allegations of impropriety in Ms. Villanueva's appointment is an email that Ms. Villanueva sent to Ms. Olano on March 22, 2013.[1103] In that email, Ms. Villanueva informs Ms. Olano that, in reviewing the arguments in the 2008 Royalty Case, she saw "good arguments for both sides," and that, while she was "more or less leaning to one side," she would "continue working on" the case file.[1104] She asked to discuss the situation with Ms. Olano.[1105] Claimant alleges that this demonstrates that Ms. Olano actively participated in the merits of the 2008 Royalty Case, which Claimant argues would constitute a serious procedural irregularity because the President is prohibited from participating in the merits of a case.[1106]

574. Claimant misinterprets the email. Nothing in the email suggests that Ms. Olano instructed Ms. Villanueva to achieve a particular outcome in the case.[1107] Ms. Villanueva merely indicated in the email that she wanted to meet with Ms. Olano. Ms. Olano has confirmed that she did not participate in the resolution of the case.[1108] As Ms. Olano attests, her conversation following that email exchange with Ms. Villanueva regarding the 2008 Royalty Case was limited

---

[1102] *See* Respondent's Counter-Memorial at para. 705.

[1103] *See* Claimant's Reply at para. 166(b); *see also* Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

[1104] Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET) ("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.").

[1105] *See* Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET) ("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.").

[1106] *See* Claimant's Reply at para. 166(b).

[1107] *See* Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

[1108] *See* Exhibit RWS-5, First Olano Statement at paras. 47-49; Exhibit RWS-12, Second Olano Statement at paras. 14-15.

to Ms. Olano recommending that Ms. Villanueva be very thorough in any analysis of the parties' arguments.[1109] Ms. Olano also sought to secure coordination between the Chambers involved in similar cases.[1110] That does not mean that Ms. Olano participated in the resolution of the case nor that she instructed Ms. Villanueva how the case should come out; she merely sought to make sure that coordination occurred among the Chambers.

575. In any case, it is clear that the *vocales* who decided the case would not have been influenced by Ms. Olano, one way or the other, either directly or indirectly through Ms. Villanueva. Mr. Sarmiento attests that the *vocales* have respect for Ms. Olano, "[b]ut that does not mean that [they] would change [their] opinions simply to match hers, or that [they] would acquiesce to pressure from her (if there were any)."[1111] It is uncontested that the *vocales* of Chamber No. 1 reviewed, discussed, and edited any draft that Ms. Villanueva prepared.[1112] The *vocales* would have made their own decision(s), even if Ms. Villanueva had drafted the resolution under Ms. Olano's influence (which she did not).

576. *Third*, contrary to Claimant's allegations,[1113] Ms. Olano did not "fast-track[]" the 2008 Royalty Case in order to pressure other Chambers to subsequently adopt the same decision in SMCV's other challenges. Ms. Olano had no hand in the timing of the issuance of Chamber No. 1's resolution in the 2008 Royalty Case. As *vocal* Sarmiento and Ms. Olano explain, the general first-in first-out practice for cases submitted to the Tax Tribunal is not a strict rule.[1114] Some cases are simpler and thus faster to resolve than others. The Tribunal prioritizes older cases, but the *vocales* decide the pace and ultimately the order in which cases are decided.[1115]

577. Claimant points to an email to Ms. Olano from Mr. Moreano, the presiding *vocal* of Chamber No. 10, which was assigned SMCV's 2006-2007 Royalty Case, in which he complains about a lack of coordination between the Chambers. Claimant uses that email to

---

[1109] *See* Exhibit RWS-12, Second Olano Statement at para. 15. *See also* Exhibit RWS-5, First Olano Statement at para. 49.

[1110] *See* Exhibit RWS-5, First Olano Statement at para. 49.

[1111] Exhibit RWS-15, Sarmiento Statement at para. 22 ("*Pero ese respeto no significa que nosotros los vocales cambiaríamos nuestras opiniones simplemente para coincidir con la de ella o que aceptaríamos presión de su parte (si es que la hubiera).*").

[1112] *See* Exhibit RE-194, Chamber No. 1, Deliberation Session Minutes, No. 0000070349, May 21, 2013.

[1113] *See* Claimant's Reply at paras. 165, 167(a); *see also* Claimant's Memorial at para. 384.

[1114] *See* Exhibit RWS-15, Sarmiento Statement at para. 12; Exhibit RWS-12, Second Olano Statement at paras. 16-17, 19-21.

[1115] *See* Exhibit RWS-12, Second Olano Statement at paras. 21-22.

argue that Chamber No. 1's issuance of the 2008 Royalty Case resolution prior to Chamber No. 10's issuance of the 2006-2007 Royalty Case resolution was improper.[1116] That is not what *vocal* Moreano's email says, nor what it implies. *Vocal* Moreano wrote that "Chamber No. 1 did not previously inform us that it was going to meet yesterday morning, let alone hand us its project [*i.e.*, draft resolution] to coordinate, [a project draft] which only reached us today, in which I find out that the Chamber No. 1 case file was [deliberated] yesterday morning. With all due respect, I don't think that was the right thing to do."[1117] This statement does not suggest that Chamber No. 10 was in disagreement with Chamber No. 1's decision, nor that either Chamber had failed to deliberate its respective case.[1118]

578. As *vocal* Sarmiento explains in his witness statement, his understanding of *vocal* Moreano's email is that *vocal* Moreano was annoyed based on a sense of professional competitiveness. He might have perceived Chamber No. 1's issuance of its resolution before that of Chamber No. 10 as a slight to Chamber No. 10's reputation within the Tribunal.[1119] *Vocal* Moreano evidently was not complaining of any procedural irregularity (other than a perceived breach of protocol) in the resolution of either the 2008 or 2006-2007 Royalty Cases. If he had been, he would have stated so clearly and then dissented from Chamber No. 10's decision. Ms. Olano and Mr. Sarmiento agree that Mr. Moreano was no shrinking violet.[1120] When he disagreed with a decision, he dissented. In fact, Mr. Moreano dissented almost more than any other *vocal* in the Tax Tribunal.[1121] It is telling that *vocal* Moreano did not dissent from Chamber No. 10's resolution of SMCV's 2006-2007 Royalty Case.[1122]

579. Furthermore, Claimant's reliance on Mr. Moreano's email is misplaced. Mr. Moreano stated in the email that he believed that the lack of coordination between the Chambers

---

[1116] *See* Claimant's Reply at para. 167(b).

[1117] Exhibit CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET) ("*La sala 1 en ningún momento nos informó previamente que ya iba a sesionar ayer en la mañana y mucho menos nos entregó su proyecto para coordinar, proyecto que recién nos ha llegado hoy, en el que yo me entero que el expediente de la sala 1 fue sesionado ayer en la mañana. Con todo respeto creo que no es lo correcto*.").

[1118] *See* Exhibit RWS-15, Sarmiento Statement at para. 15.

[1119] *See* Exhibit RWS-15, Sarmiento Statement at para. 15.

[1120] *See* Exhibit RWS-15, Sarmiento Statement at para. 15; Exhibit RWS-12, Second Olano Statement at para. 27.

[1121] *See* Exhibit RWS-12, Second Olano Statement at Annex II – Percentage of Dissenting Votes of Resolutions Issued between 2009-2013 – SUNAT Case Files.

[1122] *See* Exhibit RWS-15, Sarmiento Statement at paras. 10, 15; Exhibit RWS-12, Second Olano Statement at para. 27.

before issuance of their resolutions was "[not] the right thing to do."[1123] According to Claimant, the Tax Tribunal President can coordinate only after two Chambers have issued contradictory decisions, not before.[1124] Claimant is wrong. Ms. Olano has the authority to coordinate administratively between Chambers that are working on parallel issues, including before the resolutions are issued.[1125] There is no rule forbidding such pre-resolution coordination because, of course, such coordination does not prevent Chambers from disagreeing and adopting different reasoning. Thus, Mr. Moreano's email in fact supports Respondent's assertion that pre-resolution coordination is proper. He not only believed that coordination between the Chambers before issuing resolutions was appropriate, but he was upset that it did not happen between Chamber No. 1 and Chamber No. 10 prior to Chamber No. 1 issuing its resolution in the 2008 Royalty Case.[1126]

580. Nor did the fact that the 2008 Royalty Case was decided ahead of the 2006-2007 Royalty Case mean that Chamber No. 10 could not have adopted a different conclusion from that of Chamber No. 1.[1127] Chamber No. 10 could have decided the case in favor of SMCV, but, based on its independent deliberations over the case, Chamber No. 10 concluded that SUNAT's assessment of royalties on SMCV for the 2006-2007 period was proper. Chamber No. 1 had come to the same conclusion with respect to the 2008 Royalty Case.[1128] Chamber No. 10 agreed with Chamber No. 1. If Chamber No. 10 had concluded otherwise, the resolutions of both Chambers would have been reviewed by the Plenary Chamber, where all of the Chambers would have voted on the result.[1129]

581. *Fourth*, there is an obvious hole in Claimant's theory that Ms. Olano conspired to (i) appoint her own advisor to Chamber No. 1 so that she could ghost-write the first draft of the resolution against SMCV, (ii) decide the 2008 Royalty Case against SMCV, and (iii) decide it before SMCV's other cases so that subsequent Chambers would be persuaded also to reject SMCV's other challenges. Why would Ms. Olano go to the lengths of which Claimant accuses

[1123] Exhibit CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET).

[1124] *See* Claimant's Reply at para. 166(d).

[1125] *See* Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 12.

[1126] *See* Exhibit CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET).

[1127] *See* Exhibit RWS-15, Sarmiento Statement at para. 14.

[1128] *See* Exhibit RWS-15, Sarmiento Statement at para. 16.

[1129] *See* Exhibit RWS-12, Second Olano Statement at para. 27.

her—let alone to any lengths—in order to harm SMCV? Claimant does not even suggest a motive for Ms. Olano to violate procedure and to contrive to harm SMCV. There simply is none.[1130]

582. The closest Claimant comes to answering this question is in the statement of Claimant's witness Mr. Estrada, an ex-employee of the Tax Tribunal, who puts forth a far-fetched theory that SMCV was caught up in Ms. Olano's general campaign "to decide high-value cases in favor of SUNAT in order to maximize the funds available to pay [performance] bonuses."[1131] Mr. Estrada's theory has no merit, including because: (i) performance bonuses for *vocales* were never implemented, as he concedes,[1132] nor does Ms. Olano receive any bonuses;[1133] (ii) the budget of the Tax Tribunal is not determined by tax collections resulting from its decisions, but rather it is set by MEF, in accordance with the government's fiscal priorities; [1134] and (iii) most tellingly, as Ms. Olano explained in her first witness statement, the statistics of Tax Tribunal decisions show that "the percentage of annulling judgments (those that rule in favor of the taxpayer) were greater than confirmatory judgments (those that rule in favor of SUNAT) in each year from 2011 to 2019 and in 2021 in the case of major disputes."[1135]

2. The Chambers of the Tax Tribunal Properly Deliberated the 2006-2007, 2009, and 2010 Royalty Cases

583. Claimant alleges that the Chambers that decided the 2006-2007, 2009, and 2010 Royalty Cases disregarded their duty to independently consider and decide each of those cases because they adopted, in whole or in part, the text of the 2008 Royalty Case resolution.[1136] Claimant's allegation is without merit. As discussed below, the similarity in the texts of the resolutions does not mean that the Chambers failed to analyze the cases before issuing those resolutions.

[1130] *See* Exhibit RWS-12, Second Olano Statement at para. 24.

[1131] Exhibit CWS-17, Second Estrada Statement at para. 18.

[1132] *See* Exhibit CWS-17, Second Estrada Statement at para. 15 ("Although the MEF never ended up implementing the bonuses, the practice of prioritizing high-value cases became ingrained within the Tax Tribunal").

[1133] *See* Exhibit RWS-12, Second Olano Statement at para. 63.

[1134] *See* Exhibit RWS-12, Second Olano Statement at paras. 61-62.

[1135] Exhibit RWS-5, First Olano Statement at para. 40, and *see also id.* at Annex D.

[1136] *See* Claimant's Reply at paras. 168, 172.

a. Chamber No. 10 Properly Deliberated the 2006-2007 Royalty Case

584. Claimant's (incorrect) assumption that Chamber No. 10 abdicated its duty to deliberate independently over the 2006-2007 Royalty Case is based on three things: (i) the level of similarity between the text of the resolution of the 2008 Royalty Case and that of the 2006-2007 Royalty Case;[1137] (ii) certain communications between Ms. Zuñiga, the *vocal ponente* of Chamber No. 1, Ms. Olano, and Mr. Moreano of Chamber No. 10 around the time that Chamber No. 1 issued the 2008 Royalty Case decision;[1138] and (iii) the absence of a law clerk's initials on Chamber No. 10's resolution in the 2006-2007 Royalty Case.[1139] None of these things means that Chamber No. 10 did not deliberate before it issued its resolution in the 2006-2007 Royalty Case. As discussed below, Chamber No. 10's deliberation over the 2006-2007 Royalty Case was thorough, independent, and provided due process to SMCV.

585. *First*, one of the *vocales* from Chamber No. 10 who decided the 2006-2007 Royalty Case, Mr. Sarmiento, attests in his witness statement that his Chamber did indeed analyze and discuss the case before deciding the outcome.[1140] That alone is sufficient to put an end to the dispute on this point. Nevertheless, there are several other points that also refute Claimant's allegations.

586. *Second*, the similarity between the 2006-2007 Royalty Case and 2008 Royalty Case resolutions is entirely unremarkable. As Respondent explained in its Counter-Memorial, for the sake of preserving consistency, it is expected that the Tax Tribunal will use similar language in decisions that involve the same issues and the same parties, such as the 2008 and 2006-2007 Royalty Cases.[1141] *Vocal* Sarmiento and President Olano confirm that it is not unusual for Chambers to adopt common language when deciding similar or related cases, especially if the cases involve the same taxpayer and the same or similar taxable events.[1142]

[1137] *See* Claimant's Reply at para. 168(a).

[1138] *See* Claimant's Reply at para. 168(b).

[1139] *See* Claimant's Reply at para. 167(d).

[1140] *See* Exhibit RWS-15, Sarmiento Statement at paras. 10-11, 16. The session minutes of Chamber No. 10 confirm Mr. Sarmiento's testimony and prove that Chamber No. 10 discussed and resolved the 2006-2007 Royalty Case in its session of May 30, 2013. *See* Exhibit RE-195, Chamber No. 10, Deliberation Session Minutes No. 0000070458, May 30, 2013.

[1141] *See* Respondent's Counter-Memorial at para. 708.

[1142] *See* Exhibit RWS-15, Sarmiento Statement at para. 16; Exhibit RWS-12, Second Olano Statement at paras. 27-28. *See also*, *e.g.*, Exhibit RE-250, Tax Tribunal, Resolution No. 12229-4-2009, November 17, 2009; Exhibit RE-251, Tax Tribunal, Resolution No. 00196-4-2010, January 7, 2010; Exhibit RE-252, Tax Tribunal, Resolution No.

587. *Third*, it is undisputed that Mr. Cayo (the *vocal ponente* of Chamber No. 10) had the 2006-2007 Royalty Case file in hand for more than a year before the Chamber decided the case, and thus, he (like the other members of the Chamber) had ample opportunity to review the case. In addition, Chamber No. 10 held a hearing (*audiencia de informe oral)* in which it heard the arguments of both SMCV and SUNAT in the 2006-2007 Royalty Case, giving the Chamber a further opportunity of its own to assess the case.[1143]

588. *Fourth*, the emails exchanged between Ms. Zuñiga of Chamber No. 1, Ms. Olano, and Mr. Moreano of Chamber No. 10 around the time that Chamber No. 1 issued its resolution in the 2008 Royalty Case do not support Claimant's assumption that Chamber No. 10 did not properly deliberate. Before Mr. Moreano complained to Ms. Olano regarding the lack of coordination between Chamber No. 1 and Chamber No. 10 in the email discussed above, Ms. Zuniga of Chamber No. 1 had in fact coordinated orally with Mr. Cayo (*vocal ponente* from Chamber No. 10) regarding the Chambers' parallel cases.[1144] Ms. Zuniga informed Ms. Olano of that coordination in an email, in which she indicated that she "spoke with Luis Cayo [from Chamber No. 10] before the session, [and that] <u>they were in agreement to confirm.</u>"[1145] Claimant asserts that Ms. Zuniga's email suggests that Chamber No. 1 had instructed Chamber No. 10 how to decide the 2006-2007 Case, but Claimant presents no support for its interpretation. The more logical interpretation of Ms. Zuniga's email is that the Chambers coordinated verbally, *i.e.*, the Chambers both shared their opinions on their respective cases and learned that their opinions were consistent. Mr. Cayo must not have informed Mr. Moreano about that communication at the time Mr. Moreano wrote the email complaining to Ms. Olano. At any rate, nothing about this exchange between *vocales* and the President was inappropriate or suggestive of a lack of proper deliberation on the part of Chamber No. 10.

01289-9-2011, January 25, 2011; Exhibit RE-253, Tax Tribunal, Resolution No. 03873-3-2017, May 5, 2017; Exhibit RE-254, Tax Tribunal, Resolution No. 09100-10-2017, October 12, 2017. SMCV itself requested the consolidation of the 2008 Case and the 2006-2007 Case because they were identical in all aspects other than the date of the collection period. *See* Exhibit RE-211, SMCV's Request for Consolidation of Proceedings, May 24, 2013 (stamped on May 27, 2013), at p. 2.

[1143] *See* Exhibit CE-79, Evidence of Oral Report No. 0286-2013-EF/TF, April 5, 2013.

[1144] *See* Exhibit CE-652, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 8:58 AM PET), p. 2 (of PDF).

[1145] Exhibit CE-652, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 8:58 AM PET), at p. 3 ("*Según conversé con Luis Cayo antes de la sesión, <u>ellos estaban de acuerdo con confirmar</u>. . . .*") (emphasis added). *See also* Respondent's Counter-Memorial at paras. 709-10.

589. *Fifth*, the absence of a law clerk's initials at the end of a Chamber's resolution is not indicative of an absence of deliberation, contrary to Claimant's allegation.[1146] Some Chambers' decisions include the drafting law clerk's initials, others do not.[1147] Even so, while Mr. Sarmiento does not recall whether a law clerk prepared the first draft of the 2006-2007 Royalty Case resolution, he testifies that he would not be surprised if *vocal ponente* Cayo wrote the draft resolution without the assistance of a law clerk. According to Mr. Sarmiento, it is not uncommon for *vocales* to write draft resolutions without the assistance of a law clerk, particularly if the resolution is short or largely repeats a previous resolution by another Chamber that decided the same issue for the same taxpayer.[1148] The Chamber No. 10 *vocales* reviewed the 2006-2007 Royalty Case file and the resolution of Chamber No. 1 on the parallel 2008 Royalty Case and agreed with Chamber No. 1's conclusion. It was thus appropriate for Chamber No. 10 to employ much of the same language from Chamber No. 1's resolution. Doing so would ensure consistency between the resolutions. Given that there was no need to draft the resolution from scratch, it would make sense—and be entirely proper—if *vocal ponente* Cayo did not see a need to use a law clerk for the first draft of the 2006-2007 Royalty Case resolution.[1149]

590. *Finally*, Claimant never argued in any of its challenges to the 2006-2007 Royalty Case before the administrative courts that Chamber No. 10's resolution was somehow invalid because of an alleged lack of deliberation.[1150] The fact that Claimant raises this argument only now, in this arbitration, suggests either that Claimant did not believe that such an argument was grounds for a challenge under Peruvian law, or that Claimant invented this argument only after it lost its appeal before the administrative courts. In either scenario, Claimant's newly invented argument is unconvincing.

b. Chambers Nos. 2 and 1 Properly Deliberated the 2009 and the 2010-2011 Royalty Cases

591. Claimant makes the same allegations—also unconvincingly—about the 2009 Royalty Case and the 2010-2011 Royalty Case.[1151] In particular, Claimant alleges that there is

[1146] *See* Claimant's Reply at para. 168(d).

[1147] *See* Exhibit RWS-15, Sarmiento Statement at para. 17; Exhibit RWS-12, Second Olano Statement at para. 29.

[1148] *See* Exhibit RWS-15, Sarmiento Statement at para. 18.

[1149] *See* Exhibit RWS-15, Sarmiento Statement at para. 18.

[1150] *See* Exhibit CE-98, SMCV Administrative Court Appeal of the Tax Tribunal's Decision, 2006/07 Royalty Assessment, September 27, 2013, at paras. 7.18-7.24; Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016.

[1151] *See* Claimant's Reply at para. 172.

no evidence of deliberation by the Chambers in the relevant resolutions, which mirror the wording of portions of the 2008 Royalty Case resolution and which were both decided against SMCV. Again, Claimant's allegations are mere speculation, and Claimant has failed to establish that the Chambers did not analyze the cases. To the contrary, the evidence indicates that both Chambers did deliberate. In both Royalty Cases, the respective deliberation minutes suggest that the Chambers discussed the Cases before issuing their resolutions.[1152]

3. The Tax Tribunal Did Not Impair SMCV's Due Process Rights When It Allowed Mr. Mejía Ninacondor to Participate in Adjudicating SMCV's Challenge to the 2010-2011 Royalty Assessment

592. Claimant alleges that the Tax Tribunal violated SMCV's due process rights when it allowed Mr. Mejía Ninacondor to participate in the 2010-2011 Royalty Case as a *vocal* of Chamber No. 1, because Mr. Mejía Ninacondor was allegedly not impartial due to his previous employment at SUNAT.[1153] To recall, SMCV had asked the Tax Tribunal to recuse Mr. Mejía Ninacondor from participating in the adjudication of the 2010-2011 Royalty Case, because Mr. Mejía Ninacondor had previously worked at SUNAT in the same division that originally assessed royalties against SMCV for 2010-2011.

593. The Tax Tribunal considered SMCV's arguments and dismissed its recusal request. It reasoned that Mr. Mejía Ninacondor's previous activities at SUNAT did not fall under the conflict-of-interest scenario established in Article 97(5) of Law 27444, given that SUNAT was not an "administered party" (*administrado*) nor a "third part[y] directly involved in the matter."[1154] In addition, the Tax Tribunal concluded that there were no reasons to disturb Mr. Mejía Ninacondor's assignment at the Tax Tribunal, given that he had disclosed his prior role at SUNAT and confirmed that he did not participate in the 2010-2011 Royalty Assessment while in that position.[1155] Presumably because SMCV did not get the outcome it wanted from its

[1152] *See* Exhibit RE-212, Chamber No. 2, Deliberation Session Minutes No. 0000090057, August 15 2018; Exhibit RE-213, Chamber No. 1, Deliberation Session Minutes No. 0000090110, August 28, 2018.

[1153] *See* Claimant's Reply at paras. 169-70. *See also* Claimant's Memorial at para. 244.

[1154] Exhibit CA-231, Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS, at Art. 97. Articles 97(5) and (6) of the General Administrative Procedures Law. Article 97(5) identifies when someone should be removed: "[w]hen he/she has or has had in the last twelve (12) months a relationship of service or subordination with any of the subjects [*administrados*] or third parties directly involved in the matter, or if he/she had a business agreement with any of the parties, even when it does not materialize later." Article 97(6) provides that "[w]hen reasons arise that disturb the function of the authority, the latter, for the sake of decorum, may recuse himself/herself by means of a duly substantiated resolution." *See also* Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 22, 2018, at pp. 11-12.

[1155] *See* Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018, at pp. 11-12.

challenge to the 2010-2011 Royalty Assessment, Claimant is now raising new arguments in this arbitration and attempting to repackage the Tax Tribunal's rejection of SMCV's recusal request as a violation of Perú's international treaty obligations. Claimant's attempt fails for the following reasons.

594. *First*, the Tax Tribunal decided to dismiss SMCV's recusal request on the basis of its review of the evidence before it.[1156] Ms. Olano stated in her first witness statement that the Plenary Chamber determined that Mr. Mejía Ninacondor did not directly participate in the 2006-2007 Royalty Case nor in the 2010-2011 Royalty Case while he was employed at SUNAT, and so there was no need to recuse him from working on cases related to SMCV.[1157] In its Reply, Claimant alleges that the record contradicts Ms. Olano's statement, because the Plenary Chamber's decision makes no mention of whether Mr. Mejía Ninacondor participated in the 2006-2007 Royalty Case.[1158] Ms. Olano's witness statement simply erred when it referred to both the 2006-2007 and 2010-2011 Royalty Cases, because it should have referred only to the 2010-2011 Royalty Case, as that was the only case on the basis of which SMCV challenged Mr. Mejía Ninacondor's impartiality. SMCV did not raise an allegation regarding Mr. Mejía Ninacondor's alleged participation in the 2006-2007 Royalty Case before the Tax Tribunal.[1159] SMCV's allegations regarding Mr. Mejía Ninacondor's supposed participation in the 2006-2007 Royalty Case are new and presented for the first time in this arbitration. Thus, it is no surprise that the Plenary Chamber decision does not discuss an allegation that was never even raised before it. Ms. Olano has clarified in her second witness statement that SMCV's recusal request was limited to Mr. Mejía Ninacondor's alleged participation in the 2010-2011 Royalty Assessments, and that the Plenary Chamber dismissed the complaint on that basis.[1160]

595. *Second*, while it is not this Tribunal's place to re-litigate the Tax Tribunal's rejection of SMCV's recusal request, Respondent will nevertheless address Claimant's new argument that Mr. Mejía Ninacondor was biased because he violated a duty to disclose some alleged participation at SUNAT in the 2006-2007 Royalty Case.[1161] The simplest answer is that there was nothing to disclose, because Mr. Mejía Ninacondor apparently did not participate in

[1156] *See* Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018.

[1157] *See* Exhibit RWS-5, First Olano Statement at paras. 74-77.

[1158] *See* Claimant's Reply at para. 170(b).

[1159] *See* Exhibit CE-180, SMCV Submission Requesting Removal of Judge Ninacondor, June 20, 2018.

[1160] *See* Exhibit RWS-12, Second Olano Statement at paras. 35-36.

[1161] *See* Claimant's Reply at para. 170(b).

SUNAT's defense of the 2006-2007 Royalty Assessments before the Peruvian courts, as Claimant alleges.[1162] His name was on a list of possible representatives from SUNAT who could appear before the courts (*apoderados*) in the 2006-2007 Royalty Case, but there is no evidence that he ever actually acted in that capacity in those proceedings.[1163] Given the nature of his (non-)"participation" in the 2006-2007 Royalty Case, there was no requirement for Mr. Mejía Ninacondor to make a disclosure. No disclosure is required if the decision-maker in question does not meet the grounds for recusal. There might have been grounds for recusal if the challenged *vocal* (i) had been related to any of SMCV's officers or its legal representatives; (ii) had participated as an advisor, expert, or witness in the same administrative proceeding; (iii) had expressed his/her opinion in a way that could be understood as having taken a position on the matter under review; (iv) had worked within the past 12 months for SMCV or a third-party with an interest in the outcome of the case; or (v) had a close personal friendship or enmity with SMCV's officials.[1164] Mr. Mejía Ninacondor did not meet any of these grounds with respect to the 2006-2007 Royalty Case, nor any of SMCV's other cases.[1165]

596. *Third*, while again insisting that it is not for this Tribunal to re-decide the substance of SMCV's recusal request against Mr. Mejía Ninacondor, in order to address all of Claimant's allegations, Respondent will discuss a new recusal ground introduced in September 2018 by Legislative Decree No. 1421. That Decree amended Article 100 of the Tax Code to provide that *vocales* must abstain from participating in proceedings if they have "directly and actively" participated in the underlying SUNAT proceedings at issue before the Tax Tribunal. Claimant alleges that Mr. Mejía Ninacondor meets this new recusal ground and moreover that Legislative Decree No. 1421 was promulgated in direct response to Mr. Mejía Ninacondor's circumstances.[1166] Claimant is wrong on the facts.

597. Legislative Decree No. 1421 extended the application of Article 97(5) of the Single Unified Text of the Law of General Administrative Procedure, Supreme Decree No. 006-2017-JUS (identifying grounds for recusal) to *vocales* who are or have been employed at

[1162] *See* Claimant's Reply at para. 170.

[1163] *See* Exhibit CE-694, Contentious Administrative Court, Entry of Appearances (2006-2007 Royalty Case), January 3, 2017, at p. 3.

[1164] *See* Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Art. 97.

[1165] *See* Exhibit RWS-12, Second Olano Statement at paras. 36-38; Exhibit RER-8, Second Bravo and Picón Report at paras. 236-39.

[1166] *See* Claimant's Reply at para. 170(c).

SUNAT, provided that their participation in the proceedings under review was "direct and active."[1167] Mr. Mejía Ninacondor did not meet this threshold under the amended law because his "participation" in the 2006-2007 Case (*i.e.*, being on a list of *apoderados*) was neither direct nor active. Hence, the decision of the Tax Tribunal to reject SMCV's recusal request would have been the same under the amended law as it was under the original law, as Ms. Olano agrees.[1168]

598. Also, there is no evidence to suggest that the amendment to Article 100 of the Tax Code was proposed in response to the (non)recusal of Mr. Mejía Ninacondor. Claimant offers only its own imaginings and fails to present any evidentiary support for this allegation. Thus, the new recusal ground would not apply to Mr. Mejía Ninacondor, and the introduction of that amendment was unrelated to Mr. Mejia's case.

599. *Fourth*, contrary to Claimant's allegations,[1169] Ms. Olano's draft of the Plenary Chamber resolution rejecting SMCV's recusal request was procedurally sound. There is nothing irregular in the draft resolution that Ms. Olano prepared for the Plenary Chamber as *vocal ponente* of the Plenary Chamber. In all requests for recusal that are brought before the Plenary Chamber, the *vocal ponente* prepares a draft of the resolution for consideration by the Plenary Chamber.[1170] In some cases, that draft includes sample language describing a possible vote outcome. For example, Ms. Olano's draft states, "Subsequently, the petition for recusal was deliberated[,] and it was unanimously agreed that the petition for recusal that was filed was inadmissible."[1171] Ms. Olano did not know that the vote would be unanimous; the draft language was merely a placeholder that in no way influences that outcome, as Claimant alleges.[1172] Nothing in the draft resolution prevented *vocales* from voting differently than was anticipated in the draft. Indeed, the vote on SMCV's recusal request was not unanimous; Chamber No. 5

[1167] Exhibit CA-238, Amendments to the Tax Code, Legislative Decree No. 1421, September 12, 2018, at Art. 3.

[1168] *See* Exhibit RWS-12, Second Olano Statement at paras. 35-38.

[1169] *See* Claimant's Reply at para. 171.

[1170] *See* Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 12 ("h) Preside over Plenary Council meetings and issue, or not issue, the tie-breaking vote involving matters submitted for the consideration of that Chamber…") (emphasis added). *See also* Exhibit RWS-5, First Olano Statement at paras. 69-71.

[1171] Exhibit CE-716, Acta de Sala Plena – Abstencion vs. MN Cerro Verde, attached to Email from Gina Castro Arana to Zoraida Alicia Olano Silva (June 21, 2018, 11:01 AM PET), at p. 4. *See also* Exhibit RWS-12, Second Olano Statement at paras. 32-33.

[1172] *See* Claimant's Reply at para 171.

dissented—and so the draft resolution's language had to be changed.[1173] The final resolution reflects that change from the initial draft resolution.[1174]

4. The Tax Tribunal Acted Reasonably in Assigning Ms. Villanueva to Participate in Adjudicating SMCV's Challenge to the Q4 2011 Royalty Assessment Case

600. Claimant alleges that Perú violated its treaty obligations by allowing Ms. Villanueva to act as a *vocal* to decide SMCV's Q4 2011 Royalty Case. Importantly, Claimant does not object to Ms. Villanueva's participation in the Q4 2011 Royalty Case merely because Ms. Villanueva previously assisted Chamber No. 1 on the 2008 Royalty Case, which SMCV also lost. Claimant rather alleges that Ms. Villanueva should have been disqualified from serving on the Q4 2011 Royalty Case, because her involvement in the 2008 Royalty Case was allegedly improper.[1175] Claimant's argument is without merit.

601. *First* and foremost, as Respondent has already demonstrated above, there was nothing improper about Ms. Villanueva providing assistance to Chamber No. 1 when it decided the 2008 Royalty Case. Thus, if improper participation in a previous case were grounds for recusal (as Claimant contends), there are no grounds for Ms. Villanueva to need to recuse herself.

602. *Second*, Claimant failed to challenge Ms. Villanueva's appointment as *vocal ponente* of the Q4 2011 Royalty Case before the Tax Tribunal, and is only raising its complaints now as part of a last-ditch attempt to impugn the Tax Tribunal's consistent application of Perú's interpretation of the scope of stability guarantees. Claimant contends it could not have challenged Ms. Villanueva in the Q4 2011 Royalty Case, because it became aware of her (allegedly improper) role in the 2008 Royalty Case only after the Q4 2011 Royalty Case had already been decided.[1176] Claimant's contention is contradicted by Claimant's own arguments regarding Ms. Villanueva's assistance in the 2008 Royalty Case. Even if Ms. Villanueva's participation had been inappropriate (it was not), SMCV would have known about her involvement in the case from the moment it was served with the resolution that decided the 2008 Royalty Case in 2013.[1177] That resolution included Ms. Villanueva's initials at the end of the

[1173] *See* Exhibit RE-196, Email from Gabriela Márquez Pacheco to Zoraida Olano, "Vote," June 21, 2018.

[1174] *See* Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018.

[1175] *See* Claimant's Reply at para. 173.

[1176] *See* Claimant's Reply at para. 173.

[1177] *See infra* at Resubmitted Annex A.

resolution.[1178] Claimant is well aware of the significance of an individual's initials at the end of a resolution, as Claimant places undue significance on the absence of a clerk's initials in the 2006-2007 Case.

* * *

603. In sum, SMCV received due process from the Tax Tribunal in SMCV's challenges to SUNAT's Royalty Assessments on the ore processed in the Concentrator Plant. Claimant's allegations to the contrary about a nefarious scheme orchestrated by Ms. Olano to rule against SMCV are frankly absurd. The soundness and legality of the Tax Tribunal's resolution of SMCV's challenges were confirmed by the Peruvian courts, including the Supreme Court of Perú, with respect to the 2008 Royalty Case. The courts also confirmed the appropriateness of the Tax Tribunal's denial of SMCV's request for a waiver of penalties and interest in that case. In the following Section I, Respondent discusses the appropriateness of Perú's assessment of penalties and interest on SMCV's Royalty and Tax Assessments that SMCV incurred for failing to pay its assessments. Then in Section J, Respondent explains that the penalties and interest that SMCV incurred for failing to provide information to SUNAT to distinguish SMCV's stabilized activities from its non-stabilized activities were also assessed in accordance with Peruvian law.

I. PERÚ ASSESSED PENALTIES AND INTEREST WITH RESPECT TO SMCV'S ROYALTY AND TAX ASSESSMENTS IN ACCORDANCE WITH PERUVIAN LAW

604. SMCV did not pay certain Royalty and Tax Assessments when they came due. SMCV had the option to pay the Assessments under protest and then contest them; had it done so, penalties and interest would not have accrued or would have stopped accruing (and, if SMCV's challenges had succeeded, the payments would have been refunded, with interest). Instead, however, SMCV elected not to pay the Assessments when they came due and to pursue its legal challenges while the Assessments remained unpaid. Entirely predictably, SUNAT assessed penalties and interest in the face of SMCV's failure to make payment. Now, before this Tribunal, Claimant is presenting the same arguments against the Royalty and Tax Assessments that failed (repeatedly) before in Peruvian administrative and judicial proceedings, as explained in Section II.A above. Claimant is also complaining about the penalties and interest that SMCV

[1178] *See* Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013 (2008 Royalty Assessment), May 21, 2013 (notified to SMCV on June 20, 2013), at p. 24.

incurred on those Assessments as a result of SMCV's deliberate choice not to pay them.[1179] The interest and penalties imposed on SMCV are of its own making, and, accordingly, the Tribunal should reject Claimant's complaints about them before this Tribunal.

605. In the sections that follow, Respondent rebuts Claimant's attempt to blame Perú for SMCV's own choices. First, Respondent reiterates that the penalties and interest that SMCV incurred on its unpaid assessments were appropriate and the result of SMCV's own actions (Section 1). Second, Respondent explains that the decisions issued by SUNAT, the Tax Tribunal, and the Peruvian courts that denied SMCV's requests to waive penalties and interest on its Royalty and Tax Assessments were consistent with Peruvian law (Section 2).

1. SMCV Was Responsible for the Amount of Penalties and Interest that It Incurred on Its Unpaid Assessments

606. In addition to arguing that SMCV should not have had to pay any penalties and interest on its unpaid assessments, Claimant alleges that the amount of penalties and interest that SMCV incurred was Perú's fault rather than SMCV's. In particular, Claimant contends (i) that SMCV did not mitigate damages by paying its Royalty and Tax Assessments prior to challenging them, because the government had made it believe that it did not owe royalties due to its Stabilization Agreement, and because it expected to receive a fair hearing when it did challenge the assessments; (ii) that SUNAT and the Tax Tribunal applied the wrong interest rate to the 2009 and 2010-2011 Royalty Assessments; and (iii) that the Tax Tribunal improperly refused to recalculate the interest rate on those assessments.[1180] Claimant is incorrect on all counts.

607. *First*, it is obvious that SMCV should have mitigated penalties and interest by paying its assessments and then challenging them, if it so desired. SMCV could have done so without risking any harm, because if it were vindicated and the assessments overturned, it would get its money back with interest. The fact that SMCV chose not to mitigate its losses is not the fault of Perú. Claimant's assertion that the government allegedly agreed with, or, at least, did not contradict, SMCV's interpretation of the Stabilization Agreement is both incorrect as a factual matter, and irrelevant as a defense to its failure to pay the assessments due. Although Claimant denies in its Reply that SMCV knew as of June 2005 that the government did not agree with SMCV's interpretation of the 1998 Stabilization Agreement,[1181] there is no question that SMCV

[1179] *See* Claimant's Reply at paras. 175-201.

[1180] *See* Claimant's Reply at paras. 197-201.

[1181] *See* Claimant's Reply at para. 198(a).

knew the government's position on June 2006 when MINEM's officials clearly stated during roundtable discussions with SMCV that SMCV's sulfide project was subject to the payment of royalties (in any case, as explained in Section E.II.5, SMCV knew or should have known, at a minimum by March 2005, during a meeting of PDAC between Mr. Harry Conger and Mr. Oswaldo Tovar, that it was obliged to pay royalties for the ore processed through the Concentrator Plant).[1182] Thus, before any assessments were due, SMCV knew the government's position that SMCV would have to pay royalties on sales from its Concentrator Plant.

608. Claimant also asserts in its Reply that not only was SMCV not required under Peruvian law to pay assessments and penalties before challenging them, but that it is not common practice to do so.[1183] Whether or not it is common practice for entities to pay assessments and penalties before challenging them—even if true (Claimant has not provided any evidence that that is the case)—is beside the point. It is something that SMCV could have done to avoid the damages that Claimant now claims, but SMCV chose to take its chances instead. That choice, in turn, meant that SMCV had to pay far more in penalties and interest than it would otherwise have been obligated to pay. It is no excuse to argue, as Claimant does, that the government may take a long time to issue reimbursements or refuse to do so altogether.[1184] Given the reasonable possibility of failing in its challenges and the obvious desirability of avoiding significant penalties and interest, SMCV should have paid the amounts due (under protest) before challenging the assessments. Perú cannot and should not be responsible for SMCV's failure to pursue a known, clear, and risk-free means of mitigating its own damages.

609. Claimant's assertion that it did mitigate some of its damages is of no help to it. According to Claimant, SMCV paid several Income Tax and GST Assessments upfront and entered into deferral and installment plants for almost all of the Royalty Assessments and for all of the SMT Assessments.[1185] The fact that SMCV may have entered into deferral and installment plans to pay some of its assessments, does not excuse SMCV's failure to pay all of the assessments it owed when they came due, which would have avoided the imposition of penalties and interest. Moreover, SMCV's payment of some assessments shows that SMCV knew the financial benefits of paying assessments when due and had plenty of opportunities to

[1182] *See supra* at Section II.E.

[1183] *See* Claimant's Reply at para. 198(b).

[1184] *See* Claimant's Reply at para. 198(b).

[1185] *See* Claimant's Reply at paras. 198(c), 311(b)-(d).

do so, yet it consciously chose not to apply the same approach to mitigate the penalties and interest for its other assessments. Claimant only has SMCV to blame for the quantum of penalties and interest about which Claimant complains in this arbitration.

610. Also, contrary to Claimant's insinuation that SMCV did not receive a fair hearing from the Tax Tribunal when SMCV challenged the Royalty and Tax Assessments,[1186] SMCV received due process from the Tax Tribunal (as discussed in Section II.H above) and from the courts (as discussed in detail in Section II.A above).

611. *Second*, as to Claimant's complaint about the interest rate applied to SMCV's arrears, SUNAT and the Tax Tribunal properly applied the interest rate required by Peruvian law to the 2009 and 2010-2011 Royalty Assessments. As Respondent's tax experts explained in their first expert report, SUNAT and the Tax Tribunal applied the 14.4 percent statutory interest rate because Article 7.3 of the Royalty Law Regulations, the regulatory framework that governs royalty assessments specifically, expressly requires the application of the statutory interest rate to unpaid royalty assessments.[1187] Claimant insists that the Tax Tribunal nevertheless should have applied instead the Consumer Price Index ("CPI") rate provided in Article 33 of the Tax Code, which was around 2 percent, because Perú's Constitutional Court established in 2005 that all assessments that were unpaid for more than 12 months were subject to the CPI rate—and the government's alleged "extensive delays" in deciding SMCV's challenges extended the length that the assessments remained unpaid.[1188] Claimant argues that the CPI rule applies to royalty proceedings because they are subject to the same procedural rules as tax proceedings.[1189] Claimant is mistaken.

612. Article 33 of the Tax Code applies to tax assessments, not royalty assessments, as Perú's experts, Drs. Bravo and Picón, explain.[1190] The distinction between royalties and taxes is well established under Peruvian law, where royalties are subject to a set of regulations different from those governing taxes. SUNAT and the Tax Tribunal have consistently applied the

[1186] *See* Claimant's Reply at paras. 163-74.

[1187] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 130-35; *see also* Exhibit CA-7, Royalty Law Regulations, Supreme Decree No. 157-2004-EF, November 15, 2005, Art. 7.3 ("The amount of the royalty not paid by the established deadline will bear a monthly interest, which will be equivalent to the Statutory Interest Rate for tax obligations administered or collected by SUNAT.").

[1188] Claimant's Reply at para. 200.

[1189] Claimant's Reply at para. 200.

[1190] Exhibit RER-3, First Bravo and Picón Report at paras. 129, 134-35; Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 33.

statutory interest rate to royalty assessments issued to mining companies in Perú.[1191] Claimant nevertheless alleges that the Constitutional Court established that taxpayers have the right to have any case before the Tax Tribunal, including royalty assessments, decided within a reasonable time and that the CPI rate should apply if that time exceeded 12 months.[1192]

613. As Drs. Bravo and Picón explain in their second expert report, Claimant misinterprets the Constitutional Court decisions. The Constitutional Court did not expressly decide that taxpayers have the right to have any case before the Tax Tribunal decided within a reasonable time and that CPI would apply in all cases (including royalties) if that time exceeded 12 months.[1193] As noted by Drs. Bravo and Picón, the Court decided that, in those specific instances, SUNAT should apply Article 33 to the specific tax assessments challenged by the taxpayers, in order to avoid additional economic loss due to the accrual of interest. Additionally, Drs. Bravo and Picón point out that the decisions cited by Claimant are distinguishable from SMCV's case, as they only discussed challenges to tax assessments and not challenges to royalties. Finally, those decisions arose from constitutional *amparo* complaints, which produce only *inter partes* effects and, therefore, could not affect or influence the outcome of third-party cases like SMCV's.[1194] Thus, SUNAT and the Tax Tribunal applied the interest rate prescribed by Peruvian law to SMCV's 2009 and 2010-2011 Royalty Assessments.

614. *Third*, the Tax Tribunal's denial of SMCV's request to recalculate interest with respect to the 2009 and 2010-2011 Royalty Assessments was fair.[1195] As Perú's experts, Drs. Bravo and Picón, explain, by the time that SMCV requested recalculation of the interest, the collection proceedings for the 2009 and 2010-2011 Royalty Assessments had ended with SMCV entering into a deferral and payment agreement with SUNAT.[1196] As such, the Tax Tribunal no longer had competence to make any determination regarding SMCV's requests.[1197] In its decision, the Tax Tribunal explained that it was obligated to follow a precedent established in March 2006 that required a claim regarding a SUNAT resolution to be filed while the collection

[1191] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 189.

[1192] *See* Claimant's Reply at para. 200.

[1193] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 191.

[1194] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 191-92.

[1195] *See* Respondent's Counter-Memorial at paras. 341-43.

[1196] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 136-38.

[1197] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 137-38.

proceeding was ongoing.[1198] Claimant alleges that that precedent would unfairly require a taxpayer to undergo collection proceedings in order to challenge a SUNAT resolution and that SMCV's solution to that inequity, *i.e.*, to enter into the deferral and installment plans under protest, should not have resulted in the Tax Tribunal refusing to consider SMCV's recalculation request.[1199] As Drs. Bravo and Picón explain, that precedent does not unfairly require a taxpayer to undergo collection proceedings to challenge a SUNAT resolution—the taxpayer may be able to challenge those resolutions in the appeal proceedings before the Tax Tribunal;[1200] however, SMCV did not request the Tax Tribunal to recalculate interest during the appeal proceedings; it only raised this request during the collection proceedings. Once those proceedings ended as a result of SMCV entering into deferral and payment agreements, the Tax Tribunal could no longer rule on those requests.[1201] Again, Claimant cannot be heard to blame the Tax Tribunal for a situation that was entirely of SMCV's own making.

615. *Fourth*, throughout its Reply, Claimant repeats excerpts of statements that one of Respondent's tax experts, Dr. Picón, made in a media interview, as alleged proof that Dr. Picón agrees with Claimant's position in this arbitration. Claimant alleges that Dr. Picón called SUNAT's assessments of SMCV and eight other major companies "absurd" and "generated by poorly interpreted formalities" and not for "alleged tax evasion."[1202] Claimant also asserts that Dr. Picón stated that the penalties and interest accrued by SMCV were due to lengthy delays that were "the fault of the State and not the taxpayer."[1203] These words and phrases that Claimant attributes to Dr. Picón are taken out of context. As Dr. Picón explains in the second expert report of Drs. Bravo and Picón, during that interview, he explained (in general terms) that most of the tax debt owed by companies to SUNAT was due to interest and penalties and not to tax evasion. Dr. Picón goes on to explain that, in any event, he was not referring specifically to the Cerro

[1198] *See* Exhibit CE-213, Tax Tribunal Decision No. 00019-Q-2019 (2009 Royalty Assessment), January 4, 2018 (notified to SMCV on January 11, 2019), at p. 2; Exhibit CE-214, Tax Tribunal Decision No. 00036-Q-2019, January 7, 2019 (notified to SMCV on January 11, 2019), at p. 2. *See also* Claimant's Memorial at Annex A (showing the dates on which the resolutions were notified to SMCV); Respondent's Counter-Memorial at para. 342.

[1199] *See* Claimant's Reply at para. 201(c).

[1200] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 205.

[1201] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 205.

[1202] Claimant's Reply at paras. 8, 176 (*citing* Exhibit CE-1039, Jorge Picón, "Nine Mega SUNAT Trials are Based on Absurd Assessments," *Lampadia*, October 4, 2017).

[1203] Claimant's Reply at para. 176 (*citing* Exhibit CE-1039, Jorge Picón, "Nine Mega SUNAT Trials are Based on Absurd Assessments," *Lampadia*, October 4, 2017).

Verde case.[1204] Rather, he was discussing tax assessments that SUNAT issued to mining companies other than SMCV. Moreover, the only specific case that he discussed with the journalist during the interview was that of Telefónica del Perú S.A.A., where SUNAT issued tax assessments years after the fact based on technicalities. This was not the case with respect to Cerro Verde, where the issues in contention were substantive (*e.g*., application of a stabilization agreement) and not formalistic in nature (*e.g.,* the lack of a proper stamp on certain documents).[1205] The excerpts of Dr. Picón's statements taken out of context do not support Claimant's allegations that SUNAT acted arbitrarily at any point with respect to SMCV.

2. Perú's Denials of SMCV's Requests for Waivers of Penalties and Interest Were Procedurally and Substantively Sound

616. Under Peruvian law (specifically, Articles 92(g) and 170 of the Tax Code), a taxpayer may be able to obtain a waiver of penalties and interest on its non-payment of applicable taxes and royalties in certain circumstances. The text of these provisions in the time period relevant to SMCV's assessments is as follows. Until an amendment in 2016, Article 92(g) of the Tax Code provided that taxpayers could "[r]equest the non-application of interest and penalties in cases of reasonable doubt or dual criteria in accordance with the provisions of Article 170."[1206] In turn, also until an amendment in 2016, Article 170 of the Tax Code provided, in relevant part, that:[1207]

> The assessment of interest or sanctions is inappropriate if:
>
> 1. As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation would have been paid until [the clarification thereof], provided the clarifying provision expressly states that this paragraph is applicable.
>
> To this end, the clarification may be made by means of a Law or provision of a similar rank, a Supreme De[c]ree endorsed by the Ministry of Economy and Finance, a Superintendency Resolution or a provision of a similar rank or a Tax Tribunal resolution as referred to in Article 154.

[1204] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 206-08.

[1205] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 206-08.

[1206] Article 92(g) was amended in 2016 to provide that taxpayers may be able to "[r]equest the non-application of interest and adjustment for inflation based on the Consumer Price Index, if applicable, and of penalties in cases of reasonable doubt or conflicting criteria in accordance with the provisions of Article 170." Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 92(g).

[1207] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 170.

> The interest that it is inappropriate to assess is that accrued from the day following the due date of the tax obligation up until ten (10) business days following the publication of the clarification in the Official Gazette *El Peruano*. Regarding penalties, those relating to offenses originating in the misinterpretation of the provision up until the expiration of the above-mentioned term will not be assessed.
>
> 2. The Tax Administration has had a duplication of criteria in the application of the provision and only with respect to the facts produced, while the previous criterion was in force.

617. Thus, Article 92(g) and Article 170 limit the possibility of a waiver to only two situations, as Drs. Bravo and Picón confirm in their reports.[1208] The first possibility arises under Article 170.1: a taxpayer may be able to obtain a waiver of penalties and interest based on "reasonable doubt," but only under very specific conditions—namely that there is (i) a misinterpretation of a law or regulation as a result of which the underlying assessment would not have been due; (ii) that leads to the government issuing a clarification correcting the misinterpretation and requiring payment, where that clarification expressly states that Article 170.1 of the Tax Code is applicable to it, and the clarification is issued via specified formal means (*i.e.*, a legal provision, a Supreme Decree endorsed by the MEF, a Superintendency Resolution or resolution by a similar authority, or a Tax Tribunal resolution referred to in Article 154 of the Tax Code); and (iii) the clarification is officially published in *El Peruano* (the official gazette in Perú).[1209] The second possibility arises under Article 170.2: a taxpayer may be able to obtain a waiver of penalties and interest if the Tax Administration has interpreted a rule inconsistently by applying two different criteria to the same set of facts.[1210] If neither of these situations is present, then there is no path for a taxpayer to obtain a waiver of penalties and interest under Articles 92(g) or 170 of the Tax Code.[1211]

618. Claimant invokes (only) the first possibility: it claims that SMCV should have been granted waivers of penalties and interest on the 2006-2011 Royalty and Tax Assessments pursuant to the "reasonable doubt" path mentioned in Article 92(g) and specified in Article

[1208] *See* Exhibit RER-3, First Bravo and Picón Report at para. 72; Exhibit RER-8, Second Bravo and Picón Report at para. 114.

[1209] *See* Respondent's Counter-Memorial at para. 724; Exhibit RER-3, First Bravo and Picón Report at para. 73; Exhibit RER-8, Second Bravo and Picón Report at paras. 114-16.

[1210] *See* Exhibit RER-3, First Bravo and Picón Report at para. 72; Exhibit RER-8, Second Bravo and Picón Report at para. 117.

[1211] *See* Exhibit RER-3, First Bravo and Picón Report at para. 74.

170.1.[1212] SMCV did not meet the requirements to obtain relief under Article 170.1, as explained in the following sections. SMCV's efforts to avoid responsibility for the penalties and interest it incurred can be divided into two groups: (i) SMCV's requests to waive penalties and interest on the 2006-2007 and 2008 Royalty Assessments, which the Tax Tribunal and the courts denied on procedural grounds; and (ii) SMCV's requests to waive penalties and interest on the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments,[1213] the 2006-2007 Income Tax Assessment, the 2006-2007 General Sales Tax Assessment, and the Q4 2011-2012 Special Mining Tax Assessment, which SUNAT and the Tax Tribunal denied on substantive grounds.[1214] In both cases, Perú properly denied SMCV's waiver requests.

619. For the first group of requests, SMCV simply filed them too late. The Tax Tribunal confirmed the 2006-2007 and the 2008 Royalty Assessments on sales from SMCV's Concentrator Project in May 2013, thereby concluding the proceedings before the Tax Tribunal.[1215] Only afterwards, SMCV asked—for the first time with respect to those assessments—the Tax Tribunal to waive the penalties and interest on those assessments pursuant to Article 170.1 of the Tax Code.[1216] SMCV claimed that it should be granted a waiver, because

[1212] *See* Claimant's Reply at paras. 179-84. Claimant does not assert that there was duplication of criteria under Article 170.2 that would justify a waiver of SMCV's penalties and interest. *See*, *e.g.*, Exhibit CE-656, SMCV, Letter to the President of Chamber No. 10 (2006/07 Royalty Assessment), June 26, 2013, at pp. 2-3; Exhibit CE-90, SMCV, Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (2008 Royalty Assessment), June 26, 2013, at pp. 2-3.

[1213] *See* Exhibit CE-146, SMCV, Reconsideration Request of SUNAT, 2010/11 Royalty Assessments, May 11, 2016, at pp. 37-39, 68-85; Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016 (notified to SMCV on March 1, 2017), at pp. 22-25; Exhibit CE-175, SMCV Request for Reconsideration (Q4 2011 Royalty Assessments), February 15, 2018, at pp. 56-62; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at pp. 36-40; Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 45-48; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at p. 9; Exhibit CE-215, SUNAT Resolution No. 0150140014560 (2012 Royalty Assessment), January 11, 2019 (notified to SMCV on January 23, 2019), at pp. 37-39; Exhibit CE-220, SUNAT Resolution No. 0150140014816 (2013 Royalty Assessment), May 28, 2019, at pp. 36-38.

[1214] *See* Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 10-11; Exhibit CE-202, Tax Tribunal Resolution No. 08470-2-2018 (2007 Income and General Tax Assessment), October 30, 2018, at pp. 40-41; Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax Assessment), August 22, 2018, at pp. 26-27; Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax Assessment), August 22, 2018 (notified to SMCV on November 19, 2018), at pp. 51-52; Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019 (Q4 2011-2012 Special Mining Tax Assessments), June 20, 2019, at pp. 18-20.

[1215] *See* Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013 (2006/07 Royalty Assessment), May 30, 2013 (notified to SMCV on June 20, 2013), at p. 28; Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013 (2008 Royalty Assessment), May 21, 2013 (notified to SMCV on June 20, 2013), at p. 24.

[1216] *See* Exhibit CE-656, SMCV, Letter to the President of Chamber No. 10 (2006/07 Royalty Assessment), June 26, 2013, at pp. 2-3; Exhibit CE-658, SMCV, Supplemental Brief to Tax Tribunal (2006/07 Royalty Assessment), July 9, 2013; Exhibit CE-90, SMCV, Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (2008

Article 83 of the Mining Law and Article 22 of the Mining Regulations were ambiguous, and thus, there had been "reasonable doubt" as to their correct interpretation and the application of SMCV's 1998 Stabilization Agreement.[1217] The Tax Tribunal denied SMCV's requests, because SMCV had failed to timely raise the issue of a waiver during the proceedings challenging those Assessments either before SUNAT or the Tax Tribunal.[1218]

620. SMCV then challenged the Tax Tribunal's decisions denying the waiver of penalties and interest before the Peruvian courts (in the same court proceedings in which it challenged the underlying assessments). Those challenges also did not succeed. The Contentious Administrative Court (first instance court) and the Superior Court of Lima (appellate court) agreed with the Tax Tribunal, holding that SMCV's waiver requests were filed too late and, thus, could not be considered.[1219] The Supreme Court then confirmed the appellate court's decisions with respect to the 2008 Royalty Assessment.[1220] (With respect to the 2006-2007 Royalty Assessment, SMCV withdrew its appeal before the Supreme Court could take the necessary votes to reach a decision.)

621. For the second category of SMCV's requests, after careful consideration of SMCV's arguments that it should be granted relief from penalties and interest under Article 170.1 of the Tax Code because there was "reasonable doubt" as to the correct interpretation of Article 83 of the Mining Law and Article 22 of the Mining Regulations, SUNAT and then the Tax Tribunal both concluded that a waiver was not available, because the requirements of Article 170.1 of the Tax Code were not met.[1221] In particular, SUNAT and the Tax Tribunal found that

---

Royalty Assessment), June 26, 2013, at pp. 2-5; Exhibit CE-659, SMCV, Supplemental Brief to Tax Tribunal (2008 Royalty Assessment), July 9, 2013.

[1217] *See* Exhibit CE-656, SMCV, Letter to the President of Chamber No. 10 (2006/07 Royalty Assessment), June 26, 2013, at pp. 2-3; Exhibit CE-658, SMCV, Supplemental Brief to Tax Tribunal (2006/07 Royalty Assessment), July 9, 2013; Exhibit CE-90, SMCV, Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (2008 Royalty Assessment), June 26, 2013, at pp. 2-5; Exhibit CE-659, SMCV, Supplemental Brief to Tax Tribunal (2008 Royalty Assessment), July 9, 2013.

[1218] *See* Exhibit CE-91, Tax Tribunal Decision No. 11667-10-2013 (2006-2007 Royalty Assessment), July 15, 2013, at pp. 5-6; Exhibit CE-92, Tax Tribunal Decision No. 11669-1-2013 (2008 Royalty Assessment), July 15, 2013, at pp. 4-5.

[1219] *See* Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016, at pp. 29-30, paras. 12.1-12.3; Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at Section Twentieth, p. 28; Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at pp. 14-15.

[1220] *See generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 49.

[1221] *See* Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at pp. 35-36; Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments,

(i) there was no misinterpretation of a relevant law or regulation as required under Article 170.1, because SMCV's challenges with respect to its Royalty and Tax Assessments concerned the interpretation of the 1998 Stabilization Agreement, not the interpretation of a law or regulation; and (ii) no official clarification was ever issued by the government to correct a misinterpretation of a law or regulation, much less was one issued in compliance with the formal requirements set out in Article 170.1.[1222] (SMCV did not challenge these decisions in Peruvian courts, opting instead to proceed to this arbitration.)

622. Despite SMCV having received ample due process and full opportunities to challenge the waiver denials, because it does not like the outcomes of those proceedings, Claimant revisits them in this arbitration. Notably, Claimant relies entirely on the very same arguments under Article 170.1 of the Tax Code that were repeatedly—and appropriately—rejected by multiple Peruvian authorities.[1223] Once again, Claimant apparently hopes that this Tribunal will deem itself more expert in Peruvian tax law and procedure than the Peruvian tax authorities and courts and will reverse all of those bodies' decisions under Article 170.

December 29, 2016 (notified to SMCV on March 1, 2017), at p. 131; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at pp. 36-37; Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 45-48; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at pp. 9-10; Exhibit CE-215, SUNAT Resolution No. 0150140014560 (2012 Royalty Assessment), January 11, 2019 (notified to SMCV on January 23, 2019), at pp. 37-39; Exhibit CE-220, SUNAT Resolution No. 0150140014816 (2013 Royalty Assessment), May 28, 2019, at pp. 36-38; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 10-11; Exhibit CE-202, Tax Tribunal Resolution No. 08470-2-2018 (2007 Income and General Tax Assessment), October 30, 2018, at pp. 40-41; Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax Assessment), August 22, 2018, at pp. 26-27; Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax Assessment), August 22, 2018 (notified to SMCV on November 19, 2018), at pp. 51-52; Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019 (Q4 2011-2012 Special Mining Tax Assessments), June 20, 2019, at pp. 18-20.

[1222] *See* Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 35; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at pp. 36-38; Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 45-48; Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 42-43; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at pp. 9-10; Exhibit CE-220, SUNAT Resolution No. 0150140014816 (2013 Royalty Assessment), May 28, 2019, at pp. 36-38; Exhibit CE-215, SUNAT Resolution No. 0150140014560 (2012 Royalty Assessment), January 11, 2019 (notified to SMCV on January 23, 2019), at pp. 37-39; Exhibit CE-220, SUNAT Resolution No. 0150140014816 (2013 Royalty Assessment), May 28, 2019, at pp. 36-38; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 10-11; Exhibit CE-202, Tax Tribunal Resolution No. 08470-2-2018 (2007 Income and General Tax Assessment), October 30, 2018, at pp. 40-41; Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax Assessment), August 22, 2018, at pp. 26-27; Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax Assessment), August 22, 2018 (notified to SMCV on November 19, 2018), at pp. 51-52; Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019 (Q4 2011-2012 Special Mining Tax Assessments), June 20, 2019, at pp. 18-20.

[1223] *See* Claimant's Reply at paras. 179-84; Respondent's Counter-Memorial at paras. 318-20, 327-28, 340-41, 347.

623. In the sections that follow, Respondent demonstrates that Claimant's arguments regarding waivers of penalties and interest must fail, as they did before SUNAT, the Tax Tribunal, and the Peruvian courts. With respect to the 2006-2007 and the 2008 Royalty Assessments, Respondent rebuts Claimant's assertion that the Tax Tribunal and the Peruvian courts were obliged to consider *sua sponte* waiving SMCV's penalties and interest after SMCV's waiver requests were time-barred (Section a).[1224] With respect to SMCV's other waiver requests that failed on their merits, Respondent demonstrates that, indeed, none of the requirements of Article 170 were met with respect to SMCV's assessments (Section b).

a. The Tax Tribunal and the Peruvian Courts Were Not Obliged to Review *Sua Sponte* SMCV's Waiver Requests with Respect to the 2006-2007 and 2008 Royalty Assessments

624. Claimant does not deny that SMCV failed to timely request a waiver of the penalties and interest relating to the 2006-2007 and 2008 Royalty Assessments, either during its challenges before SUNAT or during its appeals before the Tax Tribunal. In fact, Claimant admits that "[i]n the 2006-2007 and 2008 Royalty Cases, SMCV requested that the Tax Tribunal waive penalties and interest immediately after it was notified of the Tax Tribunal's decisions in those cases."[1225] This was fatal to SMCV's waiver requests, because Article 147 of the Tax Code requires an appellant to raise at the outset of its complaint all issues that it wishes the Tax Tribunal to consider.[1226] SMCV did not raise its waiver requests at the outset of its complaints against the 2006-2007 and 2008 Royalty Assessments; thus, the Tax Tribunal was not required to consider SMCV's untimely waiver requests. The Contentious Administrative Court (first instance court) for the 2006-2007 Royalty Case, the Superior Court of Lima (appellate court) in both royalty assessments, and the Supreme Court, for the 2008 Royalty Case, all confirmed that SMCV's waiver requests were appropriately rejected because they were untimely.[1227]

625. Claimant nevertheless argues in its Reply that, even if SMCV's requests were untimely, the Peruvian courts should have considered *sua sponte* whether to waive penalties and

[1224] *See* Claimant's Reply at paras. 189-92.

[1225] Claimant's Memorial at para. 409 (emphasis added).

[1226] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 147.

[1227] *See* Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016, at pp. 29-30, paras. 12.1-12.3; Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at p. 29, para. 20; Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at p. 15. *See also* Respondent's Counter-Memorial at para. 737.

interest against SMCV.[1228] According to Claimant, Article 170 is a "peremptory norm," *i.e.*, a provision that must be applied by the authorities if its conditions are met, even if a taxpayer does not request its application.[1229] Claimant's argument has no merit.

626. *First*, the laws and regulations to which Claimant cites do not support its claims that the courts are required to review *sua sponte* a waiver of penalties and interest in the context of Article 170 of the Tax Code. As Perú's experts, Drs. Bravo and Picón, confirmed in their first expert report, Article 170 contains discretionary language regarding issuance of a clarification of an ambiguous regulation—which indicates that the provision is not peremptory.[1230] For example, Article 170.1 stipulates "to this end, the clarification may be made by means of a Law or provision of similar rank,"[1231] meaning that the regulation does not require the State to issue the clarifying provision. Moreover, even if the courts had been required to consider the question of waiver *sua sponte*, they would not have been able to grant any such waivers, because the conditions of Article 170.1 were not met in SMCV's case. A waiver of penalties and interest can be granted under Article 170 only if the circumstances set out in that article all occurred—which clearly they did not.[1232]

627. Claimant argues that Article 127 of the Tax Code, which provides that "[t]he decision-making body is empowered to conduct a full re-examination of the particulars of the disputed matter, whether such issues have been raised by the interested parties or not, and new verifications shall be conducted where relevant," imposes an obligation on the Tax Tribunal and the Peruvian courts to consider on their own initiative whether penalties and interest should be waived under Article 170.[1233] But Article 127 does nothing of the sort. While this provision

[1228] Claimant also alleges that the Contentious Administrative Courts had a duty to review SMCV's waiver of penalties and interest request "*de novo*," however its Peruvian law experts do not address this allegation. *See* Claimant's Reply at para. 189. A "*sua sponte"* review and a "*de novo"* review are distinct concepts. The former refers to the review of an issue even if the issue is not raised by the parties; the latter refers to the standard of review by which an appellate body reviews a decision, *i.e.,* with no deference to the lower court. Claimant's reference to a *de novo* standard is irrelevant because in the present case, a court would not review—under any standard—Claimant's request for a waiver of penalties and interest as SMCV did not raise the request before the Tax Tribunal, unless there were a *sua sponte* obligation of review (which there is not). Respondent therefore addresses only Claimant's allegations regarding an obligation of *sua sponte* review.

[1229] *See* Claimant's Reply at paras. 189-90.

[1230] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 76-77.

[1231] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 170.1 (emphasis added).

[1232] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 76-78, 249.

[1233] Claimant's Reply at para. 191; Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 127.

empowers the Tax Tribunal or the courts to consider issues that the parties did not raise, it does not require them to do so. In response to this straightforward textual and logical interpretation of Article 127, Claimant and its expert, Dr. Hernández, insist that Article 127 does create an obligation, because Article 129 of the Tax Code obligates the decision-making bodies to "rule on all the questions raised by the interested party and any others raised by the case file."[1234] But this overstretched attempt to create a *sua sponte* obligation by weaving together inapplicable Tax Code provisions is also unavailing.

628. Article 129 of the Tax Code (whether on its own or via Article 127) does not create an obligation for the Tax Tribunal or the courts to consider *sua sponte* a waiver of penalties and interest under Article 170 of the Tax Code. Article 129 requires that adjudicators' decisions include rulings on (i) "all the questions raised by the interested party," and (ii) "any others raised by the case file."[1235] SMCV did not raise the question of waivers in its complaints, so Claimant must be imagining that waivers of penalties and interest are "[questions] raised by the case file."[1236] They are not.

629. For the question of whether there existed a misinterpretation and clarification (for purposes of Article 170.1) to have been a question raised by the case file, SMCV would have had to have submitted a waiver request under Article 170.1 as part of its cases challenging the Assessments.[1237] As Perú's experts, Drs. Bravo and Picón, explain, "the taxpayer [SMCV] did not request [the waiver]," and "both for SUNAT and the Tax Tribunal, the regulation was clear with respect to the scope of the Mining Law."[1238] Additionally, in their second expert report, Drs. Bravo and Picón point to a Supreme Court decision that found that it was unacceptable to argue that Article 129 requires the Tax Tribunal to rule on any questions raised by the case file, as it would be contrary to the *non ultra petita* principle (*principio de congruencia*).[1239]

630. It is not plausible to interpret Article 129 as requiring decision-making bodies to rule on arguments such as those that SMCV raised in its waiver requests without a waiver

[1234] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 129.

[1235] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 129. Claimant also cites to Article 5 of the Law on the Contentious-Administrative Procedure.

[1236] *See* Claimant's Reply at para. 191; *see also* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 129.

[1237] *See* Exhibit RER-3, First Bravo and Picón Report at para. 85.

[1238] Exhibit RER-3, First Bravo and Picón Report at para. 85.

[1239] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 170.

request first being part of the case file. If it were an obligation for decision-making bodies to guess whether any provision of any law or regulation might have affected a taxpayer's non-payment and then to rule on such issues in their decisions without any request from the interested parties to do so, the work of the decision-making bodies would never end. The Tax Tribunal and the Peruvian courts are obliged to resolve timely-raised and specific claims that are submitted to them for resolution (assuming the claims fall within their jurisdiction). They are not required to imagine *sua sponte* and then review or decide every potential issue relating to a dispute that a taxpayer does not raise on its own.

631. *Second*, the Contentious Administrative Courts' conclusions that the Tax Tribunal properly rejected SMCV's waiver requests as untimely were in accordance with Peruvian law. Claimant alleges that the Contentious Administrative Courts did not independently analyze SMCV's waiver requests,[1240] and, thus, both (i) violated a duty to review *sua sponte* all of the issues with respect to the 2006-2007 and the 2008 Royalty Assessments;[1241] and (ii) ignored SMCV's request for the courts to rule on whether the Tax Tribunal should have considered *sua sponte* the waiver issue, which, Claimant alleges SMCV had requested from the Tax Tribunal.[1242] Claimant's allegations are rife with inaccuracies.

632. To begin with, Contentious Administrative Courts in Perú are governed by the *non ultra petita* principle (*principio de congruencia*) which means that they may decide only those issues that are submitted to them.[1243] As Respondent stated in its Counter-Memorial, the Contentious Administrative Courts act similarly to appellate courts *vis-à-vis* the Tax Tribunal.[1244] In that role, the Contentious Administrative Courts review Tax Tribunal decisions to determine whether those decisions were made in conformity with the law. As Perú's experts, Drs. Bravo and Picón, explain, the Contentious Administrative Courts can only set aside penalties and

[1240] *See* Claimant's Reply at para. 192. *See also* Respondent's Counter-Memorial at para. 737.

[1241] *See* Claimant's Reply at paras. 189, 192.

[1242] *See* Claimant's Reply at para. 192.

[1243] *See* Exhibit CA-54, Single Unified Text of the Code of Civil Procedure, approved through Ministerial Resolution No. 10-93-JUS, April 22, 1993, at Art. VII ("The judge must enforce the law that pertains to the process, even if it [is] not invoked by the parties or has been invoked erroneously. However, he or she may not go beyond the requested petition or base his or her decision on facts other than those alleged by the parties."). *See also* Exhibit RER-8, Second Bravo and Picón Report at paras. 169-70.

[1244] *See* Respondent's Counter-Memorial at para. 737. Claimant is correct that the administrative courts are not, formally speaking, courts of appeal from the Tax Tribunal. *See* Claimant's Reply at para. 192. Respondent's point was that they can be analogized to courts of appeal, because they have certain powers to review administrative proceedings. That review is limited to assessing whether the administrative entity in question acted in conformity with the law.

interest if that is what the taxpayer explicitly requests.[1245] SMCV did not properly raise its waiver requests before the Contentious Administrative Courts; thus, the courts were not obliged to consider them on their merits.[1246] The Contentious Administrative Courts reviewed the procedural ruling of the Tax Tribunal and found it appropriate. Thus, the Contentious Administrative Courts' actions were consistent with Peruvian law.

633. Claimant asserts in its Reply that the first instance and appellate courts completely ignored SMCV's requests to rule on whether the Tax Tribunal should have considered the waiver issue *sua sponte*.[1247] Claimant alleges that two of the Supreme Court justices in the Supreme Court decision (with respect to the 2006-2007 Royalty Assessment) explicitly noted "this defect"[1248] (in Claimant's words) when they stated that the appellate court had "not addressed claimant's request" to waive penalties and interest under Article 170.[1249] Claimant unjustifiably interprets the comments of those two individual justices to mean that the Supreme Court as a whole thought that the appellate court should have ruled on whether the Tax Tribunal had an obligation of *sua sponte* review.[1250] It did not. First, the Supreme Court did not reach the required votes to issue a final decision on the extraordinary appeal (*casación*) filed by SMCV in the 2006-2007 Royalty Case. The Supreme Court needed to deliberate on the matter until the necessary votes were reached to take a final decision, but that process was cut off because SMCV withdrew its claim.[1251] Second, even if the opinions of the Supreme Court justices could be considered indicative of what the justices would have finally decided, as Claimant assumes, then the two justices' opinions that Claimant cites would have been destined to remain in the minority. The majority of the Supreme Court justices considered that the conditions for Article

[1245] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 171 ("[T]he [Contentious Administrative] Courts do not have full discretion nor the duty to officially decide all matters that arise from a case and that have not been raised by the parties during the tax proceeding, […] they do not review matters on merits or points of law not litigated or discussed before the Tax Tribunal—including the exemption from interest and fines.").

[1246] *See* Exhibit CE-97, SMCV Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments, September 19, 2013, at pp. 2-4; Exhibit CE-98, SMCV Administrative Court Appeal of the Tax Tribunal's Decision, 2006/07 Royalty Assessment, September 27, 2013, at pp. 2-4.

[1247] *See* Claimant's Reply at para. 192.

[1248] Claimant's Reply at para. 192.

[1249] Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at para. 2.15, p. 47.

[1250] *See* Claimant's Reply at para. 192.

[1251] *See* Claimant's Memorial at para. 235.

170 to apply were not met in SMCV's case.[1252] Third, Claimant mischaracterizes the opinions of the dissenting justices. The opinions observe that, when it rejected SMCV's appeal, the appellate court did not comment on SMCV's argument that Article 170 of the Tax Code applied. Therefore, in the opinion of the minority dissenting justices, the appellate court decision lacked proper reasoning.[1253] The dissenting justices did not take a stance on the merits of the underlying question whether the Tax Tribunal had an obligation to consider *sua sponte* a waiver under Article 170 of the Tax Code even absent a timely request from the taxpayer.

634. In sum, there is no obligation for the Tax Tribunal and the Peruvian courts to consider *sua sponte* waivers of penalties and interest under Article 170. Thus, contrary to Claimant's allegations, the courts acted appropriately and in accordance with Peruvian law when they denied SMCV's waiver requests as untimely and did not volunteer, unprompted, to consider waiving the penalties and interest assessed against SMCV on its overdue Royalty and Tax Assessments.

635. Furthermore, Claimant's arguments regarding *sua sponte* obligations are in fact irrelevant. Even if it were properly classified as a "peremptory norm," Article 170 would only apply "if its conditions are met"—as Claimant concedes.[1254] In SMCV's case, the conditions of Article 170 were not met. As discussed in more detail next, there was no misinterpretation of a law or regulation as a result of which SMCV did not pay its debts, and the government did not issue any clarification of a relevant law or regulation, much less did it do so in compliance with the requirements of Article 170.1. Therefore, there were no grounds for the Tax Tribunal or the

[1252] Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at Section Twenty-Ninth, pp. 33-34.

[1253] *See* Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at para. 2.17, p. 47 ("From that which has been recognized, it can be observed that the decision to confirm the appealed ruling does not contain arguments that resolve the abovementioned wrongs invoked in the appeal, and therefore the challenged ruling fails to satisfy the requirement of judicial motivation, which violates due process in its expression regarding due motivation. For the abovementioned reasons, it is pertinent to annul the challenged Court of Appeals' ruling and thus to order the Court of Appeals to issue a new duly motivated ruling.") ("*De lo discernido se aprecia que en la decisión de confirmar la sentencia apelada, no se han plasmado argumentos que resuelvan los agravios de apelación arriba precisados, incurriendo la recurrida en motivación insuficiente, lo que transgrede el debido proceso en su manifestación de debida motivación. Por las razones expuestas, corresponde nulificar la sentencia de vista impugnada, debiéndose ordenar a la Sala Superior que expida nueva sentencia debidamente motivada*.").

[1254] Claimant's Reply at para. 190.

courts to apply Article 170.1 to SMCV's penalties and interest, either *sua sponte* or by request.[1255]

b. SUNAT and the Tax Tribunal Denied SMCV's Remaining Waiver Requests with Respect to Its Other Royalty and Tax Assessments in Accordance with Peruvian Law

636. With respect to SMCV's requests for waivers of penalties and interest on its other assessments (*i.e.*, the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessment, the 2006-2007 Income Tax Assessment, the 2006-2007 General Sales Tax Assessment, and the Q4 2011-2012 Special Mining Tax Assessment[1256]), which were timely presented but then denied on their merits, Claimant alleges that those decisions by SUNAT and the Tax Tribunal were unfair. In particular, Claimant contends that the waiver denials were arbitrary because, it alleges, (i) there was "reasonable doubt" as to the correct interpretation of Article 83 of the Mining Law and Article 22 of the 1993 Mining Regulation, which, according to Claimant, was the central issue in dispute; and (ii) the government was obligated to issue a clarification of the alleged ambiguity (and the fact that it did not should not preclude the application of Article 170.1).[1257] Claimant's allegations are unavailing, as demonstrated below. SUNAT and the Tax Tribunal's denials of SMCV's waiver requests were reasonable and in accordance with Peruvian Law. Article 170.1 simply did not apply in SMCV's case.

[1255] Claimant objects that it would be contrary to the peremptory nature of Article 170 if the *sua sponte* obligation were dependent on the government's issuance of a clarification, which Respondent maintains is discretionary. *See* Claimant's Reply at para. 190. Respondent demonstrates the flaws in Claimant's argument in Section II.I.2.b below.

[1256] *See* Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 35; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at pp. 36-38; Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 45-48; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at pp. 9-10; Exhibit CE-215, SUNAT Resolution No. 0150140014560 (2012 Royalty Assessment), January 11, 2019 (notified to SMCV on January 23, 2019), at pp. 37-39; Exhibit CE-220, SUNAT Resolution No. 0150140014816 (2013 Royalty Assessment), May 28, 2019, at pp. 36-38; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 10-11; Exhibit CE-202, Tax Tribunal Resolution No. 08470-2-2018 (2007 Income and General Tax Assessment), October 30, 2018, at pp. 40-41; Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax Assessment), August 22, 2018, at pp. 26-27; Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax Assessment), August 22, 2018 (notified to SMCV on November 19, 2018), at pp. 51-52; Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019 (Q4 2011-2012 Special Mining Tax Assessments), June 20, 2019, at pp. 18-20.

[1257] *See* Claimant's Reply at paras. 179-92.

(i) There Was No Ambiguous Regulation Relevant to the Royalty and Tax Assessments Issued Against SMCV

637. Contrary to Claimant's assertions, there was no "reasonable doubt" that would justify the application of a waiver of penalties and interest under Article 170.1 of the Tax Code to SMCV's assessments. The first step in Claimant's argument rests on its claim that Article 170.1 was applicable to SMCV because there existed "reasonable doubt" as to the correct interpretation of Article 83 of the Mining Law and Article 22 of the 1993 Mining Regulation, and SMCV did not pay its assessments as a result of that objective ambiguity.[1258]

638. In its attempt to establish the objective ambiguity of Article 83 of the Mining Law and Article 22 of the 1993 Mining Regulation, Claimant contends (i) that there were differing opinions among Peruvian government entities or officials about the scope of stability guarantees under the 1998 Stabilization Agreement; (ii) that a 2012 report from SUNAT shows that SUNAT interpreted the Mining Law and Regulations inconsistently even after it allegedly did an about-face in 2006; (iii) that Perú issued a 2014 amendment to the Mining Law and a 2019 amendment to the Regulation in order to clarify the ambiguity that had existed in Article 83 of the Mining Law and Article 22 of the Mining Regulation, respectively; and (iii) that certain court decisions and votes of judges on SMCV's challenges to the assessments confirmed SMCV's position contrary to SUNAT's position, illustrating the ambiguity.[1259] Claimant misconstrues the statements and actions of the Peruvian government.

639. *First*, contrary to Claimant's assertions, there were no differing opinions among Peruvian government entities or officials about the scope of the stability guarantees under the 1998 Stabilization Agreement. As detailed in Sections II.E-G above, and in Section II.D of Respondent's Counter-Memorial, the Peruvian government, including in particular MINEM, MEF, and SUNAT, have consistently maintained that the scope of a mining stabilization agreement (such as the 1998 Stabilization Agreement) is limited to the specific investment project that is the basis for the agreement and is set out in the feasibility study attached to that agreement. MINEM has repeatedly expressed this view through numerous reports, communications, and publicly televised congressional presentations, as discussed in Section II.E above.[1260] MEF has confirmed that under the GEM Law, which is applicable to mining

[1258] *See* Claimant's Reply at paras. 179-84.

[1259] *See* Claimant's Reply at paras. 179-84.

[1260] *See* Respondent's Counter-Memorial at Section II.D.

companies with stabilization agreements, the payment of voluntary contributions is decided according to stabilized "mining projects," *i.e.*, not concessions, as discussed in Section II.F above.[1261] SUNAT also determined (independently from MINEM) that the 1998 Stabilization Agreement applied only to SMCV's Leaching Project, which was the project identified in the Agreement and set out in the 1996 Feasibility Study. SUNAT concluded that the 1998 Stabilization Agreement did not cover the Concentrator Project, as to which SUNAT issued multiple Royalty and Tax assessments, as discussed in Section II.G above.[1262] Claimant is also wrong that MINEM officials had, at one point, told SMCV that the 1998 Stabilization Agreement applied to its Concentrator Project,[1263] or that the government's actions confirming that the 1998 Stabilization Agreement did not cover the Concentrator Project represented a "*volte-face*."[1264]

640. *Second,* Claimant points to a SUNAT report from 2012 and mistakenly characterizes it as (i) support for Claimant's interpretation of the scope of stability guarantees under stabilization agreements, and (ii) evidence that, even after SUNAT's alleged *volte-face* on the scope of the 1998 Stabilization Agreement in 2006, SUNAT still interpreted the Mining Law and Regulations differently, thus showing the objective ambiguity of the Law and Regulations.[1265] The 2012 SUNAT report does not support Claimant's arguments. As explained above in Section II.G.3, and as Ms. Bedoya explains in her second witness statement, SUNAT's 2012 report does not contradict SUNAT's position that stability guarantees are limited to the investment projects identified in the relevant stabilization agreement and related feasibility study; thus, it is not evidence of an inconsistent opinion or any objective ambiguity.[1266] The consistency of SUNAT's position is further reinforced by the fact that around the same time as the 2012 SUNAT report, SUNAT continued to issue—and confirm—Royalty and Tax

[1261] *See supra* at Section II.F. *See also* Respondent's Counter-Memorial at para. 233; Exhibit RWS-6, First Camacho Statement at paras. 36-37; Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2.

[1262] *See infra* at Resubmitted Annex A.

[1263] *See* Claimant's Reply at para. 181.

[1264] Claimant's Reply at para. 182.

[1265] *See* Claimant's Reply at para. 182.

[1266] *See* Exhibit RWS-11, Second Bedoya Statement at paras. 29-31. *See also* Exhibit CE-883, SUNAT, Report No. 084-2012-SUNAT/4B0000, September 13, 2012.

Assessments against SMCV with respect to the non-stabilized Concentrator Plant.[1267] Thus, there is no (and never was) inconsistency of opinion at SUNAT to suggest that the Mining Law and Regulations were objectively ambiguous.

641. *Third*, the 2014 amendment of Article 83 of the Mining Law and the 2019 amendment of Article 22 of the 1993 Mining Regulation do not establish that those provisions were ambiguous prior to their amendment.[1268] Claimant mischaracterizes the amendments.

- The amendments to Article 83 (of the Law) and Article 22 (of the Regulation) did not change those articles from limiting stability guarantees to concessions and mining units, to limiting stability guarantees to the investment specifically designated in the feasibility study, as Claimant alleges. That is because the original articles already limited stability guarantees to the investment specifically designated in the feasibility study.[1269] For example, the addition of Article 83-B in 2014 did not confirm that there was a need to clarify the scope of the stability guarantees provided in the Mining Law, as Claimant alleges.[1270]

  As discussed above in Section II.B.1, Article 83-B was incorporated with the purpose of making it possible to extend stabilization guarantees to later investments that were made in addition to those detailed in the relevant feasibility study. Specifically, the amendment in Article 83-B provides that stability guarantees would apply to "additional activities" if certain conditions were met, even if those activities were not originally set out in the related feasibility study.[1271]

  As previously explained by Perú's expert Dr. Eguiguren, the purpose of this amendment was to expand the pre-existing scope of agreements like the 1998 Stabilization Agreement. Up until that point, as confirmed by the Statement of Reasons for this amendment, such stability guarantees were limited to the investment project that was analyzed in the feasibility study submitted in support of the application for a stabilization agreement.[1272] Agreeing with Dr. Eguiguren, Perú's tax experts, Drs. Bravo and Picón, explain that the amendment expanded the scope of the stability guarantees to cover "additional activities" that were not

[1267] Those SUNAT Assessments are the 2010-2011, Q4 2011, 2012 and 2013 Royalty Assessments; 2007, 2008, 2009, 2010 and 2011 GST Assessments; 2007, 2008, 2009, 2010, 2012 and 2013 Income Tax Assessments; 2009, 2010, 2011, 2013 TTNA Assessments; Q4 2011-2012, 2013 SMT Assessments; and 2013 CMPF Assessment. *See infra* at Resubmitted Annex A.

[1268] *See* Respondent's Counter-Memorial at paras. 357, 600, 602-04.

[1269] *See supra* at Section II.B.1., explaining that versions of Article 83 of the Mining Law and Article 22 of the Mining Regulations in force before 2014 limited stability guarantees to specific investment projects.

[1270] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 106-08.

[1271] *See* Respondent's Counter-Memorial at paras. 601-05.

[1272] *See* Exhibit RER-1, First Eguiguren Report at paras. 91, 93; *see also* Exhibit RER-3, First Bravo and Picón Report at paras. 106-08.

previously identified in the requisite feasibility study, thus confirming the pre-existing narrower application of the stability guarantees.[1273]

- Claimant takes out of context the 2014 amendment's stated goal of "[creating] a clearer" framework, which was set out in the 2014 amendment's Statement of Reasons.[1274] Respondent explained in its Counter-Memorial that that statement about improving the legal framework was not specific to Articles 83 of the Mining Law and 22 of the Mining Regulation. Rather, it referred generally to the proposed changes to the Mining Law.[1275] To illustrate, the relevant sentence reads: "The effect of the various proposed changes to the General Mining Law will make it possible to establish a clearer regulatory framework . . . ."[1276]

  Moreover, the section title immediately preceding that sentence provides: "Effects of the Measures Incorporated into the GML."[1277] The sentence itself, and when read in conjunction with the corresponding section title, clearly show that the stated goal was referring generally to the whole of the various proposed changes made to the Mining Law, and not Article 83 of the Mining Law and Article 22 of the Mining Regulations in particular as Claimant asserts. Claimant's refusal to read sentences in full and in context is telling, once again, because doing so is fatal to its argument.

  Importantly, a goal of making legislation clearer or more explicit does not mean that the law was objectively ambiguous to start with.[1278] Claimant relies on an obviously flawed assumption that "if an amendment expressly seeks to make the law clearer, it is necessarily because the law, in its current state, is not sufficiently clear."[1279] A law can be sufficiently clear and still be amended to be even more clear. There is not only one way to write a law. Various iterations of a law can be clear and still be improved and made clearer with changes to its phrasing. Furthermore, contrary to Claimant's allegations, Peruvian authorities have repeatedly concluded that the Mining Law and its Regulations—at the time of the 1998 Stabilization Agreement—were clear regarding the scope of stabilization agreements.[1280]

- Indeed, the Peruvian authorities, including MINEM and SUNAT, uniformly understood the pre-existing scope of the stability guarantees under the Mining Law (before the 2014 amendment) as being limited to the investment projects identified in the feasibility study and thus forming the basis for the related

[1273] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 106-08.

[1274] *See* Exhibit CE-823, Congress, Draft Law No. 30230, Statement of Motives at p. 11, para. 5.

[1275] *See* Respondent's Counter-Memorial at para. 731.

[1276] Exhibit CE-823, Congress, Draft Law No. 30230, Statement of Motives at p. 11, para. 5 (emphasis added).

[1277] Exhibit CE-823, Congress, Draft Law No. 30230, Statement of Motives at p. 11, para. 5 (emphasis added).

[1278] *See* Respondent's Counter-Memorial at paras. 731-32.

[1279] Claimant's Reply at para. 183(b).

[1280] *See*, *e.g.*, Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at pp. 36-38. *See also* Respondent's Counter-Memorial at para. 328.

agreement, as demonstrated by their actions over many years prior to the 2014 amendment.[1281]

For example, MINEM explained in the 2005 April Report (almost ten years prior to the amendment) that stability guarantees under stabilization agreements apply to the investment projects specifically identified in the agreements.[1282] MINEM consistently held this position, as evidenced in its subsequent reports, communications, and congressional presentations, all of which predate the 2014 amendment.[1283] Additionally, SUNAT first determined, as early as 2006 (eight years before the 2014 amendment) that SMCV's Concentrator Project was subject to royalties and taxes because it was not a project identified in the 1996 Feasibility Study and the 1998 Stabilization Agreement.[1284] Based on this determination, SUNAT began issuing Royalty and Tax Assessments in connection with SMCV's Concentrator Project.[1285] A legal provision interpreted in a consistent manner by different government entities shows that the provision is anything but "unclear"[1286] or "ambiguous."[1287]

- With regard to the 2019 amendment of the Mining Regulation, Claimant, again, chooses to read one provision and ignore another that was amended at the same time. Claimant considers the amendment to Article 22[1288] but failed to consider the simultaneous amendment to Article 39, which provides, in relevant part, that "[i]n conformity with paragraph three of Article 83-B of the Single Unified Text, the contractual benefit also has effect on the additional activities undertaken following the execution of the Investment Program contained in the Technical

[1281] *See supra* at Sections II.E-II.G.

[1282] *See* Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005.

[1283] *See* Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005; Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005; Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005; Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006; Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006.

[1284] *See* Exhibit RE-179, SUNAT June 2006 Internal Report at pp. 5-9.

[1285] *See infra* at Resubmitted Annex A.

[1286] Claimant's Reply at paras. 179, 183.

[1287] Claimant's Reply at paras. 179, 183.

[1288] Before its amendment, Article 22 provided in relevant part 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. 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." The 2019 amendment amended that language as follows "[t]he contractual guarantees benefit the mining activity titleholder exclusively for the investments set out in the agreement that it implements in the concessions or Economic-Administrative Units. To determine the results of its operations, the mining activity titleholder engaging in activities related to the aforementioned investments, in any [of] the concession(s) or Economic-Administrative Unit(s) it has, must keep independent accounts for each one of those activities and reflect them in separate earnings statements." *See* Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Art. 22. Claimant alleges that the amendment demonstrates that Article 22 of the Mining Regulation was objectively ambiguous. However, as Drs. Bravo and Picón explain in their First Report, this amendment was intended to adapt the Mining Regulations to the modifications implemented in Article 83 of the Mining Law, which allow the extension of stability guarantees to new investments not included in the feasibility study. *See* Exhibit RER-3, First Bravo and Picón Report at para. 110.

Economic Feasibility Study."[1289] Thus, consistent with the 2014 amendment to Article 83 of the Mining Law, the amendment to Article 39 of the Mining Regulations confirms the government's intent to expand the scope of stability guarantees to cover "additional activities" (if they meet certain conditions), in addition to the investment projects set out in the feasibility study and the related stabilization agreement. This amendment confirms that the pre-existing scope of the stability guarantees was more limited, *i.e.*, they applied only to the investment project that was specifically identified in the feasibility study and thus was the basis of the stabilization agreement.

- Relatedly, contrary to Claimant's assertion,[1290] the Statement of Reasons for the 2019 Amendments to the Regulations did not confirm that Article 22 of the Mining Regulations could "misleadingly lead"[1291] to a misinterpretation of the Regulation providing that stability guarantees apply to concessions or EAUs, and thereby create "reasonable doubt" as to the correct interpretation of Article 22.

  Respondent explained in its Counter-Memorial that that statement indicates that the first paragraph of Article 22, if read "without considering the provisions of Articles 79, 83, 83-B of the Single Unified Text of the [Mining Law]" (the last sentence of the same paragraph), would be misleading.[1292] After Respondent pointed out that the last sentence clearly instructs a reader to read Article 22 together with Articles 79, 83 and 83-B, Claimant argued that the last sentence of the paragraph was somehow irrelevant, given that the Articles to which it refers were amended (or added in the case of 83-B) in 2014.[1293]

  But, whether or not Articles 79 and 83 were amended in 2014 is irrelevant, because, even as they stood prior to being amended in 2014, Articles 79 and 83 dispelled doubt regarding the interpretation of Article 22 of the Mining Regulations. As explained in Section II.B above, these provisions have always established that stability is granted exclusively to the investment projects set out in the relevant feasibility study. Thus, the last sentence of the paragraph is highly relevant, and the Statement of Legislative Intent does not support Claimant's argument that Article 22 is ambiguous or creates "reasonable doubt."

642. *Fourth*, Claimant is incorrect when it claims that "reasonable doubt" exists on the basis of certain events in the courts. Claimant tries to find "reasonable doubt" in the facts that (i) a single first instance court decided in favor of SMCV (with respect to the 2008 Royalty Assessment) whereas every other court decided against SMCV; and (ii) a handful of appellate

[1289] Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Art. 39 (emphasis added).

[1290] *See* Claimant's Reply at para. 183(c).

[1291] Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Statement of Grounds, Section I.B.b.1.

[1292] Respondent's Counter-Memorial at paras. 731-32.

[1293] *See* Claimant's Reply at para. 183(d).

court and Supreme Court judges dissented from the majority opinions that confirmed the denials of SMCV's challenges to the 2006-2007 and 2008 Royalty Assessments.[1294]

643. The existence of a single court decision by the Contentious Administrative Court in favor of SMCV in the 2008 Royalty Case does not indicate that the relevant provisions of the Mining Law and Regulations were ambiguous. In any case, the Contentious Administrative Court's decision was reversed by the Superior Court of Lima (appellate court),[1295] and the Supreme Court confirmed the reversal.[1296] That means the Contentious Administrative Court's decision ceased to have any legal effect. As Perú's experts, Drs. Bravo and Picón, explained in their first expert report, the "lower court ruling . . . did not have the value of *res judicata* since it was appealed and overturned."[1297]

644. A first instance court decision cannot establish that there has been a misinterpretation of a legal provision. That can only be established for purposes of Article 170 when the competent authority (*i.e.*, the tax administration) issues a clarification to correct the misinterpretation that expressly invokes Article 170.1.[1298] The overturning of a lower court's decision by a higher court does not automatically mean that there is ambiguity as to the issues under dispute. If that were the case, a taxpayer could seek the waiver of penalties and interest any time that an appeal was decided differently from a lower court ruling, including in cases where there is no ambiguous law or regulation (as in this case). That cannot be right.

645. Additionally, and contrary to Claimant's assertions in its Reply submission,[1299] the timing of that sole Contentious Administrative Court decision is relevant and, in fact, undermines Claimant's allegation that "reasonable doubt" was present for purposes of Article 170.1. Article 170.1 permits a waiver of penalties and interest based on "reasonable doubt" if a taxpayer's non-payment of the underlying assessment is "a result of the misinterpretation of a provision" (provided, of course, that additional requirements under Article 170.1 are also

[1294] *See* Claimant's Reply at para. 184.

[1295] *See* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at p. 15.

[1296] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017.

[1297] Exhibit RER-3, First Bravo and Picón Report at para. 97.

[1298] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 126-28.

[1299] *See* Claimant's Reply at para. 184(a).

met).[1300] Here, the first instance court decision post-dates SMCV's non-payment of its assessments[1301]—and so it cannot possibly be the source of SMCV's misinterpretation nor have caused SMCV not to pay the assessment.

646. Thus, even if the appellate process could serve as evidence of objective ambiguity (it cannot), SMCV would not have known of that alleged ambiguity at the time it decided not to pay royalties that were due for 2008, and its failure to pay could not have been as "a result of" any such objective ambiguity. If SMCV did not know of the apparent objective ambiguity, its assumption of ambiguity would have been only subjective. In Claimant's own words, "this would render the objective criterion of reasonable doubt essentially meaningless, leaving behind only the purely subjective criterion of the decision-maker's caprice."[1302] Here, SMCV's non-payment of royalties was not "a result of" any alleged "reasonable doubt" manifested in the lone (and short-lived) court decision in its favor.

647. With respect to the handful of judges who dissented from the majority who ruled against SMCV, Claimant continues to erroneously assert that the existence of those dissents somehow supports its position.[1303] It does not. The fact that one appellate court judge and two Supreme Court justices voted in SMCV's favor against their respective majorities with respect to the 2006-2007 Royalty Assessment is not evidence that the Mining Law and Regulations were ambiguous. This is particularly true here, because the dissents were not based on disagreements on the merits of the case, but rather on the procedural approaches of the lower court decisions they were evaluating.[1304] Dissents on procedural issues cannot be the basis for "reasonable doubt" regarding the interpretation of substantive provisions.

648. Even if the dissents had been based on a disagreement on legal issues (they were not), a difference of legal opinion does not evidence ambiguity in every piece of law or legislation on which there is a difference of opinion. If that were the case, virtually every

---

[1300] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 170 (emphasis added).

[1301] The first instance court's decision was issued on December 17, 2014. *See* Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014. That was over four years after SUNAT issued the 2008 Royalty Assessment on June 1, 2010, *see* Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010 (notified to SMCV on June 18, 2010), and even more years since SMCV's royalty payment was initially due for the fiscal year of 2008. *See* Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010 (notified to SMCV on June 18, 2010).

[1302] Claimant's Reply at para. 187.

[1303] *See* Claimant's Reply at para. 184(c).

[1304] *See* Respondent's Counter-Memorial at para. 729.

provision of law and or piece of legislation would be subject to a "reasonable doubt" argument, and very few taxpayers would ever pay penalties or interest on their outstanding payments. Furthermore, as with the case of the first instance court decision in the 2008 Royalty Assessment case, the dissents of the appellate court judge and the two Supreme Court justices in the 2006-2007 Royalty Case post-date SMCV's non-payment by many years.[1305] As with the 2008 Royalty Assessment, those dissents could not possibly have created an alleged objective ambiguity that was the basis for SMCV's decision not to pay its assessments.

649. In any event, Claimant's arguments regarding "reasonable doubt" as to the interpretation of Article 83 of the Mining Law and Article 22 of the Regulations are irrelevant, because they are focused on the wrong target. The core of SMCV's dispute against the Royalty and Tax Assessments was the interpretation of SMCV's 1998 Stabilization Agreement, not the interpretation of the Mining Law and Regulations. "Reasonable doubt" about the meaning of a contract is not a permissible basis for seeking a waiver under Article 170.1 of the Tax Code; only misinterpretations and clarifications of laws and regulations can give rise to waivers under that provision.

650. That is not the case here. As the Tax Tribunal stated in its resolution of SMCV's challenges of the 2009 Royalty Assessment:

> in the instant case, the discussion has dealt with the scope of what was agreed to in the stability agreement signed between the Peruvian State and the appellant, i.e., to establish which activities were included within the scope of the stability guarantee granted under that agreement. This dispute did not originate in a doubt arising from the interpretation of the scope of Article 83 of the General Mining Law or Article 22 of its Regulations, but in the verification of the scope of the agreement executed, in other words, to establish what was agreed to therein.[1306]

651. Claimant nevertheless argues that Respondent's experts' in this arbitration and the dissenting opinions of three judges in the Peruvian court cases confirm that the "key issue" of

[1305] The appellate court decision was issued in July 2017, and the Supreme Court decision was issued in November 2018, *see* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017; Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018. That was 8 and 9 years, respectively, after SUNAT issued the 2006-2007 Royalty Assessments against SMCV on August 17, 2009. *See also* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009).

[1306] Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 31.

SMCV's case was the interpretation of the Mining Law and Regulations rather than the 1998 Stabilization Agreement.[1307] Claimant's arguments are misleading and incorrect.

652. *First*, in their expert reports, Dr. Morales, Dr. Eguiguren, and Drs. Bravo and Picón do not use the expression "key issue," as could be misunderstood from Claimant's use of quotation marks.[1308] If Respondent's experts had used that term, it would have been to describe the issue of the interpretation of the 1998 Stabilization Agreement. While Respondent's experts do discuss in their reports the legal framework applicable to the 1998 Stabilization Agreement, that discussion is in response to Claimant's experts' arguments that the Mining Law and Regulations should be interpreted to confer the benefits of the 1998 Stabilization Agreement on SMCV's Concentrator Project in addition to the Leaching Project.[1309] Respondent's experts' rebuttal of Claimant's experts' specific arguments do not invalidate Respondent's experts' overall conclusions that the central issue in SMCV's case was the interpretation of the 1998 Stabilization Agreement and that said Agreement applied to the Leaching Project only.[1310]

653. *Second*, the dissenting opinions of Judge Reyes Ramos of the Superior Court of Lima and Justices Martínez Maraví and Rueda Fernández of the Supreme Court in the 2006-2007 Royalty Case do not further Claimant's argument. Dissenting opinions, especially in cases that were never formally decided, (as in the 2006-2007 Case, which SMCV withdrew from the Supreme Court's consideration), are of little probatory value here. Furthermore, elsewhere in the dissenting opinions that Claimant quotes,[1311] the judges acknowledge that the dispute concerns the interpretation of the 1998 Stabilization Agreement. For example, Judge Reyes Ramos wrote that "the merits of the case" are focused on the interpretation of the 1998 Stabilization

[1307] *See* Claimant's Reply at paras. 184(c), 194.

[1308] *See* Claimant's Reply at para. 194.

[1309] *See* Exhibit RER-1, First Eguiguren Report at paras. 42-74; Exhibit RER-2, First Morales Report at paras. 39-47; and Exhibit RER-3, First Bravo and Picón Report at paras. 21-46.

[1310] *See*, *e.g.*, Exhibit RER-1, First Eguiguren Report at para. 74 ("However, as we have already noted when examining the content of the Stabilization Agreement entered into by SMCV and the Peruvian State in 1998, such guarantee agreement only makes a specific reference, repeatedly, to the "Cerro Verde Leaching Project" and the Feasibility Study where it is included (Clauses 1.1, 3.1, 4.1, 4.3.1, 5, 7.1, 11.2, and Annex II). It does not contain any reference to the "Primary Sulfide Project" or to other investments. The Primary Sulfide Project got underway in 2004 (*i.e.*, during the term of the Feasibility Agreement) but was never incorporated into the agreement in force, nor was it subject to a new stabilization agreement, which was legally possible."); Exhibit RER-2, First Morales Report at para. 80 ("In conclusion, in keeping with a careful analysis of the Stabilization Agreement under a textual, systematic, and functional interpretation, it follows that the agreement granted benefits of stability solely and exclusively to the SMCV Leaching Project that would be developed in its Mining and Beneficiation Concessions.").

[1311] *See* Claimant's Reply at paras. 184(c), 194.

Agreement,[1312] and that "the dispute on hand . . . [is] determining whether the investment made by the petitioner in the Primary Sulfides Concentration Plant is included in the [Stabilization] Agreement signed by [SMCV] with the Peruvian State or if such Agreement only covers the investment made in the Leaching Plant."[1313] With respect to the dissenting opinion of Justices Martínez Maraví and Rueda Fernández of the Supreme Court, that opinion does not discuss the merits of SMCV's case, contrary to Claimant's allegations.[1314] Rather, that opinion considers whether the appellate court had properly supported its decision.[1315]

(ii) The Government Has Discretion Whether to Issue Clarifications

654. For a taxpayer to be able to receive a waiver of penalties and interest under Article 170.1, in addition to the existence of a misinterpretation of a relevant law or regulation as a result of which the taxpayer did not pay the underlying assessment, there must also have been a published clarification to correct that misinterpretation. In SMCV's case, there was no government-issued clarification of any relevant law or regulation (further evidence that Article 83 of the Mining Law and Article 22 of the Regulations were not ambiguous in the first place). Faced with that uncontested fact, which is fatal on the face of Article 170.1, Claimant has to resort to arguing that the government is required to issue clarifications regarding the correct interpretation of a regulation when there is objective ambiguity—and that the government's failure to issue one here is impermissible and cannot bar waiver relief for SMCV, regardless of Article 170.1's requirements.[1316] Claimant maintains that Article 83 of the Mining Law and Article 22 of the Regulations were "objectively ambiguous" (they were not, as demonstrated

[1312] *See* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at para. 8.5 of dissent, p. 36 (of PDF) ("The above leads us to a discussion that must precede any discussion on the merits of this case, namely, the meta-discussion on how laws must be interpreted. In our opinion, since this case basically boils down to a dispute surrounding two clashing interpretations on the same piece of legislation, which in turn conditioned the interpretation of the agreement.") (emphasis added). *See also id.* at para. 1 of dissent, pp. 28-29 (of PDF).

[1313] Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at para. 1 of dissent, pp. 28-29.

[1314] *See* Claimant's Reply at para. 184(c).

[1315] *See* Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at para. 2.17 of dissent, p. 48 (of PDF) ("From that which has been recognized, it can be observed that the decision to confirm the appealed ruling does not contain arguments that resolve the abovementioned wrongs invoked in the appeal, and therefore the challenged ruling fails to satisfy the requirement of judicial motivation, which violates due process in its expression regarding due motivation. For the abovementioned reasons, it is pertinent to annul the challenged Court of Appeals' ruling and thus to order the Court of Appeals to issue a new duly motivated ruling."). *See also supra* para. 633.

[1316] *See* Claimant's Reply at paras. 185-88.

above),[1317] and therefore the government's failure to issue clarifications of those provisions was arbitrary and unfair.[1318] The flaws in Claimant's reasoning are numerous.

655. *First*, the text of Article 170 signals on its face that the issuance of clarifications is discretionary. It states that "the clarification may be made by means of a Law or provision of a similar rank, a Supreme De[c]ree endorsed by the Ministry of Economy and Finance, a superintendency resolution or a provision of a similar rank or a Tax Tribunal resolution as referred to in Article 154."[1319] The assertion by Claimant and its expert, Dr. Hernández, that the word "may" merely indicates discretion in the choice of the means by which the government can issue the clarification, rather than discretion of whether to issue the clarification at all,[1320] misses the point. True, the sentence states a list of the specific, alternative means by which the government can issue a clarification. But if Claimant's interpretation were correct, the Article would read "shall be made [by one of the following means]" instead of "may be made [by one of the following means]." The better reading of Article 170.1, as written, is that the government may issue a clarification by one of certain specific means or it may not issue a clarification at all. Perú's experts, Drs. Bravo and Picón, likewise opine that Article 170.1 does not establish that the State is required to issue a clarifying provision, nor does it identify any circumstances in which the State must issue a clarification. It rather provides that if and when the State decides it needs to correct a misinterpretation of the law, it may do so using certain specific means.[1321]

656. If Claimant's interpretation were correct that issuance of a clarification is mandatory, there would be other corroborating indications in the law. It is not credible to think that Article 170 (or any other source) would be silent on the issue if it were intended to compel the tax authorities to issue clarifications; surely Article 170 would articulate circumstances under which clarifications were or were not required to be issued, or speak to how a taxpayer should go about demanding the issuance of a clarification, for example. Most likely there is no demand mechanism for the simple reason that there is no right to obtain or obligation to issue such an official clarification. Claimant has not pointed to any Peruvian law or regulation that confirms Claimant's interpretation of Article 170 or that obligates the government to issue clarifications in

[1317] *See* Claimant's Reply at para. 181.

[1318] *See* Claimant's Memorial at para. 403(c); Claimant's Reply at para. 185.

[1319] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 170 (emphasis added); *see also* Exhibit RER-3, First Bravo and Picón Report at para. 77.

[1320] *See* Claimant's Reply at para. 186; Exhibit CER-8, Second Hernández Report at para. 84.

[1321] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 153.

any other situations, nor has it identified any precedents such as court or Tax Tribunal decisions granting a waiver under Article 170 (or otherwise) on the basis of an obligatory-but-never-issued clarification.[1322]

657. *Second*, the discretionary nature of the issuance of a clarification under Article 170.1 is consistent with Peruvian law and policy broadly. Article 170.1 is not rendered unfair or meaningless, because the government has discretion to issue clarifications, as Claimant asserts.[1323] Claimant's interpretation assumes that the government would always refuse to issue a clarification, even if it were needed to clarify an objectively ambiguous provision or to correct a misinterpretation, in order to avoid then being faced with waiver requests. That is a false assumption that is easily dispelled by pointing to SUNAT's actual practice: the government has chosen to issue clarifications in the past. Drs. Bravo and Picón provide two examples of Mandatory Compliance (*observancia obligatoria*) Resolutions in which the Tax Tribunal issued clarifying provisions based on Article 170.1. In each of those cases, Perú exercised its discretion to issue a clarification.[1324] Peruvian authorities are motivated to issue clarifications when there is genuine confusion over the interpretation of a regulation so that people will comply with the law.

658. For tax authorities, in particular, it is preferable that taxpayers understand the laws and pay the taxes and royalties that are due without the tax authorities having to press them to do so. Claimant's assumption that, absent an obligation to issue clarifications, the government would exploit the requirements of Article 170 to deny taxpayers waivers of penalties and interest misses the bigger picture. The government wants taxpayers to pay the taxes that they owe up front. If an ambiguous regulation were preventing the payment of taxes, it would be in the government's own interest to clarify any such ambiguity. The gains in tax revenue from correcting misunderstandings about tax obligations logically would almost inevitably outweigh whatever penalties and interest might be forgone on the basis of an official clarification.

[1322] *See* Respondent's Counter-Memorial at para. 725.

[1323] *See* Claimant's Reply at para. 187.

[1324] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 120 (*quoting* Exhibit RE-274, Tax Tribunal, Resolution No. 05320-9-2021, June 17, 2021, where the Tax Tribunal found that the legal regime under discussion had been subject to multiple interpretations and thus, decided to issue a clarifying provision that declared that said clarification was a Mandatory Compliance Resolution and expressly stated that Article 170.1 applied; *citing also* Exhibit RE-275, Tax Tribunal, Resolution No. 0598-1-2000, August 18, 2000, where the Tax Tribunal found that Article 170.1 applied because the Tax Tribunal had previously issued a Mandatory Compliance Resolution clarifying the correct interpretation of the law in question).

659. *Third*, the principle of proportionality set out in Article IV (paragraph 1.4) of the Law on General Administrative Procedure ("LGAP") does not serve to exempt SMCV from paying penalties and interest on unpaid assessments, as Claimant alleges.[1325] According to Claimant and its expert, Dr. Hernández, even if the government had discretion whether to issue clarifications, it should have issued a clarification in the case of Article 83 of the Mining Law and Article 22 of the Mining Regulations, because the penalties and interest that SMCV incurred as a result of ambiguity in those provisions were disproportionate to the "equitable purpose of Article 170."[1326] Claimant's argument is without merit.

660. The purpose of Article 170 is to protect taxpayers from penalties and interest on unpaid assessments when there is real confusion over the interpretation of a regulation, such that it is not possible to determine whether the underlying assessment is due. That is not the case with SMCV's royalties and taxes. As explained in Respondent's Counter-Memorial and above in Sections II.B and II.C , it was or should always have been apparent that the 1998 Stabilization Agreement applied to (only) the Leaching Project and any other assets and activities would not benefit from the stabilized regime. SMCV and its shareholders identified this question as an important concern, and they knew that they should secure written government confirmation if they thought to rely on the opposite interpretation (though of course they eventually elected to proceed without it). It was not an impossible question to answer.

661. Moreover, once SUNAT issued the Royalty Assessments, there was no open question about whether payment was due. If SMCV objected to the State's interpretation of SMCV's 1998 Stabilization Agreement, SMCV was free to challenge SUNAT's assessments, which SMCV did—but in that case, SMCV should have mitigated the penalties and interest by paying the assessments under protest until the obligation could be overturned through administrative or court proceedings. SMCV, however, refused to mitigate those penalties and interest and instead let them continue to accrue for years, as discussed above; thus, the penalties and interest SMCV incurred are entirely of its own making. The principle of proportionality of the LGAP is not a tool for taxpayers to use to excuse their own bad judgment.

[1325] *See* Claimant's Reply at para. 188.

[1326] Claimant's Reply at para. 188.

J. PERÚ PROPERLY ASSESSED TAX AND PENALTIES AGAINST SMCV IN LIGHT OF ITS FAILURE TO DISTINGUISH ITS STABILIZED AND NON-STABILIZED ACTIVITIES

662. SMCV failed to keep or to provide sufficient information to SUNAT to distinguish which of SMCV's assets and activities were related to the Leaching Project and, thus, had the benefit of the 1998 Stabilization Agreement, and which were not. For all assets and activities that SMCV failed to establish as related solely to the Leaching Project, SUNAT appropriately assessed taxes according to the non-stabilized regime. SMCV was also obliged by law to keep accounts of its stabilized and non-stabilized activities separately. SMCV failed to do so. SUNAT, thus, appropriately, and consistent with Peruvian law, levied penalties against SMCV for its failure to provide separate accounting information as required by law.

663. Claimant alleges in its Reply that those assessments and penalties violated the 1998 Stabilization Agreement, because some of the assessed assets and activities did relate to the Leaching Project and thus should have benefited from the stabilized regime, and because SMCV was not legally obliged, or able, to keep separate accounting records of its investment projects.[1327] Claimant is incorrect on all fronts.

664. SUNAT's assessments and related penalties were fair, reasonable, and consistent with Peruvian law, as demonstrated in the following sections. Despite the multiple opportunities that SUNAT gave to SMCV to establish which of its assets and activities benefitted from the stabilized regime, SMCV never provided SUNAT with the requested information (Section 1). SMCV was obliged by law to keep separate accounts for its stabilized and non-stabilized projects (Section 2). Additionally, SMCV was capable of keeping separate accounts, because there were multiple reasonable allocation methods available to it (Section 3).

[1327] Claimant's Reply at paras. 124-29. In particular, Claimant complains about the following Assessments: (i) the 2007-2013 Additional Income Tax Assessments, (ii) the 2009-2013 Temporary Tax on Net Assets Assessments, and (iii) the 2013 Complementary Mining Pension Fund Assessment. *See id.* at paras. 124-29. *See also* Claimant's Memorial at paras. 266-87. Claimant also complains that (a) with respect to the 2010-2013 Income Tax Assessments, SUNAT applied non-stabilized depreciation rates to certain, and then all, assets relating to the leaching facilities that were in the past considered as stabilized assets; and (b) with respect to the 2007-2013 Income Tax Assessments, SUNAT denied the application of deductions that were stabilized under the 1998 Stabilization Agreement. *See* Claimant's Reply at paras. 124(a)-(b). Claimant also argues that SMCV should not have to pay the penalties assessed against SMCV for failing to provide SUNAT with accounting information separating its Leaching Project and Concentrator Project on the 2010-2011 Royalty Assessment and the 2006-2011 GST Assessment. *See* Claimant's Memorial at paras. 240, 270.

1. SMCV Failed to Provide SUNAT with Adequate Information About Which of Its Assets and Activities Related Solely to Its Stabilized Investment (i.e., the Leaching Project)

665. As a mining company in Perú, SMCV is required to pay taxes to the Peruvian government. The tax rates and rules are established by legislation. In special circumstances, such as when a mining company enters into a stabilization agreement, a taxpayer may benefit from stabilized tax rates on the investment project that is the basis of the agreement. But stabilization is not the norm. It is a case-specific benefit that is applied only to assets and activities that qualify under the relevant stabilization agreement. The *onus* is on the taxpayer to provide SUNAT with the information that is necessary to confirm whether a particular asset or activity relates to the stabilized project and thus benefits from the agreement.[1328]

666. In SMCV's case, only the assets and activities related to the Leaching Project benefitted from stabilization under the 1998 Stabilization Agreement. Thus, unless SMCV established to SUNAT's satisfaction that an asset or activity was related to the Leaching Project, then, by default, that asset or activity was subject to the standard, non-stabilized rates and rules. On multiple occasions, SUNAT requested the specific information that it needed to establish which of SMCV's assets and activities benefited from the stability guarantees conferred by the 1998 Stabilization Agreement.[1329]

667. Despite those multiple requests, SMCV never furnished the requested information to SUNAT, as the Tax Tribunal noted in its resolutions.[1330] For example:

- With respect to the 2006 Income Tax Assessment, on March 14, 2011, SUNAT sent Letter No. 0522110000184 to SMCV requesting that it provide separate accounting information for each of SMCV's projects.[1331] On May 6, 2011, SUNAT recorded that SMCV had failed to provide the requested information in

[1328] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 103-05; Exhibit RER-3, First Bravo and Picón Report at para. 189.

[1329] *See* Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400, March 30, 2012, at p. 126; Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014), at pp. 172-73; Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015), at pp. 374-77; Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015), at pp. 323-28.

[1330] *See*, *e.g.*, Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018 (2006 Income Tax Assessment), August 22, 2018, at p. 33; Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018 (2007 Income Tax Assessment), August 22, 2018 (notified to SMCV on November 19, 2018), at p. 48.

[1331] *See* Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400, March 30, 2012, at p. 126; Exhibit RE-285, SUNAT, Request for Information No. 0522110000184, March 14, 2011, at p. 3.

violation of Article 175 of the Tax Code.[1332] SUNAT repeated its information request in Letter No. 0522110000346 of May 6, 2011, which meant that SMCV had the opportunity to rectify its violation and reduce penalties accordingly.[1333] SMCV did not respond to SUNAT's second request either.[1334]

- With respect to the 2008 Income Tax Assessment, on September 20, 2011, SUNAT sent to SMCV Letter No. 0522110000870 requesting that it provide separate accounting information for each of SMCV's projects.[1335] According to SUNAT's report from October 4, 2011, SMCV failed to provide the requested information.[1336] SUNAT repeated its information request in Letter No. 0522110000940 of October 5, 2011, which gave SMCV the opportunity to rectify its violation and reduce penalties accordingly.[1337] SMCV did not respond to SUNAT's second request either.[1338] SUNAT also requested that SMCV provide the technical study that supported the transfer pricing of certain sale operations that SMCV had carried out with Minera Freeport-McMoran South America S.A.C.[1339] SMCV replied to this request (only) on June 27, 2012, stating that it was not required to provide the technical study.[1340]

- With respect to the 2009 and 2010 GST Assessments, SUNAT asked SMCV in Letters Nos. 0522120000345 and 0522120000347 of April 4, 2012, respectively, to provide separate accounting information for each of SMCV's projects.[1341] On March 19, 2013, SUNAT recorded that SMCV had failed to provide the requested information in violation of Article 175.2 of the Tax Code.[1342] SUNAT repeated its information request in Letters Nos. 0522130000409 and 0522130000411 of March 19, 2013, which gave SMCV the opportunity to rectify its violation and

[1332] *See* Exhibit RE-286, SUNAT, Report on Results of Request for Information Request No. 0522110000184, May 6, 2011 (excerpts), at p. 29 (of PDF).

[1333] *See* Exhibit RE-287, SUNAT, Request for Information No. 0522110000346, May 6, 2011.

[1334] *See* Exhibit RE-288, SUNAT, Report on Results of Request for Information No. 0522110000346, May 24, 2011.

[1335] *See* Exhibit RE-289, SUNAT, Request for Information No. 0522110000870, September 20, 2011.

[1336] *See* Exhibit RE-290, SUNAT, Report on Results of Request for Information No. 0522110000870, October 6, 2011, at p. 12.

[1337] *See* Exhibit RE-291, SUNAT, Request for Information No. 0522110000940, October 5, 2011.

[1338] *See* Exhibit RE-292, SUNAT, Report on Results of Request for Information No. 0522110000940, October 5, 2012.

[1339] *See* Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014), at p. 177 (of PDF CE-109B).

[1340] *See* Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014), at p. 177 (of PDF CE-109B).

[1341] *See* Exhibit RE-293, SUNAT, Request for Information No. 0522120000345, April 4, 2012, p. 3 (of PDF); Exhibit RE-294, SUNAT, Request for Information No. 0522120000347, April 4, 2012, at p. 3 (of PDF).

[1342] *See* Exhibit RE-295, SUNAT, Report on Results of Request for Information No. 0522120000345, March 19, 2013, at p. 18 (of PDF); Exhibit RE-296, SUNAT, Report on Results of Request for Information No. 0522120000347, March 19, 2013, at p. 17 (of PDF).

reduce penalties accordingly.[1343] SMCV did not respond to SUNAT's second request either.[1344]

- With respect to the 2009 Income Tax Assessment, on April 4, 2012, SUNAT sent to SMCV Letter No. 0522120000346 requesting that SMCV provide separate accounting information for each of SMCV's projects.[1345] SMCV failed to provide that information according to SUNAT's report from March 19, 2013.[1346] SUNAT repeated its information request in Letter No. 0522130000408 of March 19, 2013, which gave SMCV the opportunity to rectify its violation and reduce penalties accordingly.[1347] SMCV did not respond to SUNAT's second request either.[1348]

668. Claimant admits that SMCV did not comply with SUNAT's requests. In the course of its argumentation regarding the obligation to keep separate accounts of its investment projects (which Respondent addresses in Sections II.J.2 and II.J.3 below), Claimant declares that "SMCV could not divide its accounting because the Government itself failed to provide a method SMCV could use to do so"[1349] as there was not a "regulation that would have allowed SMCV to provide the information that SUNAT requested."[1350] Thus, it is undisputed that SMCV failed to provide SUNAT with the information SUNAT deemed necessary to determine which assets and activities related solely to the Leaching Plant, such that SMCV could take advantage of the 1998 Stabilization Agreement. Faced with that information shortfall, SUNAT appropriately and unsurprisingly proceeded to apply the standard, non-stabilized regime to SMCV's unsegregated assets and activities. SUNAT's approach was fully in accordance with Peruvian law.

669. Claimant nevertheless alleges in its Reply that SUNAT had a duty to assess taxes based on "verifiable facts," rather than on "presumptions," and to adopt all measures necessary to "divide SMCV's accounting according to whatever criteria SUNAT wrongly believed

---

[1343] *See* Exhibit RE-297, SUNAT, Request for Information No. 0522130000409, March 19, 2013; Exhibit RE-298, SUNAT, Request for Information No. 0522130000411, March 19, 2013.

[1344] *See* Exhibit RE-299, SUNAT, Report on Results of Request for Information No. 0522130000409, December 23, 2013; Exhibit RE-300, SUNAT, Report on Results of Request for Information No. 0522130000411, June 23, 2014.

[1345] *See* Exhibit RE-301, SUNAT, Request for Information No. 0522120000346, April 4, 2012, at p. 3.

[1346] *See* Exhibit RE-302, SUNAT, Report on Results of Request for Information No. 0522120000346, March 19, 2013, p. 16.

[1347] *See* Exhibit RE-303, SUNAT, Request for Information No. 0522130000408, March 19, 2013.

[1348] *See* Exhibit RE-304, SUNAT, Report on Results of Request for Information No. 0522130000408, September 15, 2014.

[1349] Claimant's Reply at para. 129(c).

[1350] Claimant's Reply at para. 129.

applied" and tax SMCV only for operations related to the Concentrator.[1351] Claimant misunderstands the tax system. To reiterate, it is the taxpayer's duty to provide SUNAT with the information necessary to assess taxes. Here, in particular, it was SMCV's obligation to supply the information needed to show which of its assets and activities were entitled to benefit from stabilized rates.[1352]

670. It is uncontroversial that all assets and activities are subject to the non-stabilized regime unless a taxpayer establishes that certain of those assets and activities qualify for special treatment. The Peruvian government has no obligation under Peruvian law to investigate on a taxpayer's behalf which of the taxpayer's assets and activities benefit from stabilized rates.[1353] If a taxpayer like SMCV wishes for SUNAT to apply the stabilized regime to certain of its assets and activities, it must prove to SUNAT that it is entitled to those benefits by identifying those assets and activities separately. SMCV did not do so.

2. SMCV Was Obligated to Keep Separate Accounts for Its Stabilized and Non-Stabilized Projects

671. SMCV also incurred penalties on certain of the assessments that it owed for assets and activities that it did not establish as related to the Leaching Project, because SMCV failed to keep separate accounting records as required by law. As Perú explained in its Counter-Memorial, Article 22 of the Mining Regulations requires taxpayers to maintain separate accounts for stabilized and non-stabilized investment projects.[1354] Claimant agrees that Article 22 establishes a requirement to keep separate accounts, but it claims that the requirement applies only to mining companies with multiple concessions or EAUs where the different concessions and/or EAUs are subject to both stabilized and non-stabilized regimes.[1355] Because, according to Claimant, SMCV's Concentrator Project is not in a separate concession or EAU subject to a regime different from the rest of its "mining unit," SMCV did not fall within the scope of Article

[1351] Claimant's Reply at para. 129(c).

[1352] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 87.5, 87.6.

[1353] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 99-100.

[1354] *See also* Respondent's Counter-Memorial at para. 395; Exhibit RER-3, First Bravo and Picón Report at Section VIII(A).

[1355] Claimant's Reply at para. 127.

22, and, thus, SMCV was not required to keep separate accounts for its investment projects.[1356] Claimant is mistaken.

672. Article 22 of the Mining Regulations requires taxpayers to keep separate accounts for stabilized and non-stabilized investment projects. Article 22 provides, in relevant part:[1357]

> 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.

The first paragraph of Article 22 establishes that stabilization guarantees are applicable to "investments," *i.e.*, the investment projects that mining companies implement within their concessions, as defined in the feasibility study related to the relevant agreement.[1358] Perú's experts, Drs. Bravo and Picón, explained in their first expert report that because the first paragraph of Article 22 confirms that it is investment projects that are stabilized, and not concessions, *per se*, that are stabilized, the only plausible reading of the second paragraph of Article 22 is that it obligates the taxpayer to keep "independent accounts" of its stabilized investment projects separate from its other projects that are non-stabilized.[1359] Drs. Bravo and Picón further explain in their second report that Article 22 must be interpreted systematically and teleologically with the Mining Law and its Regulation, which provide that the stabilized tax and administrative regimes under a stabilization agreement apply to the specific investment project and not the entire concession or mining unit where it is located.[1360] Thus, Article 22 must be read as requiring taxpayers to keep separate the accounts of their stabilized and non-stabilized investment projects.

673. The Peruvian government has uniformly applied this understanding of the requirements of Article 22. For example, the Tax Tribunal has consistently recognized in numerous resolutions an obligation for mining companies to keep separate accounts for

---

[1356] Claimant's Reply at para. 127.

[1357] Exhibit CA-2, Mining Regulations at Art. 22 (emphasis added).

[1358] *See* Exhibit RER-3, First Bravo and Picón Report at paras. 171-72.

[1359] *See* Exhibit RER-3, First Bravo and Picón Report at para. 172.

[1360] Exhibit RER-8, Second Bravo and Picón Report at paras. 49-50.

stabilized and non-stabilized investment projects.[1361] MINEM has similarly recognized such an obligation. For example, MINEM's April 2005 Report, which refers to Article 22 of the Mining Regulations, explains that "[i]f 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."[1362] SUNAT has also recognized the same obligation, for example, by confirming the understanding of mining company Tintaya S.A. ("Tintaya") when SUNAT assessed fines against the company for failing to consolidate results from its two projects. While the obligation under Article 22 of the Mining Regulations to separate the accounts of stabilized and non-stabilized projects was not the issue in Tintaya's case, SUNAT discussed that obligation when assessing Tintaya and confirmed that Tintaya had kept separate accounts.[1363] Thus, Claimant's assertion that SMCV is not required under Peruvian law to keep separate accounts for its Leaching Project (a stabilized project under the 1998 Stabilization Agreement) and its Concentrator Project (a non-stabilized project) is incorrect.

674. Claimant concedes that SMCV did not keep separate accounts, and therefore necessarily concedes also that SMCV violated the Article 22 obligation. As Claimant admits, SMCV "kept a single set of account[s]" for the Leaching Project and the Concentrator Project.[1364] Thus, in the face of SUNAT's and Perú's reasonable and appropriate interpretation of the obligations imposed by Article 22, SUNAT's application of penalties against SMCV due to its failure to keep separate accounts was reasonable and in accordance with Peruvian law.

3. Multiple Allocation Methods for the Separation of Accounts Were Available to SMCV

675. Another of Claimant's excuses for SMCV's failure to keep separate accounts and provide the necessary accounting information to SUNAT is that Peruvian law provided no official guidance on how to allocate assets and activities of particular investment projects to

[1361] Exhibit RER-3, First Bravo and Picón Report at para. 173 (*citing* Exhibit CA-184, Tax Tribunal, Resolution No. 20290-1-2011, December 6, 2011, at p. 6; Exhibit RE-85, Tax Tribunal Resolution No. 18198-2-2013, December 6, 2013, at pp. 9-10; Exhibit RE-86, Tax Tribunal Resolution No. 18397-10-2013, December 11, 2013, at p. 46).

[1362] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at p. 8 (emphasis added); *see also* Exhibit RER-3, First Bravo and Picón Report at para. 176; Exhibit RWS-2, First Isasi Statement at paras. 18, 20-21.

[1363] *See* Exhibit RE-86, Tax Tribunal Resolution No. 18397-10-2013, December 11, 2013, at p. 3, n.1 ("It is important to note that the Administration does not question the fulfillment by the appellant party of keeping independent accounts and reflecting them in separate results."); *see also* Exhibit RER-8, Second Bravo and Picón Report at paras. 55-59.

[1364] Claimant's Reply at para. 127(b); *see also* Exhibit CER-3, Expert Report of Luis Hernández Berenguel, October 19, 2021 ("First Hernández Report"), at para. 51.

separate accounts.[1365] Claimant's tax expert, Dr. Hernández, additionally claims that "fundamental taxation principles of certainty and predictability" require Peruvian law to define "every material aspect of a tax," including the method to separate accounts between different mining activities.[1366] Claimant's and its expert's claims are misguided at best.

676. To address Dr. Hernández's claim first, "fundamental taxation principles of certainty and predictability" do not require Peruvian law to define a method for mining companies to keep separate the accounts of their investment projects. Peruvian tax law can provide certainty and predictability to taxpayers without including in each law a specific accounting method for the taxpayer to employ in their accounting practices.[1367] Furthermore, according to Perú's experts, Drs. Bravo and Picón, the principle of Tax Privilege (*reserva tributaria*)—which encompasses the taxation principles of certainty and predictability—does not apply to accounting methods to keep separate accounts, because those methods are not related to the creation of a specific tax. Rather, accounting allocation methods are secondary aspects of a tax and thus are not required to be expressly specified in the law.[1368]

677. At the end of the day, however, the question of whether Perú should be required to a specify an accounting methodology is largely moot because, contrary to Claimant's assertion, Peruvian law does contain official guidance on accounting allocation methods that SMCV could have used to comply with its obligations under Article 22.

678. Government authorities, as well as many accounting practitioners, have identified multiple allocation methods that allow mining companies to keep their accounts separated by activity, and many of these methods are readily provided in Peruvian law. In their first expert report, Perú's tax experts, Drs. Bravo and Picón, listed several of these methods, such as (i) the transfer price method; (ii) the non-controlled comparable price method; (iii) the retail price method; (iv) the incremental cost method; (v) the profit splitting method; (vi) the residual profit splitting method; (vii) the transactional net margin method; and more.[1369] Peruvian law includes specific references to all of these methods. For example, Article 32 of the income tax law

[1365] *See* Claimant's Reply at para. 128.

[1366] *See* Exhibit CER-8, Second Hernández Report at para. 17.

[1367] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 85; *see also* Exhibit RER-9, Second Ralbovsky Report at paras. 148, 158.

[1368] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 80-82, 85.

[1369] *See* Exhibit RER-3, First Bravo and Picón Report at para. 185.

presents the transfer price method,[1370] and Article 32-A presents the non-controlled comparable price method, the retail price method, the incremental cost method, and others.[1371]

679. Moreover, the allocation methods that Drs. Bravo and Picón outline were not SMCV's only options. Perú's international mining tax expert, Mr. Ralbovsky, explained two additional methods that mining companies routinely use to separate shared costs between different mining activities, and thereby maintain separate accounts for each project.[1372] The allocation methods Mr. Ralbovsky described are (i) the relative value method, which is based on the relative value of the copper produced through each process; or (ii) the tonnage method, which is based on the tons of ore transported to each processing plant.[1373] Mining companies have been using these methods since at least the late 1980s.[1374] To this day, mining companies routinely employ these methods to keep separate accounts between different mining projects.[1375] Mr. Ralbovsky also explained in both of his reports that the relative value method is provided in Article 22 of the Mining Regulations.[1376] It is notable that Claimant did not address either of these methods in its Reply. While Claimant did attempt to dismiss the allocation methods that Drs. Bravo and Picón described, Claimant did not respond at all to Mr. Ralbovsky in its Reply. Thus, Claimant does not dispute the availability and suitability of the accounting allocation methods that Mr. Ralbovsky discusses in his report as a means by which SMCV could keep separate accounting records of its investment projects.

680. Claimant tries to discount the many available allocation methods that Drs. Bravo and Picón explained by arguing that these methods would have been hard to implement, specifically because certain of these methods allegedly (i) did not exist at the time the 1998 Stabilization Agreement was in force; (ii) were unsuitable because they are meant for other purposes; or (iii) do not apply to certain kinds of operations.[1377] Claimant's arguments are beside

[1370] *See* Exhibit CA-111, Single Unified Text of the Income Tax Law, Supreme Decree No. 179-2004-EF, December 8, 2004, at Art. 32, numeral 4.

[1371] *See* Exhibit CA-111, Single Unified Text of the Income Tax Law, Supreme Decree No. 179-2004-EF, December 8, 2004, at Art. 32-A.

[1372] *See* Exhibit RER-4, First Ralbovsky Report at paras. 20, 93.

[1373] Exhibit RER-4, First Ralbovsky Report at paras. 20, 88; Exhibit RER-9, Second Ralbovsky Report at para. 92.

[1374] Exhibit RER-9, Second Ralbovsky Report at paras. 9, 118.

[1375] Exhibit RER-9, Second Ralbovsky Report at paras. 9, 118; Exhibit RER-4, First Ralbovsky Report at para. 93.

[1376] Exhibit RER-4, First Ralbovsky Report at para. 88; Exhibit RER-9, Second Ralbovsky Report at para. 9.

[1377] *See* Claimant's Reply at paras. 128, 128(c).

the point. As Drs. Bravo and Picón explain, in their first report they did not assert that the multiple allocation methods available to SMCV comprised the applicable legal framework to separate the accounting of stabilized and non-stabilized projects.[1378]

681. Although several of the methods Drs. Bravo and Picón explained are provided in Peruvian law, such procedures might not be applicable to every practical situation that a taxpayer might face over time. Tax regulations cannot, and do not, provide procedures for every possible tax situation. Nevertheless, taxpayers may draw on available accounting principles and methods to comply with tax obligations (*e.g.*, the obligation to keep separate accounts), including the methods that Drs. Bravo and Picón gave as examples.[1379] At any rate, as noted above, in addition to the examples of accounting methods that Drs. Bravo and Picón provided, Mr. Ralbovsky explained two additional methods that mining companies have been using for decades to keep separate accounts.

682. Claimant also attempts to support its assertion that there was a lack of guidance on allocation methods in Peruvian law at the time that the Stabilization Agreement was in force by arguing that the December 2019 amendment of Article 22 of the Regulations added detailed accounting guidance for mining companies that was previously lacking.[1380] Claimant's argument fails for several reasons. *First*, the version of Article 22 that was in effect prior to the December 2019 amendment did include guidance on how to allocate costs from separate projects into separate accounts.[1381] The third paragraph of Article 22 provided that the taxpayer should distribute expenses that cannot be distinguished between investment projects in proportion to the net sales of the mining substances extracted through each project.[1382] The 2019 amendment of Article 22 simply expanded on the guidance that was already there by explaining how to allocate expenses between different investment activities if there are no net sales linked to such activities,

[1378] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 82-85.

[1379] Exhibit RER-8, Second Bravo and Picón Report at para. 88.

[1380] Claimant's Reply at para. 128(b).

[1381] Exhibit RER-8, Second Bravo and Picón Report at paras. 85, 90; Exhibit RER-4, First Ralbovsky Report at para. 88.

[1382] *See* Exhibit CA-2, Mining Regulations at Art. 22 ("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.").

or in case it is not possible to distribute them in proportion to the activities that receive the contractual benefit and those which do not.[1383]

683. *Second*, as noted above, guidance on allocation methods was not required to be expressly provided for in Article 22 because the obligation to keep separate accounts was not related to the creation of a tax, rather it was a secondary effect of a tax. *Third*, as established earlier, Article 22 was not the only provision of the Regulations to include guidance regarding accounting allocation methods. Articles 32 and 32-A also include—and included before December 2019 and during the term of the 1998 Stabilization Agreement—guidance on accounting allocation methods.[1384] That is not to mention the multiple allocation methods that have been known and used in the mining industry for over thirty years, *i.e.*, well before December 2019, as Mr. Ralbovsky explained in his second report.[1385] Thus, contrary to Claimant's assertions, there was ample guidance in Peruvian law, and ample knowledge in the mining industry—at the time the Stabilization Agreement was in force—regarding methods that SMCV could have applied to separate its accounts between its mining projects. SMCV simply needed to choose a method to implement.

684. In any event, even if Claimant were correct that there was no guidance under Peruvian law regarding accounting allocation methods during the term of the 1998 Stabilization Agreement (there was),[1386] that is no excuse for SMCV's failure to separate the accounts of its investment projects. A reasonable taxpayer, let alone a sophisticated investor like SMCV, aware of its tax obligations, should have performed due diligence to identify suitable allocation methods, of which there were many, including methods that have been used by mining companies for over 30 years, as Perú's expert, Mr. Ralbovsky, explains.[1387] SMCV surely could have enlisted the help of tax or accounting advisors to ensure that it complied with applicable tax regulations. As Mr. Ralbovsky explains, "Of course, substantial effort is required to perform this calculation . . . . But the concept and the math are not difficult, especially for mining or tax accounting method specialists. If SMCV found it difficult to perform these calculations, it

[1383] *See* Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Art. 22.

[1384] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 88.

[1385] Exhibit RER-9, Second Ralbovsky Report at paras. 9, 118.

[1386] *See* Claimant's Reply at para. 128(b).

[1387] Exhibit RER-9, Second Ralbovsky Report at para. 106.

should have consulted an appropriate mining tax and/or tax accounting method specialist."[1388] According to Mr. Ralbovsky, SMCV's "[s]topping dead in its tracks and not even attempting to make the calculation was not an appropriate choice. Using its lack of basic tax accounting method knowledge as an excuse to not produce separate taxable income figures for primary sulfide and for oxide/secondary sulfide was entirely inappropriate."[1389] Thus, Claimant's attempts to justify SMCV's failure to comply with its legal obligation to keep separate accounts are futile.

* * *

685. In sum, SMCV was obligated under Article 22 of the Mining Regulations to keep separate accounts of its stabilized and non-stabilized activities. It did not, notwithstanding the fact that many options for keeping separate accounts were available to SMCV. SUNAT thus appropriately assessed penalties against SMCV for failing to keep separate accounts in accordance with Peruvian law. In addition, because SMCV failed to keep separate accounts of its stabilized and non-stabilized activities, SMCV did not provide to SUNAT the information needed in order for SUNAT to determine which of SMCV's assets and activities benefitted from the Stabilization Agreement and which did not. Thus, SUNAT correctly, and in accordance with Peruvian law, applied the non-stabilized regime to those assets and activities that SMCV did not identify as relating exclusively to the Leaching Project.

K. CONCLUSION

686. In its Reply, Claimant claims that a series of events allegedly prove that Perú changed its interpretation of the scope of mining stabilization agreements "for political reasons," and that, in particular, MINEM officials were pressured to take action against SMCV.[1390] Claimant's allegations are mere self-serving conjectures to try to justify SMCV's (and Claimant's) own actions.

687. First and foremost, it is not the case, as Claimant alleges, that Perú changed its mind regarding the scope of mining stabilization agreements—and, thus, of course, did not change its mind as a result of alleged political pressure. As Respondent demonstrated in its Counter-Memorial and again in this Reply, MINEM, MEF, and SUNAT have consistently

[1388] Exhibit RER-9, Second Ralbovsky Report at para. 99. *See also id.* at paras. 106, 114, 148, 158.

[1389] Exhibit RER-9, Second Ralbovsky Report at para. 114.

[1390] *See* Claimant's Reply at para. 138.

understood and stated to others that (i) mining stabilization agreements grant stability guarantees to the specific project for which the agreement was entered into, as described in the feasibility study attached to and incorporated in any such agreement; and (ii) SMCV's 1998 Stabilization Agreement exclusively covered the Leaching Project and not the Concentrator Project (which was a separate, unrelated, and new investment project). There simply was no *volte-face*.

688. The various communications from certain Congressmen to MINEM officials, or MINEM's responses to the same, on which Claimant focuses in its Reply do not prove that MINEM changed its mind nor that it did so as a result of alleged political pressure. Members of Congress, in a legitimate exercise of their role as legislators, have the right to question actions of government officials and/or to request explanations from them regarding subjects of particular interest. But that does not mean that government officials change their views or act outside the law whenever they receive such inquiries. As the evidence shows, Perú acted in accordance with Peruvian law at all times, and MINEM did not change its longstanding position regarding the scope of mining stabilization agreements, including that of SMCV.

689. Moreover, the fact that MINEM consistently defended SMCV's Leaching Project's stabilized status before Congress defeats Claimant's conspiracy theory that government officials were "out to get" SMCV. Had MINEM "succumbed" to political pressure to act against SMCV, it would not have repeatedly insisted to Congress, or to unhappy community leaders in Arequipa, that mining stabilization agreements offered profit reinvestment benefits, or that they protected companies from having to pay royalties with respect to projects that were stabilized, and that SMCV, in particular, was not obliged to pay royalties with respect to its stabilized project—the Leaching Project.

690. The actual facts of this case are vastly simpler than the complex conspiracy scheme that Claimant has woven together for this arbitration. SMCV (and Phelps Dodge, Freeport's predecessor) wanted to avoid paying royalties for the Concentrator Project; so, it had to get creative to try to include the Concentrator within the scope of its existing mining stabilization agreement. SMCV never obtained confirmation from the State that it could extend the scope of the Agreement to include the Concentrator Project. Nevertheless, SMCV took a calculated risk and hoped that the government would not enforce the royalty and other tax payments with respect to its Concentrator Plant. SMCV (and Phelps Dodge and Claimant) lost that bet.

691. Royalty and Tax Assessments were assessed against SMCV with respect to the Concentrator Project, and SMCV failed to convince SUNAT, the Tax Tribunal, and Peruvian courts (including Perú's highest court) that its interpretation of the 1998 Stabilization Agreement was correct. Throughout the process, Perú consistently maintained its long-held position on the scope of mining stabilization agreements. It did not change its views as a result of alleged political pressure. There was no conspiracy or plot against SMCV. Perú should not be held internationally liable for SMCV's (and Phelps Dodge's and Claimant's) own mistakes or its own calculated risk that it took but, in the end, lost.

III. JURISDICTIONAL OBJECTIONS

692. As Respondent explained in its Counter-Memorial, the Tribunal need not even reach the factual or legal merits of Claimant's claims, because the Tribunal lacks jurisdiction to hear almost all of those claims. The Tribunal lacks jurisdiction on five grounds. *First*, Claimant has failed to file its claims related to SUNAT's Royalty and Tax Assessments within the three-year limitations period set in Article 10.18.1 of the TPA. *Second*, Claimant's claims of alleged breaches of the TPA based on the Peruvian government's decisions not to waive penalties and interest on SUNAT's Tax Assessments are outside the Tribunal's jurisdiction, because the imposition of penalties and interest for non-payment of taxes constitutes "taxation measures" which are carved out from the scope of the TPA pursuant to Article 22.3.1. *Third*, Claimant's claims arising from SUNAT's Assessments are deeply rooted in acts or facts that occurred before the TPA entered into force, and thus, those claims fall outside the Tribunal's jurisdiction by reason of Article 10.1.3 of the TPA. *Fourth*, because SMCV submitted the claims that Claimant presses in these proceedings (*i.e.*, challenges to SUNAT's Assessments against SMCV) to Perú's Supreme Court, the Superior Court of Lima (appellate court), the Contentious Administrative Court (first instance court), the Tax Tribunal, and SUNAT's Claims Division (SUNAT's appeal body), Article 10.18.4 of the TPA precludes Claimant from submitting (on SMCV's behalf) those claims to this Tribunal. *Fifth*, because Claimant failed to demonstrate that it (Freeport) relied on the 1998 Stabilization Agreement when it (Freeport) established or acquired its covered investments, Claimant may not submit (on SMCV's behalf) claims of alleged breaches of the 1998 Stabilization Agreement under Article 10.16.1 of the TPA. To be clear, the burden to prove that the jurisdictional requirements to submit a claim under the TPA are met belongs to

Claimant.[1391] Claimant has failed to meet that burden, and the Tribunal lacks jurisdiction to hear Claimant's claims in these proceedings.

693. This Section III details how Claimant's claims fall outside the Tribunal's jurisdiction. Section III.A demonstrates that Claimant (and SMCV) first knew or should have known of the alleged breaches caused by SUNAT's Assessments, and that SMCV incurred loss or damage as a result, more than three years before Claimant submitted its Notice of Arbitration to ICSID on February 28, 2020 (*i.e.*, before the limitations period cut-off date of February 28, 2017). Section III.B explains that Claimant's allegations of breaches of the TPA based on the Peruvian government's imposition and maintenance of penalties and interest on SUNAT's Tax Assessments are outside the Tribunal's jurisdiction, because those penalties and interest on unpaid taxes constitute "taxation measures" which are excluded from the scope of the TPA under Article 22.3.1. Section III.C establishes that Claimant's claims related to SUNAT's Assessments are deeply rooted in acts or facts that occurred before the TPA entered into force on February 1, 2009, and, thus, Claimant's claims fall outside of the coverage of the TPA and outside the Tribunal's jurisdiction. Section III.D explains that the same claims of alleged breaches of the 1998 Stabilization Agreement submitted (by Claimant on SMCV's behalf) to this arbitration were previously submitted to Perú's Supreme Court, Contentious Administrative Appellate Court, SUNAT's Claims Division and the Tax Tribunal, and thus, cannot be re-litigated in these arbitral proceedings. Section III.E shows that Claimant has failed to prove that it relied on the 1998 Stabilization Agreement when it acquired its covered investments on March 19, 2007 and, thus, Claimant may not submit (on SMCV's behalf) claims of alleged breaches of that purported investment agreement to arbitration under the TPA.

A. CLAIMANT'S CLAIMS BASED ON SUNAT'S ROYALTY AND TAX ASSESSMENTS ARE OUTSIDE THE TRIBUNAL'S JURISDICTION, BECAUSE CLAIMANT FIRST KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED BREACHES, AND THAT SMCV INCURRED LOSS OR DAMAGE, MORE THAN THREE YEARS BEFORE CLAIMANT FILED ITS NOTICE OF ARBITRATION

694. Article 10.18.1 of 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 (for claims brought on its own behalf) or the enterprise that the claimant owns or controls (for claims brought on the enterprise's behalf) incurred related

[1391] *See* Exhibit RA-5, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ("*Resolute Forrest Products v. Canada*, Decision on Jurisdiction"), at paras. 83, 85. *See also* Respondent's Counter-Memorial, at para. 522.

loss or damage.[1392] Claimant has submitted claims both on its own behalf for alleged breaches of the TPA and on behalf of SMCV[1393] for alleged breaches of the 1998 Stabilization Agreement. Claimant submitted its Notice of Arbitration on February 28, 2020,[1394] and thus, the limitations period cut-off date is February 28, 2017. As Respondent explained in its Counter-Memorial, Claimant (and SMCV) was well aware long before February 28, 2017 of the alleged breaches caused by SUNAT's Assessments, and by related measures such as SUNAT's imposition of penalties and interest on the assessed amounts. Thus, Claimant's claims based on those alleged breaches are time-barred, and, therefore, the Tribunal lacks jurisdiction to hear those claims.[1395]

1. Alleged Breaches of the 1998 Stabilization Agreement

695. Claimant admits that, under Article 10.18.1 of the TPA, if it (independently or through SMCV) first knew or should have known of the breaches it alleges and that SMCV incurred loss or damage more than three years before Claimant filed its Notice of Arbitration, then its claims of alleged breach of the 1998 Stabilization Agreement and of the TPA would fall outside of the TPA's limitations period, and thus, the Tribunal would have no jurisdiction to hear those claims.[1396] On this the parties agree.[1397] Thus, if Claimant first knew or should have known of the alleged breaches and that SMCV incurred loss or damage as a result of those alleged breaches before February 28, 2017 (*i.e.*, three years before Claimant filed its Notice of Arbitration on February 28, 2020), all of Claimant's claims of alleged breach of the Agreement, and almost all of Claimant's claims of alleged breach of the TPA, would fall outside the Tribunal's jurisdiction. Claimant, however, argues that it first knew of the alleged breaches and

[1392] *See* Exhibit CA-10, United States-Perú Trade Promotion Agreement, signed April 12, 2006, entered into force February 1, 2009 ("U.S.-Perú TPA"), at Art. 10.18.1.

[1393] Claimant states that it owns or controls SMCV indirectly through its 53.56% ownership interest. *See* Claimant's Memorial at para. 28; Claimant's Notice of Arbitration, February 28, 2020 ("Claimant's Notice of Arbitration"), at para. 21.

[1394] Claimant's Notice of Arbitration at cover page.

[1395] If the Tribunal agrees that Claimant's claims of alleged breaches are time-barred under TPA Article 10.18.1, the only claims that would survive the application of the limitations period 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 by reason of TPA Article 10.1.3, as discussed in Section III.C below. Furthermore, all of those claims fail on the merits, in any event, as discussed in Section IV.B below.

[1396] Claimant's Reply at para. 211.

[1397] *See* Respondent's Counter-Memorial at paras. 416, 418; Claimant's Reply at para. 211.

the related loss or damage after the cut-off date, and thus, its claims of alleged breaches of the 1998 Stabilization Agreement and of the TPA are not time-barred under the TPA.[1398] Claimant's assertions have no merit. Because Claimant's characterization of its knowledge of the alleged breaches of the Agreement and of the TPA vary, Respondent will first discuss the application of the limitations period to Claimant's alleged breaches of the Agreement (Section III.A.1), followed by the same for Claimant's alleged breaches of the TPA (Section III.A.2).

696. Article 10.18.1 provides that the three-year limitations period starts to run "from the date on which 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."[1399] The *Corona Materials v. Dominican Republic* tribunal, interpreting the limitations provision under CAFTA-DR (which is identical to the limitations provision in the TPA[1400]), held that the key requirement of that provision is to identify "the earliest possible date on which the [c]laimant would have obtained knowledge of the alleged breach . . . and of the incurred loss or damage . . . ."[1401] Even the authority that Claimant cites in its Reply[1402] supports this approach, as the *Mobil II* tribunal held that the claimant in that case "first acquired knowledge that the Guidelines would be enforced in the future, and that it had suffered loss as a result, at the earliest when it received [a particular letter from the government]."[1403] As Perú demonstrated in its

[1398] Claimant's Reply at para. 211.

[1399] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.1 (emphasis added).

[1400] *See* Exhibit RE-112, The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), Chapter Ten, signed on August 5, 2004, entered into force on January 1, 2009 ("CAFTA-DR Chapter Ten"), at Art. 10.18.1 ("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.").

[1401] Exhibit RA-3, *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, May 31, 2016 ("*Corona Materials v. Dominican Republic*, Award on Preliminary Objections"), at para. 198 (emphasis added); *see also* Exhibit RA-2, *Spence International Investments LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, October 25, 2016 ("*Spence v. Costa Rica*, Interim Award") at n.139 (*citing* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 198). *See also* Exhibit CA-420, *Mobil v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, July 13, 2018 ("*Mobil v. Canada II*, Decision on Jurisdiction"), at para. 172.

[1402] *See* Claimant's Reply at para. 217(b) (*citing* Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction, at para. 154).

[1403] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 172 ("It first acquired knowledge that the Guidelines would be enforced in the future, and that it had suffered loss as a result, at the earliest when it received the 9 July 2012 letter. The Tribunal therefore concludes that the limitation period in Articles 1116(2) and 1117(2) began to run again from the time of receipt of that letter.") (emphasis added).

Counter-Memorial,[1404] and summarizes below, the date when Claimant first knew or should have known of the alleged breaches and that SMCV had incurred loss or damage was well before the limitations period cut-off date.

697. In this case, the core of Claimant's claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement is SUNAT's non-application of the stability benefits that Claimant asserts were guaranteed under that Agreement to SMCV's Concentrator Project. When it issued the Royalty and Tax Assessments against SMCV (and the penalties and interest related thereto), SUNAT applied the non-stabilized regime to SMCV's Concentrator Project, and thus, according to Claimant, acted in contravention of the 1998 Stabilization Agreement.[1405]

698. As Perú explained in its Counter-Memorial,[1406] the first date on which Claimant first knew or should have known of SUNAT's alleged breach of the 1998 Stabilization Agreement was when SMCV was notified of the first assessment from SUNAT on August 18, 2009, indicating that SMCV owed US$ 138,879.45 (for 2006) and US$ 30,949,760.25 (for 2007) in royalty payments for its activities related to the Concentrator Project for the years 2006-2007.[1407] The Assessment (issued one day earlier on August 17, 2009) stated directly, in pertinent part, that:

> [T]he [stability] benefits granted under the contract [*i.e.*, the 1998 Stabilization Agreement] only relate to the "**Cerro Verde Leaching Project**". Therefore, as to the exploitation of mining resources for the "**Primary Sulfide Project**", because it is not subject to the contract's protective scope, the payment of mining royalties is required in accordance with the provisions of Law No. 28258 and its amending provisions.[1408]

The Assessment stated the legal basis for the assessment—the non-application of the 1998 Stabilization Agreement—and declared that SMCV was required to pay royalties on that basis.

[1404] *See* Respondent's Counter-Memorial at Section III.A.

[1405] *See* Respondent's Counter-Memorial at para. 423.

[1406] *See* Respondent's Counter-Memorial at paras. 424-35.

[1407] *See* Claimant's Memorial at Annex A, p. 1 ("SUNAT Assessment Notified to SMCV: 18/08/09"); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 1 of PDF ("[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT" ("Recibido 18 AGO. 2009")), p. 2 of PDF ("Total Calculated Royalty US$ 138,879.45 (Dec-2006), p. 4 of PDF (Total Calculated Royalty US$ 30,949,760.25 (Jan-2007-Dec-2007).

[1408] Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 3 of PDF (emphasis in the original).

Thus, as of that moment, SMCV (and, thus, Claimant) knew how SUNAT interpreted the 1998 Stabilization Agreement: namely, as not stabilizing any products or activities related to the Concentrator Project.

699. As of that date Claimant (and SMCV) also knew, or should have known, that the Assessments caused loss or damage to SMCV, because the Assessment explicitly stated both the total amount of royalties that SMCV was required to pay,[1409] and specifically, the amount of royalties SMCV owed every month for the Concentrator Project. For example, the Assessment stated that for the month of December 2006, SMCV owed US$ 138,879.45.[1410] Similar specific amounts were identified on a month-to-month basis for the year 2007 (*e.g.*, assessing US$ 283,732.80 for January 2007, US$ 732,386.47 for February 2007, and US$ 698,606.11 for March 2007).[1411] In addition, the Assessment stated the penalties and interest that SMCV owed for failing to timely pay those royalties for its Concentrator Project.[1412] For example, the Assessment stated that for the month of December 2006, SMCV owed penalties in the amount of 44,511 soles, and interest charges of 16,939 soles and 7,036 soles, and that the amount of interest would be updated over time while payment remains outstanding.[1413] Under Peruvian law, the amounts identified in the Assessment were immediately due and owed to SUNAT and, therefore, immediately became liabilities of SMCV.[1414] Thus, SMCV experienced harm (in the form of increased liabilities) at that moment, even if its cash outlay might come later in time.

[1409] Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 2 of PDF ("Total Calculated Royalty US$ 138,879.45 (Dec-2006), p. 4 of PDF (Total Calculated Royalty US$ 30,949,760.25 (Jan-2007-Dec-2007).

[1410] *See, e.g.*, Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 2 of PDF.

[1411] *See, e.g.*, Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 2 (indicating the amount of royalties owed for December 2006), p. 4 of PDF (indicating the amount of royalties owed every month from January 2007 through December 2007).

[1412] *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at pp. 5-46 of PDF.

[1413] *See, e.g.*, Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 5 of PDF ("PERIOD: 2006-12 AMOUNT OF THE PENALTY: S/44,511 AMOUNT OF INTEREST CAPITALIZED: S/16,939 AMOUNT OF DEFAULT INTEREST: S/7,036 AMOUNT TOTAL: S/68,486 THE DEBT HAS BEEN CALCULATED UNTIL 17/08/2009. AFTER THAT DATE IT WILL BE UPDATED PURSUANT TO ARTICLE 7 OF D.S. 157-2004-EF.") ("PERIODO: 2006-12 IMPORTE DE LA MULTA: S/44,511 MONTO DE INTERES CAPITALIZADO: S/16,939 MONTO DE INTERES MORATORIO: S/7,036 MONTO TOTAL: S/68,486 LA DEUDA HA SIDO CALCULADA HASTA EL 17/08/2009. POSTERIOR A ESTA FECHA SERÁ ACTUALIZADA CONFORME AL ARTÍCULO 7° D.S. 157-2004-EF."). *See also* Respondent's Counter-Memorial at para. 438.

[1414] *See* Exhibit RER-3, First Bravo and Picón Report at para. 62; *see also* Exhibit RER-2, First Morales Report at paras. 106-07.

700. Subsequent to SUNAT's issuance of the 2006-2007 Royalty Assessment, it issued additional Royalty Assessments against SMCV for the tax periods 2008, 2009, 2010-11, Q4 2011, 2012, and 2013, as well as Tax Assessments for the periods of 2005 through 2013. These subsequent Assessments constitute, in the language of the *Grand River* tribunal, "a series of similar and related actions by a respondent state,"[1415] because the Assessments are all based on SUNAT's consistent interpretation of the scope of the very same contract, the 1998 Stabilization Agreement, in light of the same legal provisions in the Mining Law and Regulations. All of the Assessments of each type (Royalty or Tax) are in most ways identical and indistinguishable, except for the specific monetary amounts assessed, which varied with Cerro Verde's production in each period. Therefore, Claimant's attempt to characterize the subsequent Assessments as separate acts and, thus, separate breaches of the 1998 Stabilization Agreement,[1416] is unavailing. The *Grand River* tribunal recognized that accepting a claimant's attempt to rely on the "most recent transgression[s]" in a "series of similar and related actions by a respondent state" would render the limitations period in a treaty ineffective.[1417]

701. As Respondent explained in its Counter-Memorial, even if the Tribunal were not to accept Respondent's position that Claimant first knew or should have known of the alleged breaches on August 18, 2009 (it should), there are three other sets of dates on which the Tribunal could find that Claimant first knew or should have known of the alleged breaches and loss—all of which pre-date the cut-off date of February 28, 2017.[1418] *First*, Claimant knew (or should have known) of the alleged breaches and that SMCV incurred loss or damage, at a minimum, on September 15, 2009, when SMCV formally challenged that same Assessment before SUNAT's Claims Division. When SMCV appealed the 2006-2007 Royalty Assessment, it formally disputed the legal basis upon which SUNAT issued the Assessment (*i.e.*, the applicability or not

[1415] Exhibit RA-4, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 ("*Grand River v. USA*, Decision on Jurisdiction"), at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

[1416] *See* Claimant's Memorial at para. 352.

[1417] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 (finding that a continuing course of conduct, without more, cannot renew the limitation period as doing so "would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims").

[1418] *See* Respondent's Counter-Memorial at paras. 436-44.

of the 1998 Stabilization Agreement to SMCV's Concentrator Project). As Respondent explained in its Counter-Memorial, the *Spence* tribunal considered the date on which a claimant challenged the respondent's regulatory conduct as the date on which the claimant necessarily knew or should have known of the alleged breach. According to the *Spence* tribunal, "[T]his conduct . . . in-and-of-itself indicates knowledge by that Claimant of a core breach that is now alleged . . . ."[1419]

702. When SMCV filed its appeal of the 2006-2007 Royalty Assessment before SUNAT's Claims Division, Claimant also knew or should have known that SMCV had incurred a loss. As previously discussed, 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.[1420] The Assessment identified the specific amount of royalties, penalties, and interest that SMCV owed.[1421] The Assessment also stated that interest would continue to accrue and that the amount of interest owed would be updated over time while payment remained outstanding.[1422] Thus, Claimant also knew or should have known that SMCV owed amounts to SUNAT and that it would continue to accrue interest on the outstanding royalties, penalties, and interest until those amounts were paid.[1423]

703. *Second*, as noted in Respondent's Counter-Memorial, Claimant's attempt to avoid the limitations period by self-editing its claims of breach—that is, by excluding the 2006-2007 and 2008 Royalty Assessments from its claims (on behalf of SMCV)—does not change the relevance of the 2006-2007 Royalty Assessment for the purposes of determining the relevant dates of Claimant's knowledge for calculating a limitations period.[1424] It is the knowledge of an alleged breach and loss that is key for the purposes of a limitations period. As the *Resolute Forest Products v. Canada* tribunal explained, "The triggering event is the knowledge, actual or

[1419] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 250.

[1420] *See* Exhibit RER-3, First Bravo and Picón Report at para. 61; *see also* Exhibit RER-2, First Morales Report at paras. 106-07.

[1421] *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at pp. 2, 5, 30 of PDF.

[1422] *See*, *e.g.*, Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 6 of PDF (stating that "the debt has been calculated until 17/08/2009. After that date it will be updated pursuant to article 7 of D.S. 157-2004-EF").

[1423] Even under Dr. Bullard's theory that the contractual breach only materializes when the administrative act becomes "final and enforceable" (it is not), SMCV initiated judicial proceedings against the "final and enforceable" administrative act (the 2006-2007 Royalty Assessment) on September 19, 2013, which is still before the cut-off date of February 28, 2017. *See* Claimant's Memorial at para. 231.

[1424] *See* Respondent's Counter-Memorial at para. 430.

constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result."[1425] But even if the Tribunal were to exclude the 2006-2007 and 2008 Royalty Assessments from its consideration because Claimant has strategically elected not to claim for those amounts (it should not), Claimant's claims (on behalf of SMCV) regarding the alleged breaches of the 1998 Stabilization Agreement still fall outside the Tribunal's jurisdiction because Claimant knew or should have known the alleged breaches and related loss or damage well before the February 28, 2017 limitations period cut-off date. In particular, SMCV was notified of the 2009 Royalty Assessment (which is included in Claimant's claims) on July 8, 2011,[1426] and it appealed that decision before SUNAT's Claims Division on August 9, 2011[1427]—once again, many years before the limitations cut-off in February 2017.

704. *Third*, as explained above, Claimant's knowledge of the alleged breaches of the 1998 Stabilization Agreement and loss related to SUNAT's Assessments against SMCV should be grounded on the first Assessment in the series of SUNAT's Royalty and Tax Assessments—*i.e.*, the 2006-2007 Royalty Assessment—and that knowledge should equally apply to every other assessment or action of Respondent taken on the same legal basis thereafter (that is, with respect to both royalty and tax assessments). However, even in the event that the Tribunal were to consider knowledge of the alleged breaches based on Tax Assessments to be somehow separate from knowledge of the alleged breaches based on Royalty Assessments (it should not), Claimant first knew or should have known of the alleged breaches and loss or damage based on SUNAT's Tax Assessments on the date SMCV was notified of the first Tax Assessment (*i.e.*, on December 30, 2009)[1428] or, alternatively, on the date when SMCV challenged that Tax Assessment before SUNAT's Claims Division (*i.e.*, on January 28, 2010)[1429]—at least seven years before the limitations period cut-off date. Similar to SUNAT's Royalty Assessments, SUNAT's Tax Assessments require SMCV to pay the taxes owed on its Concentrator Project,

[1425] Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 153.

[1426] *See* Claimant's Memorial at para. 353 and Annex A, p. 1.

[1427] *See* Claimant's Memorial at para. 179 and Annex A, p. 1.

[1428] *See* Claimant's Memorial at Annex A, p. 2 ("SUNAT Assessment Notified to SMCV: 30/12/09"); *see also* Exhibit CE-35, SUNAT Assessments No. 052-003-0005626 to No. 052-003-0005637, December 28, 2009; Exhibit RE-123, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0005626 to 052-003-0005637 to SMCV, December 30, 2009; Exhibit RE-124, Acknowledgement of Notifications of SUNAT Fine Resolutions Nos. 052-002-0003816 to 052-002-0003827 to SMCV, December 30, 2009.

[1429] *See* Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at p. 1 ("CONSIDERING Claim File No. 0550340003016 dated January 28, 2010 interposed by SOCIEDAD MINERA CERRO VERDE S.A.A. . . . .").

with penalties and interest, all of which becomes immediately due upon the issuance of the Assessments.[1430] Thus, SMCV incurred a loss or damage when SUNAT issued the first Tax Assessment against SMCV. Because all of SUNAT's subsequent Tax Assessments constitute a "series of similar and related actions"[1431] in that they all rely on the same construction of the 1998 Stabilization Agreement, all of Claimant's claims of alleged breaches of the 1998 Stabilization Agreement (brought in this arbitration on SMCV's behalf) based on any subsequent Tax Assessments also fall outside of the limitations period and, thus, outside the Tribunal's jurisdiction.

705. In sum, all of the dates when Claimant first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement based on SUNAT's Assessments occurred years before the cut-off date and, thus, Claimant's claims fall outside of the limitations period. Consequently, the Tribunal lacks jurisdiction to hear claims based on those Assessments. To summarize, below are the alternative dates on which Claimant first knew or should have known of the alleged breaches of the Agreement and the alleged loss or damage:

Table 2: Claimant (and SMCV) Knew or Should Have Known of the Alleged Breaches of the 1998 Stabilization Agreement and Loss or Damage Related Thereto before February 28, 2017[1432]

Assessment	SMCV Notified of Assessment	SMCV Challenged Assessment before SUNAT's Claims Division
Royalties		
2006-2007	August 18, 2009	September 15, 2009

[1430] *See* Respondent's Counter-Memorial at para. 442.

[1431] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

[1432] *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 1 of PDF ("[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT" ("Recibido 18 AGO. 2009"); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments (received by SUNAT on September 15, 2009), at p. 1; Claimant's Memorial at para. 172 ("On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments."); Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011 (notified to SMCV on July 8, 2011); Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at p. 1; Claimant's Memorial at para. 179 ("On 9 August 2011, SMCV requested that SUNAT reconsider the 2009 Royalty Assessments"); Exhibit RE-123, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0005626 to 052-003-0005637 to SMCV, December 30, 2009, at p. 1; Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at para. 1; *see also* Claimant's Memorial at Annex A, at pp. 1-2.

Assessment	SMCV Notified of Assessment	SMCV Challenged Assessment before SUNAT's Claims Division
2009 (*i.e.*, first Royalty Assessment included in Claimant's claims)	July 8, 2011	August 9, 2011
Taxes		
2005 General Sales Tax Assessment	December 30, 2009	January 28, 2010

706. Indeed, Claimant first knew or should have known of the alleged breaches and related loss and damage on the alternative dates identified in Table 2 above, because from those points forward, SMCV (i) was on notice from SUNAT that it was subject to the same royalty and tax obligations related to the Concentrator Project for all subsequent fiscal years; and (ii) repeatedly challenged SUNAT's Assessments before various dispute resolution fora in Perú, *i.e.*, SUNAT's Claims Division, the Tax Tribunal, the Contentious Administrative Court, the Superior Court of Lima, and the Supreme Court, on the basis that SUNAT's Assessments were inappropriate because they were allegedly contrary to the terms of the 1998 Stabilization Agreement. Table 3 below identifies the dates on which each of these events occurred, all of which pre-dated the cut-off date of February 28, 2017. In summary, Table 3 below describes the events that occurred after the dates on which Claimant first knew or should have known of the alleged breaches and loss, *i.e.*, when SMCV was notified of the first Assessment, or at a minimum, when SMCV challenged the first Assessment (the dates identified in Table 2 above). These events show that Claimant had the necessary knowledge of the alleged breaches and loss as of those dates identified in Table 2 above, and in any case, before February 28, 2017.

Table 3: SMCV Was Notified of SUNAT's Assessments and SMCV Subsequently Challenged Those Assessments Before Various Dispute Resolution Fora in Perú before February 28, 2017[1433]

Date	Events
August 18, 2009	SMCV was notified of the 2006-2007 Royalty Assessment.
September 15, 2009	SMCV challenged the 2006-2007 Royalty Assessment before SUNAT's Claims Division.
December 30, 2009	SMCV was notified of the 2005 General Sales Tax (GST) and GST on Non-Residents Assessments.
January 28, 2010	SMCV challenged the 2005 GST and GST on Non-Residents Assessments before SUNAT's Claims Division.
April 22, 2010	SMCV was notified of SUNAT's Claims Division's decision regarding the 2006-2007 Royalty Assessment.
May 12, 2010	SMCV appealed SUNAT's Claims Division's decision regarding the 2006-2007 Royalty Assessment to the Tax Tribunal.
June 18, 2010	SMCV was notified of the 2008 Royalty Assessment.
July 15, 2010	SMCV challenged the 2008 Royalty Assessment before SUNAT's Claims Division.
October 22, 2010	SMCV was notified of SUNAT's Claims Division's decision regarding the 2005 GST on Non-Residents Assessment.
November 15, 2010	SMCV appealed SUNAT's Claims Division's decision regarding the 2005 GST on Non-Residents Assessment to the Tax Tribunal.

[1433] *See infra* Resubmitted Annex A, at pp. 1-8 (showing dates on which (i) SMCV was notified of SUNAT's Assessments, (ii) SMCV challenged the Assessments to SUNAT's Claims Division, (iii) SMCV was notified of SUNAT's Claims Division's decisions regarding the Assessments; and (iv) SMCV was notified of the Tax Tribunal's decisions regarding the Assessments). Respondent cites here to exhibits on the record for those dates included in Table 3 which are not otherwise included below in Resubmitted Annex A. *See* Exhibit CE-40, SMCV Appeal to Tax Tribunal, 2006/07 Royalty Assessments, May 12, 2010, at p. 39; Exhibit CE-49, SMCV Appeal to Tax Tribunal, 2008 Royalty Assessments, March 10, 2011, at p. 51; Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1; Exhibit RE-334, SMCV's Appeal before the Tax Tribunal, 2006 General Sales Tax Assessment, September 15, 2011, at p. 1; Exhibit CE-647, SMCV, Appeal to Tax Tribunal (Income Tax for 2007), at p. 1; Exhibit CE-666, SMCV, Appeal to Tax Tribunal (GST for 2008) , at p. 105 of PDF; Exhibit CE-673, SMCV, Appeal to Tax Tribunal (Income Tax for 2008) , at p. 1; Exhibit CE-780, SMCV, Withdrawal of Appeal to Tax Tribunal (TTNA for 2009), February 25, 2020, at p. 1; Exhibit CE-243, Partial Withdrawal, General Sales Tax 2009, Docket No. 2929-2015, February 27, 2020, at p. 1; Exhibit CE-244, Partial Withdrawal, General Sales Tax 2010, Docket No. 16744-2015, February 27, 2020, at p. 1; Exhibit CE-249, Partial Withdrawal, Income Tax 2009, Docket No. 16697-2015, February 27, 2020, at p. 1; Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at p. 1; Exhibit CE-781, SMCV, Withdrawal of Appeal to Tax Tribunal (TTNA for 2010), February 25, 2020, at p. 1; Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016, at p. 1; Exhibit CE-247, Partial Withdrawal, General Sales Tax on Non-Residents 2006, Docket No. 1891-2012, February 27, 2020, at p. 1; Exhibit CE-49, SMCV Appeal to Tax Tribunal, 2008 Royalty Assessments, March 10, 2011, at p. 1; Claimant's Memorial at n.670 (noting that the proceedings before the Tax Tribunal regarding the 2005 GST for Non-Residents Assessment was "pending since 15 November 2010"; noting that the proceedings before the Tax Tribunal regarding the 2005 GST Assessment was "pending since 15 December 2010"; noting that the proceedings before the Tax Tribunal regarding the 2007 GST Assessment was "pending since 5 November 2012"), at paras. 217, 225, 231, 233.

Date	Events
November 25, 2010	SMCV was notified of SUNAT's Claims Division's decision regarding the 2005 GST Assessment.
December 15, 2010	SMCV appealed SUNAT's Claims Division's decision regarding the 2005 GST Assessment to the Tax Tribunal.
December 30, 2010	SMCV was notified of the 2006 GST and GST on Non-Residents Assessments.
January 27, 2011	SMCV challenged the 2006 GST and GST on Non-Residents Assessments before SUNAT's Claims Division.
February 17, 2011	SMCV was notified of SUNAT's Claims Division's decision regarding the 2008 Royalty Assessment.
March 10, 2011	SMCV appealed SUNAT's Claims Division's decision regarding the 2008 Royalty Assessment to the Tax Tribunal.
June 3, 2011	SMCV was notified of the 2006 Income Tax Assessment.
July 4, 2011	SMCV challenged the 2006 Income Tax Assessment before SUNAT's Claims Division.
July 8, 2011	SMCV was notified of the 2009 Royalty Assessment.
August 9, 2011	SMCV challenged the 2009 Royalty Assessment before SUNAT's Claims Division.
August 24, 2011	SMCV was notified of SUNAT's Claims Division decision regarding the 2006 GST Assessment.
September 15, 2011	SMCV appealed SUNAT's Claims Division's decision regarding the 2006 GST Assessment to the Tax Tribunal.
October 28, 2011	SMCV was notified of SUNAT's Claims Division's decision regarding the 2006 GST on Non-Residents Assessment.
November 21, 2011	SMCV appealed SUNAT's Claims Division's decision regarding the 2006 GST on Non-Residents to the Tax Tribunal.
December 26, 2011	SMCV was notified of SUNAT's Claims Division's decision regarding the 2009 Royalty Assessment.
December 29, 2011	SMCV was notified of the 2007 GST and Additional Income Tax Assessments.
January 16, 2012	SMCV appealed SUNAT's Claims Division's decision to the Tax Tribunal regarding the 2009 Royalty Assessment.
January 26, 2012	SMCV challenged the 2007 GST and Additional Income Tax Assessments before SUNAT's Claims Division.
April 11, 2012	SMCV was notified of SUNAT's Claims Division decision regarding 2006 Income Tax Assessment; SMCV was notified of the 2007 Income Tax Assessment.

Date	Events
May 10, 2012	SMCV challenged the 2007 Income Tax Assessment before SUNAT's Claims Division.
October 12, 2012	SMCV was notified of SUNAT's Claims Division decision regarding the 2007 GST and Additional Income Tax Assessments.
November 5, 2012	SMCV appealed SUNAT's Claims Division's decision regarding the 2007 GST Assessment to the Tax Tribunal.
December 27, 2012	SMCV was notified of the 2008 GST and Additional Income Tax Assessments.
January 25, 2013	SMCV challenged the 2008 GST and Additional Income Tax Assessments before SUNAT's Claims Division.
February 18, 2013	SMCV was notified of SUNAT's Claims Division's decision regarding the 2007 Income Tax Assessment.
March 7, 2013	SMCV appealed SUNAT's Claims Division's decision regarding the 2007 Income Tax Assessment to the Tax Tribunal.
June 20, 2013	SMCV was notified of the Tax Tribunal's decision regarding the 2006-2007 and the 2008 Royalty Assessments.
September 2, 2013	SMCV was notified of the 2008 Income Tax Assessment.
September 19, 2013	SMCV appealed the Tax Tribunal's decisions regarding the 2006-2007 and 2008 Royalty Assessments to the Contentious Administrative Court (first instance court).
September 30, 2013	SMCV challenged the 2008 Income Tax Assessment before SUNAT's Claims Division.
November 4, 2013	SMCV was notified of SUNAT's Claims Division decision regarding the 2008 GST and Additional Income Tax Assessments.
November 25, 2013	SMCV appealed SUNAT's Claims Division's decision regarding the 2008 GST Assessment to the Tax Tribunal.
December 30, 2013	SMCV was notified of the 2009 GST Assessment; SMCV was notified of the 2009 Temporary Tax on Net Assets (TTNA) Assessment.
January 28, 2014	SMCV challenged a portion of the 2009 GST Assessment before SUNAT's Claims Division; SMCV challenged the 2009 TTNA Assessment before SUNAT's Claims Division.
June 10, 2014	SMCV was notified of SUNAT's Claims Division's decision regarding the 2008 Income Tax Assessment.
June 24, 2014	SMCV was notified of the 2010 GST Assessment.
July 1, 2014	SMCV appealed SUNAT's Claims Division's decision regarding the 2008 Income Tax Assessment to the Tax Tribunal.

Date	Events
July 22, 2014	SMCV challenged the remaining portion of the 2009 GST Assessment before SUNAT's Claims Division.
July 22, 2014	SMCV challenged the 2010 GST Assessment before SUNAT's Claims Division.
September 15, 2014	SMCV was notified of SUNAT's Claims Division decision regarding the 2009 TTNA Assessment.
October 6, 2014	SMCV appealed SUNAT's Claims Division's decision regarding the 2009 TTNA Assessment to the Tax Tribunal.
October 30, 2014	SMCV was notified of a portion of the 2009 Income Tax and Additional Income Tax Assessments.
November 14, 2014	SMCV was notified of SUNAT's Claims Division decision regarding the 2009 GST Assessment.
November 27, 2014	SMCV was notified of the remaining portion of the 2009 Income Tax and Additional Income Tax Assessments; SMCV challenged a portion of the 2009 Income Tax and Additional Income Tax Assessments before SUNAT's Claims Division.
December 4, 2014	SMCV appealed SUNAT's Claims Division's decision regarding the 2009 GST Assessment to the Tax Tribunal.
December 26, 2014	SMCV challenged the remaining portion of the 2009 Income Tax and Additional Income Tax Assessments before SUNAT's Claims Division.
February 13, 2015	SMCV was notified of the 2010 Income Tax and Additional Income Tax Assessments.
March 13, 2015	SMCV challenged a portion of the 2010 Income Tax and Additional Income Tax Assessments before SUNAT's Claims Division.
March 23, 2015	SMCV challenged the remaining portion of the 2010 Income Tax and Additional Income Tax Assessments before SUNAT's Claims Division.
June 9, 2015	SMCV was notified of SUNAT's Claims Division decision regarding the 2010 GST Assessment.
July 1, 2015	SMCV appealed SUNAT's Claims Division's decision regarding the 2010 GST Tax Assessment to the Tax Tribunal.
August 7, 2015	SMCV was notified of SUNAT's Claims Division's decision regarding the 2009 Income Tax and Additional Income Tax Assessments.
August 14, 2015	SMCV was notified of the 2010 TTNA Assessment.
August 28, 2015	SMCV appealed SUNAT's Claims Division's decision regarding the 2009 Income Tax Assessment to the Tax Tribunal.
September 10, 2015	SMCV challenged the 2010 TTNA Assessment before SUNAT's Claims Division.

Date	Events
November 6, 2015	SMCV was notified of SUNAT's Claims Division's decision regarding the 2010 Income Tax and Additional Income Tax Assessments.
February 9, 2016	SMCV was notified of the decision of the Superior Court of Lima (appellate court) regarding the 2008 Royalty Assessment.
February 23, 2016	SMCV appealed the decision of the Superior Court of Lima (appellate court) regarding the 2008 Royalty Assessment to the Supreme Court.
March 16, 2016	SMCV was notified of SUNAT's Claims Division's decision regarding the 2010 TTNA Assessment.
April 8, 2016	SMCV appealed SUNAT's Claims Division's decision regarding the 2010 TTNA Assessment to the Tax Tribunal.
April 13, 2016	SMCV was notified of the 2010-2011 Royalty Assessment.
April 25, 2016	SMCV was notified of the decision of the Contentious Administrative Court (first instance court) regarding the 2006-2007 Royalty Assessment.
May 2, 2016	SMCV appealed the decision of the Contentious Administrative Court (first instance court) regarding the 2006-2007 Royalty Assessment to the Superior Court of Lima (appellate court).
May 11, 2016	SMCV challenged the 2010-2011 Royalty Assessment before SUNAT's Claims Division.
July 27, 2016	SMCV was notified of the 2011 TTNA Assessment.
August 25, 2016	SMCV challenged the 2011 TTNA Assessment before SUNAT's Claims Division.
February 28, 2017	Cut-off date of the limitations period under the TPA.

707. In its Reply, Claimant argues that the limitations period should start to run at a much later set of dates. Claimant makes three assertions. *First*, Claimant asserts that under the terms of Article 10.18.1, the limitations period can only start after a claimed breach has occurred and the claimant has incurred damages—and that those events did not occur until "the relevant Assessment became final and enforceable."[1434] *Second*, Claimant argues that Perú's breaches of the 1998 Stabilization Agreement did not occur until each Assessment became "final and enforceable."[1435] *Third*, Claimant argues that each final and enforceable Royalty or Tax Assessment gave rise to a separate breach of the 1998 Stabilization Agreement, with the

[1434] Claimant's Reply at para. 220. *See also id.* at paras. 215-20.

[1435] *See* Claimant's Reply at paras. 220-22.

knowledge of each (and the resulting limitations period for each) also being separate.[1436] Respondent addresses each of these arguments below.

a. Claimant First Acquired Knowledge of the Alleged Breaches and of SMCV's Loss When SMCV Was Notified of the First SUNAT Assessment, or at a Minimum, When SMCV Challenged the First SUNAT Assessment

708. As discussed in paragraphs 698 to 700 above and in Respondent's Counter-Memorial, Respondent takes the position that, for purposes of TPA Article 10.8.1, the date when Claimant first had or should have had knowledge of the alleged breaches of the 1998 Stabilization Agreement and knowledge that SMCV had incurred loss or damage was August 18, 2009, when SMCV was notified of the 2006-2007 Royalty Assessment.[1437] In its Reply, Claimant asserts that that application of Article 10.18.1 of the TPA is inconsistent with the plain terms of the Article.[1438] Claimant argues that Article 10.18.1 does not refer to knowledge or constructive knowledge that a claimant or enterprise "would incur" loss or damage but, rather, that a claimant or enterprise "has incurred loss or damage."[1439] Thus, according to Claimant, the limitations period cannot start to run until both the breach and loss have actually occurred.[1440] But even if it were a correct reading of the provision to require completed breach and injury, which Respondent does not accept, those purported requirements would be met here, because both breach and loss were incurred on the date of the Assessment's issuance.

709. As discussed in Respondent's Counter-Memorial,[1441] Article 10.18.1 inquires when a claimant "first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . or [the enterprise it owns or controls] has incurred loss or damages."[1442] According to the *Corona Materials* tribunal, a "[t]ribunal's first task is thus to determine the earliest possible date on which the [c]laimant would have obtained knowledge of the alleged breach of the [t]reaty and of the incurred loss or damage . . . ."[1443] Accordingly, for

[1436] *See* Claimant's Reply at paras. 223-29.

[1437] *See* Respondent's Counter-Memorial at paras. 424-35.

[1438] *See* Claimant's Reply at para. 216.

[1439] Claimant's Reply at para. 217 (emphasis in the original).

[1440] *See* Claimant's Reply at para. 217.

[1441] *See* Respondent's Counter-Memorial at para. 416.

[1442] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.1 (emphasis added).

[1443] Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 198 (emphasis added); *see also* Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at n.139 (*citing* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at paras. 196-99).

this Tribunal to have jurisdiction over Claimant's claims, the claims must have been submitted to arbitration within three years of the earliest possible date when Claimant first knew or should have first known of the alleged breaches and loss or damages.

710. Again, the essence of Claimant's claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement is SUNAT's purported failure to apply the stability benefits that Claimant asserts were guaranteed under that Agreement to SMCV's Concentrator Project. Claimant contends that by issuing the Royalty and Tax Assessments against SMCV (and penalties and interest related thereto) (*i.e.*, by applying the non-stabilized regime to SMCV's Concentrator Project), SUNAT acted in contravention of the 1998 Stabilization Agreement, which Claimant believes guarantees stability benefits to SMCV's Concentrator Project.

711. As discussed in Respondent's Counter-Memorial and above, the first date on which Claimant first knew or should have known of SUNAT's alleged breaches of the 1998 Stabilization Agreement was when SMCV was notified of the first assessment from SUNAT on August 18, 2009.[1444] At that moment, SMCV (and, thus, Claimant) knew how SUNAT interpreted the 1998 Stabilization Agreement—as not including any products or activities related to the Concentrator Project—and that SMCV had incurred loss or damage on the basis of that interpretation.

712. Thus, at that point in time, the breach of the 1998 Stabilization Agreement about which Claimant complains in this arbitration had occurred, and SMCV (and, thus, Claimant) knew that it had incurred loss or damage as of the moment it was notified. It was at that moment that SMCV received notice that it was obligated to pay royalties and corresponding accumulated penalties and interest for the period of 2006-2007 and, indeed, for every fiscal year for which it failed to pay royalties (and taxes) at a non-stabilized rate for its non-stabilized Concentrator Project. The fact that SMCV was assessed again each time that it repeated its failure to make royalty and tax payments with respect to the Concentrator Project for the years 2008 to 2013 also does not mean that the limitations period started anew with each and every Assessment, as Respondent discussed in its Counter-Memorial[1445] and elaborates in Section III.A.1.b below.

[1444] *See* Claimant's Memorial at Annex A, p. 1 ("SUNAT Assessment Notified to SMCV: 18/08/09"); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 1 of PDF ("[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT" ("Recibido 18 AGO. 2009")).

[1445] *See* Respondent's Counter-Memorial at paras. 421, 429.

(i) An Alleged Breach Occurs When the Related Government Act Gives Rise to a Cause of Action, Regardless of Whether that Act May (or May Not) Be Corrected Later

713. According to Claimant, the alleged breaches of the 1998 Stabilization Agreement did not occur when SUNAT first applied the non-stabilized regime to SMCV's Concentrator Project in each of the Assessments, but, rather, occurred only when SUNAT's Assessments become "final and enforceable" many years later.[1446] In particular, Claimant asserts that SUNAT's Assessments became "final and enforceable" on only (i) the business day after SMCV was served with the Tax Tribunal's decision affirming SUNAT's confirmation of the Assessments (for challenged Assessments); (ii) the business day after the deadline to challenge the Assessments passed (for unchallenged Assessments); (iii) the business day after the date that SMCV's withdrawal requests—most of which were dated the day before its Notice of Arbitration—were accepted (in cases where the Peruvian government acted on SMCV's withdrawal requests); and (iv) the date of SMCV's withdrawal requests (in cases where the Peruvian government did not act on SMCV's withdrawal requests).[1447] Claimant's assertion that the alleged breaches occurred only when SUNAT's Assessments become "final and enforceable" lacks a basis in the TPA and is inconsistent with investment treaty arbitration decisions and the views of learned commentators.

714. Perú explained in its Counter-Memorial that, for purposes of a limitations period, tribunals have held that an alleged breach occurs when (i) a government act forming the basis of the alleged breach is performed, and (ii) that act gives rise to an independent cause of action.[1448] Considering a similar limitations provision in CAFTA, the *Spence* tribunal stated that "if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, . . . it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge

[1446] *See* Claimant's Reply at para. 220.

[1447] Claimant's Reply at para. 220(a), n.1073. *See also* Claimant's Memorial at para. 353.

[1448] *See*, *e.g.*, Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 210 ("[I]f a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period."); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 227 ("[I]t is important, for purposes of its jurisdictional assessment, that the Tribunal identifies what it understands to be the essence of the Claimants' case."); Exhibit RA-1, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021 ("*Infinito v. Costa Rica*, Award"), at para. 247; Exhibit RA-6, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 Award, October 11, 2002 ("*Mondev v. USA*, Award"), at para. 70; Exhibit RA-7, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013 ("*Apotex v. USA*, Award on Jurisdiction"), at paras. 317, 330.

within the limitation period."[1449] Notably, Claimant does not deny that SUNAT's Assessments form the basis of its claims of alleged breaches of the 1998 Stabilization Agreement.[1450] Claimant also agrees that those Assessments gave rise to a cause of action.[1451] According to Claimant, however, that cause of action did not materialize (and thus Claimant could not be deemed to have knowledge of the breach of the 1998 Stabilization Agreement) until the Assessments became final and enforceable against SMCV.[1452] Claimant's assertion is without merit.

715. As explained in Perú's Counter-Memorial, SUNAT's application of the non-stabilized regime to SMCV's Concentrator Project through the Assessments gave rise to a cause of action based on alleged breaches of the 1998 Stabilization Agreement.[1453] It was at that moment that Perú did not apply the stability benefits allegedly promised in the Agreement to SMCV's Concentrator Project, which was, according to Claimant, an act in breach of the provisions of the Agreement. Perú's expert Dr. Morales explains that a breach of the 1998 Stabilization Agreement will occur when "an act whose content departs from what has been agreed to in the Stabilization Agreement" occurs, and in this case, (according to Claimant) such an act "occurred when SUNAT (an entity of the Peruvian State) issued and notified [sic] the Assessment and Penalty Resolutions against SMCV . . . ."[1454]

716. Dr. Morales also makes clear that SMCV had a cause of action based on breach of contract when it was notified of the first SUNAT Assessment,[1455] because it was at that moment

[1449] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 210.

[1450] *See generally* Claimant's Reply at Section II.B.2; Claimant's Memorial at Section IV.A.2.

[1451] *See* Claimant's Reply at para. 224.

[1452] *See* Claimant's Reply at para. 224.

[1453] *See* Claimant's Reply at para. 224.

[1454] Exhibit RER-2, First Morales Report at para. 106; *see also* Exhibit RER-7, Second Morales Report at paras. 99, 103.

[1455] Exhibit RER-2, First Morales Report at paras. 106 ("[B]reach of contract requires an act whose content departs from what has been agreed to in the Stabilization Agreement. In this specific case, such an act (according to the Claimant) would be constituted by the application of legal regulations lying outside of the stabilized legal regime under the Agreement. This application of legal regulations other than those stabilized under the Stabilization Agreement occurred when SUNAT (an entity of the Peruvian State) issued and notified the Assessment and Penalty Resolutions against SMCV, quantifying the amount of the tax obligation owed. . . . [I]t is at this moment that SMCV's payment obligation arose, and this act is effective from notification."), 108 ("The statute of limitations for filing a claim for civil liability in Perú begins to elapse from the day on which that action may be exercised. Consequently, the statute of limitations for exercising actions based on alleged breach of contract before the judicial bodies began to elapse from the moment SMCV was notified of the Assessment and Penalty Resolutions, since it was at that moment that the breach by the State occurred and SMCV suffered financial loss in consequence thereof.").

SMCV (and Claimant) knew that the Peruvian government had applied (and would continue to apply) the non-stabilized regime to SMCV's Concentrator Project, officially denying the stability guarantees that Claimant insists apply to that Project under the 1998 Stabilization Agreement.[1456] Thus, as of that moment, SMCV had the right to claim breach of that Agreement, regardless of whether the Peruvian government might or might not subsequently change or correct the Assessment. As Perú's expert Dr. Morales explains, "the statute of limitations to exercise the alleged breach of contract claim before the courts began to run from the moment SMCV was notified of the Assessment and Penalty Resolutions, since it is from that moment the alleged breach by the State had materialized and SMCV would have suffered as a consequence, a patrimonial loss."[1457] As such, Claimant's assertion that SMCV's right to a legal claim did not arise until after the Assessments become "final and enforceable" is simply incorrect.

717. In its continuing attempt to assert "the latest possible date," Claimant argues that in the case of royalty and tax assessments, the "Peruvian limitation period for breach of contract claims ran from the date of the Tax Tribunal resolutions."[1458] Claimant relies on decisions issued by the Peruvian courts in the unrelated *Poderosa* case to demonstrate that point.[1459] Claimant's assertion is meritless, and its reliance on the *Poderosa* decisions is wholly misplaced.

718. *First*, Perú's civil law expert Dr. Morales points out that Claimant's expert Dr. Bullard's assertion regarding Peruvian law is fundamentally incorrect.[1460] Dr. Bullard states that SMCV had a claim of contractual breach only after SUNAT's Assessments became "final, definitive and enforceable" and that would occur only once the administrative procedures were exhausted upon the Tax Tribunal's issuance of its decision.[1461] Dr. Morales explains that Dr. Bullard erroneously "attempt[s] to mix the sphere of administrative procedure with the contractual sphere of the State's actions in this case."[1462] According to Dr. Morales, even while SMCV challenged (or was challenging) SUNAT's Assessments through the administrative

[1456] *See* Exhibit RER-2, First Morales Report at paras. 96-98, 102-03.

[1457] Exhibit RER-7, Second Morales Report at para. 112.

[1458] Claimant's Reply at para. 220(d).

[1459] *See* Claimant's Reply at para. 220(d); Exhibit CER-7, Second Bullard Report at para. 81 (*citing* Exhibit CA-384, Trial Court No. 43, File No. 41531-2006.79, Decision, May 8, 2007, at pp. 2-3, and Exhibit CA-385, Civil Appellate Court, Case File No. 956-2007, Decision, November 20, 2007, at pp. 2-3).

[1460] *See* Exhibit RER-2, First Morales Report at paras. 95-96.

[1461] Exhibit CER-7, Second Bullard Report at para. 81. *See also* Exhibit RER-2, First Morales Report at para. 90; Exhibit CER-2, First Bullard Report at para. 89.

[1462] Exhibit RER-2, First Morales Report at para. 95.

processes, SMCV had a claim of contractual breach under Peruvian law as of the moment that SUNAT applied the non-stabilized regime to SMCV's Concentrator Project (*i.e.*, upon SUNAT's Assessments of royalties and taxes), because, according to Claimant's allegations in this arbitration, that was an act contrary to the terms of the 1998 Stabilization Agreement.[1463] Thus, SMCV had a right of action for contractual breach when SMCV was notified of SUNAT's Assessments, because, as Dr. Morales explains in his first report, "the Assessment and Penalty Resolutions, like any administrative act, are valid and effective from the time of notification thereof."[1464] Dr. Morales reiterates this point in his Second Report:

> SUNAT's Assessments and Penalty Resolutions, contrary to what Dr. Bullard asserted, do generate effects from their notification despite the fact that the enforceability of their payment is suspended while the remedies filed by the company are resolved. For this reason, SMCV was entitled to initiate a breach of contract claim since it was notified of the first Assessment and Penalty Resolution by which SUNAT applied norms outside the stabilized regime to SMCV with respect to the Concentrator."[1465]

719. *Second*, the Peruvian court decisions in the *Poderosa* case cited by Claimant does nothing to support its assertion that a taxpayer does not have a right to claim contractual breach based on SUNAT's assessments until after the Tax Tribunal rules on the challenged assessments. According to Claimant's expert Dr. Bullard, the trial court in the *Poderosa* case held that the contractual breach occurred on the dates the Tax Tribunal issued its resolutions, and the appellate court affirmed the trial court's decision.[1466] Perú's expert Dr. Morales explains that "Dr. Bullard is taking out of context what was analyzed and established by the Civil Court and the Superior Court in the *Poderosa* case . . . the judicial instances were not [presented with] the legal question, nor did they analyze it, on whether or not it was necessary to exhaust the administrative remedies to configure the contractual breach of the tax stabilization agreement."[1467] Thus, Claimant's reliance on the *Poderosa* decisions is misplaced.

720. But even if Claimant's interpretation of the *Poderosa* case were correct (it is not), it is the provision of the TPA, not Peruvian law, that dictates the start date of the TPA's limitations period and whether Claimant's claims are timely filed under the TPA. TPA Article

[1463] Exhibit RER-2, First Morales Report at paras. 97, 98, 103.

[1464] Exhibit RER-2, First Morales Report at para. 98.

[1465] Exhibit RER-7, Second Morales Report at para. 106.

[1466] Exhibit CER-7, Second Bullard Report at para. 81.

[1467] Exhibit RER-7, Second Morales Report at para. 108.

10.18.1 expressly provides that the limitations period starts to run at the moment a claimant first knew or should have known of the alleged breach and loss or damage.[1468] Claimant had the right to file a breach of contract claim under Peruvian law and had a known loss immediately upon the issuance of the first Assessment. Thus, Claimant is plainly wrong in asserting that the TPA's limitations period should start to run years after Claimant first knew the alleged breaches and loss and should instead start on a later date when each Assessment became "final and enforceable" as a matter of Peruvian administrative law (such as when the Tax Tribunal issued its decision on the Assessment).

(ii) Claimant Knew SMCV Incurred a Loss When SMCV Was Notified by the First Assessment that It Was Subject to Payment Obligations, Regardless of Whether It May (or May Not) Have Been Subject to Coercive Collection at that Time

721. Claimant also contends that SMCV "was under no obligation to pay" the Assessments and that the tax administration could not have enforced or collected them until they become "final and enforceable."[1469] According to Claimant, therefore, it was only when the Assessments become "final and enforceable" that SMCV incurred a loss or damage.[1470] Claimant misunderstands or misrepresents the Peruvian royalty and tax systems. As explained in Perú's Counter-Memorial and reiterated below, the amounts stated in the Assessments (royalties or taxes owed, along with applicable penalties and interests) were immediately due and owed to SUNAT upon the issuance and notification of the Assessments, as a matter of Peruvian law.[1471] Indeed, Article 76 of the Tax Code provides: "The Determination Resolution [*i.e.*, the SUNAT assessment] is the act by which the Tax Administration informs the tax debtor of the result of its work aimed at controlling compliance with tax obligations, and establishes the existence of the

[1468] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18(1) (emphasis added).

[1469] Claimant's Reply at para. 220(c).

[1470] Claimant's Reply at para. 220(e).

[1471] Respondent's Counter-Memorial at para. 427. *See also* Exhibit RER-3, First Bravo and Picón Report at para. 61 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 59(b) and 76); *see also* Exhibit RER-2, First Morales Report at paras. 106-07.

tax credit or debt."[1472] In SMCV's case, the amounts stated in the Assessments[1473] "establish[ed] the existence of the tax . . . debt" (consisting of royalties or taxes, penalties, and interest), and SMCV was immediately obligated to pay those amounts when SUNAT "inform[ed] the tax debtor [*i.e.*, SMCV]" of its debt to ensure "compliance with tax obligations."[1474]

722. To support its argument that SMCV was not obligated to pay the Assessments when it was notified of those Assessments, because SUNAT allegedly cannot enforce them until they become "final and enforceable," Claimant quotes Perú's experts Drs. Bravo and Picón as saying "taxpayer challenges [to] these resolutions ha[ve] the effect of suspending [their] enforceability."[1475] However, Claimant is seeking to take from that statement a meaning that it obviously does not support.

723. *First*, Claimant takes the statement of Drs. Bravo and Picón out of context by baldly omitting from this quotation the key phrase that followed the text quoted above. The following is the complete statement: "[T]axpayer challenges [to] these resolutions ha[ve] the effect of suspending [their] enforceability but it does not annul the payment obligation."[1476] Contrary to Claimant's assertion, Drs. Bravo and Picón do not support Claimant's argument because they make clear in the very next, qualifying clause of the sentence that SMCV's payment obligation remains operative notwithstanding the fact that the assessments have been challenged. *Second*, as discussed above, whether or not the tax administration can enforce the Assessment against Claimant is entirely irrelevant to the question of when Claimant first knew (or should have known) of the alleged breaches and loss.[1477] The plain text of Article 10.18.1

[1472] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 76 ("*La Resolución de Determinación es el acto por el cual la Administración Tributaria pone en conocimiento del deudor tributario el resultado de su labor destinada a controlar el cumplimiento de las obligaciones tributarias, y establece la existencia del crédito o de la deuda tributaria*.") (emphasis added). *See also* Exhibit RER-3, First Bravo and Picón Report at para. 61 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 59(b) and 76); Exhibit RER-2, First Morales Report at paras. 106-07.

[1473] *See*, *e.g.*, Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at pp. 2, 4, 5 of PDF.

[1474] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 76. *See also* Exhibit RER-3, First Bravo and Picón Report at para. 61 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 59(b) and 76); Exhibit RER-2, First Morales Report at paras. 106-07.

[1475] Claimant's Reply at para. 220(c) (*citing* Exhibit RER-3, First Bravo and Picón Report at para. 61).

[1476] Exhibit RER-3, First Bravo and Picón Report at para. 61 ("The fact that the taxpayer challenges these resolutions has the effect of suspending its enforceability, but it does not annul the payment obligation.") (emphasis added).

[1477] *See supra* at para. 721.

requires the limitations period to start running when SMCV "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."[1478] It simply does not require a government act to become "final and enforceable" (words that appear nowhere in Article 10.18.1) to trigger the limitations period.

724. Similarly, Claimant's claims that Perú's expert Dr. Morales supports its position, because he "acknowledges that the Assessments could not be enforced against SMCV until the administrative process was complete" must also fail, on the same basis.[1479] Again, Claimant takes Dr. Morales's statement out of context. In subsequent paragraphs, Dr. Morales emphasizes this point: "Now, the fact that the act (the Assessment and Penalty Resolution) is not enforceable by SUNAT until such time as it is possible for the administrative procedure to be brought to an end does not mean that the alleged breach of the Stabilization Agreement would not have arisen from the time of the notification of the aforementioned Resolution. . . . there can be no doubt that the alleged breach of the Stabilization Agreement would have occurred from the notification of the Assessment and Penalty Resolutions."[1480] Moreover, Dr. Morales explains in his Second Report that a cause of action related to the Assessments arises upon the notification of those Assessments to the taxpayer, because it is at that moment "SUNAT determines that the taxpayer has been in breach of its tax obligations and quantifies the debt, interest and penalties that must be paid."[1481] Thus, Dr. Morales's statement does not support Claimant's interpretation of Article 10.18.1.

725. Claimant further contends that Articles 115(a) and (c) of the Tax Code show that SMCV was not under an obligation to pay the Assessments, and thus, that it did not suffer a loss, until the Assessments become "final and enforceable."[1482] Citing Article 115, Claimant's expert Dr. Bullard asserts that "under Peruvian law, the enforceability of assessments relates to the

[1478] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.1.

[1479] Claimant's Reply at para. 220(c) (*citing* Exhibit RER-2, First Morales Report at para. 99).

[1480] Exhibit RER-2, First Morales Report at paras. 102-03 (emphasis added).

[1481] Exhibit RER-7, Second Morales Report at para. 103; *see also* Exhibit RER-2, First Morales Report at para. 106 ("This application of legal regulations other than those stabilized under the Stabilization Agreement occurred when SUNAT (an entity of the Peruvian State) issued and notified the Assessment and Penalty Resolutions against SMCV, quantifying the amount of the tax obligation owed. As I explained in the previous section, it is at this moment that SMCV's payment obligation arose, and this act is effective from notification." (emphasis added).

[1482] Claimant's Reply at para. 220(c).

Government's power to take action to collect them."[1483] Claimant's expert Dr. Hernandez also states that SUNAT can initiate a coercive enforcement procedure only after the Assessment becomes "final and enforceable."[1484] None of Claimant's or its experts' assertions changes the result here, because enforceability is not the measurement set by the TPA. *First*, whether or not the Assessments were or could be subject to coercive collection does not alter the fact that, upon being notified of the Assessments, SMCV knew that it accrued liability in the form of royalty and tax debts, and thus knew that it incurred a loss. The liability for SMCV (and thus SMCV's loss) existed from the moment the payment obligation of the Assessment came into existence, not from the moment of its enforceability. As Perú's expert Dr. Morales explains, "these [Assessments]—from the moment they are issued and notified—have already determined the existence of tax obligation in charge of the taxpayer that is presumed valid."[1485] *Second*, as Perú's experts Drs. Bravo and Picón explain, SMCV was under an obligation to pay the royalty and tax debts created by SUNAT's Assessments upon being notified of those Assessments, regardless of whether SUNAT may (or may not) initiate coercive collection at a later time.[1486] Indeed, taxpayers can and do pay royalty or tax debts created by SUNAT assessments before any such coercive collection occurs, in order to reduce the amount due in penalties and accrued interest.[1487] As Dr. Morales explains, when a taxpayer pays the tax assessments before the challenges to the assessments have been resolved, "the payment made by the taxpayer constitutes a valid payment of an existing obligation."[1488] Thus, SMCV knew that it incurred a loss when it was notified of SUNAT's Assessment.

726. In its Counter-Memorial, Respondent clarified that Claimant's attempts to overcome the limitations period by identifying the latest points in time when SMCV (and, thus, Claimant) allegedly knew of the purported breaches and associated damages or losses were futile and, significantly, also inconsistent with other investor-state tribunal decisions, which have consistently held that a claimant cannot use a court decision or subsequent court proceedings to

[1483] Exhibit CER-7, Second Bullard Report at para. 79 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 115).

[1484] Exhibit CER-3, First Hernández Report at paras. 42-43.

[1485] Exhibit RER-7, Second Morales Report at para. 104.

[1486] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 251.

[1487] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 251.

[1488] Exhibit RER-7, Second Morales Report at para. 105.

toll the limitations period.[1489] In its Reply, Claimant tries to dismiss Respondent's arguments by insisting that those investment treaty decisions are distinguishable because (i) Freeport is not claiming that the administrative review process before SUNAT's Claims Division and the Tax Tribunal "tolled" an already-running limitation period, but, rather, that the limitations period did not start to run until each Assessment had become final and enforceable;[1490] and (ii) neither SUNAT nor the Tax Tribunal are courts, but, rather, administrative agencies of MEF.[1491] Claimant's strained distinctions do nothing to undermine Respondent's arguments.

727. *First*, the fact that Claimant has argued that the administrative review process delayed the limitations period but has not argued that it tolled the limitations period is a distinction without a difference. Both have the same effect—changing the limitations period cut-off date—as Claimant seeks to do by trying to identify the very latest possible points in time when it might claim that the challenged measures occurred. *Second*, the fact that SUNAT's Claims Division and the Tax Tribunal are administrative adjudicatory bodies rather than courts is also beside the point. Claimant is doing in this proceeding exactly what the claimant did in the *Apotex* case. In that case, the claimant argued that its challenge of an administrative decision issued by the Food and Drug Administration ("FDA") before a U.S. court brought its claim within the limitations period.[1492] In rejecting that claimant's claims, the *Apotex* tribunal did not focus on the fact that a challenge of the administrative decision was before a U.S. court, *per se.* The key, for the *Apotex* tribunal, was the fact that the claimant was challenging an administrative decision by the FDA, which in and of itself was a measure that "could have been the subject of a separate complaint under the NAFTA."[1493] Under such circumstances, the limitations period could not be delayed by "resort to a court action."[1494] Here, too, the measure about which Claimant complains is the determination by SUNAT that the Concentrator Project falls outside the scope of the 1998 Stabilization Agreement, which resulted in each of the Assessments. It is that act (repeated for different fiscal years) that is at the center of Claimant's claims. It is the

[1489] *See* Respondent's Counter-Memorial at para. 433.

[1490] *See* Claimant's Reply at para. 221.

[1491] *See* Claimant's Reply at para. 221.

[1492] Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 313. *See also* Respondent's Counter-Memorial at para. 433.

[1493] Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 330-31. *See also* Respondent's Counter-Memorial at para. 433.

[1494] Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 330-31. *See also* Respondent's Counter-Memorial at para. 433.

challenge of that decision which, in the words of the *Apotex* tribunal, "ha[s] to be brought within the three year[]" limitations period and which "[can]not be delayed by resort to" an appeal process—a rule that logically would apply regardless of whether that appeal is presented to administrative review or a "court action."

728. Claimant's Reply also did nothing to undermine Respondent's position that Claimant knew that SMCV incurred a loss when SMCV accrued liability (*i.e.*, when SMCV was subject to an obligation to pay royalties or taxes (with penalties and interest) when SMCV was notified of the first Assessment. Respondent's position is consistent with (i) relevant tribunal holdings, and (ii) the intent of the parties to the TPA ("TPA Parties"). *First*, in its Reply submission, Claimant did not dispute the holding of the *Grand River* tribunal (and similar tribunal decisions) that "one incurs a loss when liability accrues. . . . A party is said to incur losses . . . even if there is no immediate outlay of funds or if the obligations are to be met through future conduct."[1495] The *Grand River* tribunal further concluded that "[a] party that becomes subject to such an obligation [to place funds in an unreachable escrow for 25 years], even if actual payment into escrow is not required until the following spring, has incurred 'loss or damage' for purposes of NAFTA Articles 1116 and 1117."[1496] *Second*, the United States—the other party to the TPA here—has also explained that a claimant incurs a loss for purposes of Article 10.18.1 of the TPA when it becomes subject to a liability. The United States explained this position in a non-disputing party submission relating to Article 10.18.1 in another pending ICSID case:

> With regard to knowledge of "incurred loss or damage" under Article 10.18.1, 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. Moreover, the term "incur" broadly means to "to become liable or subject to." Therefore, an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate.[1497]

[1495] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 77; *see also* Exhibit RA-6, *Mondev v. USA*, Award at para. 87.

[1496] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 82.

[1497] Exhibit RA-98, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America, June 21, 2019 ("*Gramercy v. Peru*, U.S. Submission"), at para. 8 (*citing* to Exhibit RE-325, "Incur," Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/incur); *see also* Exhibit RA-94, *United States v. Laney*, 189 F.3d 954

729. There is no question that SMCV (thus, Claimant) first knew that it incurred a loss when it was notified of the first Assessment (or, at a minimum, when it proceeded to challenge that Assessment before SUNAT), because that is when SMCV became subject to a payment obligation—regardless of whether its cash outlay came at a later time or whether the Assessment was immediately subject to coercive collection. In fact, SMCV challenged the Assessments shortly after it was notified thereof because it knew, as of that moment, it had incurred a loss, and it hoped to change the Assessments. Thus, Claimant's assertions that the TPA's limitations period starts only when the Assessments become "final and enforceable" have no basis in the TPA or in investor-state jurisprudence.

b. SUNAT's Assessments Are a Series of Similar and Related Government Acts, Such that Knowledge of the Alleged Breaches and Loss Based on the Assessments Attaches to the First Assessment in the Series of Assessments

730. Perú explained in its Counter-Memorial that SUNAT's Assessments are a "series of similar and related actions by a respondent state,"[1498] and that knowledge of the alleged breaches and losses based on SUNAT's application of the non-stabilized regime against SMCV's

(9th Cir. 1999), at p. 966 (finding that to "incur" means to "become liable or subject to" and that "a person may become 'subject to' an expense before she actually disburses any funds"); Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 77; Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 213 ("the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred") (emphasis in original). *See also* Exhibit RA-95, *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, PCA Case No. 2016-17, Submission of the United States of America, July 6, 2018, at para. 11 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 77; Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 213; Exhibit RA-96, *Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Submission of the United States of America, June 19, 2019 ("*Jin Hae Seo v. Korea*, U.S. Submission"), para. 20 (citing to Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 77; Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 213); Exhibit RA-99, Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala, ICSID Case No. ARB/18/43, Submission of the United States of America, February 19, 2021 ("*Kappes v. Guatemala*, U.S. Submission"), at para. 6 (*citing* to Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 77; Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 213); Exhibit RA-100, *Spence International Investments LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015 ("*Spence v. Costa Rica*, U.S. Submission"), at para. 9 ("other NAFTA tribunals have held, knowledge of loss or damage incurred does not require knowledge of the full or precise extent of loss or damage"); Exhibit RA-97, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission of the United States of America, March 11, 2016 ("*Corona Materials v. Dominican Republic*, U.S. Submission"), at para. 6 ("other NAFTA tribunals have held, knowledge of loss or damage incurred does not require knowledge of the full or precise extent of loss or damage").

[1498] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

Concentrator Project—an act implemented through the Assessments—must attach to the first Assessment in the series of Assessments.[1499]

731. In its Reply, Claimant asserts that Perú's interpretation of Article 10.18.1 would mean that the limitations period for Claimant's alleged breaches of the 1998 Stabilization Agreement would have commenced before the breach and the loss even occurred.[1500] In particular, Claimant alleges that Perú, in arguing that SUNAT's Assessments are not separate breaches with many limitations periods but, rather, that they are "a series of similar and related actions by a respondent state" subject to a single limitations period, somehow means that SMCV should have known about future breaches of the 1998 Stabilization Agreement or future losses.[1501] Claimant misrepresents Perú's position.

732. Perú did not claim that the limitations period should start to run before the alleged breaches have occurred or before the loss or damage is known, as Claimant alleges.[1502] Rather, Perú argued in its Counter-Memorial, and reiterates above, that Claimant first knew or should have known of the alleged breaches and loss on the dates identified in Table 2 above, because those dates are "the earliest possible date[s]"[1503] on which Claimant (or SMCV) knew that the Peruvian government had applied the non-stabilized regime to its Concentrator Project, and knew that it has incurred a loss as a result of the assessment of royalties or taxes, penalties, and interest.[1504] Even though SUNAT continued after those dates to issue additional Assessments against SMCV's Concentrator Project for later tax periods, Article 10.18.1 explicitly requires the limitations period to start running from the moment Claimant first knew of the alleged breaches and loss. To do that, Claimant's knowledge of the alleged breaches and loss must attach to the first Assessment in the series of SUNAT Assessments against SMCV.

733. Perú also explained that SUNAT's Assessments against SMCV are similar and related government acts, and that both the language in Article 10.18.1 and investor-state jurisprudence make clear that knowledge of the alleged breach based on a series of government

---

[1499] *See* Respondent's Counter-Memorial at paras. 421-39.

[1500] Claimant's Reply at paras. 21, 213-18, 225, 227.

[1501] *See* Claimant's Reply at para. 225.

[1502] Claimant's Reply at paras. 21, 213-18, 225, 227.

[1503] Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 198; *see also* Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at n.139 (*citing* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections).

[1504] *See* Respondent's Counter-Memorial at paras. 424-444.

acts must attach to the first act in that series—here, to the first Assessment in the series of Assessments.[1505] SUNAT's Assessments against SMCV are similar and related acts because: (i) SUNAT performed the exact same act (issued an Assessment against SMCV's Concentrator Project), (ii) under the same regulatory framework (Article 83 of the Mining Law and Article 22 of the Mining Regulations), and (iii) based on the same interpretation of the scope of the same agreement (*i.e.*, the 1998 Stabilization Agreement covers only the Leaching Project, thus SMCV's Concentrator Project is not a stabilized project, and is therefore subject to royalty and tax assessments).

734. And, because SUNAT, in its first Assessment, informed SMCV of its interpretation of the scope of the Agreement under the relevant Mining Law and Regulations, and its conclusion that SMCV's Concentrator Project is outside of the scope of the Agreement and, therefore, is not stabilized, Claimant (or SMCV) knew at that moment that SMCV must pay royalties and taxes for all other fiscal years[1506] for which it had failed to pay royalties and taxes (at a non-stabilized rate) and that the same obligations would apply in future years as well. Therefore, SMCV must have known that it was subject to paying royalties and taxes at non-stabilized rates for every fiscal year after it received the first Assessment. To assert otherwise is entirely nonsensical. Indeed, Claimant repeatedly admitted in its Memorial and Notice of Arbitration that SUNAT assessed royalties and taxes for subsequent fiscal years against SMCV's Concentrator Project following the same interpretation of the 1998 Stabilization Agreement that was contained in same source (MINEM's June 2006 Report). A list of Claimant's admissions to

[1505] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

[1506] SUNAT assessed royalties and taxes against SMCV for each applicable fiscal year, with four exceptions where assessments for two fiscal years were combined in a single Assessment, or where the Assessment spanned only a select quarter(s) of a fiscal year: (i) 2006-2007 Royalty Assessment; (ii) 2010-2011 Royalty Assessment; (iii) Q4 2011 Royalty Assessment; and (iv) Q4 2011-2012 Special Mining Tax Assessment. *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009). *See* Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016; Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017; Exhibit CE-163, Assessment No. 012-003-0092658, December 29, 2017; Exhibit CE-164, Assessment No. 012-003-0092961, December 29, 2017; Exhibit CE-165, Assessment No. 012-003-0092962, December 29, 2017 (notified on January 18, 2018); Exhibit CE-166, Assessment No. 012-003-0092963, December 29, 2017 (notified on January 18, 2018); Exhibit CE-167, Assessment No. 012-003-0092964, December 29, 2017.

that effect is found in paragraph 477 of Respondent's Counter-Memorial.[1507] Claimant, again, makes similar admissions in its Reply:

- "Starting in 2009, SUNAT issued Royalty and Tax Assessments against SMCV based on MINEM's novel position that SMCV's Concentrator was not covered by the Stability Agreement."[1508]

- "And even SUNAT itself appears not to have been sold on MINEM's novel position despite relying on it for each of the Royalty and Tax Assessments SUNAT issued against SMCV. In fact, three years after SUNAT issued its first Royalty Assessment against SMCV, SUNAT advised mining companies in a report that 'mining-activity owners that have signed [stability agreements] will enjoy a stabilized tax system applicable solely to the concession or economic-administrative unit for which said agreement has been signed.'"[1509]

- "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 novel position on the scope of stability guarantees. . . . 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 Stability Agreement."[1510]

- "[N]either Peru nor Ms. Bedoya have anything to say about why SUNAT took action against SMCV only after MINEM sent SUNAT Mr. Isasi's June 2006 Report, ..."[1511]

- "Perú'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. The importance of Mr. Isasi's opinion to the Government's ultimate decisions against SMCV is likewise corroborated by contemporaneous evidence."[1512]

[1507] Respondent's Counter-Memorial at para. 477 (listing Claimant's assertions in its Memorial and Notice of Arbitration that SUNAT issued (and subsequently confirmed) all of the Royalty and Tax Assessments against SMCV at issue here on the basis of MINEM's interpretation of the Mining Law and Regulations and the 1998 Stabilization Agreement reflected in the June 2006 Report). *See also id.* at para. 478 (listing Claimant's assertions in its Memorial that the decisions of the Tax Tribunal, the Contentious Administrative Court, and the Supreme Court were based on MINEM's June 2006 interpretation).

[1508] Claimant's Reply at para. 7 (emphasis added).

[1509] Claimant's Reply at para. 8 (emphasis added).

[1510] Claimant's Reply at para. 152(iv)-(v) (emphasis added).

[1511] Claimant's Reply at para. 153(e) (emphasis added).

[1512] Claimant's Reply at para. 158(e) (emphasis added) (internal citations omitted).

- Claimant cites to SUNAT's 2006/2007 Royalty Assessment and states that that assessment "expressly rel[ied] on [MINEM's] June 2006 Report in assessing royalties against SMCV."[1513]

735. As Perú explained, for claims involving a series of similar and related acts, tribunals have held that knowledge of the alleged breach and loss will be held to attach to the first known act in the series of those acts. For example, the *Corona Materials* tribunal, which interpreted CAFTA-DR's limitations-period provision (which is identical to Article 10.18.1 in the TPA[1514]), held that "[w]here a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series.'"[1515] Likewise, the *Grand River* tribunal held that the claimant's argument that there was "not one limitations period, but many" given the occurrence of each government act, would "render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[1516] Indeed, the *Mobil II* tribunal (an authority relied upon by Claimant) explains that, "an investor cannot first acquire knowledge of the same matter on more than one occasion."[1517]

[1513] Claimant's Reply at para. 158(e), n.775 (*citing* to Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010), p. 34) (emphasis added).

[1514] *See* Exhibit RE-112, CAFTA-DR Chapter Ten, at Art. 10.18.1 ("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.").

[1515] Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 ("Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty.").

[1516] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 ("Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty.").

[1517] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 147 (emphasis in original). *See also* Exhibit RA-98, *Gramercy v. Peru*, U.S. Submission at para. 6 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-5, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 ("*Resolute Forrest Products v. Canada*, Decision on Jurisdiction"), at para. 147) (citing U.S. Submission at para. 7 ("[A]n investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis.") (emphasis added)).

736. Because Perú did not claim that the limitations period would start to run before an alleged breach and loss have occurred, Claimant's assertions to that effect in its Reply, including paragraphs 213 through 218, its reference to *Eli Lilly*, *Resolute Forest Products*, *Mobil II*, and *Pope & Talbot*,[1518] and its reliance on its expert opinions stating that the knowledge of an alleged breach can arise only after the alleged breach has occurred,[1519] are entirely misplaced and should be disregarded in full. For the same reason, Claimant's policy argument that Perú's interpretation would encourage submission of unripe claims should be ignored.[1520] Even if the Tribunal were to consider these cases, they do not help Claimant's position. To avoid repetition, Perú explains the reasons for which the tribunal holdings in *Eli Lilly*, *Resolute Forest Products*, and *Mobil II* support Perú's interpretation of Article 10.18.1 at paragraphs 745, 746, 755 and 756 below. There, Perú demonstrates that those cases recognize that the limitations period starts to run as of the moment when the alleged breach and loss have occurred and became known to the claimant, which is consistent with Perú's insistence here that Claimant first knew of the alleged breaches and that SMCV incurred loss when SUNAT issued the first Assessment against SMCV's Concentrator Project.

737. Regarding *Pope & Talbot*, Claimant cited this text from the award: "[t]he critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur."[1521] But, that statement is entirely consistent with Perú's interpretation, because Perú asserts that "the loss ha[d] occurred and was known to [Claimant]" when SMCV was notified of the first Assessment (in the series of SUNAT's Assessments), because that is when Claimant first knew or should have known that SMCV has incurred a loss as a result of SUNAT's assessment of royalty (or tax), penalties, and interest, against SMCV's Concentrator Project. SMCV incurred a loss

[1518] Claimant's Reply at para. 217 (*citing* Exhibit CA-411, *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, March 16, 2017 ("*Eli Lilly v. Canada*, Final Award"), at paras. 113, 167; Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 153; Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 154; Exhibit CA-364, *Pope & Talbot Inc. v. Government of Canada*, Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record, February 24, 2000 ("*Pope & Talbot v. Canada*, Award on Preliminary Motion"), at para. 12).

[1519] Claimant's Reply at para. 218 (*citing* Exhibit CER-11, Sampliner Report at para. 23; Exhibit CWS-12, Witness Statement of Carlos Alberto Herrera Perret, September 13, 2022 ("Herrera Statement"), at para. 22).

[1520] Claimant's Reply at paras. 21, 218, 225.

[1521] Claimant's Reply at para. 217(b) (*citing* Exhibit CA-364, *Pope & Talbot v. Canada*, Award on Preliminary Motion at para. 12).

because it accrued liability or debt that was due to be paid immediately upon notification of the Assessment.

738. In its Reply, Claimant also objects to Perú's assertion that knowledge of an alleged breach and loss in a claim involving a series of similar and related acts must attach to the first act in the series and instead argues that each of SUNAT's Assessments gives rise to a separate breach with its own limitations period.[1522] Claimant's interpretation must fail, because Perú's interpretation is consistent with (i) the text of Article 10.18.1; (ii) relevant investor-state jurisprudence; and (iii) the intent of the TPA Parties. The first two points have already been addressed above and in Respondent's Counter-Memorial: Article 10.18.1 requires identifying the moment when a claimant first knew (or should have known) the alleged breach and loss.[1523] The earliest possible date when SMCV knew of the alleged breach and damages is when SMCV was first notified of the Assessments, for the reasons discussed above. Thus, Respondent's interpretation of Article 10.18.1 is consistent with its text and ordinary meaning. Claimant further argues that "Article 10.18.1 refers to the limitation period for a 'claim,' not for 'a series of similar or related' claims" and on that basis asserts that Respondent's argument is inconsistent with the text of Article 10.18.1.[1524] Claimant misunderstands Respondent's argument. Respondent is not alleging that Claimant is asserting "'a series of similar or related' claims." Rather, Respondent is asserting that Claimant is alleging a claim for a series of similar or related acts. Thus, Claimant's attempt to assert that Respondent's arguments are inconsistent with the text of Article 10.18.1 must fail. It is Claimant's arguments, not Respondent's, that are "completely divorced from the text of Article 10.18.1."[1525]

739. In addition, as discussed in Respondent's Counter-Memorial and summarized above, several tribunals have agreed with Perú's interpretation, and have specifically rejected the exact interpretation offered by Claimant in this proceeding.[1526]

740. Were there any question about Article 10.18.1's ordinary meaning (and realistically, there is not), it could be noted that Perú's interpretation is also consistent with the intent of the TPA Parties. In multiple submissions filed by the United States as a non-disputing

[1522] *See* Claimant's Reply at para. 224.

[1523] *See* Respondent's Counter-Memorial at para. 416. *See also* Section III.A.1.a.

[1524] Claimant's Reply at para. 225.

[1525] Claimant's Reply at para. 225.

[1526] *See* Respondent's Counter-Memorial at paras. 421, 429, 433. *See also supra* at para. 735.

party interpreting the same or identical limitations-period provisions to Article 10.18.1 of the TPA, the United States has supported the interpretation offered by Perú in this case and rejected the interpretation offered by Claimant. For example, in its submission in *Gramercy et al. v. Peru*, also an arbitration under the U.S.-Perú TPA, the United States stated:

> An investor or enterprise first acquires knowledge of an alleged breach and loss under Article 10.18.1 as of a particular "date." Such knowledge cannot *first* be acquired on multiple dates or on a recurring basis. As the *Grand River* tribunal recognized in interpreting the nearly identical limitations provisions under Articles 1116(2) and 1117(2) of the NAFTA, subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitations period once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. To allow otherwise would permit an investor to evade the limitations period by basing its claim on the most recent transgression in that series, rendering the limitations provisions ineffective.[1527]

The United States made similar statements in its non-disputing party submissions with regard to the limitations-period provision in the CAFTA-DR, which is identical to Article 10.18.1 of the TPA:

> Such knowledge cannot be acquired at multiple points in time or on a recurring basis. Accordingly, a continuing course of conduct cannot renew the limitations period under Article 10.18.1. A legally distinct injury, by contrast, can give rise to a separate limitations period under CAFTA-DR Chapter Ten.
>
> Where a "series of similar and related actions by a respondent state" is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression in that series." To allow an investor to do so would, as the tribunal in *Grand River* recognized, "render the limitations provisions ineffective[.]"[1528]

[1527] Exhibit RA-98, *Gramercy v. Peru*, U.S. Submission at para. 6 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 158) (emphasis added). *See also* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81); Exhibit RA-99, *Kappes v. Guatemala*, U.S. Submission at paras. 4-5; Exhibit RA-96, *Jin Hae Seo v. Korea*, U.S. Submission at para. 19.

[1528] Exhibit RA-100, *Spence v. Costa Rica*, U.S. Submission at paras. 5, 7 (emphasis added) (*see* Exhibit RE-112, CAFTA-DR Chapter Ten, at Art. 10.18.1 ("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.")). *See also* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81); Exhibit RA-98, *Gramercy v. Peru*, U.S. Submission at

741. The U.S. submission also opines that "a legally distinct injury" gives rise to a separate limitations period.[1529] Conversely, a claimant's injury that is not legally distinct cannot give rise to separate limitations periods. Here, Claimant's injury arising from SUNAT's application of the non-stabilized regime in each of the Assessments is not "legally distinct," because as detailed in paragraph 733 above, the legal basis for SUNAT's Assessments is identical for each of the Assessments about which Claimant complains in this arbitration. For the reasons discussed above, Claimant's claims arising from SUNAT's Assessments cannot give rise to separate breaches with differing limitations periods.[1530] Thus, the debate about the correctness of Perú's interpretation of Article 10.18.1 must end here.

742. Claimant's assertion in its Reply that SUNAT issued each Assessment based on a differing set of facts is misleading.[1531] Claimant argues that the Assessments are separate breaches based on superficial differences: (i) SUNAT's Assessments relate to specific fiscal periods; (ii) SUNAT conducted separate audits and notified SMCV of the separate Assessments; (iii) SUNAT's Claims Division's and the Tax Tribunal's decisions corresponded to specific Assessments; and (iv) SUNAT's and the Tax Tribunal's decisions had no binding or precedential effect on the other Assessments.[1532] Equally misleading is Claimant's expert Dr. Hernandez's

---

para. 6 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 158); Exhibit RA-99, *Kappes v. Guatemala*, U.S. Submission at paras. 4-5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 158) (*see* Exhibit RE-112, CAFTA-DR Chapter Ten, at Art. 10.18.1 (quoted above)); Exhibit RA-96, *Jin Hae Seo v. Korea*, U.S. Submission at para. 19 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81) (*see* Exhibit RE-326, U.S.-Korea Free Trade Agreement (KORUS), Chapters Eleven and Twenty-Four, signed on June 30, 2007, entered into force March 15, 2012, at Art. 11.18.1 ("No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 11.16.1 and knowledge that the claimant (for claims brought under Article 11.16.1(a)) or the enterprise (for claims brought under Article 11.16.1(b)) has incurred loss or damage.")).

[1529] Exhibit RA-100, *Spence v. Costa Rica*, U.S. Submission at para 5. *See also* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81); Exhibit RA-96, *Jin Hae Seo v. Korea*, U.S. Submission at n.18 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81).

[1530] *See* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

[1531] *See* Claimant's Reply at para. 226.

[1532] *See* Claimant's Reply at paras. 226, 226(a)-(c).

assertion that SUNAT issued Assessments "based on specific facts, which varied from one fiscal period to another."[1533]

743. Indeed, the fiscal period and the exact amounts due in each Assessment vary, but that is a distinction without a difference, because the government act constituting Claimant's alleged breaches is the same from the first through the last Assessment: SUNAT applied the non-stabilized regime to SMCV's Concentrator Project. Even if the Assessments may be separate acts, they all rest on the same alleged breach of the 1998 Stabilization Agreement, and thus the date when Claimant first acquired knowledge of the alleged breach and loss must attach to the first government act (the first Assessment) in the series of similar and related government act (subsequent Assessments). And, even if each act standing alone were to give rise to its own cause of action, as Claimant asserts, tribunals have held that where those acts are part of a series of similar and related acts, the start date of the limitations period must attach to the first act in that series, so that a claimant cannot "base its claim on the most recent transgression, . . . if it had knowledge of earlier breaches and injuries."[1534]

744. Claimant also asserts that SMCV's Assessments are somehow severable for purposes of its knowledge and the limitations period because, after SUNAT notified SMCV of the first Assessment, the Peruvian government allegedly "continued to confirm [to SMCV] that the Concentrator was stabilized."[1535] As Respondent clarified in its Counter-Memorial and affirmed in this submission, Respondent did no such thing. In particular, contrary to Claimant's assertion, Respondent did not confirm to SMCV that the Concentrator Project was stabilized subsequent to the issuance of the first Assessment in August 2009.[1536] Critically for the purpose of the limitations period analysis, the record shows that SUNAT continued to consistently assess

[1533] Exhibit CER-8, Second Hernández Report at para. 125 ("SUNAT also issued the Royalty and Tax Assessments based on specific facts, which varied from one fiscal period to another.") (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 75-77).

[1534] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81. *See also* Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 ("Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty."); Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81); Exhibit RA-98, *Gramercy v. Peru*, U.S. Submission at para. 6 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 158); Exhibit RA-99, *Kappes v. Guatemala*, U.S. Submission at paras. 4-5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 158); Exhibit RA-96, *Jin Hae Seo v. Korea*, U.S. Submission at para 19 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81).

[1535] Claimant's Reply at para. 226(d).

[1536] *See* Respondent's Counter-Memorial at para. 262. *See also supra* Section II.E.

royalties and taxes against SMCV's Concentrator Project on the basis that the Concentrator Project was not covered by the 1998 Stabilization Agreement. Thus, SUNAT did not change its interpretation of the scope of the 1998 Stabilization Agreement and did not vary in its position that SMCV's Concentrator Project was not entitled to stability benefits.

745. Claimant's attempt to rely in its Reply on *Eli Lilly*, *Nissan*, *Bilcon*, and *Grand River*[1537] to support its assertion that government actions in a series of similar and related government acts should have separate limitations periods is unavailing, as discussed below:

a) The facts in *Eli Lilly* are not only distinguishable from those in this case, but the tribunal's holding is in fact consistent with Perú's interpretation of the TPA's limitations period. In the *Eli Lilly* case, claimant alleged that Canada breached its NAFTA obligations when its courts invalidated claimant's patents, Strattera and Zyprexa, under the "promise utility doctrine."[1538] Canada challenged the timeliness of claimant's claims, contending that claimant first knew of the alleged breach when the Canadian courts invalidated claimant's other patent, Raloxifene, under the same doctrine.[1539] The tribunal determined that "the alleged breach with respect to a <u>different investment</u> (the Raloxifene Patent) was irrelevant to the application of NAFTA Articles 1116(2) and 1117(2) to the investments at issue in [the] arbitration (the Zyprexa and Strattera Patents)."[1540] Although the courts invalidated claimant's patents under the same legal basis, the tribunal determined that knowledge of the alleged breach based on the patents at issue in the NAFTA claims could not be attached to a prior court decision concerning a <u>different patent or investment</u>. Here, SUNAT's Assessments were issued based on the same legal basis <u>and the exact same investment</u>—SMCV's Concentrator Project.

b) Contrary to Claimant's assertion, the *Nissan* decision supports Perú's interpretation of Art. 10.18.1. The *Nissan* tribunal agreed with respondent's argument regarding the limitations period of the applicable treaty, stating that "once an investor has knowledge that it has been harmed by a particular State act alleged to breach a [treaty] obligation, <u>additional conduct related to the *same*</u>

[1537] Claimant's Reply at para. 228.

[1538] *See* Exhibit CA-411, *Eli Lilly v. Canada*, Final Award at para. 5.

[1539] *See* Exhibit CA-411, *Eli Lilly v. Canada*, Final Award at para. 126.

[1540] *See* Exhibit CA-411, *Eli Lilly v. Canada*, Final Award at para. 167 (emphasis added).

underlying harm 'cannot without more renew the limitation period' for filing a claim seeking redress."[1541] Here, as discussed in paragraph 733 above, SUNAT performed the same act in each Assessment (applied the non-stabilized regime to assess royalties and taxes), against the same party for the same project (SMCV and its Concentrator Project), based on the same regulatory framework (Mining Law and Regulations) and the same interpretation held by SUNAT with regard to the same contract (the 1998 Stabilization Agreement does not apply to SMCV's Concentrator Project because this Project is not identified in the 1996 Feasibility Study). In the words of the *Nissan* tribunal, SUNAT's Assessments concern "the same underlying harm [that] 'cannot without more renew the limitation period . . . .'"[1542]

c) The facts in *Bilcon/Clayton* are substantially different from the facts in this case, making Claimant's reliance on the tribunal's *dicta* (*i.e.*, that it is "possible and appropriate . . . to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits") untenable.[1543] In *Bilcon/Clayton*, claimant's project was subjected to the state's lengthy and onerous environmental review process, where distinct and varied regulatory measures, guidelines, and obligations (*e.g.*, "Blasting Conditions," "Guidelines for the Use of Explosives," examination by the "Joint Review Panel") were imposed by different ministerial and provincial authorities (*e.g.*, Department of Fisheries and Oceans, Nova Scotia Department of Environment and Labour) under distinct regulatory frameworks (*e.g.*, Fisheries Act, Navigable Waters Protection Act, Nova Scotia Environment Act, Canadian Environmental Assessment Act).[1544] Here, SMCV's Concentrator Project was uniformly subjected to the same measure (assessment of royalty and taxes) and the same obligation (payment of royalties and taxes) imposed by the same governmental

[1541] Exhibit CA-243, *Nissan Motor Co., Ltd. v. India*, PCA Case No. 2017-37, Decision on Jurisdiction, April 29, 2019 ("*Nissan v. India*, Decision on Jurisdiction"), at para. 325 (emphasis by underline added; emphasis in italics in original).

[1542] *See* Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 325 (emphasis in original).

[1543] Claimant's Reply at para. 228(c) (*citing* to Exhibit CA-278, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015 ("*Clayton v. Canada*, Award"), at para. 266.)

[1544] *See generally* Exhibit CA-278, *Clayton v. Canada*, Award at Sections IV.A, V.A.

agency (SUNAT) under a unified legal framework (the Mining Law and Regulations). Thus, *Bilcon/Clayton* does not help Claimant, and, in any event, it is not instructive for this case.

d) Claimant cannot credibly assert that the *Grand River* decision "supports Freeport's position that independent limitation periods apply to independent causes of action"[1545] when the tribunal said just the opposite. Rejecting claimant's arguments that "the limitations periods under Articles 1116(2) and 1117(2) applied separately to each contested measure taken by each state implementing the MSA" and that "there is not one limitations period, but many,"[1546] the *Grand River* tribunal expressly stated in response that "[claimant's] analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."[1547] Moreover, Claimant argues that *Grand River* differs from the present case and is thus inapplicable, because in the present case "there was no government action that pre-destined each of the Assessments."[1548] That is plainly incorrect. As explained in Sections II.E and II.G above, the Peruvian government's interpretation of the scope of the 1998 Stabilization Agreement predestined the Assessments issued against SMCV's Concentrator Project, because once MINEM and SUNAT interpreted the scope of the Agreement as excluding SMCV's Concentrator Project, every single Assessment was essentially guaranteed (predestined) to come out the same way, *i.e.*, SMCV was subject to royalty and tax payments for activities related to that Project.

746. Also, contrary to Claimant's assertion, the cases cited by Perú (*Infinito Gold, Resolute Forest Products*, *Spence*, *Corona Materials*, and *Apotex*) do not support Claimant's

[1545] Claimant's Reply at para. 228(d).

[1546] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81 (emphasis in original).

[1547] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81 (emphasis added).

[1548] Claimant's Reply at para. 228(d).

argument that each of SUNAT's Assessments gives rise to independent causes of action with separate limitations periods, for the reasons discussed below:[1549]

a) In *Infinito Gold*, the claimant alleged that the combination of five government measures restricting its mining rights had resulted in the cancellation of the claimant's mining project.[1550] The tribunal rejected respondent's argument that the five measures constituted a chain or series of events that constituted a composite breach, principally on the basis that the claimant had not alleged or established a composite breach.[1551] The facts of *Infinito Gold* are distinguishable from those in this case. In that case, the five alleged measures at issue were distinct government acts that addressed dissimilar issues: the 2011 Administrative Chamber Decision (which, among other things, upheld the Contentious Administrative Tribunal's (TCA) nullification of a mining concession owned by claimant's subsidiary and the applicability of a 2002 moratorium on open-pit mining); the 2011 Legislative Mining Ban (which prohibited open-pit mining); the 2012 resolution issued by the Ministry of the Environment, Energy and Telecommunications (which cancelled the subsidiary's mining concession); the 2013 Constitutional Chamber Decision (which dismissed the subsidiary's challenge of the constitutionality of a TCA decision), and a 2019 TCA decision (which addressed the subsidiary's discrete complaint that it suffered "additional environmental damage").[1552] In contrast, in this case, the SUNAT's Assessments are identical in nature (as discussed in paragraph 733 above). Thus, Claimant's reliance on *Infinito Gold* is misplaced.

b) Claimant's attempt to rely on *Resolute Forest Products* also fails. In that case, the tribunal determined that the claimant's claims were within the limitations period, because, even though the alleged breaching act (incentive offerings allegedly provided by the Government of Nova Scotia to help a struggling paper mill in Nova Scotia secure a new buyer) occurred before the cut-off date, claimant did not have knowledge of the alleged loss (*i.e.*, financial loss and possible closure of

[1549] Claimant's Reply at para. 229.

[1550] *See* Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 225.

[1551] *See* Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 230.

[1552] *See* Exhibit RA-1, *Infinito v. Costa Rica*, Award at paras. 104, 108, 109, 112, 117.

its own paper mill in nearby Quebec as a result of increased competition allegedly caused by the state's measures) until a date after the cut-off date.[1553] Unlike the claimant in *Resolute Forest Products*, SMCV knew immediately upon receipt of SUNAT's Assessment that it owed royalties and taxes at the non-stabilized rate and corresponding penalties and interest with respect to its Concentrator Project, and that it would owe such royalties and taxes (and corresponding penalties and interest) for every fiscal year it had failed to pay royalties and taxes for its Concentrator Project.[1554]

c) Claimant's attempt to differentiate the present case from *Spence*, and to argue that Perú inappropriately relied on the *Spence* tribunal's holding, must also fail. According to Claimant, the tribunal in the *Spence* case determined that claimant's claims were timed-barred because they were "deeply and inseparably rooted" in state acts that occurred before the cut-off date. In particular, the *Spence* tribunal discussed the state's adoption of a law permitting expropriation of private property to create an offshore ecological park and its issuance of a "binding legal interpretation" indicating that the park extended inland, including to claimants' residential properties.[1555] Claimant tries to find significance in the fact that, unlike in *Spence*, "Peru has never issued a 'binding legal interpretation' of the [1998 Stabilization] Agreement that predestined any of the Assessments."[1556] Claimant's attempt to distinguish this case from *Spence* is unavailing for the following reasons: (i) as discussed above, Article 83 of the Mining Law and Article 22 of the Mining Regulations (both adopted before SUNAT issued the first Assessment) predestined SUNAT's Assessments, because the legal provisions dictate that unless an investment project was set out in a feasibility study, that project would not be subject to the application of the related stabilization agreement; (ii) according to Claimant itself, the June 2006 MINEM Report definitively interpreted the 1998 Stabilization Agreement and brought

[1553] *See* Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at paras. 155, 179.

[1554] *See* Respondent's Counter-Memorial at para. 427, and Table 1 (showing the amount of royalties, penalties and interest that SMCV owed to SUNAT (for every month it failed to pay royalties for the Concentrator Project) are displayed on pages 2 and 4 of the 2006-2007 Royalty Assessment).

[1555] *See* Claimant's Reply at para. 229(c); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at paras. 37-38, 174.

[1556] Claimant's Reply at para. 229(c).

about the SUNAT Assessments; and (iii) in the first Assessment (2006-2007 Royalty Assessment)—on the very first page—SUNAT set out its interpretation of the scope of the 1998 Stabilization Agreement and concluded that the Agreement does not apply to SMCV's Concentrator Project.[1557] SUNAT's interpretation of the scope of the 1998 Stabilization Agreement is the Peruvian government's interpretation, which is binding on the counter-party of the Agreement, SMCV.

d) Nor does Claimant's reliance on *Corona Materials* support its case. In the *Corona Materials* case, the claimant alleged breach of the applicable treaty based on (i) the government's decision to refuse to grant an environmental permit to the claimant, and (ii) its failure to respond to the claimant's request for reconsideration of that decision.[1558] The claimant argued, on the one hand, that the second alleged act constituted a continuing breach which occurred after the cut-off date and, alternatively, that the second alleged act should be treated as an autonomous act and that the two acts constituted two separate breaches.[1559] Claimant argues that the *Corona Materials* case is distinguishable from this case on its facts. Claimant's attempt to distinguish this case from the *Corona Materials* case is without merit.

First, Claimant asserts that the *Corona Materials* tribunal "rejected the claimant's argument that the failure of the Ministry to render a decision on the claimant's motion for reconsideration of the denial of the claimant's environmental permit before the cut-off date constituted a continuing breach of the CAFTA-DR after the cut-off date."[1560] Claimant argues that this case is distinguishable from the

[1557] Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 1 ("From the analysis conducted on the relevant legal regulations and the Agreement for Promotion and Guarantee of Investment signed with the Peruvian State and the taxpayer, ... The conclusion is that the State granted the taxpayer guarantees of tax, administrative and exchange stability in accordance with the legal regime in force on the approval date of the feasibility study, upon signing on February 13, 1996, the Agreement for the "**Cerro Verde Leaching Project**" . . . . In this connection, the benefits granted in administrative matters are only related to the '**Cerro Verde Leaching Project**'. Therefore, regarding the exploitation of mining resources destined for the '**Primary Sulfide Project**', as they are not within the scope of protection of the Agreement, the payment of the mining royalty is required in accordance with the provisions of Law No. 28256 and its amending regulations.") (emphasis in original).

[1558] *See* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 204.

[1559] *See* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at paras. 205, 209.

[1560] Claimant's Reply at para. 229(d).

Corona Materials case because, in this case, Freeport does not allege a continuing breach based on a failure to render a decision regarding the Assessments, but rather argues that each decision became final and enforceable after the cut-off date. Claimant misses the point of the tribunal's decision in *Corona Materials*.

While Claimant is correct that the *Corona Materials* tribunal rejected the claimant's continuing breach argument, it also rejected the claimant's alternative, "two autonomous acts" argument.[1561] The key to the tribunal's latter holding was that the tribunal found that the two alleged breaches related to the same theory of liability and therefore were not separable. In particular, the tribunal agreed with the respondent that "the alleged breaches relate[d] to the same theory of liability, which [was] predicated on the notion that 'the DR [Dominican Republic] refused to permit Corona Materials to proceed with its mining project for reasons that are not legitimate . . .'. Even the claim relating to the absence of a response to [c]laimant's reconsideration request rest[ed] on this theory of liability."[1562] Like in the *Corona Materials* case, all of SUNAT's Assessments in this case are based on the "same theory of liability" as the first Assessment—that is, that the 1998 Stabilization Agreement does not apply to the Concentrator Project.[1563] Thus, contrary to Claimant's assertion, the *Corona Materials* case supports Respondent's case, not Claimant's.

Second, Claimant also fails in its attempt to distinguish this case from the *Corona Materials* case on the basis that the tribunal in the latter found that the denial was "not a mere notification of the decision" but "a clear indication of the decision's final character insofar as the environmental authorities were concerned."[1564] Here, according to Claimant, "SUNAT's notification of each Assessment lacked final character and did not result in the closure of the administrative file for each Assessment."[1565] Claimant is wrong on the facts. In this case, like the *Corona Materials* case, the notifications from SUNAT regarding the Assessments were

[1561] *See* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections para. 210.

[1562] Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 210 (emphasis added).

[1563] *See supra* at para. 733.

[1564] Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 222.

[1565] Claimant's Reply at para. 229(d).

"clear indication[s] of [SUNAT's] decision[s'] final character insofar as the [tax] authorities were concerned."[1566] The fact that SMCV appealed those findings does not change the definitive nature of the interpretation for SUNAT's purposes.

The *Corona Materials* tribunal further held that "[t]he [c]laimant's actual knowledge of the Environment Ministry's measure and of its definitive character is confirmed by its own letter to the Environment Ministry . . . in which it complained about the decision and asked the Ministry to reconsider it."[1567] This is exactly what happened in this case—SMCV repeatedly requested that SUNAT's Assessments be reconsidered before SUNAT's Claimant's Division and the Tax Tribunal. SMCV's repeated requests for reconsideration of the Assessments, if anything, are evidence of its "actual knowledge of [SUNAT's decision] and of its definitive character." Thus, contrary to Claimant's assertions, the facts in this case are analogous to those in the *Corona Materials* case, and like the *Corona Materials* tribunal, this Tribunal should also find that SUNAT's Assessments reflect its "final" administrative interpretation of the 1998 Stabilization Agreement, and that Claimant first knew of the alleged breach and loss when SMCV was notified of SUNAT's first Assessment.

e) Claimant's suggestion that *Apotex* is inapplicable to this case because Freeport, unlike claimant in *Apotex*, did not allege a continuing breach, is also unavailing.[1568] In *Apotex*, the claimant argued that the administrative decisions by the U.S. Food and Drug Administration ("FDA") that were made before the cut-off date and subsequent court decisions rejecting the claimant's challenge were part of a continuous set of underlying facts that resulted in the respondent's alleged breach.[1569] The tribunal rejected that argument on the basis that, in the tribunal's view, the claimant was attempting to toll the limitations period for its claim based on the state's administrative measure using later court proceedings.[1570] The tribunal's rejection of the claimant's claim is not only

[1566] *See* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 222.

[1567] Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 223 (emphasis added).

[1568] Claimant's Reply at para. 229(e).

[1569] *See* Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 325.

[1570] *See* Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 325.

pertinent but instructive in this case.[1571] Here, Claimant argues that the alleged breaches based on SUNAT's Assessments did not occur when the Assessments were notified to SMCV, but when they became "final and enforceable" (years later) after the Assessments had been reviewed by the Tax Tribunal, or when SMCV withdrew any of such pending appeals, whichever is latest. Thus, like the claimant in *Apotex*, Claimant in this case is attempting to toll the limitations period for its claims to the latest point in time by citing appeal proceedings, and this Tribunal should see through that attempt and reject Claimant's attempt to avoid the limitations period.

In addition, Claimant's assertion that the *Apotex* tribunal held that the claimant's claims based on court decisions were "analytically distinct" and, as such, gave rise to independent causes of action that were not time-barred,[1572] does not help its case. To be clear, the claimant in the *Apotex* case brought claims based on distinct measures: (i) the FDA measure, and (ii) subsequent decisions of the Court of Appeals of the D.C. Circuit. The tribunal held that these claims were "analytically distinct," because it found that the former claim was based on an administrative ruling, whereas the latter claim was based on judicial decisions.[1573] Here, SUNAT's Assessments are not "analytically distinct" from one another—they are analytically the same for the reasons discussed in paragraph 733 above.

747. Claimant also asserts that Perú's claim that a treaty's limitations period should be interpreted strictly is "simply wrong," because the cases that Perú cited in support of that proposition "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,"[1574] and

[1571] Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 324-25 (". . . the Tribunal accepts the Respondent's submission that by reason of NAFTA Article 1116(2), all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed. Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a '*continuing breach*' by the United States, or '*part of the same single, continuous action*,' in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure.") (emphasis in original).

[1572] *See* Claimant's Reply at para. 229(e) (*citing* Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 334).

[1573] Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 334 ("But the two types of claim are clearly analytically distinct. One is a claim that a breach occurred, and loss was incurred, as at 11 April 2006, by reason of the FDA's (administrative) ruling that the dismissal of Apotex's declaratory judgment action against the patent owner did not constitute a 'court decision trigger'. The other is a claim that a breach occurred, and loss was incurred, as at 6 June 2006, or alternatively 17 August 2006, by reason of the (judicial) decisions of the Court of Appeals for the D.C. Circuit.").

[1574] Claimant's Reply at para. 219.

because Perú did not "proffer a 'strict interpretation' of Article 10.18.1."[1575] Claimant misunderstands Respondent's argument. Respondent's argument is not that tribunals have interpreted limitations periods strictly *per se* but, rather, that they have applied the limitations provisions strictly to bar untimely claims.[1576] In the words of the *Resolute Forest Products* tribunal, when interpreting the limitations provision in the NAFTA (which is similar to the provision in the TPA), the "time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitations period, ..."[1577] The tribunal in *Grand River* similarly noted, when interpreting the limitations provisions under NAFTA, that they "introduce[] a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification . . . ."[1578]

2. Alleged Breaches of Article 10.5 of the TPA

748. Respondent explained in its Counter-Memorial that most of Claimant's claims of alleged breaches of Article 10.5 of the TPA fell outside of the limitations period under Article 10.18.1, because the date on which Claimant (or SMCV) first knew or should have known of the alleged breaches and loss was well before the cut-off date of February 28, 2017.

749. *First*, Claimant's claims based on frustration of legitimate expectations, arbitrary actions, and inconsistent and non-transparent acts are all related to the Royalty Assessments, and because, as discussed above with regard to the breach of contract claims arising from those same Assessments, SUNAT's Assessments are "a series of similar and related acts of the respondent state," such that 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).[1579] Hence, the dates on which Claimant first knew or should have known of the alleged TPA breaches and the related loss were (i) the date when SMCV was notified of the first Royalty Assessment (*i.e.*, August 18, 2009), or (ii) at a minimum, the date when SMCV challenged the first Royalty Assessment before SUNAT's Claims Division (*i.e.*, September 15, 2009).[1580]

[1575] Claimant's Reply at para. 219.

[1576] *See* Respondent's Counter-Memorial at para. 417.

[1577] Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 153.

[1578] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 29.

[1579] *See supra* at Section III.A.1.b.

[1580] Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 1 of PDF ("[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT" ("Recibido 18 AGO. 2009")); Claimant's Memorial at Annex A, p. 1

750. *Second*, certain of Claimant's TPA claims based on due process violations related to the Tax Tribunal's handling of the proceedings for the 2006-2007 and 2008 Royalty Assessments are also time-barred. That is because Claimant first knew or should have known of the alleged breaches and losses when SMCV was notified of the Tax Tribunal's decisions regarding those Assessments on June 20, 2013, *i.e.*, years before the February 28, 2017 cut-off date.[1581]

751. *Third*, regarding Claimant's Article 10.5 claims based on SUNAT's refusal to waive penalties and interest on the Royalty and Tax Assessments: (a) its claims related to Tax Assessments are barred under Article 22.3.1 of the TPA, which excludes TPA claims based on "taxation measures"; and (b) its claims related to Royalty Assessments are time-barred because the date on which Claimant (through SMCV) first knew or should have known of the alleged breaches and loss tied to the denied waiver was April 22, 2010, *i.e.*, when SUNAT notified SMCV that it confirmed its Royalty Assessment as well as the corresponding penalties and interest arising therefrom and would not waive them[1582]—also years before February 28, 2017. As such, only a handful of Claimant's claims of alleged breaches of Article 10.5 of the TPA survive in the face of the TPA's three-year limitations period (and they fail on the merits in any case, as will be discussed in Section IV.B below).[1583]

("SUNAT Assessment notified to SMCV: "18/08/09" (2006-2007 Royalty Case)) and para. 172 ("On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments."); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments (received by SUNAT on September 15, 2009), at p. 1. *See also* Respondent's Counter-Memorial at para. 447.

[1581] Claimant's Memorial at para. 211 ("While the Tax Tribunal notified SUNAT of the resolution in the 2008 Royalty Case almost immediately, on 27 May 2013, it did not notify SMCV of either resolution until over three weeks later, on 20 June 2013.") and Annex A, p. 1 ("Tax Tribunal Resolution Notified to SMCV: 20/06/13" (2006-2007 Royalty Case); "Tax Tribunal Resolution Notified to SMCV: 20/06/13" (2008 Royalty Case)). *See also* Respondent's Counter-Memorial at para. 453.

[1582] Claimant's Memorial at Annex A, p. 1 ("SUNAT Confirmation of Assessment Notified to SMCV: 22/04/10" (2006-2007 Royalty Case)); Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010), at p. 1 ("[Stamp: SOCIEDAD MINERA CERRO VERDE S.A.A. LEGAL MANAGEMENT 22 APR 2010 RECEIVED."). *See also* Respondent's Counter-Memorial at para. 459, n.939.

[1583] The only claims that remain in light of the TPA's limitations period are limited to 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. However, claims (b) and (c) are in any case outside the Tribunal's jurisdiction under TPA Article 10.1.3 as discussed in Section III.C below.

752. In its Reply, Claimant again insists that its claims of alleged breaches of Article 10.5 of the TPA are within the limitations period. As discussed below, each of Claimant's arguments is untenable.

753. *(1)(a) Legitimate Expectations, Arbitrary Actions, and Inconsistent and Non-Transparent Action*. Claimant argues that its TPA claims based on frustration of legitimate expectations, arbitrary actions, and inconsistent and non-transparent action are timely, because according to Claimant, it first knew of the alleged breaches and losses based on SUNAT's Assessments only when the Assessments became "final and enforceable" at the end of all court appeals or upon SMCV's withdrawal of the court cases, which happened after February 28, 2017. In particular, Claimant relies on the *Mobil II* tribunal's holding to support its assertion that a government decision does not give rise to a cause of action until it is "final and enforceable."[1584] Claimant's interpretation regarding when knowledge of an alleged breach and loss arises is not only unsupported by Article 10.18.1 and investment treaty jurisprudence (as discussed in Section III.A.1 above), but also by the tribunal's decision in *Mobil II*.

754. *First*, the record is clear that SMCV (and thus Claimant) had the necessary knowledge on August 18, 2009 when SMCV was notified about the first Assessment, for all the reasons just discussed at length in Section III.A.1 above.

755. *Second*, contrary to Claimant's assertion, the *Mobil II* tribunal's decision does not support Claimant's interpretation, but rather Respondent's interpretation, regarding when knowledge of an alleged breach and loss arises. In *Mobil II*, the Canada-Newfoundland and Labrador Offshore Petroleum Board ("Board"), which regulates the operators' activities in the oil and gas industry in the Newfoundland and Labrador Offshore Area on behalf of the Canadian government (and the Province of Newfoundland and Labrador ("Province")), adopted the "2004 Guidelines on Research and Development Expenditures" ("Guidelines"). The Guidelines required operators of offshore petroleum projects to contribute a percentage of their revenue to research and development, education and training in the Province.[1585] Mobil, an operator of two offshore petroleum projects (the Hibernia and Terra Nova offshore oil projects), was subject to the Guidelines.[1586] The Guidelines were unsuccessfully challenged before the Canadian courts,

[1584] *See* Claimant's Reply at para. 233.

[1585] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 55.

[1586] *See* Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 62.

with the Supreme Court finally dismissing the related appeal on February 19, 2009.[1587] Mobil initiated an international arbitration against Canada ("*Mobil I*") on November 2, 2007, and the tribunal in that case found that the Guidelines breached Canada's performance obligations under NAFTA.[1588] Following the *Mobil I* decision, Mobil submitted a letter requesting that the Board "waive Mobil's portion of Hibernia and Terra Nova's outstanding shortfall under the 2004 Guidelines."[1589] In a letter dated July 9, 2012, the Board informed Mobil that the Guidelines would still be applied on all applicable operators, and that it does not intend to waive any operator's obligations.[1590] The *Mobil II* tribunal held that claimant first knew of the alleged breach and loss on the date it received the July 9, 2012 letter:

> It first acquired knowledge that the Guidelines would be enforced in the future, and that it had suffered loss as a result, at the earliest when it received the 9 July 2012 letter. The Tribunal therefore concludes that the limitation period in Articles 1116(2) and 1117(2) began to run again from the time of receipt of that letter.[1591]

The *Mobil II* tribunal was interpreting NAFTA's limitations period under Articles 1116(2) (for claims brought by an investor on its own behalf) and 1117(2) (for claims brought by an investor on behalf of an enterprise), which are almost identical to the TPA's Article 10.18.1 (as Mobil brought claims both on its behalf and on behalf of two enterprises in *Mobil II*).[1592]

756. *Mobil II* supports Perú's interpretation in the following ways. *First*, the tribunal agreed that knowledge of the alleged breach and loss arose when Mobil was notified, by the July 9, 2012 letter addressed to it, that the Guidelines would be applied against it.[1593] (Here, although slightly different than the July 9, 2012 letter, the 2006-2007 Royalty Assessment stated that

---

[1587] *See* Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 64.

[1588] *See* Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 65. *See also* Exhibit RA-55, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012, at para. 490(3).

[1589] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 78.

[1590] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 79.

[1591] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 172 (emphasis added).

[1592] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at paras. 126-27 (*citing* Exhibit RE-113, North American Free Trade Agreement (NAFTA), signed on December 17, 1992, entered into force on January 1, 1994, at Art. 1116(2) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.") and Art. 1117(2) ("An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.") (emphasis added).

[1593] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 172.

SUNAT had interpreted the 1998 Stabilization Agreement and applied the non-stabilized regime against SMCV's Concentrator Project as a result. Like Mobil, SMCV had to know that that interpretation would be applied against it further, for other tax periods as well.) *Second*, the tribunal stated that knowledge that loss has been incurred arises when there exists "at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained."[1594] (Here, the 2006-2007 Royalty Assessment specifically stated the amount of debt owed by SMCV to SUNAT based on SUNAT's application of the non-stabilized regime to SMCV's Concentrator Project, and as such, established with certainty that loss had been incurred.) Based on premises (i) and (ii), the tribunal determined that the date on which Mobil received the July 9, 2012 letter was the start date of NAFTA's limitations period, because that was when Mobil first knew of the alleged breach and that loss has been incurred.[1595] Perú's interpretation of the TPA's limitations period is consistent with the holding of the *Mobil II* tribunal. SMCV first knew of the alleged breach and loss when it was notified of the first Assessment on August 17, 2009 (or at a minimum, on September 15, 2009 when SMCV challenged the Assessment before the SUNAT's Claims Division). As such, Claimant's claims are time-barred under Article 10.18.1, and, thus, they fall outside the Tribunal's jurisdiction.

757. *(1)(b) Alleged Due Process Violations*. For the alleged due process violations related to the 2006-2007 and 2008 Royalty Assessments, Claimant alleges that the Tax Tribunal committed procedural irregularities when its President, Ms. Zoraida Olano, and her assistant, Ms. Ursula Villanueva, purportedly interfered with cases related to the aforementioned Royalty Assessments ("Royalty Cases"). To support its allegations, Claimant relies not on the substance of the decisions but, rather, on the alleged procedural irregularities which, according to Claimant, appeared on the face of the Royalty Case decisions. Importantly, Claimant admits that SMCV received the Tax Tribunal's decisions (where these supposed procedural defects were recorded) in both Royalty Cases on the same day on June 20, 2013.[1596] That admission alone is fatal to

[1594] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 155 ("Even if it is possible to read the requirement in Articles 1116(2) and 1117(2) that the investor must have acquired knowledge that loss or damage has been incurred as embracing a case in which the investor knows that loss or damage will be incurred, the time limit imposed in those provisions could not start to run until the investor had knowledge that it would suffer such loss or damage. While the Tribunal agrees with Canada that it is not necessary that the quantum of loss or damage be known, it is clear that there must be at least a reasonable degree of certainty on the part of the investor that some loss or damage will be sustained.") (emphasis added).

[1595] Exhibit CA-420, *Mobil v. Canada II*, Decision on Jurisdiction at para. 172.

[1596] Claimant's Memorial at para. 211 ("While the Tax Tribunal notified SUNAT of the resolution in the 2008 Royalty Case almost immediately, on 27 May 2013, it did not notify SMCV of either resolution until over three weeks later, on 20 June 2013."); Claimant's Memorial at Annex A, p. 1 ("Tax Tribunal Resolution Notified to

Claimant's defense, because, as Perú explained in its Counter-Memorial, SMCV undoubtedly knew of the alleged breaches and losses related to the procedural irregularities about which Claimant complains in these proceedings as of that mid-2013 date, *i.e.*, more than three years before the cut-off date of February 28, 2017.[1597]

758. Claimant's related assertions in its Reply are equally fatal to its defense. Claimant argues that it did not know "the full extent of the due process violations" until 2019 and 2021 when it gathered more information during its investigation and through its requests for access to public information.[1598] However, Article 10.18.1 does not state that the limitations period is triggered only after a claimant acquires knowledge of the "full extent" of the alleged breach (and loss). Instead, Article 10.18.1 states that the limitations period starts to run 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."[1599] Indeed, a claimant may not know the "full extent" of an alleged breach until after an investor-state tribunal issues an award. Thus, Claimant's interpretation of Article 10.18.1 cannot possibly be correct. Claimant said in its Memorial that it finds multiple indications of purported irregularities on the face of the Tax Tribunal's decisions[1600]—but in that case (*i.e.*, assuming *arguendo* that the indicated issues were irregularities), then receiving and reading the Tax Tribunal's decisions put SMCV on notice of those defects. At a minimum, the decisions should have prompted SMCV (or Claimant) to start inquiring into or investigating the supposed irregularities. Instead, it appears that Claimant waited more than six years to investigate the alleged existence of irregularities. In an attempt to defend such delay, Claimant argues that the appearance of Ms. Villanueva's initials "standing alone" was insufficient to give SMCV knowledge of possible procedural irregularities.[1601] But, Claimant did not have to consider Ms. Villanueva's initials "standing alone," since it could and should have considered all the other indications that it identified in the decisions. Thus, Claimant can only blame itself or SMCV for

SMCV: 20/06/13" (2006-2007 Royalty Case); "Tax Tribunal Resolution Notified to SMCV: 20/06/13" (2008 Royalty Case)).

[1597] *See* Respondent's Counter-Memorial at paras. 450-54.

[1598] Claimant's Reply at para. 236.

[1599] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.1 (emphasis added).

[1600] Claimant's Memorial at paras. 200, 209-10.

[1601] Claimant's Reply at para. 237.

not being sufficiently diligent in looking into the perceived procedural irregularities in a timely fashion (in the three years afforded to it by the TPA's limitations period).

759. To be clear, Claimant does not expressly state which dates should be used to start the limitations period with respect to its due process violation claims. Instead, it offers potential dates—in 2019, when SMCV began investigating the origin of the 2006-2007 and 2008 Royalty Case decisions; or in 2021, when SMCV apparently decided to submit two Requests for Information to the government and, following receipt of the documents requested, purportedly learned "the full extent of the due process violations."[1602] However, if Claimant were allowed to establish a start date for the limitations period in either 2019 or 2021, then Article 10.18.1 of the TPA would be rendered meaningless, since a claimant could easily overcome a limitations period by delaying the date of its investigation to a date that is clearly within the limitations period, and then assert that it did not know of the alleged breaches and loss until the date when it learned the "full extent of the due process violations."[1603] In fact, under Claimant's theory, the limitations period may not even be triggered if Claimant has not yet started to investigate the facts of which they were aware. This, of course, is not how the limitations period is intended to operate, because as tribunals have held, the purpose of the limitations period is to discourage claimants from sitting on known claims.[1604]

760. Notably, and fatal to Claimant's case, SMCV could have filed its requests immediately following its receipt of the Tax Tribunal's decisions on June 20, 2013, and if it found reason to believe a breach of the TPA had occurred, could have filed a claim within the three-year limitations period. It did not. By requiring the limitations period to start either on the date the claimant "first acquired, or should have first acquired" knowledge of the alleged breaches and loss, Article 10.18.1 of the TPA intends to foreclose dilatory conduct in pursuing

[1602] *See* Claimant's Reply at para. 236.

[1603] Claimant's Reply at para. 236.

[1604] *See* Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 247 ("This conclusion is consistent with the *raison d'être* of a statute of limitations, which is to promote legal certainty by avoiding that claimants delay bringing their claims."); Exhibit RA-8, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, August 22, 2008, at p. 31 ("The Arbitral Tribunal considers that the purpose of such a statute of limitation provision is to require diligent prosecution of known claims . . ."); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 ("[T]he Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims."); Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 332 ("[T]his provides the certainty and finality intended by NAFTA Article 1116(2), and forces parties to initiate proceedings with respect to (as here) administrative decisions . . . ."). *See also* Respondent's Counter-Memorial at para. 430.

TPA claims (as in this case).[1605] Equally important, waiting to start the limitations period until a claimant knows "the full extent" of an alleged violation even though the claimant could have and should have learned of the alleged violation years earlier would be contrary to the intent of Article 10.18.1. As the United States stated in a non-disputing party submission regarding the analogous limitations-period provision under CAFTA, "[A]cquiring more detailed information about the breach or the loss does not reset the limitations period."[1606] Because Claimant first knew or should have known of the alleged breaches and loss based on the purported due process violations concerning the 2006-2007 and 2008 Royalty Cases years before February 28, 2017, Claimant's due process claims related to the 2006-2007 and 2008 Royalty Case decisions are time-barred, and thus, they fall outside the Tribunal's jurisdiction.

761. As stated in Perú's Counter-Memorial, Claimant's only due process claims that could be heard by this Tribunal given the limitations period are limited to its complaints 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 transpired after the cut-off date of February 28, 2017.[1607] Respondent maintains that no due process-based breaches of Article 10.5 of the TPA occurred with respect to any of these events, including these few, circumscribed allegations that happen to remain in light of the limitations period.

762. *(2) Refusal to Waive Penalties and Interest on Royalty and Tax Assessments*. Claimant alleges that Perú breached Article 10.5 of the TPA when it allegedly arbitrarily failed to waive the penalties and interest assessed against SMCV's Concentrator Project.[1608] According to Claimant, the penalty and interest charges were unfair and inequitable, because SMCV's purported understanding of the scope of the 1998 Stabilization Agreement was reasonable in light of the Mining Law and Regulations, and the penalties and interest were allegedly disproportionate to the principal assessed by SUNAT.[1609]

763. In its Counter-Memorial, Perú explained that Claimant's penalties-and-interest claims related to Tax Assessments are barred by Article 22.3.1, which bars claims of TPA

[1605] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.1.

[1606] Exhibit RA-100, *Spence v. Costa Rica*, U.S. Submission at para. 9.

[1607] Respondent's Counter-Memorial at para. 454.

[1608] *See* Claimant's Memorial at para. 400.

[1609] *See* Claimant's Memorial at para. 401.

breaches based on "taxation measures."[1610] Perú further explained that SUNAT's decision to not waive penalties and interest assessed against SMCV based on unpaid Tax Assessments is a "taxation measure," because the TPA defines "measure" as "any law, regulation, procedure, requirement, or practice,"[1611] and SUNAT's decision is a "requirement" as SUNAT obligated SMCV to pay penalties and interest on the Tax Assessments.[1612] These issues of jurisdiction *ratione materiae* are revisited in Section III.B below.

764. With regard to Claimant's penalties-and-interest claims related to Royalty Assessments, Perú explained that Claimant first knew or should have known the alleged breaches of the TPA based on SUNAT's maintenance of the penalties and interest imposed on the 2006-2007 Royalty Assessments no later than April 22, 2010, when SUNAT notified SMCV that the Royalty Assessment was confirmed, with the related penalties and interest.[1613] Therefore, Claimant first knew or should have known of the alleged breaches and loss as of that date, which is many years before the cut-off date of February 28, 2017.[1614]

765. Perú also explained that Claimant's argument that each time SUNAT declined to waive penalties and interest constituted a separate breach with its own limitations period must fail, for the same reasons explained in Section III.A.1.b above. Where the alleged government act is part of a "series of similar and related actions by a respondent state," each act does not amount to separate breaches, and the limitations period does not renew each time the alleged act occurs.[1615] SUNAT's decisions in rejecting SMCV's timely request to waive penalties and interest are undoubtedly a series of similar and related government acts—they are grounded in

[1610] Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.1.

[1611] Exhibit CA-10, U.S.-Perú TPA at Art. 1.3. The term "taxation measures" is not directly defined in the TPA (the TPA only indicates what "taxation measures" exclude (*i.e.*, "a customs duty" or "measures listed in exceptions (b) and (c) of the definition of customs duty," which include antidumping or countervailing duties or fees or other charges in connection with importation, that are not applicable in this case)). *See id.* at Art. 22.5. The measures listed in (b) and (c) are "(b) antidumping or countervailing duty that is applied pursuant to a Party's domestic law; or (c) fee or other charge in connection with importation commensurate with the cost of services rendered.").

[1612] Respondent's Counter-Memorial, paras. 457-58.

[1613] *See* Respondent's Counter-Memorial at para. 459.

[1614] *See* Claimant's Memorial at Annex A, p. 1 ("SUNAT Confirmation of Assessment Notified to SMCV: 22/04/10" (2006-2007 Royalty Case)); Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010), at p. 1 ("[Stamp: SOCIEDAD MINERA CERRO VERDE S.A.A. LEGAL MANAGEMENT 22 APR 2010 RECEIVED."). *See also* Respondent's Counter-Memorial at para. 459.

[1615] Respondent's Counter-Memorial at paras. 460-61 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81); Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (*citing* the Exhibit RA-97, *Corona Materials v. Dominican Republic*, U.S. Submission at para. 5 (*citing* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

the same legal basis (the 1998 Stabilization Agreement does not apply to SMCV's Concentrator Project and, thus, SMCV is subject to penalties and interest for its unpaid royalties or taxes) and the same provisions of the Mining Law and Regulations, among other reasons detailed in paragraph 733 above.

766. Importantly, Perú explained in its Counter-Memorial that Claimant's framing of its claims as "failure to waive" penalties and interest is yet another example of its attempt to delay the start date of the limitations period to as late as possible.[1616] Claimant's real complaint is actually about SUNAT's *imposition* of penalties and interest, which occurred much earlier (and even longer before the cut-off date) when SUNAT issued assessments against SMCV's Concentrator Project.[1617] SUNAT's imposition of penalties and interest is also part of a series of similar and related government acts grounded on the same legal basis and the same provisions of the Mining Law and Regulations.

767. For penalties-and-interest claims related to the Royalty Assessments, Claimant continues to insist in its Reply that the alleged breaches and loss only occurred each time the Assessments become "final and enforceable."[1618] Claimant's claims are plainly inconsistent with the text of Article 10.18.1 and investment arbitration jurisprudence, as Perú explained in its Counter-Memorial,[1619] and reiterated at Section III.A.1 above.

768. With regard to Perú's assertion that Claimant's true complaint underlying its "failure to waive" penalties and interest claims is SUNAT's imposition of penalties and interest against SMCV's Concentrator Project,[1620] Claimant argues, specifically with regard to its penalties-and-interest claims related to the 2006-2007 and the 2008 Royalty Assessments, that its real complaint is the Contentious Administrative Courts' alleged failure to review SMCV's waiver requests *de novo*.[1621] To be sure, Perú maintains that Claimant's complaints regarding the Peruvian government's "failure to waive" penalties and interest are still, at their core, complaints that SMCV was required to pay penalties and interest in the first place. But, even if the Tribunal were to accept Claimant's characterization of its penalties and interest claims (it should not), the

[1616] *See* Respondent's Counter-Memorial at para. 460.

[1617] *See* Respondent's Counter-Memorial at para. 460.

[1618] Claimant's Reply at para. 240.

[1619] *See* Respondent's Counter-Memorial at paras. 431-35.

[1620] Respondent's Counter-Memorial at para. 461.

[1621] *See* Claimant's Reply at para. 239. *See also* Claimant's Memorial at para. 427.

only claim that 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 July 12, 2017.[1622] SMCV was necessarily notified on or after that date, which is after the cut-off date. (In any case, Respondent objects to this claim on the merits for the reasons explained in Section IV.B below.) All other penalties-and-interest claims fall outside of the limitations period, because SMCV was notified of the decisions of the Contentious Administrative First Instance Court related to the 2006-2007 Royalty Assessment on April 25, 2016,[1623] and of the Contentious Administrative Appellate Court related to the 2008 Royalty Assessment on February 9, 2016 (with the decision of the Contentious Administrative First Instance Court related to the 2008 Royalty Assessment notified to SMCV necessarily before this date).[1624]

769. *(3) Refusal to Refund GEM Payments*. As stated in Perú's Counter-Memorial, Perú does not dispute that Claimant's claims related to the alleged refusal by the Peruvian government to refund the GEM payments made for Q4 2011 through Q3 2012 to SMCV were filed within the applicable limitations period, because SMCV was notified of SUNAT's decision rejecting SMCV's refund requests on March 22, 2019.[1625] Instead, Respondent objects to those claims on their merits for the reasons explained in Section IV.B below.

B. CLAIMANT'S CLAIMS REGARDING PENALTIES AND INTEREST ON ASSESSED TAXES FALL OUTSIDE THE TRIBUNAL'S JURISDICTION BECAUSE THEY CONSTITUTE "TAXATION MEASURES" WHICH ARE EXCLUDED FROM THE SCOPE OF THE TPA UNDER ARTICLE 22.3.1

770. As Perú explained in its Counter-Memorial, Claimant's claims of alleged breaches of the TPA based on the Peruvian government's decisions to impose and maintain penalties and interest on SMCV's non-payment of the taxes identified in SUNAT's Tax Assessments fall outside the Tribunal's jurisdiction, because they constitute "taxation measures"

[1622] *See* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at p. 1.

[1623] *See* Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016, at p. 3 of PDF ("[O]n April 25, 2016, we were served Resolution No. 25, dated April 14, 2016 (the 'JUDGMENT'), whereby the trial-level court mistakenly dismissed our complaint as groundless in all respects.").

[1624] *See* Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014; Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at p. 1 ("[O]n February 9, 2016, we were served with Resolution No. 51 of January 29, 2016 ('APPELLATE JUDGMENT') . . . .").

[1625] *See* Respondent's Counter-Memorial at para. 464.

under Article 22.3.1 of the TPA.[1626] Article 22.3.1 of the TPA expressly excludes taxation measures from the scope of protection of the TPA.[1627] In particular, Article 22.3.1 provides: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."[1628]

771. In its Reply, Claimant agrees that claims of alleged breaches of the TPA based on Tax Assessments are barred under Article 22.3.1 because, as Claimant acknowledges, tax assessments are taxation measures.[1629] However, Claimant argues that the penalties and interest (which, to be clear, were imposed on the assessed tax amounts in the same Tax Assessments) are not taxation measures, and thus that its claims relating to penalties and interest are not barred by Article 22.3.1. In particular, Claimant asserts that penalties are not "taxation measures," because (i) Peruvian law excludes penalties in the definition of "taxes," and (ii) penalties serve a punitive purpose, unlike taxes, which serve to fund the provision of public resources and to redistribute wealth.[1630] It also claims that interest is not a "taxation measure," because (i) the Peruvian Tax Code does not include interest in the categories of taxes, and (ii) unlike taxes, interest serves to compensate the government for the loss of the use of money.[1631] Claimant further contends that treating penalties and interest as "taxation measures" merely because they are connected to tax assessments would be contrary to the intent of the TPA Parties.[1632] Claimant's assertions are entirely baseless.

772. *First*, Claimant appears to conflate TPA Article 22.3.1's term "taxation measures" with "taxes." The TPA defines "measure" broadly, to include "any law, regulation, procedure, requirement, or practice."[1633] Indeed, the *Canfor* 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.'"[1634] Additionally, the term "taxation" is interpreted broadly, as the *Link Trading* tribunal

[1626] *See* Respondent's Counter-Memorial at paras. 456-59.

[1627] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.1.

[1628] Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.1.

[1629] *See* Claimant's Reply at para. 271.

[1630] Claimant's Reply at para. 273.

[1631] Claimant's Reply at para. 273.

[1632] *See* Claimant's Reply at para. 274.

[1633] Exhibit CA-10, U.S.-Perú TPA at Art. 1.3.

[1634] Exhibit RA-9, *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006, at para. 258.

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."[1635] Thus, "taxation measures" should be interpreted under the TPA as including more than just "taxes" themselves.

773. *Second*, Claimant agrees that the Tribunal should "look to Peruvian law to determine whether a Government measure constitutes 'taxation.'"[1636] But doing so defeats Claimant's argument. 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.[1637] Similarly, Law No. 30230 entitled "Law Establishing Tax Measures, Simplification of Procedures and Permits for Promoting and Vitalizing Investment in the Country" provides, at Article 4, that the procedures in the determination of tax debts that are subject to adjustment (due to inflation) includes the assessment of the corresponding interest.[1638] Claimant and its expert

[1635] Exhibit RA-101, *Link Trading v. Department for Customs Control of Republic of Moldova*, Award on Jurisdiction, February 16, 2001, at p. 9. *See also* Exhibit RA-102, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), at p. 458 (noting that "[t]ribunals thus have declined to give restrictive interpretation to the word 'taxation.'").

[1636] *See* Claimant's Reply at para. 272.

[1637] *See* Exhibit RE-327, 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, October 6, 2016 (published on October 9, 2016), at Art. 2(1)(a)(5) ("Article 2. Subject-matter of delegation of Legislative powers Within the scope of delegation of powers that article 1 of this Law refers to, the Executive Branch has authority to: 1) Legislate on economic reactivation and formalization matters in order to: . . . a. 5) Settle the tax debt and other income administered by the National Superintendency of Customs and Taxes (SUNAT) that are under administrative, judicial or coercive collection litigation, applying a discount on interest and fines according to the level owed.") ("*Artículo 2. Materia de elusila delegación de facultades Legislativas En el marco de la delegación de facultades a la que se refiere el artículo 1 de la presente Ley, el Poder Ejecutivo está facultado para: 1) Legislar en materia de reactivación económica y formalización a fin de: . . . a.5) Sincerar la deuda tributaria y otros ingresos administrados por la Superintendencia Nacional de Aduanas y de Administración Tributaria (SUNAT) que se encuentren en litigio en la vía administrativa, judicial o en cobranza coactiva, aplicando un descuento sobre los intereses y multas de acuerdo al nivel adeudado*.") (emphasis added). *See also* Exhibit RE-328, MEF, Press Release, "Government Approves Tax Measures that Will Have a Positive Impact on Investment Measures and Will Modernize the Legislation Adapting It to International Standards," September 13, 2018 ("**Modern Legislation** The second group of measures aimed at the adoption of international standards and recommendations in tax matters, measures include aspects such as the general anti-avoidance rule. Measures have been incorporated on this rule to provide guarantees to taxpayers in its application, creating a Review Committee that will issue a binding opinion regarding whether or not there are elements to apply the general anti-avoidance clause. Likewise, the configuration of infractions and sanctions is regulated, the joint and several liability of the legal representatives is established, and parameters for its application according to the size of the companies") ("***Legislación moderna*** *El segundo grupo de medidas orientada a la adopción de estándares y recomendaciones internacionales en materia tributaria, medidas comprende aspectos como la norma antielusiva general. Sobre esta norma, se han incorporado medidas para brindar garantías a los contribuyentes en su aplicación, creando un Comité Revisor que emitirá opinión vinculante respecto a si existen elementos o nopara aplicar la cláusula antielusiva general. Asimismo, se regula la configuración de infracciones y sanciones, se establece la responsabilidad solidaria de los representantes legales y, parámetros para su aplicación según el tamaño de las empresas*.") (emphasis by underline added, emphasis in bold in original).

[1638] Exhibit CA-209, Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230, July 12, 2014, at Arts. 4.1-4.3.

Dr. Hernandez point to two decisions of the Tax Tribunal and the Constitutional Court that appear to define the term "tax,"[1639] and a provision within the Tax Code that appears to identify the types of "taxes."[1640] But Claimant's reliance on these sources is unavailing, not only because the sources do not explain what measures constitute "taxation measures" (the term employed in the TPA), but also because they show Claimant's and its expert's erroneous treatment of "taxation measures" as meaning the same thing as "taxes." As discussed, "taxation measures" encompasses more than just "taxes," and, indeed, Peruvian Laws No. 30506 and 30230 recognize that the application of penalties and interest are taxation measures, as they are part-and-parcel of the government's administration of taxes.

774. *Third*, because the imposition of penalties and interest is the specific means by which a government enforces a tax obligation (a taxation measure), the application of tax-related penalties and interest for purposes of enforcing tax obligations must be a "taxation measure" for purposes of Article 22.3.1. As Perú's tax experts Drs. Bravo and Picón explain, 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.[1641] Indeed, Drs. Bravo and Picón point out that legal provisions that regulate the application and assessment of tax-related penalties and interest refer to such procedures as "taxation measures."[1642] To be clear, the disputed penalties and interest were imposed on SMCV as a direct result of its failure to comply with its underlying tax obligations. If the underlying tax obligations cannot be the basis for claims of breach of the TPA under Article 22.3.1, then the related penalties and interest imposed as a result of those tax obligations also cannot be the basis of claims of breach of the TPA.

[1639] Claimant's Reply at para. 272 (*citing* Exhibit CER-8, Second Hernández Report at para. 132 (*citing* Exhibit CA-378, Constitutional Court Decision in Case No. 3303-2003-AA/TC, June 28, 2004, at paras. 4-5 ("The foregoing is based on the very definition of what is technically understood as tax, ... Thus, tax is defined as . . . . On the basis of this notion, we can establish the essential elements of a tax, ... These elements of tax can be identified in Article 10 of Law No. 27332 . . . ."); Exhibit CA-365, Tax Tribunal Resolution No. 889-5-2000, October 27, 2000, at p. 3 ("Due to the fact that our legislation does not contain a definition of what is a tax, . . . On the basis of this definition, the relevant characteristics . . . will be analyzed, in order to determine if it qualifies as a tax.") (emphasis added)).

[1640] Claimant's Reply at para. 272 (*citing* Exhibit CER-8, Second Hernández Report at para. 133 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Rule II ("This Code governs the legal relations originated by taxes (*tributos*). For these purposes, the generic term tax (*tributo*) includes: a) Tax (Impuesto): It is the tax which . . . . b) Contribution: It is the tax which . . . . c) Fee (Tasa): It is the tax which . . . ." (emphasis added)).

[1641] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 260-61.

[1642] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 258-59.

775. *Fourth*, treating tax-related penalties and interest as "taxation measures" is consistent with the language in Article 22.3.1. According to Claimant, "If the TPA parties intended Article 22.3.1 to apply to any measures connected to taxation measures, they would have used language to that effect."[1643] But, the TPA Parties did just that. They defined the term "measures" broadly to include "any law, regulation, procedure, requirement, or practice."[1644] If the TPA Parties intended "taxation measures" to be limited solely to "taxes," as Claimant suggests, Article 22.3.1 would only have carved-out only "taxes" from the investment chapter rather than "taxation measures."

776. *Fifth*, Claimant's reliance on the decisions in *Nissan* and *Murphy II* does not help its case, as discussed below.

a) Contrary to Claimant's assertion, the *Nissan* decision supports Perú's interpretation that penalties and interest charges imposed as a result of a taxpayer's failure to comply with tax obligations constitute a taxation measure. First, interpreting a similarly-worded provision as Article 22.3.1 of the TPA,[1645] the *Nissan* tribunal recognized that "if the harm to the investor was caused by a 'taxation measure,' then that measure cannot be challenged through CEPA-based arbitration."[1646] Indeed, the penalties and interest charges that SUNAT imposed against SMCV—the same penalties and interest charges that Claimant is challenging in this arbitration—were a "harm to [Claimant (through SMCV) that] was caused by a 'taxation measure,'" because SUNAT imposed the penalties and interest charges on basis of SMCV's failure to pay taxes for its Concentrator Project. Although the *Nissan* tribunal deferred its decision on whether the alleged government conduct in that case constitutes a "taxation measure" to the merits

[1643] Claimant's Reply at para. 274.

[1644] Exhibit CA-10, U.S.-Perú TPA at Art. 1.3.

[1645] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 376 (*quoting* the Comprehensive Economic Partnership Agreement between Japan and the Republic of India, February 16, 2011 ("CEPA"), at Art. 10(1) ("[u]nless otherwise provided for in this Agreement, the provisions of this Agreement shall not apply to any taxation measures.").

[1646] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 380 ("Accordingly, the question of whether something involves a 'taxation measure' excluded from the CEPA may arise in the context either of (a) determining the source of an alleged right that the investor seeks to protect, or (b) determining the nature of the challenged government act that the investor alleges interfered with its rights. Under the former inquiry, if the rights in question were created by a 'taxation measure,' then the State has no CEPA-based obligations to protect them, even though it may have relevant duties under its domestic laws. Under the latter inquiry, if the harm to the investor was caused by a "taxation measure," then that measure cannot be challenged through CEPA-based arbitration, even though it may be challenged through domestic law mechanisms.") (emphasis added).

phase, the tribunal's provisional analysis is nonetheless instructive in this case.[1647] Thus, based on the *Nissan* tribunal's analysis, Claimant's claims based SUNAT's imposition (or refusal to waive) penalties and interest cannot be challenged through a TPA-based arbitration.

Second, the tribunal noted that "it is self-evident that measures regulating the obligation to pay taxes to a central, regional or local government would constitute 'taxation measures,' including executive branch actions implementing tax laws to the same degree as legislative branch actions issuing those laws in the first place . . . ."[1648] As discussed above, 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.[1649] Similarly, Article 4 of Law No. 30230 provides that the assessment of interest is one of the procedures in the determination of tax debts.[1650] The decision to impose (or refuse to waive) penalties and interest by SUNAT, an executive branch of the Peruvian government, is a measure to regulate the payment of taxes and to enforce tax obligations. As such, Claimant's claims related to SUNAT's assessment of penalties and interest is a claim based on "taxation measures," which is barred under Article 22.3.1 of the TPA.

Third, even under the *Nissan* tribunal's "nuanced inquiry" to which Claimant refers, SUNAT's penalties and interest charges are still considered "taxation measures." According to the tribunal, such an inquiry involves asking three questions within the domestic law framework: (i) a "'who' question seeks to determine *which entities* are empowered under domestic law to regulate, administer, collect or refund taxes, and whether the case at hand involves the

[1647] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 399(b).

[1648] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 384.

[1649] *See* Exhibit RE-327, 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, October 6, 2016 (published on October 9, 2016), at Art. 2(1)(a)(5). *See also* Exhibit RE-328, MEF, Press Release, "Government Approves Tax Measures that Will Have a Positive Impact on Investment Measures and Will Modernize the Legislation Adapting It to International Standards," September 13, 2018.

[1650] Exhibit CA-209, Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230, July 12, 2014, at Arts. 4.1-4.3.

conduct of these entities"[1651]; (ii) a "'what' question in turn seeks to assess the *qualitative nature* of the acts in question, namely whether they were of the type customarily used in the State . . . to deal with matters of taxation"[1652]; and (iii) a "'why' question examines the *purpose* of the relevant acts, including whether they were motivated principally by tax objectives."[1653] Here, (i) SUNAT is empowered by Peruvian law to regulate, administer, and collect taxes, and Claimant is challenging SUNAT's imposition (or refusal to waive) penalties and interest with respect to the Tax Assessments against SMCV; (ii) Peruvian Laws No. 30506 and 30230 provide that penalties and interest may be employed by the Peruvian state (through SUNAT) when handling tax matters;[1654] and (iii) SUNAT imposed penalties and interest against taxpayers like SMCV to ensure their future compliance with tax obligations. Thus, it is clear that the penalties and interest assessed against SMCV, which Claimant disputes in these proceedings, are "taxation measures" under the TPA. Hence, the Tribunal lacks jurisdiction to hear those claims.

b) The facts in *Murphy II* are readily distinguishable from those in this case. In that case, the alleged measure concerned Ecuador's levy on oil profits where the "stated purpose of the law was to amend certain oil contracts held by certain oil companies."[1655] The tribunal held that the alleged measure did not constitute "matters of taxation" (the relevant criteria in the exclusion provision under the applicable treaty).[1656] Here, not only is the purpose of SUNAT's imposition of penalties and interest related to the Tax Assessments is to ensure compliance with

[1651] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 386.

[1652] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 386 (emphasis in original).

[1653] Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 386 (emphasis in original).

[1654] *See* Exhibit RE-327, 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, October 6, 2016 (published on October 9, 2016), at Art. 2(1)(a)(5); Exhibit RE-328, MEF, Press Release, "Government Approves Tax Measures that Will Have a Positive Impact on Investment Measures and Will Modernize the Legislation Adapting It to International Standards," September 13, 2018.

[1655] *See* Exhibit CA-279, *Murphy Exploration & Production Co. Int'l v. Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, May 6, 2016 ("*Murphy v. Ecuador*, Partial Final Award"), at para. 190.

[1656] *See* Exhibit CA-279, *Murphy v. Ecuador*, Partial Final Award at para. 192.

tax obligations, its application of penalties and interest is specifically provided for under Laws No. 30506 and 30230.

777. As such, Claimant's claims relating to the waiver of penalties and interest with respect to the tax assessments are "taxation measures," and, accordingly, they are excluded from the scope of the TPA under Article 22.3.1. Therefore, the Tribunal lacks jurisdiction to hear those claims.

C. CLAIMANT'S CLAIMS OF ALLEGED BREACHES ARE OUTSIDE THE TRIBUNAL'S JURISDICTION, BECAUSE THEY ARE BASED ON ACTS OR FACTS THAT OCCURRED BEFORE THE TPA ENTERED INTO FORCE

778. Even if the Tribunal were to find that almost all of Claimant's claims of alleged breaches of the 1998 Stabilization Agreement and of the TPA are not time-barred under the TPA's three-year limitations period (they are), almost all of Claimant's claims are outside the Tribunal's jurisdiction *ratione temporis* for a second reason—because the claims of alleged breaches of the 1998 Stabilization Agreement and of the TPA are based on acts or facts that took place before the TPA entered into force on February 1, 2009[1657], as explained in Perú's Counter-Memorial.[1658] The Parties agree that the TPA does not apply retroactively, and thus, Perú did not have any obligations under the TPA before February 1, 2009, and thus could not have breached any TPA obligations before that date.[1659] Indeed, Article 10.1.3 of the TPA provides explicitly that, "[f]or 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."[1660]

779. As explained in Perú's Counter-Memorial, interpreting an identical provision under CAFTA-DR (also Article 10.1.3),[1661] the *Spence* 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.[1662]

[1657] *See* Exhibit CA-19, United Nations Conference on Trade and Development - Division of Investment and Enterprise, Table of Peru – Treaties with Investment Provisions, February 28, 2020.

[1658] *See* Respondent's Counter-Memorial at Section III.B.

[1659] *See* Respondent's Counter-Memorial at paras. 470-72; Claimant's Reply at para. 263.

[1660] Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.3 (emphasis added).

[1661] Exhibit RE-112, CAFTA-DR Chapter Ten, at Art. 10.1.3 ("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.").

[1662] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at paras. 246, 298. *See* Respondent's Counter-Memorial at paras. 472.

The *Spence* tribunal's approach is consistent with longstanding international law precedents. For example, the Permanent Court of International Justice ("PCIJ") in *Phosphates in Morocco* held that the parties' dispute concerning Morocco's allegedly unlawful monopolization of phosphates and denial of royalty entitlement to an Italian company was outside the Court's jurisdiction, because the "source of the dispute" (the Moroccan government's adoption of the phosphate monopolization regime) was based on "facts" that occurred before the date on which the French government's declaration accepting the compulsory jurisdiction of the Court was ratified.[1663] In particular, the Court held that it had no jurisdiction over the dispute, because the French government's declaration explicitly limited the Court's jurisdiction to "any disputes which may arise after the ratification of the [declaration] with regard to situations or facts subsequent to this ratification."[1664] Interpreting this language (which is similar to Article 10.1.3 of the TPA), the Court stated that:

> In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded, are perfectly clear: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification and with regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute. ...
>
> Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise.
>
> The French declaration mentions situations or facts. The Court is of opinion that the use of these two terms shows the intention of the signatory State to embrace, in the most comprehensive expression possible, all the different factors capable of giving rise to a dispute. The Court also observes that the two terms "situations" and "facts" are placed in conjunction with one another, so that the limitation *ratione temporis* is common to them both, and that the employment of one term or of the other could not have the effect of extending the compulsory jurisdiction. The situations and the facts which form the subject of the limitation *ratione temporis* have to be considered

[1663] Exhibit RA-171, *Phosphates in Morocco*, 1938 P.C.I.J. (Ser. A/B) No. 74, Decision on Preliminary Objections (June 14) ("*Phosphates in Morocco*, Decision on Preliminary Objections"), at p. 26. *See also id.* at pp. 25-26.

[1664] Exhibit RA-171, *Phosphates in Morocco*, Decision on Preliminary Objections at p. 22 (emphasis added).

> from the point of view both of their date in relation to the date of ratification **and of their connection with the birth of the dispute**. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose.[1665]

780. In this case, Claimant alleges breach of the 1998 Stabilization Agreement and of Article 10.5 of the TPA based on SUNAT's Assessments. Notably, Claimant has asserted (repeatedly) that the basis of all of SUNAT's Assessments—every single royalty, tax, penalty, and interest assessments at issue in this case—(and, thus, the "birth of [Claimant's] dispute," to use the PCIJ's turn of phrase)[1666] is MINEM's interpretation of the scope of the Agreement and the Mining Law and Regulations contained in its June 2006 Report, and MINEM's determination that SMCV's Concentrator Project fell outside of the scope of the Agreement, both of which long pre-date the TPA's February 1, 2009 entry into force.[1667]

781. For example, Claimant asserts that it was MINEM's interpretation reflected in its June 2006 Report that directly caused SUNAT to issue the Royalty and Tax Assessments against SMCV starting in August 2009.[1668] In Claimant's own words:

[1665] Exhibit RA-171, *Phosphates in Morocco*, Decision on Preliminary Objections at pp. 23-24 (emphasis added). *See also* Exhibit RA-172, *The Electricity Company of Sofia and Bulgaria*, 1939 P.C.I.J. (Ser. A/B) No. 77, Decision on Preliminary Objections (April 4), at p. 87 ("The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being the source of the dispute. . . . A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute.") (emphasis added); Exhibit RA-173, *Case Concerning Right of Passage Over Indian Territory (Portugal v. India)*, Judgment, 1960 I.C.J. 6 (April 12), at p. 35 ("The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only 'those which must be considered as being the source of the dispute', those which are its 'real cause'.") (emphasis added).

[1666] Exhibit RA-171, *Phosphates in Morocco*, Decision on Preliminary Objections at p. 24.

[1667] *See*, *e.g.*, Claimant's Memorial at paras. 13, 175-76, 280, 314; Claimant's Notice of Arbitration at paras. 52, 53, 57-58, 71. For a complete list of Claimant's assertions that the basis of SUNAT's Assessments was MINEM's interpretation of the scope of the Agreement and the Mining Law and Regulations, *see* Respondent's Counter-Memorial at para. 477.

[1668] For a list of the sequence of events as described by Claimant, *see* Respondent's Counter-Memorial at para. 476; *see also* Claimant's Memorial at para. 142 ("[O]n 16 June 2006, Mr. Isasi [of MINEM] sent Minister Sánchez Mejía [a] nonbinding legal report regarding the scope of SMCV's Stability Agreement . . . ."); *id.* at para. 377(d) ("[On 29] January 2008, . . . 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 Stability Agreement. As soon as SUNAT had received these documents, SUNAT 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") (emphasis added); *id.* at para. 163 ("On 2 June 2008, SMCV received an audit letter from SUNAT Arequipa 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.") (emphasis added); *id.* at para. 170 ("[O]n 17 August 2009, SUNAT issued assessments against SMCV for royalties, ...") (emphasis added); *id.* at para. 267 ("On 28 December 2009, . . . SUNAT issued its first Tax Assessment against SMCV, ...") (emphasis added); Claimant's

> [On 29] January 2008, . . . 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 Stability Agreement. **As soon as SUNAT had received these documents, SUNAT 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.[1669]

782. Claimant also characterizes MINEM's interpretation contained in its June 2006 Report as "the interpretation at the heart of the dispute."[1670] Indeed, Claimant asserted in its Memorial and Notice of Arbitration that the June 2006 Report holds "the novel interpretation that formed the basis for SUNAT's Assessments,"[1671] and that "SUNAT then began to issue assessments against SMCV" by "[r]elying on MINEM's novel interpretation."[1672] Similarly,

---

Reply at paras. 152(iv)-(v) ("(iv) 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 novel position on the scope of stability guarantees. (v) A few months later, SUNAT initiated an audit of SMCV. 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 Stability Agreement.") (emphasis added).

[1669] Claimant's Memorial at para. 377(d) (emphasis added). *See also* Claimant's Reply at paras. 152(iv)-(v).

[1670] Claimant's Memorial at para. 423(b) ("MINEM's Mr. Isasi had provided the interpretation at the heart of the dispute, which MINEM then provided to SUNAT.") (emphasis added).

[1671] Claimant's Memorial at para. 314 ("Mr. Isasi, who in June 2006 authored the novel interpretation that formed the basis for SUNAT's Assessments . . . .") (emphasis added). *See also* Claimant's Notice of Arbitration at para. 52 ("SUNAT's 2006/07 Royalty Assessments . . . were based on an entirely novel and restrictive interpretation of the Mining Law and Regulations." (emphasis added)); *id.* at para. 57 ("SUNAT continued to issue further Royalty Assessments against SMCV, which were also premised on its novel and restrictive interpretation of the scope of stabilization benefits.") (emphasis added); *id.* at para. 53 (Under SUNAT's novel and restrictive interpretation, the scope of the Stability Agreement was therefore allegedly limited to the investments set forth in the 1996 Feasibility Study.") (emphasis added); *id.* at para. 58 ("In addition to the Royalty Assessments, the Government imposed on SMCV several Tax Assessments . . . , which it also based on its novel and restrictive interpretation of the scope of stabilization benefits) (emphasis added); *id.* at para. 71 ("[T]he Government based its Royalty Assessments on a completely novel and restrictive interpretation of the scope of stabilization benefits . . . .) (emphasis added); *id.* at para. 7 ("The Government based its Assessments on a completely novel and restrictive interpretation of the stabilization benefits granted under the Mining Law and Regulations and the Stability Agreement pursuant to which the stabilization benefits applied only to the investments set forth in the feasibility study that the investor must submit to obtain the stability agreement.") (emphasis added); *id.* at para. 57 ("After the initial 2006/07 Royalty Assessments, SUNAT continued to issue further Royalty Assessments against SMCV, which were also premised on its novel and restrictive interpretation of the scope of stabilization benefits.") (emphasis added).

[1672] Claimant's Memorial at para. 13 ("Relying on MINEM's novel interpretation, SUNAT then began to issue assessments against SMCV for royalties that it had allegedly failed to pay on the minerals processed in the Concentrator, ..." (emphasis added)). *See also id.* at para. 176 ("SUNAT also acknowledged that it had relied on information MINEM provided to SUNAT designating SMCV as a company 'obliged to pay the mining royalty.'" (emphasis added)); *id.* at para. 175 ("On 31 March 2010, SUNAT rejected SMCV's reconsideration request for the 2006-2007 Royalty Assessments. In its decision, SUNAT again relied on Mr. Isasi's novel and restrictive interpretation of the Mining Law, ...") (emphasis added); *id.* at para. 280 ("The AIT [(Additional Income Tax)] Assessments for 2009-2013 were issued at the same time as the Income Tax Assessments, and also relied on Mr. Isasi's interpretation that stability benefits are limited to the investments set forth in the 1996 Feasibility Study.") (emphasis added); Claimant's Reply at paras. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57, 58, 71.

Claimant asserts in its Reply that SUNAT issued the first Assessment "in which it relied on MINEM's conclusion that SMCV's Concentrator was not protected by the Stability Agreement."[1673] Claimant even asserted that the subsequent confirmation of SUNAT's Assessments (by the Tax Tribunal, the Contentious Administrative Appellate Court, and the Supreme Court) were similarly made "on the basis of Mr. Isasi's novel and restrictive interpretation."[1674]

783. Thus, Claimant admits that the genesis of this entire dispute is MINEM's interpretation reflected in the June 2006 Report.[1675] That interpretation dictates that SMCV's Concentrator Project is outside of the scope of the 1998 Stabilization Agreement, and was (and is) thus subject to payment of royalties and taxes—and, on Claimant's own telling, that interpretation led SUNAT to assess royalties and taxes against that Project. Clearly, Claimant's own words make the case that MINEM's interpretation is the *sine qua non* of SUNAT's Assessments which in turn are measures challenged in Claimant's claims of alleged breaches. Because the alleged conduct (*i.e.*, SUNAT's Assessments) is deeply rooted in acts or facts that occurred before the TPA entered into force (*i.e.*, MINEM's interpretation of the 1998 Stabilization Agreement and the Mining Law and Regulations contained in its June 2006 Report), Article 10.1.3 dictates that Claimant's claims based on SUNAT's Assessments fall outside of the scope of the TPA.

784. In its Reply, Claimant asserts that the TPA applies to "measures adopted or maintained by a Party relating to" a protected investor and investment,[1676] and that the relevant analysis under Article 10.1.3 is only whether the measure alleged to constitute the breach predates the TPA's entry into force.[1677] Claimant rejects the *Spence* tribunal's consideration of

---

[1673] Claimant's Reply at para. 152(v) (emphasis added). *See also supra* at n.1671, 1672.

[1674] Claimant's Memorial at para. 212 ("[T]he Tax Tribunal's resolutions upholding the 2006-2007 and 2008 Royalty Assessments on the basis of Mr. Isasi's novel and restrictive interpretation.") (emphasis added). *See also id.* at para. 213 ([T]he Tax Tribunal's resolutions were based on a completely novel interpretation of the Mining Law and Regulations—in particular, the interpretation set forth in Mr. Isasi's June 2006 Report . . . .) (emphasis added); *id.* at para. 391(c) ("Chamber No. 1 issued Ms. Villanueva's resolution in the 2008 Royalty Case—which rejected SMCV's challenge based on the novel interpretation . . . .") (emphasis added); *id.* at para. 399 ("Ms. Villanueva again adopted the novel interpretation.") (emphasis added); *id.* at para. 223 ("Echoing the novel interpretation first concocted by Mr. Isasi, and then adopted by SUNAT and the Tax Tribunal, the Appellate Court concluded that: . . . 'a future investment, . . . will not be covered by the benefits of the Stability Agreement . . . .") (emphasis added); *id.* at para. 226 ("[T]he Supreme Court endorsed Mr. Isasi's novel interpretation of the scope of the stability guarantees, ...) (emphasis added).

[1675] In fact, as Respondent has explained in Sections II.E and II.G, Perú's consistent interpretation was manifest much earlier than June 2006, but for purposes of this discussion it is sufficient to focus on the June 2006 Report.

[1676] Claimant's Reply at para. 265 (*citing* Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.1) (emphasis added).

[1677] Claimant's Reply at para. 265.

whether the alleged measure is "deeply and inseparably rooted" in acts or facts that took place before the TPA's entry into force.[1678] Claimant's interpretation is incorrect, because it is inconsistent with (i) the text of Article 10.1.3, (ii) relevant investment arbitration jurisprudence, and (iii) the intent of the TPA Parties.

785. *First*, Claimant's interpretation of Article 10.1.3 is inconsistent with the text of the Article itself. If, as Claimant argues, Article 10.1.3 applies only if the alleged breaching measure occurred prior to the TPA's entry into force, then that Article would have been written to read "this Chapter does not bind any Party [for an alleged breach] that took place before the date of entry into force of this Agreement" or "this Chapter does not bind any Party in relation to any [measure] that [was adopted] before the date of entry into force of this Agreement." The TPA Parties knew when and how to use the word "measure" when they meant to do so—see for example Articles 10.2.2, 10.6.1, and 10.7.1 referring to "measures."[1679] Instead, Article 10.1.3 is worded more broadly to encompass "<u>any</u> <u>act or fact</u> that took place" before the TPA's entry into force.[1680] This was the basis upon which the *Spence* tribunal interpreted an identical provision in CAFTA-DR to bar claims of alleged breaches that were "deeply and inseparably rooted" in acts or facts that took place before CAFTA-DR entered into force.[1681]

786. Claimant alleges that Perú's interpretation of Article 10.1.3 is "inconsistent with Perú's concession that it is the Assessments that are at 'the heart of Claimant's claims.'"[1682] Claimant also argues that it is not alleging breach (of the 1998 Stabilization Agreement and Article 10.5 of the TPA) based on MINEM's pre-TPA interpretation (of the 1998 Stabilization Agreement and Mining Law and Regulations), but rather based on the post-TPA SUNAT Assessments.[1683] Claimant misunderstands Perú's arguments. In its Counter-Memorial, Perú explained that the Tribunal lacks jurisdiction to hear Claimant's claims under Article 10.1.3 of the TPA, because the alleged breaching act underlying those claims (SUNAT's Assessments) is "deeply and inseparably rooted" in acts and facts that occurred before the TPA entered into force (MINEM's interpretation of the 1998 Stabilization Agreement and the Mining Law and

[1678] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 298.

[1679] Exhibit CA-10, U.S.-Perú TPA at Arts. 10.2.2, 10.6.1, 10.7.1.

[1680] Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.3 (emphasis added).

[1681] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 298.

[1682] Claimant's Reply at para. 266.

[1683] *See* Claimant's Reply at para. 266.

Regulations).[1684] And, as just discussed, Claimant in fact agrees (even insists) that "[e]ach Assessment was based on the Government's restrictive interpretation of the scope of the stability guarantees."[1685] Because "the Government's restrictive interpretation" materialized long before February 1, 2009, including but not only in the June 2006 Report on which Claimant repeatedly focuses, the Tribunal does not have jurisdiction to hear claims related to each of the Assessments that were founded on that interpretation under Article 10.1.3.[1686]

787. *Second*, Claimant's interpretation of Article 10.1.3 is inconsistent with relevant and persuasive investment arbitration decisions. Relying on *Spence* and *Mondev*, Claimant argues that tribunals have recognized that similar non-retroactivity provisions like Article 10.1.3 of the TPA "only appl[y] if the measure alleged to constitute a breach pre-dates the treaty's entry into force."[1687] Claimant's argument lacks merit, as discussed below:

a) In *Spence*, the tribunal held that the non-retroactivity provision in CAFTA-DR applies to exclude claims from the scope of the treaty if a claimant cannot show that post-entry into force conduct is "separable from the pre-entry into force conduct in which they are deeply rooted," such that the post-entry into force conduct "could properly be evaluated on the merits without requiring a finding going to the lawfulness of [the pre-entry into force] conduct."[1688] As discussed above, that is exactly what happened in this case.[1689] Claimant has failed to show that SUNAT's Assessments are separable from MINEM's pre-TPA interpretation. Instead, Claimant has consistently asserted the opposite: that it was MINEM's (allegedly "novel") interpretation of the scope of the 1998 Stabilization Agreement and the Mining Law and Regulations contained in its June 2006 Report that (i) caused SUNAT to assess royalties and taxes against SMCV's Concentrator Project,[1690] and (ii) formed the basis of all of SUNAT's

[1684] Respondent's Counter-Memorial at para. 482; Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 298.

[1685] Claimant's Memorial at para. 20 (emphasis added).

[1686] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 298.

[1687] Claimant's Reply at para. 265. *See also id.* at n.1253.

[1688] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 246.

[1689] *See supra* at paras. 780-83. *See also* Respondent's Counter-Memorial at Section III.B.

[1690] *See* Claimant's Memorial at paras. 142, 162-63, 170, 267, 377(d). *See also* Claimant's Reply at paras. 152(iv)-(v).

Assessments.[1691] Claimant went on to highlight in its Memorial the significance of MINEM's interpretation in these words: "MINEM's Mr. Isasi had provided the interpretation at the heart of the dispute, which MINEM then provided to SUNAT."[1692] Thus, Claimant cannot deny that SUNAT's Assessments (*i.e.*, post-TPA conduct) are deeply rooted in and, thus, inseparable from, MINEM's interpretation (*i.e.*, pre-TPA conduct). Perú's interpretation of Article 10.1.3 is entirely consistent with the *Spence* tribunal's holding, contrary to Claimant's assertion.

b) Claimant cites this text from the *Mondev* award as supporting its interpretation of Article 10.1.3: "[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."[1693] However, this text says nothing to support Claimant's interpretation that a non-retroactivity provision bars claims only when the alleged breaching act occurs before the treaty enters into force. To be clear, Perú does not dispute that there existed post-TPA conduct in this case. Rather, Perú argues that the post-TPA conduct (SUNAT's Assessments) is "deeply and inseparably rooted" in pre-TPA conduct (MINEM's interpretation), such that Article 10.1.3 applies to bar Claimant's claims based on those Assessments.

788. Claimant also argues that the fact that pre-TPA acts or facts are relevant to the alleged breaches does not make those breaches fall outside the Tribunal's temporal jurisdiction.[1694] Claimant again misunderstands Perú's argument. Perú does not claim that Article 10.1.3 applies merely because Claimant's alleged breaching measures are related or "relevant" to pre-TPA acts or facts. Rather, Perú argues that the alleged breaches based on SUNAT's Assessments—by Claimant's own description—are causally connected to MINEM's pre-TPA interpretation of the scope of the 1998 Stabilization Agreement and Mining Law and Regulations. Due to this causal connection, the post-TPA SUNAT's Assessments are not

[1691] *See* Claimant's Memorial at paras. 13, 175-76, 280, 314. *See also* Claimant's Reply at para. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57-58, 71.

[1692] Claimant's Memorial at para. 423(b) (emphasis added).

[1693] Claimant's Reply at n.1253.

[1694] *See* Claimant's Reply at para. 269.

"separable from the pre-entry into force conduct in which they are deeply rooted,"[1695] and that post-entry into force conduct could not "properly be evaluated on the merits without requiring a finding going to the lawfulness of [the pre-entry into force] conduct."[1696]

789. Claimant relies on *Spence*, *Mondev*, *Eco Oro*, *Tecmed*, and *M.C.I. Power*.[1697] Respondent has explained the reasons why *Spence* and *Mondev* do not support Claimant's interpretation of Article 10.1.3 in paragraph 787 above. As discussed below, Claimant's reliance on *M.C.I. Power*, *Tecmed*, and *Eco Oro* is also untenable.[1698] Thus, Claimant's interpretation of Article 10.1.3 finds no support in investment arbitration jurisprudence.

a) Claimant cites the following statement made in the *M.C.I. Power* award in support of its assertion that this decision is consistent with its interpretation of Article 10.1.3: "[E]vents or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date."[1699] But, this statement does not help Claimant and, instead, is entirely consistent with Perú's position. First of all, the statement is not a limitation—it does not say that prior events can *only* be relevant as antecedents, and cannot have any other significance. Second, the Peruvian government's interpretation of the 1998 Stabilization Agreement and the Mining Law and Regulations, which occurred before the TPA entered into force, was not just a mere antecedent or background fact to the SUNAT Assessments. Rather, as Claimant itself asserted, the government's pre-TPA interpretation brought about SUNAT's post-TPA Assessments against SMCV,[1700] and that the same interpretation formed the essential legal basis of SUNAT's Assessments.[1701]

[1695] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 246. *See also* Respondent's Counter-Memorial at Section III.B.2.

[1696] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 246. *See also* Respondent's Counter-Memorial at Section III.B.2.

[1697] Claimant's Replyat para. 269, n.1270.

[1698] Claimant's Replyat para. 269, n.1270.

[1699] Claimant's Replyat n.1270 (*citing* Exhibit RA-11, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007 ("*M.C.I. v. Ecuador*, Award"), at para. 84).

[1700] *See* Claimant's Memorial at paras. 142, 162-63, 170, 267, 377(d); Claimant's Reply at paras. 152(iv)-(v).

[1701] *See* Claimant's Memorial at paras. 13, 175-76, 280, 314; Claimant's Reply at para. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57-58, 71.

b) Additionally, the *M.C.I. Power* tribunal stated:

> The [t]ribunal observes that a prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior **disputes** that continue after the entry into force of the BIT are not covered by the BIT.[1702]

Under international law, a "dispute" means "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[1703] Here, before the TPA entered into force on February 1, 2009, the dispute between the Peruvian government (*i.e.*, SUNAT) and SMCV related to the payment of royalties for SMCV's Concentrator Project already existed as of June 4, 2008: (i) on May 30, 2008, SUNAT sent an audit letter to SMCV, stating that SMCV was obligated to pay royalties for its Concentrator Project, further to SUNAT's determination that the 1998 Stabilization Agreement did not cover that Project;[1704] and (ii) on June 4, 2008, SMCV replied to SUNAT's audit letter, stating its disagreement with SUNAT that it was not obligated to pay royalties for that Project.[1705] Thus, as of June 4, 2008, not only were there pre-TPA events inextricably intertwined with Claimant's claims, there was already a pre-TPA dispute (*i.e.*, "a disagreement on a point of law or fact") regarding the payment of royalties related to the Concentrator Project. Employing the words of the *M.C.I. Power* tribunal, the dispute regarding the payment of royalties related to the Concentrator Project is a "prior dispute[] that continue[d] after the entry into force

[1702] Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 66 (emphasis added).

[1703] Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 63 (emphasis added) (*citing* Exhibit RA-103, *Mavrommatis Palestine Concessions (Greece v. U.K.),* Judgment on the Objection to the Jurisdiction of the Court Made by His Britannic Majesty's Government, 1924 P.C.I.J. (Ser. A) No. 2 (August 30), at p. 11; Exhibit RA-104, *Northern Cameroons (Cameroons v. United Kingdom)*, Judgment on Preliminary Objections, 1963 I.C.J. 15 (December 2), at p. 27; Exhibit RA-105, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion*, 1988 I.C.J. Reports 12 (April 26), at p. 27) (emphasis added).

[1704] *See* Exhibit CE-577, SUNAT, Inductive Letter No. 108052004279, May 30, 2008 ("[T]o date, [SMCV] ha[s] not filed [a mining royalty statement] for the sale of copper ore from the primary sulfide investment project subject to the payment of mining royalties . . . corresponding to the taxable years 2006 and 2007."). *See also* Respondent's Counter-Memorial at para. 256.

[1705] *See* Exhibit CE-578, Letter from SMCV to SUNAT, Letter No. SMCV-AL-1346-2008, June 4, 2008, at p. 1 ("We have received Induction Letter No. 108052004279 dated May 30, 2008, in which we are requested to file the PDT 698 related to the Mining Royalty for the sales of copper ore from the primary sulfide investment project. In this regard, we are complying by pointing out that WE ARE NOT SUBJECT TO THE OBLIGATION TO PAY MINING ROYALTIES and, therefore, it is not appropriate for us to file the PDT 698.").

of the [TPA],"[1706] and thus, Claimant's claims of alleged breaches of the 1998 Stabilization Agreement fall outside the scope of the TPA.

c) Claimant also cites to the following text from the *Tecmed* award: "[I]t should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force."[1707] Again, this statement is consistent with Perú's position—MINEM's pre-TPA interpretation, which Claimant admitted is both the cause and the basis of SUNAT's Assessments, is relevant (and, indeed, is much more than just "relevant") to deciding Claimant's claims of alleged breaches of the 1998 Stabilization Agreement. Moreover, the tribunal in *Tecmed* held that "consideration of whether the Agreement is to be applied retroactively must first be determined in light of the claims of the Parties."[1708] Unlike the claimant in *Tecmed* who the tribunal found "d[id] not include in its claims . . . acts or omissions of the Respondent prior to [the Treaty's entry into force] which, considered *in isolation*, could be deemed to be in violation of the Agreement prior to such date,"[1709] Claimant here not only "include[s] in its claims" but it affirmatively argues that MINEM's (pre-TPA) interpretation of the 1998 Stabilization Agreement and the Mining Law and Regulations contained in the June 2006 Report caused SUNAT to issue Assessments against SMCV (post-TPA),[1710] and formed the basis of those same Assessments.[1711] Thus, *Tecmed* does not help Claimant's case.

d) The facts in *Eco Oro* are distinguishable to those in this case. There, the claimant alleged that "its rights were only deprived by events which took place after the

[1706] Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 66.

[1707] Claimant's Reply at para. 269, n.1270 (*citing* Exhibit CA-99, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award, May 29, 2003 ("*Tecmed v. Mexico*, Award"), at para. 66).

[1708] Exhibit CA-99, *Tecmed v. Mexico*, Award at para. 56 (emphasis added).

[1709] Exhibit CA-99, *Tecmed v. Mexico*, Award at para. 60 (emphasis in original).

[1710] *See* Claimant's Memorial at paras. 142, 162-63, 170, 267, 377(d); Claimant's Reply at paras. 152(iv)-(v).

[1711] *See* Claimant's Memorial at paras. 13, 175-76, 280, 314; Claimant's Reply at para. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57-58, 71.

FTA entered into force,"[1712] and the tribunal also found that "Eco Oro relies only on post-15 August 2011 measures."[1713] Here, although Claimant states that it does not allege that Perú breached the 1998 Stabilization Agreement and Article 10.5 of the TPA based on MINEM's interpretation of the Agreement and the Mining Law and Regulations (but rather based on SUNAT's Assessments),[1714] Claimant, unlike the claimant in *Eco Oro*, expressly grounded its entire case of alleged breaches on MINEM's purportedly "novel" interpretation which, according to Claimant, both caused and formed the basis of SUNAT's Assessments.[1715] Thus, Claimant's own words make the case that the alleged breaches based on SUNAT's Assessments must be analyzed in light of MINEM's pre-TPA interpretation, in which SUNAT's Assessments are "deeply and inseparably rooted."

790. *Third*, relying on the testimonies of Mr. Herrera and Mr. Sampliner, Claimant argues that the TPA Parties did not intend Article 10.1.3 to apply to preclude claims "solely because the challenged measures relate to acts or facts that occurred prior to the entry into force."[1716] Claimant's argument is unsupported by the evidence it submits. As discussed in paragraph 785 above, if the TPA Parties intended to narrow the application of Article 10.1.3 to claims involving breaching measures that occur before the TPA entered into force, then the TPA parties most certainly would not have used broad terms like (i) "in relation to," (ii) "any," and (iii) "acts or facts." Instead, the TPA Parties would have used clear, narrow, and specific terms like "measures."

791. To support Claimant's assertion, Mr. Sampliner and Mr. Herrera rely on the TPA's preparatory work, *i.e.*, a draft of the U.S.-Andean Free Trade Agreement (FTA) and summaries of related negotiations.[1717] As a preliminary matter, interpreting a treaty provision by

[1712] Exhibit CA-285, *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021 ("*Eco Oro v. Colombia*, Decision on Jurisdiction"), at para. 359 (emphasis added).

[1713] Exhibit CA-285, *Eco Oro v. Colombia*, Decision on Jurisdiction at para. 360 (emphasis added).

[1714] *See* Claimant's Reply at para. 266.

[1715] *See* Claimant's Memorial at paras. 13, 142, 162-63, 170, 175-76, 267, 280, 314, 377(d); Claimant's Reply at para. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57-58, 71.

[1716] Exhibit CER-11, Sampliner Report at para. 39. *See also* Claimant's Reply at para. 267 (*citing* Exhibit CER-11, Sampliner Report at paras. 17-18, 39-40; Exhibit CWS-12, Herrera Statement at paras. 15, 33, 35).

[1717] *See* Claimant's Reply at para. 267 (*citing* Exhibit CWS-12, Herrera Statement at para. 33 (*citing* Exhibit CE-1062, U.S.-Andean FTA Draft, July 19, 2004, at Art. X.1.2)); n.1260 (*citing* Exhibit CWS-12, Herrera Statement at

relying on such materials is impermissible under Article 32 of the Vienna Convention on the Law of Treaties (VCLT), unless the ordinary meaning is unclear. According to Article 32, recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" is permitted only when good faith interpretation according to the terms' ordinary meaning in their context and in light of its object and purpose (under Article 31 of the VCLT) leaves the meaning "ambiguous or obscure" or leads to "manifestly absurd or unreasonable" result.[1718] Neither is the case here at all. Article 10.1.3 of the TPA plainly provides that the investment chapter of the TPA "does not bind any Party in relation to any act or fact that took place . . . before the date of entry into force of [the TPA]."[1719] Interpreting Article 10.1.3 according to Article 31 of the VCLT, claims founded on "any act or fact that took place" before the TPA's entry into force cannot bind a Party (*i.e.*, Perú) under the Treaty, and thus, Claimant's claims founded on the Peruvian government's pre-TPA interpretation cannot bind Perú, and must fall outside of the scope of the TPA. This interpretation is not only unambiguous and reasonable, it is consistent with Perú interpretation of Article 10.1.3 here. The Tribunal should, therefore, disregard Claimant's assertion in reliance on the TPA's preparatory work cited by Mr. Herrera and Mr. Sampliner. Even if there were a basis to consider those materials, they do not support Claimant's assertion about the TPA Parties' intent regarding Article 10.1.3:

a) In his witness statement, Mr. Herrera cites to an early draft of the U.S.-Andean FTA dated July 19, 2004, which provides: "[t]his chapter [the investment chapter] shall not be applicable to disputes over facts and acts [that] occurred or over any situation that ceased to exist prior to its entry into force, ..."[1720] Claimant and Mr. Herrera assert that the TPA Parties revised that provision in favor of what became Article 10.1.3, because "the reference to disputes was 'unacceptably

para. 33 (*citing* Exhibit CE-1060, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), May 19, 2004, at p. 26; Exhibit CER-11, Sampliner Report at para. 40 (*citing* Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004), at pp. 23-25)).

[1718] *See* Exhibit CA-49, Vienna Convention on the Law of Treaties, May 23, 1969 ("VCLT"), at Art. 32. See also *id.* at Art. 31.

[1719] Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.3.

[1720] Exhibit CE-1062, U.S.-Andean FTA Draft, July 19, 2004, at Art. X.1.2). *See also* Claimant's Reply at para. 267 (*citing* Exhibit CWS-12, Herrera Statement at para. 33 (*citing* Exhibit CE-1062, U.S.-Andean FTA Draft, July 19, 2004, at Art. X.1.2)).

broad,'"[1721] and that the parties understood that the revised text (that became Article 10.1.3) "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."[1722] *First*, replacing the earlier draft with the current text—which is also broadly-worded—does not demonstrate that the Parties intended to limit or narrow the scope of Article 10.1.3. At a minimum, it shows the Parties' consistent preference to apply Article 10.1.3 broadly, as Perú argues. *Second*, Claimant and Mr. Herrera provided no specific evidence to support the TPA Parties' purported understanding that Article 10.1.3 applies only when the alleged breaching act occur before the TPA entered into force. Thus, there is no support for Mr. Herrera's assertion.

b) Mr. Sampliner and Mr. Herrera cite to a summary prepared by Perú's Ministry of Foreign Trade and Tourism (MINCETUR) of the first round of U.S.-Andean FTA negotiation dated May 18 and 19, 2004 in support their interpretation of Article 10.1.3 of the FTA.[1723] But, the summary merely shows that the non-retroactivity provision is one of the "defined overlapping interests" shared among the Andean states, *i.e.*, Perú, Colombia, and Ecuador.[1724] It does not prove that the TPA Parties, *i.e.*, Perú and the United States, intended Article 10.1.3 to apply narrowly only to alleged measures that occur before the TPA's entry into force. Nor does the description of the application of the treaty only to "disputes arising from events after the FTA"[1725] enters into force support Claimant's interpretation. It actually supports Perú's interpretation of Article 10.3.1, because the statement shows that the TPA Parties contemplated disputes arising before the TPA entered into force being excluded from the TPA.

[1721] Claimant's Reply at para. 267 (*citing* Exhibit CWS-12, Herrera Statement at para. 33). *See also* Exhibit CWS-12, Herrera Statement at para. 33.

[1722] Exhibit CWS-12, Herrera Statement at para. 35. *See also* Claimant's Reply at para.. 267 (*citing* Exhibit CWS-12, Herrera Statement at para. 35).

[1723] *See* Claimant's Reply at para. 267, n.1260 (*citing* Exhibit CWS-12, Herrera Statement at para. 33 (*citing* Exhibit CE-1060, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), May 19, 2004, at p. 26); Exhibit CER-11, Sampliner Report at para. 40 (*citing* Exhibit CE-1060, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), May 19, 2004, at pp. 25-27)).

[1724] Exhibit CE-1060, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), May 19, 2004, at p. 25 ("Peru, Colombia and Ecuador defined overlapping interests in many fields, among which the following can be pointed out: . . . Application of the Investor-State dispute resolution mechanism to disputes arising from events after the FTA.").

[1725] Exhibit CE-1060, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), May 19, 2004, at p. 25.

c) Mr. Sampliner also cites to a MINCETUR summary of the second round of U.S.-Andean FTA negotiation dated June 14-18, 2004.[1726] The summary states: "the US is seeking the application of the dispute resolution mechanism only to cases derived from events occurring after the agreement has entered into effect. The Andean countries consider it advisable to lay this out clearly in the text."[1727] Contrary to Claimant's assertion, this reference confirms the TPA Parties' intent was to limit the scope of the TPA to disputes that arose after the TPA entered into force. Moreover, the case here is indeed "derived from" events occurring prior to (not only after) the TPA's entry into force, such as MINEM's June 2006 report, and thus, on the approach reportedly sought by the US and embraced by the Andean countries, it should be excluded.

792. Claimant's other arguments in its Reply regarding Article 10.1.3 are also without merit. Claimant asserts that MINEM's June 2006 Report cannot be the *sine qua non* of SUNAT's Assessments, because the Report is not binding, and that, in any case, Perú's witness Ms. Bedoya testified that SUNAT conducted "independent legal analysis" when it issued the Assessments against SMCV.[1728] *First*, Claimant's argument contradicts its own assertions. In its Notice of Arbitration, Memorial, and Reply, Claimant consistently asserted that SUNAT issued the Assessments in reliance on MINEM's interpretation of the 1998 Stabilization Agreement and Mining Law and Regulations, including its June 2006 Report (authored by Mr. Isasi), as discussed above.[1729] Claimant even contended that "MINEM's Mr. Isasi had provided the interpretation <u>at the heart of the dispute</u>."[1730] Thus, Claimant's about-face attempt only in this context to downplay the significance of MINEM's interpretation in light of the requirements in Article 10.1.3 is simply not credible.

793. *Second*, even if the Tribunal were to accept that MINEM's interpretation in the June 2006 Report is not the *sine qua non* of SUNAT's Assessments, surely SUNAT's <u>own</u> interpretation of the scope of the 1998 Stabilization Agreement and the Mining Law and

[1726] *See* Claimant's Reply at n.1260 (*citing* Exhibit CER-11, Sampliner Report at para. 40 (*citing* Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004), at pp. 23-25).

[1727] Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004), at p. 24.

[1728] Exhibit RWS-4, First Bedoya Statement at para. 16. *See also* Claimant's Reply at para. 268 (*citing* Exhibit RWS-4, First Bedoya Statement at paras. 2, 16, 44-45). *See also supra* at Section II.G.

[1729] *See also* Claimant's Memorial at paras. 13, 175-76, 280, 314; Claimant's Reply at para. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57-58, 71.

[1730] Claimant's Memorial at para. 423(b) (emphasis added).

Regulations is a *sine qua non* of its Assessments against SMCV—and that SUNAT interpretation also predated the TPA's entry into force, appearing no later than the same month (June 2006) as MINEM's interpretation. Before SUNAT issued the first Assessment against SMCV, it determined in a June 2006 internal report that the 1998 Stabilization Agreement only applies to the "investment related to the project for which the agreement was entered into," and that "the project to expand SMCV's current operations through a primary sulfide concentrator plant pertains to a completely different investment than the Leaching Project" and that "we can conclude that such an 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."[1731] Notably, the same interpretation was also expressed in earlier reports issued by SUNAT. For example, in a report issued in September 2002, SUNAT concluded that stability guarantees provided in stability agreements only apply "with respect to the investment activities that are the subject matter of the agreements."[1732] Another SUNAT report dated September 20, 2007 also echoed the same interpretation.[1733] All of these reports formed part of the basis of SUNAT's subsequent Assessments against SMCV's Concentrator Project, which SUNAT concluded was outside the scope of the 1998 Stabilization Agreement. Like MINEM's June

[1731] Exhibit RE-179, SUNAT June 2006 Internal Report at p. 5 (". . . 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 section 1.2 of this report, we can conclude that such an 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.") (". . . *que haya sido objeto del respective contrato, es decir, a la inversión vinculada al proyecto respecto del cual se suscribió el contrato. . . . En tal sentido, y como quiera que el proyecto de ampliación de las operaciones actuales de SMCV a través de una planta concentradora de sulfuros primaries se refierre a una inversion completamente distinta al Proeycto de Lixiviación tal como fue aprobado a efecto de la suscripción del contrato de garantías, según la descripción detallada en el punto 1.2 del presente informe, Podemos concluir que dicha ampliación no se encontraría dentro del ámbito de aplicación del contrato de garantías, toda vez que se trata de una inversion nueva no contemplada por las partes al momento de la suscripción del contrato*"). *See supra* at Section II.G.

[1732] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm ("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.") ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el regimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa*."). *See also* Respondent's Counter-Memorial at Section II.D.2; *supra* at Section II.G.

[1733] *See* Exhibit RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007, *available at* https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm, at p. 1 (". . . the investment activities that are the subject matter of the agreement and were indicated in the Feasibility Study, ...") (". . . *las inversiones realizadas que se encontraban previstas en el Estudio de Factibilidad, ...*"). *See also* Respondent's Counter-Memorial at para. 276; *supra* at Section II.G.

2006 Report, these multiple SUNAT reports all predate the TPA's entry into force on February 1, 2009. Thus, Claimant's claims based on SUNAT's Assessments fall outside the Tribunal's jurisdiction pursuant to Article 10.1.3 of the TPA.

794. Claimant also argues in its Reply that even if MINEM's June 2006 Report were the *sine qua non* to SUNAT's Assessments, the fact that SUNAT's subsequent Assessments reflected that interpretation makes the Report not a "situation that ceased to exist" before the TPA entered into force.[1734] But, Article 10.1.3 provides two alternative situations under which a claim falls outside of the scope of the TPA: either when a claim of breach is (i) "in relation to any act or fact that took place . . . before the date of entry into force of [the TPA]," "or" (ii) "in relation to . . . any situation that ceased to exist before the date of entry into force of [the TPA]."[1735] The first situation is satisfied, because, as discussed above, Claimant's claims of alleged breaches of the 1998 Stabilization Agreement and Article 10.5 of the TPA based on SUNAT's Assessments are "in relation to" MINEM's and SUNAT's pre-TPA interpretation of the Agreement and relevant laws which took place "before the date of entry into force of [the TPA]."[1736] Respondent does not need to rely on the alternative "ceased to exist" scenario of Article 10.1.3. Therefore, the Tribunal does not have jurisdiction to hear Claimant's claims pursuant to Article 10.1.3.

795. In addition, Claimant argues that Perú failed to explain why the June 2006 Report is the *sine qua non* "for other breaches that are unquestionably not based on the interpretation in the June 2006 Report, including: (*i*) the Tax Tribunal's arbitrary failure to waive penalties and interest; (*ii*) the Supreme Court and the Appellate Court's arbitrary failures to consider *de novo* SMCV's entitlement to a waiver of penalties and interest in the 2008 and 2006-2007 Royalty Cases; or (*iii*) SUNAT's arbitrary refusal to reimburse GEM payments."[1737] Claimant is incorrect.

796. *First*, with regard to Claimant's complaints about the Tax Tribunal's "failure to waive" the penalties and interest related to SUNAT's Assessments against SMCV, Perú explained in its Counter-Memorial that these allegations are inherently tied to Claimant's complaints that the penalties and interest assessed against SMCV were "unfair and inequitable,"

[1734] Claimant's Reply at para. 268.

[1735] Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.3 (emphasis added).

[1736] Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.3.

[1737] Claimant's Reply at para. 268.

because, according to Claimant, SMCV had "'reasonable doubt' as to the proper interpretation of the Mining Law and Regulations."[1738]

797. 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 Stabilization Agreement and the Mining Law and Regulations, and in particular (by Claimant's account), MINEM's interpretation contained in its June 2006 Report.[1739] Because the government determined that stabilization agreements only extend to the specific investment projects set out in the related feasibility study and stability agreement, and because SMCV's Concentrator Project was deemed not stabilized under the 1998 Stabilization Agreement (since it is not a project identified in the 1996 Feasibility Study nor the 1998 Stabilization Agreement), SMCV was thus subject to royalty and tax payments for that Project, along with penalties and interest when it failed to pay those royalties and taxes that were due. Thus, the basis of SUNAT's imposition of penalties and interest (and the Tax Tribunal's failure to waive the same) is fundamentally the same as the basis of SUNAT's Assessments. As discussed above, the government's interpretation of the scope of the 1998 Stabilization Agreement about which Claimant complains in these proceedings was clear before the TPA's entry into force. In any case, Claimant's complaints about the penalties and interest imposed on SUNAT's Tax Assessments are entirely barred under Article 22.1.3 for the reasons discussed in Section III.B above and in Perú's Counter-Memorial.[1740]

798. In addition, as explained in Perú's Counter-Memorial, the Tax Tribunal refused to waive penalties and interest for 2006-2007 and 2008 Royalty Assessments because SMCV's waiver requests were untimely (by Claimant's admission, they were filed after the Tax Tribunal had rendered its decisions regarding SMCV's challenges against those Assessments).[1741] As for the remaining waiver requests that were timely filed, the Tax Tribunal found the requirements for a waiver under Article 170 of the Tax Code were not met (there were no grounds for "reasonable doubt" as to the correct interpretation of a law or regulation).[1742] For the waiver

[1738] Claimant's Memorial at para. 404; *see also* Claimant's Reply at para. 175.

[1739] *See* Respondent's Counter-Memorial at para. 491. *See also* Claimant's Memorial at paras. 13, 175-76, 280, 314; Claimant's Reply at para. 152(v); Claimant's Notice of Arbitration at paras. 7, 52, 57-58, 71.

[1740] *See supra* at Section III.B; *see* Respondent's Counter-Memorial at paras. 439-90.

[1741] *See* Respondent's Counter-Memorial at para. 319; Claimant's Memorial at para. 212.

[1742] *See* Respondent's Counter-Memorial at para. 489.

requests that were rejected on merits, the bases of the Tax Tribunal's decisions were, again, rooted in the Peruvian government's (pre-TPA) interpretation of the 1998 Stabilization Agreement and Mining Laws and Regulations: the penalties and interest charges were maintained because SMCV was required to pay royalties and taxes for its non-stabilized Concentrator Project, and it failed to comply with that payment obligation for several fiscal years.[1743] Claimant itself admitted that MINEM's interpretation contained in the June 2006 Report is "the interpretation at the heart of the dispute,"[1744] and because this interpretation occurred before the TPA entered into force, Claimant's claims based on alleged "failure to waive" penalties and interest (and all other claims that are inherently grounded on the Peruvian government's interpretation of the 1998 Stabilization Agreement) fall outside the Tribunal's jurisdiction.

799. *Second*, Claimant's complaint that the Supreme Court and the Contentious Administrative Appellate Court arbitrarily failed to consider *de novo* SMCV's requests to waive penalties and interest related to the 2006-2007 and the 2008 Royalty Assessments[1745] are also deeply rooted in MINEM's interpretation of the 1998 Stabilization Agreement and the Mining Law and Regulations, which occurred before the TPA's entry into force. The essence of Claimant's complaint is that SMCV was entitled to a waiver of penalties and interest under Article 170 of the Tax Code because, according to Claimant, SMCV had "reasonable doubt" as to the correct interpretation of the Mining Law and Regulation.[1746] Thus, the root of Claimant's complaint is, again, based on acts or facts that occurred before the TPA entered into force—namely, the bases for interpreting the Mining Law and Regulation and the 1998 Stabilization Agreement.

800. *Third*, similar to Claimant's complaints regarding penalties and interest, its complaints about Perú's failure to refund certain GEM payments are also inherently rooted in the government's interpretation of the scope of the 1998 Stabilization Agreement and the Mining Law and Regulations which occurred as early as 2002. To be clear, SUNAT only rejected SMCV's request for refund for its GEM payments for Q4 2011 through Q3 2012, because it was filed after the applicable statute of limitations expired, as discussed in Perú's Counter-

[1743] *See* Respondent's Counter-Memorial at para. 489.

[1744] Claimant's Memorial at para. 423(b).

[1745] *See* Claimant's Reply at para. 268.

[1746] *See* Claimant's Memorial at para. 404; Claimant's Reply at para. 175.

Memorial.[1747] Claimant alleges that SUNAT's refusal to refund its GEM payments breached Article 10.5 of the TPA, because (according to Claimant) "SMCV's GEM payments were clearly premised on the fact that, . . . SMCV was not obligated to make royalty or SMT [(Special Mining Tax)] payments."[1748] Once again, these claims arise from SUNAT's Assessments which were issued on the basis of the Peruvian government's pre-TPA interpretation, as Claimant readily admits.[1749] Thus, Perú's refusal to refund the GEM payment is "deeply and inseparably rooted" in acts or facts that occurred before the TPA entered into force. As such, the Tribunal has no jurisdiction to hear those claims, either.

D. CLAIMANT'S CLAIMS (ON BEHALF OF SMCV) OF ALLEGED BREACHES OF THE 1998 STABILIZATION AGREEMENT ARE OUTSIDE THE TRIBUNAL'S JURISDICTION, BECAUSE THEY HAVE ALREADY BEEN SUBMITTED TO DISPUTE SETTLEMENT PROCEDURES IN PERÚ

801. As Perú explained in its Counter-Memorial, the Tribunal also lacks jurisdiction over Claimant's claims (submitted on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement, because those claims have already been submitted for resolution to administrative tribunals of Respondent and to binding dispute settlement procedures (*i.e.*, SUNAT's appeal body (the Claims Division), and the Tax Tribunal).[1750] For claims submitted on behalf of an enterprise that the claimant owns or controls, Article 10.18.4(a) prohibits submission of a claim to arbitration if either the claimant or the enterprise "has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure."[1751] Therefore, once SMCV submitted claims of alleged breaches of the 1998 Stabilization Agreement to an "administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure," those claims were definitively and irrevocably precluded from being submitted to arbitration before this Tribunal.

802. As Perú explained in its Counter-Memorial and summarizes below, in this case, SMCV has definitively submitted to SUNAT's Claims Division and the Tax Tribunal the same alleged breaches that Claimant (on behalf of SMCV) is submitting in this arbitration—*i.e.*, claims of alleged breaches of the 1998 Stabilization Agreement.[1752] Perú explained in its

[1747] *See* Respondent's Counter-Memorial at para. 752.

[1748] Claimant's Memorial at para. 422. *See also* Respondent's Counter-Memorial at para. 492.

[1749] *See*, *e.g.*, Claimant's Memorial at para. 422.

[1750] *See* Respondent's Counter-Memorial at Section III.C.

[1751] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.4(a).

[1752] *See infra* at Table 4.

Counter-Memorial that SUNAT's Claims Division and the Tax Tribunal are each "an administrative tribunal . . . of the respondent," and a "binding dispute settlement procedure."[1753] Perú also explained in its Counter-Memorial that the claims SMCV submitted to SUNAT's Claims Division and the Tax Tribunal rest on the same fundamental basis as SMCV's claims before this Tribunal of alleged breaches of the 1998 Stabilization Agreement.[1754] Thus, Claimant is barred from submitting (on behalf of SMCV) those same claims—*i.e.*, alleged breaches of the 1998 Stabilization Agreement—to arbitration under Article 10.18.4 of the TPA (Section III.D.1).

803. Alternatively, even were the Tribunal to find that SUNAT's Claims Division and the Tax Tribunal do not constitute "an administrative tribunal" or a "binding dispute settlement procedure" (it should not), Claimant's claims of alleged breaches of the 1998 Stabilization Agreement submitted before this Tribunal 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 (Section III.D.2).

804. Under either scenario, Claimant's claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement fall outside the Tribunal's jurisdiction.[1755]

1. SMCV Challenged Before SUNAT's Claims Division and the Tax Tribunal the Same Royalty and Tax Assessments (and Related Measures) that Claimant Alleges in These Proceedings Constitute Breaches of the 1998 Stabilization Agreement

805. As Respondent stated in its Counter-Memorial, it is undisputed that SMCV challenged almost all of SUNAT's Royalty and Tax Assessments against it before SUNAT's Claims Division, which is the first phase of the administrative proceeding for resolving taxpayer

[1753] *See* Respondent's Counter-Memorial at paras. 500-03.

[1754] *See* Respondent's Counter-Memorial at paras. 514-17.

[1755] Under scenario number one, almost all of Claimant's claims would fall outside the Tribunal's jurisdiction. As Respondent explained in its Counter-Memorial, the only possible claims left standing would be those based on the 2013 Income Tax and Additional Income Tax Assessments, and the 2012 Temporary Tax on Net Assets Assessments, because SMCV did not challenge them before SUNAT's Claims Division or the Tax Tribunal. *See* Respondent's Counter-Memorial at para. 497. Nevertheless, these claims would still fall outside the Tribunal's jurisdiction for the reasons explained in Sections III.A and III.C above. Under scenario number two, all of Claimant's claims would fall outside the Tribunal's jurisdiction because having submitted the same alleged breach of the 1998 Stabilization Agreement to Perú's courts, SMCV definitively elected to have that issued decided by Perú's courts to the exclusion of submitting the same alleged breach to arbitration.

disputes related to royalty and tax assessments.[1756] In all of the challenges that it decided,[1757] SUNAT's Claims Division (in this case, SUNAT's Regional Intendent for Arequipa)[1758] confirmed the Assessments against SMCV. SMCV then appealed most of SUNAT's decisions confirming the Assessments to the Tax Tribunal. Respondent provided in its Counter-Memorial a table (*i.e.*, Table 4) setting out the fate of each of SUNAT's Royalty and Tax Assessments, most of which were the subject of appeals filed by SMCV before SUNAT's Claims Division and then before the Tax Tribunal.[1759]

806. Despite this uncontroverted record of SMCV's numerous appeals before SUNAT's Claims Division and the Tax Tribunal where SMCV challenged the exact same measures that now, in this arbitration, Claimant (on behalf of SMCV) alleges constitute a breach of the 1998 Stabilization Agreement, Claimant argues in its Reply that those appeals to the Claims Division and the Tax Tribunal do not bar its claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement under Article 10.18.4. Claimant makes two arguments: (i) Claimant argues that SUNAT's Claims Division and the Tax Tribunal are neither an "administrative tribunal . . . of the respondent" nor a "binding dispute settlement procedure" and, thus, SMCV has not submitted its claims to any such fora in Peru; and (ii) Claimant asserts that SMCV's claims before SUNAT's Claims Division and the Tax Tribunal are not claims for alleged breaches of the 1998 Stabilization Agreement, and, thus, SMCV did not previously submit claims for the "same alleged breach"[1760] as would be required for a claim to fall outside the Tribunal's jurisdiction. As Perú demonstrates below, Claimant's arguments are without merit.

[1756] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 124; Exhibit RWS-4, First Bedoya Statement at para. 10 ("The challenge before the SUNAT Regional Intendency and appeal to the Tax Tribunal constitute the appellate phases within the administrative phase of a contentious tax proceeding."). ("*La reclamación ante la Intendencia Regional de la SUNAT y la apelación ante el Tribunal Fiscal constituyen las etapas de apelación dentro de la etapa administrativa de un procedimiento contencioso tributario*.").

[1757] SMCV withdrew several pending *Recursos de Reclamación* (administrative challenges) upon the filing of this arbitration, before SUNAT could rule on them. *See* Exhibit CE-252, Partial Withdrawal, Income Tax 2012, Docket No. 0150340017563, February 27, 2020; Exhibit CE-259, Withdrawal, Additional Income Tax 2012, Docket No. 0150340017566, February 27, 2020; Exhibit CE-254, Withdrawal, Complementary Mining Pension Fund Tax 2013, Docket No. 0150340017649, February 27, 2020.

[1758] Exhibit RWS-4, First Bedoya Statement at paras. 10-11.

[1759] *See* Respondent's Counter-Memorial at para. 498, Table 4: SMCV Elected to Complain about SUNAT's Royalty and Tax Assessments to SUNAT's Claims Division and the Tax Tribunal.

[1760] *See* Claimant's Reply at para. 242.

a. SUNAT's Claims Division and the Tax Tribunal Constitute Administrative Tribunals and Binding Dispute Settlement Procedures

807. In its Counter-Memorial, Perú explained that SUNAT's Claims Division and the Tax Tribunal are administrative tribunals and that they also constitute binding dispute settlement procedures, either of which would trigger the claims bar of Article 10.18.4 of the TPA.[1761] Respondent summarizes the basis for this assertion and Claimant's response in its Reply below.

(i) SUNAT's Claims Division and the Tax Tribunal Are Administrative Tribunals

808. As Respondent explained in its Counter-Memorial, both SUNAT's Claims Division and the Tax Tribunal are part of the same administrative dispute settlement proceedings, where SUNAT's Claims Division is the first phase of the proceedings (where a taxpayer can challenge SUNAT's assessment) and the Tax Tribunal is the second phase of the proceedings (where a taxpayer can appeal SUNAT's Claims Division's decision on the taxpayer's challenge of SUNAT's assessment).[1762] Respondent further demonstrated that, at a minimum, the Tax Tribunal is an administrative tribunal under Peruvian law, because the Tax Tribunal is a statutorily empowered decision-making body within the MEF that hears and resolves disputes submitted by taxpayers.[1763]

[1761] *See* Respondent's Counter-Memorial at paras. 500-03.

[1762] *See* Respondent's Counter-Memorial at para. 500.

[1763] *See* Respondent's Counter-Memorial at para. 501 (*citing* Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 5(1) ("[The duties of the Tax Tribunal include] [t]o hear in the last administrative instance appeals filed against resolutions issued by SUNAT in case files related to mining royalties.") (emphasis added); Exhibit CA-250, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/41, February 27, 2020, at Art. 16 ("The Tax Tribunal is the Ministry's decision-making body that constitutes the highest administrative body in tax and customs matters on the national level.") (emphasis added); Exhibit CA-4, Peruvian Tax Code, Supreme Decree No. 135-99-EF, August 19, 1999, at Art. 101(c) ("Hear and resolve in the last administrative instance appeals against Resolutions of the Administration resolving claims filed against . . . Assessment Resolutions, Fine Resolutions or other administrative acts directly related to the determination of tax liability; . . . .") (emphasis added); Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 101(1) ("The powers of the Tax Tribunal are: 1. Hear and rule in the last resort administratively on appeals against Tax Administration Resolutions that resolve claims filed against . . . Assessment Resolutions, Penalty Resolutions or other administrative acts directly related to the assessment of the tax obligation, ...") (emphasis added); Art. 127 ("The decision-making body is empowered to conduct a full reexamination of the issues of the disputed case, ...") (emphasis added); Art. 157 ("The resolution of the Tax Tribunal exhausts the administrative channel.") (emphasis added); Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 1 of PDF ("The Tax Tribunal is the administrative last resort for tax and customs matters within the framework of the measures designed to improve the resolution of tax procedures.") (emphasis added); Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013 (2008 Royalty Assessment), May 21, 2013 (notified to SMCV on June 20, 2013) ("According to item 1 of article 5 of Law No. 28969, one of the duties of the Tax Court, among others, is to hear, in its capacity as a court of final administrative instance, any appeals filed against resolutions issued by SUNAT in the files linked to mining royalties, and therefore it proceeds to issue a decision on the case of record.) (emphasis added). *See also* Exhibit CA-14, Peruvian Tax

809. Claimant should be held to have conceded that both SUNAT's Claims Division and the Tax Tribunal are administrative tribunals, because Claimant itself characterizes them as administrative bodies that resolve taxpayers' administrative challenges against SUNAT's assessments. In its Reply, Claimant admits that "[i]n royalty and tax matters, SUNAT's Claims Division is the second-instance administrative decision-maker and the Tax Tribunal is the final-instance administrative decision-maker"[1764] and that "SMCV submitted administrative challenges to the validity of the majority of the Assessments to two agencies of the MEF—SUNAT's Claims Division and the Tax Tribunal."[1765] Claimant's admissions are prevalent throughout its Memorial and Reply submissions.[1766] These admissions alone are fatal to Claimant's defense that SUNAT's Claims Division and the Tax Tribunal are somehow not administrative tribunals (or that they do not constitute binding dispute settlement procedures (discussed in Section III.D.1.a(ii) below)).

810. Recall that Claimant alleges due process violations on the part of the Tax Tribunal in its handling of the various administrative challenges relating to certain Royalty Assessments.[1767] The concept of "due process of law" concerns the protection of a party's rights before courts or tribunals.[1768] By complaining that the Tax Tribunal allegedly violated due process when deciding on SMCV's challenges, Claimant implicitly recognizes that the Tax Tribunal is, in fact, an administrative tribunal that is subject to the general rules of fairness and due process when resolving administrative challenges. Thus, Claimant's attempt to back-track from its own (correct) understanding that the Tax Tribunal is an administrative tribunal must fail.

Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 53 ("The resolution-issuing bodies in tax matters are: The Tax Tribunal.") (emphasis added).

[1764] Claimant's Reply at para. 259 (emphasis added).

[1765] Claimant's Reply at para. 242 (emphasis added).

[1766] *See* Claimant's Memorial at para. 196 ("SMCV challenged the 2006-2007 Royalty Assessments before the Tax Tribunal, the body within the MEF that serves as the final administrative appeal for royalty and tax matters. The Tax Tribunal is empowered to review SUNAT assessments *de novo* . . . .") (emphasis added); Claimant's Reply at para. 20 ("SMCV filed administrative challenges to the Assessments before SUNAT and the Tax Tribunal."), and para. 226(b) ("Article 77 of the Tax Code required SMCV to file administrative challenges for each Assessment with SUNAT's Claims Division and the Tax Tribunal.") (emphasis added). *See also* Claimant's Memorial at para. 196; Claimant's Reply at paras. 220(b), 226(b).

[1767] *See* Claimant's Reply at paras. 163-74. *See also* Claimant's Memorial at paras. 384-99.

[1768] *See* Exhibit RA-143, "Due process of law," *Black's Law Dictionary*, Sixth ed., at p. 500 ("Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.").

811. Notwithstanding its own telling characterizations of both tribunals, however, Claimant argues that neither SUNAT's Claims Division nor the Tax Tribunal "qualify" as an administrative tribunal under Article 19.5.1 of the TPA (because they do not meet the "definition" of "administrative tribunal" under that Article,[1769] they do not review "final administrative actions,"[1770] and they are not independent of the "office or authority entrusted with administrative enforcement"[1771]), and therefore they should not be considered administrative tribunals for purposes of Article 10.18.4, either.[1772] Claimant's argument is without merit. *First*, Claimant's reliance on Article 19.5.1 to set limits on the definition of "administrative tribunals" is unsupportable. Article 19.5.1 is not meant to operate as a limiting definition. It provides: "Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter."[1773] But, Article 19.5.1 says nothing about whether SUNAT's Claims Division or the Tax Tribunal is an administrative tribunal. To be clear, Article 19.5.1 does not provide a definition of "administrative tribunal" at all. It is an Article that discusses administrative tribunals, as one among a number of adjudicatory bodies, for a different purpose in the Treaty. Article 19.5, a provision under Chapter 19 entitled "Transparency," describes the "Review and Appeal" procedures that the TPA Parties should make available for purposes of ensuring transparency in the State's dispute settlement procedures.[1774] The TPA nowhere indicates that the term "administrative tribunal" in Article 10.18.4 is to be interpreted based on the description of the term contained in Article 19.5.1.[1775] Thus, Claimant's assertion that neither SUNAT's Claims Division nor the Tax Tribunal meet this "definition"[1776] is inappropriate, and worse, misleading.

[1769] Claimant's Reply at para. 258.

[1770] Exhibit CA-10, U.S.-Perú TPA at Art. 19.5.1. *See also* Claimant's Reply at para. 259.

[1771] Exhibit CA-10, U.S.-Perú TPA at Art. 19.5.1. *See also* Claimant's Reply at para. 261.

[1772] *See* Claimant's Reply at para. 247.

[1773] Exhibit CA-10, U.S.-Perú TPA at Art 19.5.1. *See also* Claimant's Reply at para. 247.

[1774] Exhibit CA-10, U.S.-Perú TPA at Art 19.5.1.

[1775] *See generally* Exhibit CA-10, U.S.-Perú TPA.

[1776] Claimant's Reply at para. 258.

812. *Second*, even if Article 19.5.1 were somehow relevant (it is not), Claimant's argument that neither SUNAT's Claims Division nor the Tax Tribunal are administrative tribunals—because neither reviews or corrects "final administrative actions"[1777] as discussed in Article 19.5.1—is also without merit. Both SUNAT's Claims Division and the Tax Tribunal review SUNAT's Assessments, which are final administrative actions: (i) SUNAT's assessments against taxpayers are final, including because they are immediately due upon issuance,[1778] (ii) the Assessments constitute actions by SUNAT,[1779] and (iii) they are administrative in nature.[1780] Thus, SUNAT's Assessments are final administrative actions. In addition, the Tax Tribunal reviews SUNAT's Claims Division's decisions (either confirming or nullifying SUNAT's Assessments), which are also final administrative actions themselves. The fact that those "final administrative actions" can be corrected by either SUNAT's Claims Division or the Tax Tribunal on appeal does not undermine their finality as to a taxpayer's obligation and does not remove them from the scope of Article 19.5.1. In fact, Article 19.5.1 provides that "judicial, quasi-judicial, or administrative tribunals or procedures" in reviewing "final administrative actions" may "correct[]" "where warranted."[1781] Article 19.5.1 thus embraces the concept of reviewing and correcting final administrative actions, which is inconsistent with the notion (in Claimant's view) that the availability of such corrections in Perú's administrative procedures should somehow change the Claims Division or the Tax Tribunal into something other than an "administrative tribunal."

813. *Third*, equally meritless is Claimant's argument that SUNAT's Claims Division and the Tax Tribunal are not administrative tribunals because Article 19.5.1 "requires" tribunals

---

[1777] Claimant's Reply at para. 259.

[1778] *See* Exhibit RER-2, First Morales Report at para. 98, p. 50; *see also* Exhibit RER-7, Second Morales Report at para. 101-02, Exhibit RER-8, Second Bravo and Picón Report at paras. 264-65.

[1779] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Art. 76 ("The Assessment Resolution is the act through which the Tax Administration informs the tax debtor of the results of its tasks of overseeing compliance with tax obligations; and it establishes the existence of the credit or of the tax debt.") ("*La Resolución de Determinación es el acto por el cual la Administración Tributaria pone en conocimiento del deudor tributario el resultado de su labor destinada a controlar el cumplimiento de las obligaciones tributarias, y establece la existencia del crédito o de la deuda tributaria*.") (emphasis added); Exhibit RER-2, First Morales Report at paras. 97-98.

[1780] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Art. 76 ("The Assessment Resolution is the act through which the Tax Administration informs the tax debtor of the results of its tasks of overseeing compliance with tax obligations; and it establishes the existence of the credit or of the tax debt.") ("*La Resolución de Determinación es el acto por el cual la Administración Tributaria pone en conocimiento del deudor tributario el resultado de su labor destinada a controlar el cumplimiento de las obligaciones tributarias, y establece la existencia del crédito o de la deuda tributaria*.") (emphasis added); Exhibit RER-2, First Morales Report at paras. 97-98.

[1781] Exhibit CA-10, U.S.-Perú TPA at Art. 19.5.1.

to be "impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter."[1782] According to Claimant, neither SUNAT's Claims Division nor the Tax Tribunal is independent of the MEF, which Claimant alleges is the "office or authority entrusted with administrative enforcement"[1783] of SUNAT's Assessments under Article 19.5.1,[1784] because they are "part of the MEF and 'subject to the technical guidelines' of the MEF."[1785] Claimant is incorrect. Although SUNAT's Claims Division and the Tax Tribunal are structurally part of the MEF, they operate independently of the MEF—each is an independent dispute resolution body within the MEF.[1786] Article 16 of the Regulations of Organization and Functions of the Ministry of Economy and Finance clarifies this distinction: "The Tax Tribunal is the Ministry's decision-making body," and, although it is administratively dependent on the MEF, "[it] is autonomous in the performance of its functions."[1787] And, even though SUNAT's Claims Division and the Tax Tribunal may be "subject to the technical guidelines" of the MEF as Claimant asserts,[1788] that does not show that they are not "impartial" or "independent" of the MEF. Even more absurd is Claimant's assertion that SUNAT's Claims Division and the Tax Tribunal are dependent on the MEF because they "cooperate closely with the other organs of the MEF on a range of matters related to royalty and tax enforcement, including legislative proposals and information sharing."[1789] Just because an organization cooperates or shares information with another organization does not mean that the former is not "impartial" or "independent" of the latter.

814. Additionally, Claimant argues that SUNAT's Claims Division and the Tax Tribunal are not independent of the MEF, because "the MEF is part of the Commission that appoints *vocales*," "the President of Peru must renew the *vocales*[*'*] terms . . . [with] recommendation of the Commission," and "the President of Peru and the MEF have discretion to dismiss any *vocal* for 'negligence, incompetence or immorality.'"[1790] Claimant's argument lacks

[1782] Exhibit CA-10, U.S.-Perú TPA at Art 19.5.1. *See* Claimant's Reply at para. 261.

[1783] Exhibit CA-10, U.S.-Perú TPA at Art. 19.5.1.

[1784] Claimant's Reply at para. 261.

[1785] Claimant's Reply at para. 261.

[1786] *See* Respondent's Counter-Memorial at paras. 500-01. *See also* Exhibit RWS-5, First Olano Statement at para. 6.

[1787] Exhibit CA-250, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/41, February 27, 2020, at Art. 16 (emphasis added). *See also* Exhibit RWS-5, First Olano Statement at para. 6.

[1788] Claimant's Reply at para. 261.

[1789] Claimant's Reply at para. 261(a).

[1790] Claimant's Reply at para. 261(b).

merit. According to Ms. Olano, even though the Tax Tribunal is an agency within the MEF, it is independent and impartial in the exercise of its adjudicative functions.[1791] Claimant also asserts that the Tax Tribunal is financially dependent on the MEF because the Tax Tribunal's "budget is capped at a percentage of SUNAT's collections, meaning that the greater SUNAT's collections, the greater the budget available to grant raises and bonuses to Tax Tribunal *vocales*."[1792] Ms. Olano explained that, although the Tax Tribunal's budget is set by the MEF, SUNAT's collections do not affect the budget, which is set based on factors related to "priorities, assumptions, and goals under which the Public Sector budget is formulated."[1793] Ms. Olano also explained that the bonus structure that Claimant's witness Mr. Estrada referred to in his witness statement was never implemented, as Mr. Estrada himself admits,[1794] and thus, such a (non-operative) bonus system could hardly impact the Tax Tribunal's independence.

815. To be clear, Claimant's assertion that the MEF is the "'authority entrusted with administrative enforcement' of royalty and tax decisions"[1795] (to try to paint the Claims Division and Tax Tribunal as insufficiently independent to satisfy Article 19.5.1's alleged "definition" of an administrative tribunal) is also plainly wrong. Worse, Claimant's assertion is contradicted by (i) its own statements; (ii) its experts' testimony; and (iii) the Peruvian law authorities that it submitted into the record—all of which point to SUNAT (not the MEF) as the authority that enforces royalty and tax decisions. For example, (i) Claimant asserts in its Memorial that "[t]he MEF carries out that function [tax enforcement] through SUNAT, which issues and enforces tax and royalty assessments,"[1796] and in its Reply that "SMCV entered, *under protest*, into the deferral and installment plans to avoid SUNAT's coercive collection measures, ..."[1797]; (ii) Claimant's expert Dr. Bullard states that "SUNAT may impose coercive measures on the tax

[1791] *See* Exhibit RWS-5, First Olano Statement at para. 6.

[1792] Claimant's Reply at para. 261(c).

[1793] Exhibit RWS-5, First Olano Statement at paras. 37-38.

[1794] *See* Claimant's Reply at para. 261(c) (*citing* to Exhibit CWS-6, Witness Statement of Leonel Estrada Gonzales, October 19, 2021 ("First Estrada Statement") at para. 20; Exhibit CWS-17, Second Estrada Statement at para. 18); Exhibit CWS-6, First Estrada Statement at para. 24 ("The MEF ultimately never issued the supreme decree establishing the specific conditions under which bonuses would be granted. As a result, the MEF never paid the promised bonuses.").

[1795] Claimant's Reply at para. 258 (emphasis added).

[1796] Claimant's Memorial at para. 387 (emphasis added). *See also* Claimant's Memorial at para. 255 ("On 10 and 18 October 2018, SUNAT issued writs of execution of the 2010-2011 and 2009 Royalty Assessments, respectively.") (emphasis added).

[1797] Claimant's Reply at para. 201(a) (emphasis in original). *See also id.* at para. 234(a) (". . . SUNAT had the right to take action to collect the assessed amount.")

debtor's assets to cover the debt"[1798]; and (iii) Article 50 of the Tax Code (an authority submitted by Claimant) provides that "SUNAT has jurisdiction for the administration of internal taxes . . . ."[1799] Thus, Claimant and its experts understand that SUNAT is the "office or authority entrusted with administrative enforcement"[1800] "of royalty and tax decisions."[1801]

816. SUNAT's Claims Division is independent of SUNAT, because the Division is charged with the power to review and decide the taxpayers' challenges against SUNAT's assessments.[1802] The Tax Tribunal is also independent and separate from SUNAT; rather, SUNAT is a party that may appear (as it did repeatedly in this case) before the Tax Tribunal, which decides appeals submitted to it by taxpayers like SMCV. Indeed, Article 101 of the Tax Code makes clear that "[t]he powers of the Tax Tribunal are [to]: 1. Hear and rule in the last resort administratively on appeals against Tax Administration Resolutions. . . . 2. Hear and rule in the last resort administratively on appeals against Resolutions issued by SUNAT, ... [and] 5. Address the complaints filed by taxpayers against the Tax Administration."[1803]

817. Thus, SUNAT's Claims Division and the Tax Tribunal are properly classified as administrative tribunals for purposes of Article 10.18.4.

[1798] Exhibit CER-2, First Bullard Report at para. 84 ("SUNAT may impose coercive measures on the tax debtor's assets to cover the debt. At that moment, therefore, the assessments also become enforceable administrative acts (or acts subject to coercive action) that the administrative entity can enforce directly, ...") (emphasis added). *See also* Exhibit CER-7, Second Bullard Report at para. 79 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Art. 115) ("Under Peruvian law, the enforceability of assessments relates to the Government's power to take action to collect them."); Exhibit CER-3, First Hernández Report at para. 42 (". . . SUNAT can initiate coercive procedures to collect the debt.") (emphasis added); Exhibit CER-8, Second Hernández Report at para. 110 (". . . SUNAT can initiate coercive proceedings to collect the assessed amounts.") (emphasis added); para. 111 ("After SUNAT commences collection proceedings to collect the debt, ...") (emphasis added).

[1799] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Art. 50. *See also id*. at Arts. 55-82.

[1800] Exhibit CA-10, U.S.-Perú TPA at Art. 19.5.1.

[1801] Claimant's Reply at para. 258.

[1802] *See* Respondent's Counter-Memorial at paras. 253, 500; Exhibit RWS-4, First Bedoya Statement at para. 10.

[1803] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Art. 101 ("The powers of the Tax Tribunal are: 1. Hear and rule in the last resort administratively on appeals against Tax Administration Resolutions that resolve claims filed against Payment Orders, Assessment Resolutions, Penalty Resolutions or other administrative acts directly related to the assessment of the tax obligation, ... It will also be able to hear and rule in the last resort administratively on appeals against the Penalty Resolutions that are applied for breach of obligations related to mutual administrative assistance in tax matters. 2. Hear and rule in the last resort administratively on appeals against Resolutions issued by SUNAT, on customs duties, tariff classifications and sanctions provided for in the General Customs Law, the regulations thereof and related rules and those appertaining to the Tax Code. . . . 5. Address the complaints filed by taxpayers against the Tax Administration, when there are actions or procedures that directly affect them or violate the provisions of this Code. . . ."). *See also* Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 5 ("These are powers of the Tax Court: 1. To hear in the last administrative instance appeals filed against resolutions issued by SUNAT in case files related to mining royalties.").

(ii) SUNAT's Claims Division and the Tax Tribunal Constitute Binding Dispute Settlement Procedures

818. Perú also explained in its Counter-Memorial that decisions by SUNAT's Claims Division and the Tax Tribunal on a taxpayer's challenges are binding on the taxpayer, unless successfully appealed—making them both "binding dispute settlement procedures" for purposes of Article 10.18.4 as well.[1804] For example, if SMCV challenged SUNAT's Assessments before SUNAT's Claims Division, and SMCV did not subsequently challenge the Division's decision confirming SUNAT's Assessments, or if SMCV withdrew its appeals to the Tax Tribunal from the Division's decisions, the Division's decisions would be binding on SMCV. Indeed, SMCV did not challenge SUNAT's Claims Division's decisions confirming the 2012 and 2013 Royalty Assessments, and the 2013 Special Mining Tax Assessment, before the Tax Tribunal.[1805] After SMCV was notified by SUNAT's Claims Division that those Assessments were confirmed, SMCV paid those Assessments,[1806] which clearly reflects its understanding that the Claims Division's decisions are final and binding (if not appealed). Also, SMCV withdrew its appeals previously submitted to the Tax Tribunal challenging the Claims Division's decisions upholding the 2009, 2010, and 2011 TTNA Assessments.[1807] In these instances, SUNAT's Claims Division's decisions were also binding on SMCV. The same is true as to the binding nature of the Tax Tribunal's decisions, as Perú explained in its Counter-Memorial.[1808] Thus, Claimant cannot deny that SUNAT's Claims Division and the Tax Tribunal constitute binding dispute settlement procedures.

819. Claimant and its experts agree that the decisions of SUNAT's Claims Division, or, at a minimum, the decisions of the Tax Tribunal, are binding on a taxpayer, and as such, Claimant should also agree that they constitute binding dispute settlement procedures. According to Claimant and its experts, for example, SUNAT's Assessments become "final and enforceable" when SUNAT's Claims Division's decisions were not appealed by the applicable deadline, and if appealed, when the Tax Tribunal's decision is issued (and notified to SMCV).

[1804] *See* Respondent's Counter-Memorial at paras. 502-03.

[1805] *See infra* at Resubmitted Annex A, pp. 1, 9.

[1806] *See infra* at Resubmitted Annex A, pp. 1, 9.

[1807] SMCV also filed partial withdrawal of its appeals previously submitted to the Tax Tribunal for the 2005 and 2006 GST Assessments on Non-Residents, the 2008 GST and Additional Income Tax Assessment, the 2009, 2010 and 2011 GST Assessments, the 2008 Income Tax Assessments, the 2009, 2010 and 2011 Income Tax and Additional Income Tax Assessments. *Infra* at Resubmitted Annex A, pp. 2-6.

[1808] *See* Respondent's Counter-Memorial at paras. 501-03.

As Dr. Bullard states, "a SUNAT Assessment became a *final*, *definitive*, and *enforceable* administrative act, which occurred either: (*i*) . . . ; (*ii*) the business day following the expiration of the deadline to challenge SUNAT's decision resolving the taxpayer's request for reconsideration of an assessment before the Tax Tribunal, without SMCV having filed such challenge; (*iii*) the business day following the Tax Tribunal's notification to SMCV of its decision rejecting the challenge filed against SUNAT's decision . . . ."[1809]

820. This means that Claimant agrees, at a minimum, that (a) a decision of SUNAT's Claims Division "resolving the taxpayer's request for reconsideration" is final, if it is not appealed to the Tax Tribunal by the applicable deadline, and (b) the decision of the Tax Tribunal is final, after it is issued (and notified to SMCV).[1810] Thus, Claimant agrees that SUNAT's Claims Division and the Tax Tribunal issue final and binding decisions with regard to taxpayers' disputes concerning SUNAT's assessments. It follows that those fora constitute binding dispute settlement procedures. At a minimum, Claimant must agree that the Tax Tribunal constitutes a binding dispute resolution procedure. Claimant cannot, on the one hand, rest its Article 10.18.1-defense regarding the limitations period on a theory that the challenged Assessments only become "final and enforceable" after the Tax Tribunal decided on the challenges (and notified SMCV of the decisions),[1811] and then turn around and argue, on the other hand, that the Tax Tribunal's decisions are not final or binding for its Article 10.18.4 defense regarding fork-in-the-road.[1812] Claimant cannot have it both ways.

821. Claimant's argument, nevertheless, that even the Tax Tribunal is not a binding dispute settlement procedure is further contradicted by (i) its own assertions; (ii) other expert testimony; and (iii) the Peruvian-law authorities that it submitted on the record. For example, (i) Claimant admits in its Memorial that "the Tax Tribunal, the body within Peru's Ministry of Economy and Finance ('MEF') . . . serves as the final administrative appeal for royalty and tax matters,"[1813] and in its Reply that "SMCV challenged SUNAT's Assessments before the Tax

[1809] Exhibit CER-7, Second Bullard Report at para. 75 (emphasis in original). *See also* Exhibit CER-2, First Bullard Report at para. 87(b)-(c); Claimant's Memorial at paras. 352-53; Claimant's Reply at para. 122.

[1810] *See* Exhibit CER-7, Second Bullard Report at para. 75; Exhibit CER-2, First Bullard Report at paras. 87(b)-(c); Claimant's Memorial at paras. 352-53; Claimant's Reply at para. 122.

[1811] *See* Claimant's Reply at Section III.A.1(ii). *See also* Claimant's Memorial at paras. 289 and 351 *et seq*.

[1812] *See* Claimant's Reply at Section III.B.2.(i).

[1813] Claimant's Memorial at para. 15 (emphasis added). *See also id.* at para. 196 ("On 12 May 2010, SMCV challenged the 2006-2007 Royalty Assessments before the Tax Tribunal, the body within the MEF that serves as the final administrative appeal for royalty and tax matters . . . and SUNAT assessments, if challenged, are not final administrative acts or enforceable against the taxpayer until the Tax Tribunal confirms them.") (emphasis added); *id*.

Tribunal, the final administrative decision-maker in tax and royalty payments, ..."[1814]; (ii) Claimant's expert Dr. Bullard states that "the Tax Tribunal resolution exhausts the administrative route,"[1815] and its tax expert, Dr. Hernández, states that "[t]he Tax Tribunal's resolution puts an end to the administrative process," with regard to SUNAT's assessments[1816]; and (iii) Article 5 of Law No. 28969 (an authority submitted by Claimant) provides that the power of the Tax Tribunal is "[t]o hear in the last administrative instance appeals filed against resolutions issued by SUNAT."[1817]

822. However, in its Reply, Claimant argues that the category of "other binding dispute resolution procedures" under Article 10.18.4 only covers a subset of Perú's adjudicative bodies

---

at para. 387 (describing the Tax Tribunal as a body which "hears individual administrative challenges to SUNAT assessments and acts as the final administrative decisionmaker") (emphasis added); *id*. at para. 384 ("SMCV attempted to challenge SUNAT's Royalty Assessments before the Tax Tribunal, the entity within the MEF that acts as the final administrative authority on tax and royalty matters.") (emphasis added); *id*. at para. 353 ("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; . . . .") (emphasis added).

[1814] Claimant's Reply at para. 9 (emphasis added). *See also id.* at para. 122 ("[T]he relevant Royalty or Tax Assessment became final and enforceable against SMCV, which occurred either (i) the business day after SMCV was served with the Tax Tribunal Resolution upholding the Assessment (for the Assessments SMCV challenged before the Tax Tribunal).") (emphasis added); *id.* at para. 259 ("In royalty and tax matters, SUNAT's Claims Division is the second-instance administrative decision-maker and the Tax Tribunal is the final-instance administrative decision-maker.") (emphasis added).

[1815] Exhibit CER-2, First Bullard Report at para. 83 (emphasis added). *See also id.* at para. 87(c) (stating that "each SUNAT assessment against SMCV became final, definitive, and enforceable . . . on any of the following dates: . . . (c) The business day following the Tax Tribunal's notification to SMCV of its decision rejecting the appeal filed against SUNAT's decision or '*resolución de intendencia*,' because the Tax Tribunal is the last administrative instance.") (emphasis added); Exhibit CER-7, Second Bullard Report at para. 82 (*citing* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Art. 157).

[1816] Exhibit CER-3, First Hernández Report at para. 35 (emphasis added). *See also id.* at para. 28 (*quoting* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 101) ("The Tax Tribunal is the MEF entity in charge of resolving in the last administrative instance disputes on national taxes and customs duties.") (emphasis added); Exhibit CER-8, Second Hernández Report at para. 4 ("The Tax Tribunal is the last administrative instance—and thus has the last word in administrative matters . . . .") (emphasis added).

[1817] Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 5 (emphasis added). *See also* Exhibit CA-250, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/41, February 27, 2020, at Art. 16 ("The Tax Tribunal is the Ministry's decision-making body that constitutes the highest administrative body in tax and customs matters on the national level.") (emphasis added); Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal, at p. 1 ("The Tax Tribunal is the administrative last resort for tax and customs matters within the framework of the measures designed to improve the resolution of tax procedures") (emphasis added); Exhibit CA-4, Peruvian Tax Code, Supreme Decree No. 135-99-EF, August 19, 1999, at Art. 101(1) ("The Tax Tribunal has the following powers: Hear and resolve as the last administrative instance appeals against Resolutions of the Administration resolving reconsideration requests . . . related to the determination of tax liability.") (emphasis added), and Art. 157 ("The resolution of the Tax Court exhausts the administrative route.") (emphasis added); Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 101 ("The powers of the Tax Tribunal are: (1) Hear and rule in the last resort administratively on appeals against Tax Administration Resolutions . . . .") (emphasis added), and Art. 157 ("The resolution of the Tax Tribunal exhausts the administrative channel.") (emphasis added); Exhibit CA-366, Organic Law of the MEF, Legislative Decree No. 183, June 12, 1981, at Art. 38 ("[t]he Tax Tribunal decides at the final administrative level claims regarding tax assessment or collection.") (emphasis added).

or dispute resolution fora. Specifically, Claimant contends that it must be read to refer only those bodies that are "competent to resolve contract claims for breach of an investment agreement,"[1818] reasoning that "Article 10.18.4 presents investors a choice between dispute settlement under Chapter Ten of the TPA and alternative adjudicative fora. The alternatives would be asymmetrical if the contemplated adjudicative bodies were incompetent to resolve contract claims for breach of an investment agreement."[1819] And because, by Claimant's account, SUNAT's Claims Division and the Tax Tribunal are not competent to resolve contract claims for breach of an investment agreement, SMCV's submission of its claims to those Peruvian fora is not capable of triggering Article 10.18.4's fork-in-the-road.[1820] Claimant's expert Mr. Sampliner and its witness Mr. Herrera likewise claim that the phrase "other binding dispute resolution procedures" in Article 10.18.4 was intended to encompass only proceedings before bodies that are competent to resolve claims for breach of an investment agreement.[1821] Claimant's, Mr. Sampliner's, and Mr. Herrera's assertions do not withstand scrutiny.

823. *First*, contrary to Claimant's argument that provisions of the TPA must be "squared with the plain terms"[1822] of that Agreement, Claimant now appears to read words into Article 10.18.4 that simply are not found there. Nowhere in Article 10.18.4 does it state that "other binding dispute resolution procedure[s]" are limited to the subset of adjudicative bodies that Claimant alleges. If the Parties to the TPA wanted to limit "other binding dispute resolution procedure[s]" in the way Claimant asserts, they could have made that clear in the text of the TPA. They did not. *Second*, even if it were appropriate under a Vienna Convention analysis to turn to the TPA's *travaux preparatoires* (which it is not, where the phrase has a perfectly straightforward ordinary meaning), it would not be appropriate to rely on Mr. Herrera's claims regarding the Peruvian delegation's alleged understanding of "binding dispute resolution procedure."[1823] Mr. Herrera does not cite in his witness statement to any documents in support of this specific claimed understanding.[1824] The one contemporaneous document he cites (a MINCETUR document summarizing the eighth round of negotiations in March 2005) and the

[1818] Claimant's Reply at para. 257.

[1819] Claimant's Reply at para. 257.

[1820] *See* Claimant's Reply at para. 256.

[1821] *See* Claimant's Reply at para. 257 (*citing* Exhibit CER-11, Sampliner Report at para. 35; Exhibit CWS-12, Herrera Statement at para. 29).

[1822] Claimant's Reply at para. 22.

[1823] Exhibit CWS-12, Herrera Statement at para. 29.

[1824] *See* Claimant's Reply at para. 257 (*citing* Exhibit CWS-12, Herrera Statement, 29).

language he quotes from that document in support of that alleged understanding is not discussing the fork-in-the-road provision or the meaning of "binding dispute settlement procedure[s]" at all, but, rather, the Andean states' general position regarding investment agreements in the FTA.[1825] *Third*, while Mr. Sampliner asserts in his report that it was the U.S. delegation's understanding that "other binding dispute settlement procedure[s]" only refer to adjudicative bodies competent to resolve contractual claims, he, too, fails to cite to any contemporaneous documents in support of that assertion.[1826]

824. In sum, Claimant cannot deny that the decisions of SUNAT's Claims Division, or at a minimum, the decisions of the Tax Tribunal, are binding and that they resolve disputes between a taxpayer and SUNAT (based on Claimant's and its expert's assertions quoted in paragraph 815 above). Because it is a matter of record that SMCV submitted its disputes regarding SUNAT's Assessments to SUNAT's Claims Division and, in some cases, to the Tax Tribunal, Claimant is barred from submitting the same dispute (on behalf of SMCV) to arbitration under Article 10.18.4 of the TPA. As the *M.C.I. Power Group* tribunal held, "[o]nce the choice has been made there is no possibility of resorting to any other option."[1827]

b. Claimant's Claims of Alleged Breaches of the 1998 Stabilization Agreement Submitted (on Behalf of SMCV) in this Arbitration and the Claims Submitted by SMCV to SUNAT's Claims Division and the Tax Tribunal Have the Same Fundamental Basis

825. Claimant's second argument is that SMCV's claims before SUNAT's Claims Division and the Tax Tribunal are not claims for breaches of the 1998 Stabilization Agreement, and, thus, SMCV cannot be deemed to have previously submitted claims for the "same alleged breach"[1828] as would be required to trigger Article 10.18.4's fork in the road. This is a resort to form over substance that the Tribunal should not entertain. SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were administrative challenges to the validity of SUNAT's assessments under the Mining Law and Regulations, and they rested on the same fundamental basis—indeed, on the exact same legal argument and the exact same claimed legal

[1825] *See* Exhibit CWS-12, Herrera Statement at para. 31 (*citing* Exhibit CE-1073, MINCETUR, Round VIII Summary (Washington, 14-18 March 2005), at p. 14 (Mr. Herrera quotes "the dispute resolution mechanism set forth in each specific investment agreement should prevail; this position is based on the negotiation framework of each agreement (concluded under the protection of internal regulations of each State), the equilibrium of which cannot be altered by the entry into force of the FTA.").

[1826] *See* Exhibit CER-11, Sampliner Report at para. 35.

[1827] Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 181.

[1828] *See* Claimant's Reply at para. 242.

right—as SMCV's claims before this Tribunal of alleged breaches of the 1998 Stabilization Agreement.

826. Perú explained in its Counter-Memorial that tribunals have interpreted the fork-in-the-road provision in a treaty, such as Article 10.18.4 of the TPA, to prohibit submission of a claim to arbitration if that claim has the same fundamental basis as the claim that was previously submitted to other dispute resolution fora (the "fundamental-basis test").[1829] Two claims have the same fundamental basis if resolving the arbitration claim requires the arbitral tribunal to reach and resolve the same underlying dispute at issue in the claim previously submitted to the alternative dispute settlement forum.[1830] Here, to resolve Claimant's claims of alleged breaches of the 1998 Stabilization Agreement in this arbitration (submitted on SMCV's behalf), this Tribunal must necessarily reach and resolve the same disputed issue that was submitted to SUNAT's Claims Division and the Tax Tribunal—*i.e.*, whether the 1998 Stabilization Agreement covers SMCV's Concentrator Project, and accordingly, whether SUNAT's Assessments were permitted under or instead breached the Agreement.

827. At their core, Claimant's contract claims before this Tribunal and SMCV's claims before SUNAT's Claims Division and the Tax Tribunal share the same fundamental basis: (i) SMCV complains about the same government measure (SUNAT's application of the non-stabilized regime to SMCV's Concentrator Project through the Assessments); (ii) SMCV claims the same legal rights under the same legal instrument (the rights to stability under the 1998 Stabilization Agreement); (iii) the claims raise the same legal question specifically regarding the same investment project (whether the 1998 Stabilization Agreement covers SMCV's Concentrator Project), all under (iv) the same legal framework (Peruvian law, specifically Article 83 of the Mining Law and Article 22 of the Mining Regulations).

828. In its Counter-Memorial, Perú demonstrated that SMCV's complaints and the underlying legal question are the same in the proceedings before SUNAT's Claims Division, the Tax Tribunal, and this Tribunal,[1831] and that the Peruvian fora had already resolved the legal question that was at issue both in those fora and here in this arbitration through their multiple decisions.[1832] As Perú demonstrates below, the parallels between the claims before SUNAT's

[1829] *See* Respondent's Counter-Memorial at paras. 509-13.

[1830] *See* Respondent's Counter-Memorial at para. 506.

[1831] *See* Respondent's Counter-Memorial at Table 5.

[1832] For a list of 35 decisions rendered by SUNAT's Claims Division, and 12 decisions rendered by the Tax Tribunal, regarding SMCV's claims, *see* Respondent's Counter-Memorial at Table 4.

Claims Division, the Tax Tribunal, and this Tribunal are undeniable (*see* Table 4 below). To illustrate and to avoid repetition, the Table below analyzes select complaints before SUNAT's Claims Division and the Tax Tribunal. In the Table below, Respondent supplements Table 5 that was originally submitted with Respondent's Counter-Memorial:[1833]

Table 4: SMCV's Claims before SUNAT's Claims Division, the Tax Tribunal, and this Arbitral Tribunal Share the Same Fundamental Basis

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	**SMCV's Appeal to the Tax Tribunal**	**SMCV's Submissions to this Tribunal**
Complaints and Arguments Raised by SMCV			
Royalty Assessment			
2009 Royalty Assessment	SMCV's *Recurso de Reclamación*:[1834] "SUNAT intends to apply the mining royalties . . . on a portion of the minerals that CERRO VERDE extracts at its 'Cerro Verde Nos. 1, 2 and 3' mining concession, despite the fact that said concession – together with the 'Cerro Verde Beneficiation Plant' beneficiation concession – enjoys tax, administrative and exchange stability under the Agreement on Guarantees and Measures for the Promotion of Investments entered into with the Peruvian State in 1998 . . . ." (p. 4) "The only argument by the Administration to support this collection consists of the feasibility study submitted by CERRO VERDE for entering into the Stability Agreement only contemplated the investment in the Leaching Plant and that, now, a portion of the minerals extracted from the 'Cerro Verde Nos. 1, 2 and	SMCV's Appeal:[1835] "Considering that said Intendancy Resolution does not comply with the applicable legal provisions and that it expressly violates a Contract Law entered into by our company with the Peruvian State [(1998 Stabilization Agreement)] within the term established by article 146 of the Tax Code, we APPEAL against it, ..." (p. 1) "The Stability Agreements seek to guarantee the application of a given tax, administrative and exchange regime to a specific 'mining project', understood as a Production Unit (UEA). It is not possible to grant stability to an independent 'investment project'. This lacks logical, economic and legal support." (para. 7.4) "[T]he Feasibility Study submitted by CERRO VERDE to enter into the Stability Agreement (referring to the	Claimant's Memorial:[1836] "Peru repeatedly breached its obligations under the Stability Agreement to grant stability guarantees to the entire Cerro Verde Mining Unit . . . ." (para. 300) "Relying on MINEM's novel interpretation, SUNAT then began to issue assessments against SMCV for royalties that it had allegedly failed to pay on the minerals processed in the Concentrator, . . . SUNAT also issued assessments for taxes that should not have applied under the stabilized regime . . . ." (paras. 13-14) "The Stability Agreement required Peru to apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator; and Peru's novel interpretation limiting stability guarantees only to the investment program included in the Feasibility Study is entirely unsupported by the

[1833] *See* Respondent's Counter-Memorial at Table 5.

[1834] Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 4, 29 (emphasis added).

[1835] Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1, paras. 7.4, 7.9 (emphasis added).

[1836] Claimant's Memorial at paras. 13-14, 124, 173, 300(ii)-(iii), 301, 302, 338(b) (emphasis added).

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	**SMCV's Appeal to the Tax Tribunal**	**SMCV's Submissions to this Tribunal**
	3' mining concession are 'treated' (after their extraction) at another plant (the Primary Sulfides Plant)." (p. 4) "Given the rules of the General Mining Law (previously analyzed), there remains no doubt that all investments made in mining concessions or Economic Administrative Units included in Stability Agreements enjoy the contractual benefits." (p. 29)	investment in the Leaching Project) is only a requirement to enter into the Stability Agreement, which does not limit the application of the agreement to that initial investment project, but covers all activities carried out in that production unit during the term of the Agreement." (para. 7.9)	plain terms of the Mining Law and Regulations and the Stability Agreement itself, ..." (para. 300(ii)-(iii)) ". . . stability guarantees must apply to the entire mining unit or concession to encourage significant and continuing mining investments." (para. 301) "[T]he Government granted stability to investors for the *entire mining unit or concession(s)* in which the qualifying minimum investment was made, 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." (para. 302) "[T]he 1996 Feasibility Study did not limit the scope of the Stability Agreement, but rather established the 'minimum investment' SMCV had to meet to apply for stability benefits. (para. 173) ". . . the Mining Law and Regulations . . . [did not] provide[] any basis to limit the scope of stability guarantees to the investment program foreseen in the feasibility study." (para. 338(b)) ". . . SMCV was entitled to stability, and that the mining royalty 'is not applicable to Cerro Verde by application of the . . . Stability Agreement.' . . . "the Stability Agreement covered the entire Cerro Verde Mining Unit—i.e., its Mining and Beneficiation Concessions—and that SMCV was not obliged to pay royalties
Tax Assessment			
2006 GST Assessment	SMCV's *Recurso de Reclamación*:[1837] "In that sense, the Tax Administration questions the application of the 18% GST rate on the sales made arguing that said sales are not linked to Cerro Verde's leaching operations, which, in the Tax Administration's opinion, is the only project that is included in the stability benefit of the Agreement of Guarantees and Measures for the Promotion of Investments entered between the Company and the Peruvian State." (p. 4) "Next we will develop the arguments that will demonstrate to the Tax Administration that the premises from which it departs are incorrect, for that we will prove: * That the sales identified by the Tax Administration are directly linked to the investment in the Cerro Verde leaching project; * That the 18% rate should be applied to the identified sales because they are directly	SMCV's appeal:[1839] "In accordance with Annex No. 06 to the Result of Request No. 052100001060. . . SUNAT objected various operations taxed by our Company with the 18% GST rate because, in its opinion, it was appropriate . . . to apply the 19% rate in force in fiscal year 2006, since such operations are not within the scope of application of the Agreement of Guarantees and Measures for the Promotion of Investments entered with the Peruvian State.." (p. 10) "The Tax Administration considers that our Company wrongly applied the 18% rate to various sales operations that are not within the scope of the stability guarantee granted by Agreement of Guarantees and Measures for the Promotion of Investments entered between our Company and the Peruvian State, so it is appropriate to apply the 19% rate." (p. 10)	

[1837] Exhibit RE-333, SMCV's Request for Reconsideration, 2006 General Sales Tax Assessment, January 27, 2011, at pp. 4, 6.

[1839] Exhibit RE-334, SMCV's Appeal before the Tax Tribunal, 2006 General Sales Tax Assessment, September 15, 2011, at pp. 10, 12, 19, 30.

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	SMCV's Appeal to the Tax Tribunal	SMCV's Submissions to this Tribunal
	related to the investment activities carried out in the Cerro Verde concession No. 1, 2 and 3." (p. 4) "[W]e consider that the benefit of the Agreement of Guarantees and Measures for the Promotion of Investments is validly applicable to waste sales; therefore, the application of the 18% rate is correct and not the 19% rate as the Tax Administration intends." (p. 6) SUNAT's decision:[1838] "[T]he appellant believes that the Guarantees and Measures for the Promotion of Investments Agreement covers all investments executed in the aforementioned beneficiation concession, as well as in the Cerro Verde No. 1, 2, and 3 mining concession during the term of the agreement, ..." (p. 62)	"In this sense, the applicable 18% GST rate would be applicable to all operations that are linked to the production processes applied in the production unit made up of the Cerro Verde mining concession No. 1, 2, 3 and the beneficiation concession Cerro Verde Beneficiation Plant, and not only to the products obtained by leaching." (p. 12) "[I]n contravention of the current legal system, the Tax Administration would be considering that only the investment 'project' detailed in the Feasibility Study referred to in the Stabilization Contract would be, according to its understanding, the only one that enjoys the guarantee of tax, administrative and currency exchange stability." (p. 19) "As has been demonstrated in the previous point, our Stabilization Agreement covers all the operations carried out in the production unit made up of the Cerro Verde mining concession No. 1, 2, 3 and the beneficiation concession. . . so that the rate applicable to all of them is 18%, thus SUNAT's objection is unfounded." (p. 30) Tax Tribunal's decision:[1840] "The appellant sustains that the benefits awarded by the Agreement on Guarantees and Measures for the Promotion of Investments, pertain to all those activities or investments that were made in the Cerro Verde Production Unit, comprised of the mining concession "Cerro	during the term of the Agreement." (para. 124)

[1838] Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 ("Resolution on Appeal of 2006 GST"), at p. 62 (emphasis added).

[1840] Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at p. 8 (emphasis added).

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	**SMCV's Appeal to the Tax Tribunal**	**SMCV's Submissions to this Tribunal**
		Verde No. 1, 2, and 3 and the concession of benefits of the 'Ben[e]fic[i]ation Plant Cerro Verde', comprising the leaching and concentration processes." (p. 8)	
Legal Question Addressed by SUNAT and the Tax Tribunal			
Royalty Assessment			
2009 Royalty Assessment	SUNAT's decision:[1841] "In the instant case, the disputed matter is limited to establishing whether the activities related to the Primary Sulfide Project fall within the scope of the stability guarantee granted by the stability agreement and, consequently, whether the appellant is obliged to pay the mining royalty for the extraction of ore from the 'Cerro Verde Nos. 1, 2 and 3' mining concession destined to the Primary Sulfide Project . . . ." (p. 25)	Tax Tribunal's decision:[1842] "[I]n this case, it is appropriate to determine the scope of the stability agreement entered into between the Peruvian Government and the appellant, in order to establish whether the extraction of minerals destined to the 'Primary Sulfides Project' is protected by the stability, and therefore, whether it is subject to the payment of mining royalties." (p. 10) "… in the instant case, the discussion has dealt with the scope of what was agreed to in the stability agreement signed between the Peruvian State and the appellant, i.e., to establish which activities were included within the scope of the stability guarantee granted under that agreement. This dispute did not originate in a doubt arising from the interpretation of the scope of Article 83 of the General Mining Law or Article 22 of its Regulations, but in the verification of the scope of the agreement executed, in other words, to establish what was agreed to therein." (p. 31)	Claimant's Memorial:[1843] "The subject matter of Freeport's claims is Peru's breaches of the 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." (para. 299) "Peru repeatedly breached its obligations under the Stability Agreement to grant stability guarantees to the entire Cerro Verde Mining Unit because: (i) Under the Mining Law and Regulations, stability guarantees applied to the entire mining unit or concessions in which the investor made its qualifying minimum investment; (ii) The Stability Agreement required Peru to apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator; and (iii) Peru's novel interpretation limiting stability guarantees only

[1841] Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011), at p. 25 (emphasis added).

[1842] Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at pp. 10, 31 (emphasis added).

[1843] Claimant's Memorial at paras. 299-300, 302 (emphasis added).

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	SMCV's Appeal to the Tax Tribunal	SMCV's Submissions to this Tribunal
Tax Assessment			to the investment program included in the Feasibility Study is entirely unsupported . . . ." (para. 300) "Under the version of the Mining Law and Regulations in force until 2014, the Government granted stability to investors for *the entire mining unit or concession(s)* in which the qualifying minimum investment was made, without distinguishing whether the investments were included in the investment program in the feasibility study, ..." (para. 302)
2006 GST Assessment	SUNAT's decision:[1844] "With the purpose of establishing which are the activities that enjoy contractual benefits, regarding those not included within the bounds of the aforesaid benefit and must be governed by the common legal framework, it is necessary to determine the applicability of the stability guarantee granted." (p. 53)	Tax Tribunal's decision:[1845] "As aforementioned it is maintained that the matter of contention is centered on establishing whether the benefits of the Agreement on Guarantees and Measures for the Promotion of Investments signed by the State of Peru and the appellant, covers only the Leaching Project as maintained by the Administration, or to the contrary covers all those activities of the Cerro Verde Production Unit, as alleged by the appellant." (p. 8) "[I]n order to establish the scope of the guarantees granted to the appellant, the scope of the agreement signed with it has been analyzed, ..." (p. 10)	
Decisions Rendered on Claims Presented			
Royalty Assessment			
2009 Royalty Assessment	SUNAT's decision:[1846] "Thus, . . . the stability guarantee granted by the Agreement on Guarantees and Measures to Promote Investment inures only to the activities related to the investment project contemplated by the agreement referred to in the Technical-Economic Feasibility Study, ..." (p. 32)	Tax Tribunal's decision:[1847] "Scope of the stability contract signed between the Peruvian State and the appellant . . . both the appellant and the Peruvian State delimited the scope and purpose of the signed stability agreement and agreed to perform a series of services to be fulfilled by both parties. In that connection, the documents issued before the signing of the agreement (Feasibility Study)	--

[1844] Exhibit CE-604, Resolution on Appeal of 2006 GST, at p. 53.

[1845] Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 8, 10 (emphasis added).

[1846] Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011), at pp. 32, 47, 50 (emphasis added).

[1847] Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 22 (emphasis added).

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	SMCV's Appeal to the Tax Tribunal	SMCV's Submissions to this Tribunal
	"In this vein, the investment made in the Primary Sulfide Project is a new investment completely distinct from the one contained in the Feasibility Study submitted by the appellant in order to obtain the tax, administrative and exchange-rate stability guarantee, ..." (p. 47) "[I]n the instant case, the stability guarantee granted by the Agreement on Guarantees and Measures to Promote Investment inures only to the activities related to the 'Cerro Verde Leaching Project' contemplated by the stability agreement, so that the investments carried out after the signing of the agreement that are not linked to said project, as is the case of the 'Primary Sulfide Project', do not enjoy said contractual benefit, and must be governed by the ordinary legal framework." (p. 50)	were intended to clearly define the subject matter of the agreement entered into, i.e., delimit the project for which the investment would be intended: the "Cerro Verde Leaching Project", whose objective is the production of copper cathodes." (p. 22) ". . . said benefits apply only to the activities connected with the investment in question, the object of which is delimited in the Feasibility Study, which, in the present case, is in reference to the "Cerro Verde Leaching Project." (p. 22)	
Tax Assessment			
2006 GST Assessment	SUNAT's decision:[1848] "It is made clear in the aforementioned provisions that these confine the benefit to the investment executed within the Feasibility Study, which previously was approved by the administrative authority to delineate the benefit, which is the subject of the agreement." (p. 53) "Thus, by virtue of the aforesaid provisions, in fact the stability guarantee granted by the Guarantees and Measures	Tax Tribunal's decision:[1849] "In accordance to what has already been expressed by this Court in Resolutions No. 08252-1-2013, No. 08997-10-2013 and No. 06141-2-2018, legally stabilized benefits are not generally awarded in favor of the owner of the mining activity nor any specific mining concession, but rather with relation to a specific project investment, clearly defined in the Feasibility Study, which has been approved by the Ministry of Energy and Mines. . . . In the	--

[1848] Exhibit CE-604, Resolution on Appeal of 2006 GST, at pp. 53, 55, 62 (emphasis added).

[1849] Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 8, 9, 11 (emphasis added).

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	SMCV's Appeal to the Tax Tribunal	SMCV's Submissions to this Tribunal
	for the Promotion of Investments Agreement solely affect the activities related to the investment project, which are the subject of the agreement referred to in the Technical Economic Feasibility Study, given that the purpose of the agreement is that the investor understands beforehand the rules that will be applied to its investment during the term of the agreement." (p. 55) "[W]ith the terms of the Guarantees and Measures for the Promotion of Investments Agreement entered into with the Peruvian State in mind, the scope of the stability guarantee, in fact, only protects the activities and results obtained from the Cerro Verde Leaching Project. . . . the Primary Sulfide Project is not covered by the contractual benefit granted by the stability agreement, due to the fact that the investment project has not been considered part of the agreement." (p. 62) "It is important to note that although the concentrator and the leaching plant are developed within the Cerro Verde Beneficiation Plant beneficiation concession itself, this does not imply that we should suppose that the Primary Sulfide Project enjoys the guarantee granted by the stability agreement, . . . : the benefits have not been granted to the so-called mining project or Economic Administrative Unit, which consists of the Cerro Verde No. 1, 2, and 3 mining concession as well as the Cerro Verde Beneficiation Plant beneficiation concession, but rather they have been granted to the appellant regarding the Cerro Verde Leaching Project, which is the subject of the stability	case under analysis, the investment subject of the stability agreement is referred to as 'Cerro Verde Leaching Project'. (p. 8) ". . . , said benefits only apply to activities connected to the cited investment, whose objective is defined in the Feasibility Study, which in the present case is referred to as the activities connected to the 'Cerro Verde Leaching Project', therefore what is argued by the appellant to the contrary, is not worthy of consideration." (p. 8) ". . . the Administration observed various activities, such as: i) Sale of unused burnt oil, . . . considering that these things were not connected to the Leaching Project and as such did not fall under the benefits established in the Agreement on Guarantees and Measures for the Promotion of Investments." (p. 8) "Taking into account that the appellant only stabilized the tax regime on the activities connected to the 'Cerro Verde Leaching Project', the activities unrelated to said project fell under the regulations in force on the date they took place. In that sense, given that during the audit and the contentious tax proceedings [the appellant] has not been proven that the activities seen in sales, services . . . , were connected to the activities of the said project, it had been agreed that the Administration apply the General Sales Tax at the 19% tax rate, ..." (p. 9) "[A]ccording to what has been stated, it was the first clause of the stability agreement that	

	SMCV's *Recurso de Reclamación* to SUNAT's Claims Division	SMCV's Appeal to the Tax Tribunal	SMCV's Submissions to this Tribunal
	agreement, and that did not include the primary sulfide ore concentration process using a concentrator to obtain copper and molybdenum concentrates and silver in any clause or in the Economic Administrative Feasibility Study." (p. 62) "For this reason, in this instance, in fact, the stability guarantee granted by the Guarantees and Measures for the Promotion of Investments Agreement covers only to those activities relating to the Cerro Verde Leaching Project, which is the subject of the stability agreement; as a result of which, the operations not linked with that project, . . . , as well as those associated with the Primary Sulfide Concentrator, do not enjoy this contractual benefit, and must be governed by the common legal framework." (p. 62)	indicated that the appellant '*filed the relevant request with the Ministry of Energy and Mines so that, by means of an agreement, it would be guaranteed the benefits (. . .), in relation to the investment in its Cerro Verde Nos. 1, 2 and 3 concession, hereinafter the Cerro Verde Leaching Project'*, where the scope of the guarantees granted contractually, limited to a certain investment that is made in a concession and not to the concession itself, is stated. By virtue of the foregoing, what is argued by the appellant, to the effect that said rule is applicable, is groundless." (p. 11)	

829. Because SMCV's complaints and arguments, as well as the legal question underlying those complaints, are the same in the proceedings before SUNAT's Claims Division, the Tax Tribunal, and this Tribunal, if this Tribunal were to proceed to resolve Claimant's claims (submitted on behalf of SMCV),[1850] it necessarily would have to engage in the same legal exercise already completed (repeatedly) by SUNAT's Claims Division and the Tax Tribunal. In the proceedings before SUNAT's Claims Division and the Tax Tribunal, SMCV complained that SUNAT's Assessments were improper, because they breached the 1998 Stabilization Agreement, or at a minimum, because they were contrary to the provisions of the 1998 Stabilization Agreement.[1851] In each of these proceedings, SMCV invoked the Agreement, argued that the

[1850] *See supra* at Table 4.

[1851] *See*, *e.g.*, Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 4, 29; Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1, paras. 7.4, 7.9; Exhibit RE-333, SMCV's Request for Reconsideration, 2006 General Sales Tax Assessment, January 27, 2011, at pp. 4, 6; Exhibit RE-334, SMCV's Appeal before the Tax Tribunal, 2006 General Sales Tax Assessment, September 15, 2011, at pp. 10, 12, 19, 30; Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 ("Resolution on Appeal of 2006 GST"), at p. 62; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at p. 8. *See also supra* at Table 4.

Agreement covers the Concentrator Project, and contended that SUNAT's Assessments against that Project were impermissible because of the provisions of the Agreement.[1852] To resolve SMCV's complaints, SUNAT's Claims Division and the Tax Tribunal reviewed the 1998 Stabilization Agreement, made a determination regarding the scope of that Agreement, and then concluded that SMCV's Concentrator Project falls outside of the scope of the Agreement, and thus, SUNAT's Assessments against that Project were appropriate.[1853]

830. Similarly, in these arbitral proceedings, Claimant (on behalf of SMCV) invokes the 1998 Stabilization Agreement, alleges that SUNAT's Assessments breached the provisions of the Agreement, and argues that the stability benefits provided in the Agreement should apply to SMCV's Concentrator Project.[1854] To resolve Claimant's claims of alleged breaches of the 1998 Stabilization Agreement, this Tribunal must necessarily reach into and re-open the dispute that was already reviewed and resolved (repeatedly) by SUNAT's Claims Division and the Tax Tribunal. Like the Peruvian fora, this Tribunal must review the 1998 Stabilization Agreement, make a determination regarding the scope of that Agreement, and reach a conclusion on whether SMCV's Concentrator Project is covered under the Agreement and whether SUNAT's Assessments were appropriate—all based on the same set of facts. The facts are: SUNAT assessed royalties and taxes against SMCV's Concentrator Project, an act which Claimant alleges breached the 1998 Stabilization Agreement. Thus, there is no denying that the claims before the Peruvian fora and this Tribunal have the same fundamental basis. In the words of the *H&H* tribunal, Claimant's arbitration claim does not have an "autonomous existence" and thus "cannot be considered separable" from the claims previously submitted to the Peruvian fora.[1855] Therefore, in accordance with Article 10.18.4, Claimant may not submit its claims of alleged breaches of the 1998 Stabilization Agreement to this Tribunal.

[1852] *See*, *e.g.*, Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 4, 29; Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1, paras. 7.4, 7.9; Exhibit RE-333, SMCV's Request for Reconsideration, 2006 General Sales Tax Assessment, January 27, 2011, at pp. 4, 6; Exhibit RE-334, SMCV's Appeal before the Tax Tribunal, 2006 General Sales Tax Assessment, September 15, 2011, at pp. 10, 12, 19, 30; Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 ("Resolution on Appeal of 2006 GST"), at p. 62; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at p. 8. *See also supra* at Table 4.

[1853] *See*, *e.g.*, Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011), at pp. 32, 47, 50; Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at pp. 22, 25; Exhibit CE-604, Resolution on Appeal of 2006 GST, at pp. 53, 55, 62; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at pp. 8-9, 11.

[1854] *See*, *e.g.*, Claimant's Memorial at paras. 289, 300(ii), 321, 326; Claimant's Reply at paras. 81, 104, 120.

[1855] Exhibit RA-13, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014 (excerpts) ("*H&H Enterprises v. Egypt*, Award"), at para. 377.

831. In its Reply, Claimant argues that Article 10.18.4 does not apply, because SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were not framed as breach-of-contract claims for alleged breaches of the 1998 Stabilization Agreement, like Claimant's claims submitted in this arbitration, but instead were "administrative challenges to the validity of the majority of the Assessments."[1856] Claimant also alleges that Perú conceded that SMCV's claims before SUNAT's Claims Division and the Tax Tribunal were administrative challenges to the validity of SUNAT's Assessments, suggesting that Perú somehow agreed that Claimant did not submit "the same alleged breach" of the 1998 Stabilization Agreement to the aforementioned Peruvian fora.[1857] Claimant's arguments lack merit. As discussed below, Claimant's interpretation of Article 10.18.4 is not only contrary to the interpretation adopted by several investment arbitration tribunals (discussed in Section III.D.1.b(i) below), it is entirely detached from the purpose of a fork-in-the-road provision like Article 10.18.4 (Section III.D.1.b (ii)), and from the TPA Parties' intent behind Article 10.18.4 (Section III.D.1.b(iii)).

(i) Perú's Interpretation of Article 10.18.4 is Consistent with the Relevant Investment Arbitration Jurisprudence

832. Because Claimant's claims before SUNAT's Claims Division, the Tax Tribunal, and this Tribunal are fundamentally the same, and because SUNAT's Claims Division and the Tax Tribunal are "administrative tribunals . . . of the respondent" and "binding dispute settlement procedure[s]," Article 10.18.4 dictates that Claimant may not subsequently submit the same dispute to arbitration. This outcome is consistent with the conclusions reached by several tribunals, including the tribunals in *Pantechniki, H&H,* and *Supervision y Control*, as explained in Perú's Counter-Memorial.[1858]

[1856] Claimant's Reply at paras. 242, 246.

[1857] Claimant's Reply at para. 248. *See also id.* at para. 246.

[1858] *See* Respondent's Counter-Memorial at paras. 508-15. *See also* Exhibit RA-12, *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 ("*Pantechniki v. Albania*, Award"), at para. 61 ("It is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the Woodruff case (1903): whether or not 'the fundamental basis of a claim' sought to be brought before the international forum, is autonomous of claims to be heard elsewhere. . . . . It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora.") (emphasis added); Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at paras. 364, 369 (". . . in order to decide whether the Claimant's Treaty claims in the present case are barred by the fork-in-the-road clause, the Tribunal must determine whether the Treaty claims have the same fundamental basis as the claims submitted before the local fora.") (emphasis added); Exhibit CA-228, *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017 ("*Supervisión y Control v. Costa Rica*, Award") at para. 308 ("In order to determine whether the proceedings before the local tribunals relate to the same dispute submitted to arbitration, the Tribunal will apply the fundamental basis of a claim test . . . .") (emphasis added).

833. Claimant argues in its Reply that the fundamental-basis test has been rejected by tribunals in *Corona Materials*, *Nissan*, *Kappes*, and *Khan Resources*.[1859] Claimant's assertion has no merit. Each of these cases concerned the difference between an alleged breach of the applicable investment treaty (under international law) and an alleged breach of domestic law, which is entirely different than the issue relevant in this case, where both claims of breach arise under the same contract and are governed by the same law (Peruvian law, specifically the Mining Law and Regulations), as discussed below.

a) In *Corona Materials*, the tribunal held that the fork-in-the-road provision under CAFTA-DR did not apply because the claimant's local affiliate did not allege "a breach of Section A of Chapter 10 of DR-CAFTA" in the local proceedings, as the claimant did in its claim submitted to arbitration.[1860] Rather, the local proceedings involved claims of violation of domestic laws.[1861]

b) In *Nissan*, the Comprehensive Economic Partnership Agreement ("CEPA") bars submission of the "investment dispute" previously submitted to local courts by the "disputing investor" to arbitration.[1862] CEPA defines "investment dispute" as being limited to a dispute involving an alleged breach of CEPA, and "disputing investor" as the claimant-investor in the treaty claim.[1863] The tribunal held that the fork-in-the-road provision did not apply because (i) the dispute submitted in the local court proceedings did not involve an alleged breach of CEPA (and, thus, was not an "investment dispute"), and because the proceedings were initiated by claimant's local (Indian) affiliates (and, thus, not by the "disputing investor", *i.e.*, the Japanese claimant in the treaty claim submitted to arbitration).[1864] Here,

[1859] Claimant's Reply at paras. 253-54.

[1860] *See* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at paras. 269-70.

[1861] *See* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 269.

[1862] *See* Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 61 (*citing* CEPA, Art. 96(6) ("No investment dispute may be submitted to international conciliation or arbitration … if the disputing investor has initiated any proceedings for the resolution of the investment dispute before courts of justice or administrative tribunals or agencies.")) (emphasis added).

[1863] *See* Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 61 (*citing* CEPA, Art. 96(1) ("For the purposes of this Chapter, an "investment dispute" is a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation under this Chapter and any other provisions of this Agreement as applicable with respect to the investor and its investments"); Art. 96(2) ("Nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as "disputing investor")).

[1864] *See* Exhibit CA-243, *Nissan v. India*, Decision on Jurisdiction at para. 183.

Article 10.18.4 of the TPA does not limit the "same alleged breach" to alleged breaches of the TPA nor does it limit the party submitting a claim to an alternative forum to the claimant-investor. Moreover, the main issue regarding the fork-in-the-road provision in this case does not concern the difference between an alleged breach of a treaty or violation of domestic law, unlike in *Nissan*.

c) Contrary to Claimant's assertion, the *Kappes* tribunal did not "consistently reject[] arguments attempting to expand fork-in-the-road provisions beyond their express terms to import a 'fundamental basis,' 'triple identity,' or 'same dispute' standard."[1865] In fact, the tribunal did not analyze the fork-in-the-road provision provided in Article 10.18.4 of CAFTA-DR at all. The tribunal analyzed the scope of Article 10.1.16(a) to determine whether a claimant could submit a "reflective loss" claim for harm suffered by its downstream investments, which includes an enterprise that it owns or controls, given that the enterprise had initiated its own local court proceedings.[1866] The tribunal found the provisions in CAFTA-DR Annex 10-E, which bars treaty-breach claims previously submitted to local courts by the claimant-investor, to be irrelevant to its analysis.[1867] Thus, *Kappes* offers no insight whatsoever regarding the interpretation of Article 10.18.4 of the TPA.

d) Similarly, Claimant's assertion that the *Khan* tribunal "expressly rejected"[1868] the fundamental-basis test wholly misrepresents the tribunal's holding. To be clear, the tribunal's statement that "the test for the application of fork in the road provisions should not be too easy to satisfy" (quoted by Claimant[1869]) was made in response to the respondent's argument against the application of the triple-identity test, not the fundamental-basis test.[1870] Moreover, there is nothing in that

[1865] *See* Claimant's Reply at para. 253.

[1866] *See* Exhibit CA-20, *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, March 13, 2020 ("*Kappes v. Guatemala*, Decision on Preliminary Objections"), at paras. 135, 140, 142.

[1867] *See* Exhibit CA-20, *Kappes v. Guatemala*, Decision on Preliminary Objections at para. 142.

[1868] *See* Claimant's Reply at para. 254.

[1869] Claimant's Reply at para. 254 (*citing* to Exhibit CA-397, *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012 ("*Khan Resources v. Mongolia*, Decision on Jurisdiction"), at para. 391).

[1870] *See* Exhibit CA-397, *Khan Resources v. Mongolia*, Decision on Jurisdiction at para. 391 ("The Respondents principally argue that the triple identity test strips the fork in the road provision of any practical effect, presumably because it is unrealistic to expect all three prongs of the test to be satisfied. It must first be replied that the test for the application of fork in the road provisions should not be too easy to satisfy, ...").

statement that suggests that the tribunal rejected the fundamental-basis test. Additionally, the facts in *Khan* are different from the facts in this case. In *Khan*, the tribunal found the fork-in-the-road provision under the Energy Charter Treaty (ECT) did not apply, for the following reasons, among others: (i) the claimant's local affiliates challenged before an administrative court the respondent's "invalidation of the Mining and Exploration Licenses on the grounds that the NEA had violated procedural requirements of various Mongolian laws and regulations," whereas the claimant's claims submitted to arbitration was based on alleged breach of the ECT;[1871] and (ii) the claims submitted to arbitration did not challenge the exact same measures challenged before the administrative court.[1872] Here, by contrast, (i) Claimant (through SMCV) complained before SUNAT's Claims Division and the Tax Tribunal that SUNAT's Assessments breached the 1998 Stabilization Agreement, and Claimant now complains (on behalf of SMCV) that SUNAT's Assessments breached that same Agreement; and (ii) the claims submitted to SUNAT's Claims Division, the Tax Tribunal, and this Tribunal concern the exact same measure, *i.e.*, SUNAT's Assessments.

(ii) Perú's Interpretation of Article 10.18.4 Is Consistent With the Text of the Article and the Object and Purpose of the Fork-In-The-Road Provision

834. Prohibiting Claimant's submission of its claims of alleged breaches of the 1998 Stabilization Agreement to arbitration because the dispute was previously submitted to other dispute resolution fora is wholly consistent with the text of Article 10.18.4 of the TPA and with the object and purpose of a fork-in-the-road provision. Article 31(1) of the VCLT requires a treaty to be interpreted in good faith: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[1873] And, the principle of *effet utile* dictates that a treaty provision must

[1871] *See* Exhibit CA-397, *Khan Resources v. Mongolia*, Decision on Jurisdiction at para. 394 ("Before the Administrative Court, Khan Mongolia and CAUC challenged the NEA's invalidation of the Mining and Exploration Licenses on the grounds that the NEA had violated procedural requirements of various Mongolian laws and regulations. The Administrative Court decided on this basis. Before this Tribunal, Khan argues its case on the basis of breach of the ECT.").

[1872] *See* Exhibit CA-397, *Khan Resources v. Mongolia*, Decision on Jurisdiction at para. 397 ("The Tribunal further notes that CAUC's claim before the Administrative Court was concerned with the allegedly invalid invalidation of the Mining License, an action of Mongolia that Khan Netherlands does not contest under the ECT.").

[1873] Exhibit CA-49, Vienna Convention on the Law of Treaties, May 23, 1969 ("VCLT"), at Art. 31(1). *See also* Exhibit RA-144, *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, April 6,

be interpreted to give it real meaning and effect.[1874] Good faith interpretation of a treaty provision in accordance with Article 31(1) of the VCLT requires an interpretation that renders the provision meaningful and effective, as the *Dawood Rawat* tribunal explains: "*Effet utile*, although not expressly set out in the VCLT, is generally accepted to flow from the principle of interpretation of treaties in good faith as envisioned in VCLT Article 31(1)."[1875] The intended purpose and effect of a fork-in-the-road provision, as detailed below, is to prevent the same dispute or controversy from being litigated more than once and in more than one forum, whereby a claimant can unfairly "take a second bite at the apple."[1876] According to the *Hassan Awdi* tribunal, "The [fork-in-the-road] provision is meant to avoid that by resorting initially to the State courts and then to arbitration under the BIT, the investor tries its case a second time should it be not satisfied with the outcome of the first attempt before the local courts."[1877] Thus, the

---

2018 ("*Rawat v. Mauritius*, Award on Jurisdiction"), at para. 182 (explaining that good faith interpretation of treaty provisions provided in Article 31(1) of the VCLT requires interpreting treaty provisions in accordance with the principle of *effet utile*).

[1874] *See* Exhibit CA-122, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, August 19, 2005, at para. 248 ("It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. [T]reaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.") (emphasis added); Exhibit RA-145, *The Renco Group, Inc. v. Republic of Peru*, UNCITRAL Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, December 18, 2014, at para. 177 ("The Tribunal also notes that the principle of effectiveness (effet utile) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that "every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or inutile)") (emphasis added); Exhibit RA-146, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, November 8, 2010, 223 (". . . the Tribunal will employ generally accepted rules of interpretation, . . . : . . . (ii) effect should be given to every provision of an agreement; and (iii) a provision must be interpreted so as to give it meaning rather than so as to deprive it of meaning. (*citing* Exhibit RA-147, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case. No. ARB/87/3, Award, June 27, 1990, para. 40)) (emphasis added).

[1875] Exhibit RA-144, *Rawat v. Mauritius*, Award on Jurisdiction at para. 182. *See also* Exhibit RA-148, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B. V. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/08/15, December 30, 2010, at para. 114.

[1876] Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 367 (". . . the purpose of Article VII of the US-Egypt BIT [the fork-in-the-road provision in the applicable treaty in that case], which is to ensure that the same dispute is not litigated before different fora."). *See also* Exhibit RA-17, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015 ("*Hassan Awdi v. Romania*, Award"), at para. 203; Exhibit RA-16, Markus A. Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches," 18 *Wash. U. Global Stud. L. Rev.* 391 (2019), at p. 424 (citing Bernardo M. Cremades & Ignacio Madalena, "Parallel Proceedings in International Arbitration," 24 *ARB. INT'L* 507 (2008), at p. 508 (noting that claimants initiate parallel proceedings in order to "seek the widest legal protection or to increase their chances of success"); Emmanuel Gaillard, "Abuse of Process in International Arbitration," 32 *ICSID REV.* 1 (2017), at p. 6 (referring to parallel proceedings as an abusive practice aimed at maximizing a claimant's chances of success)); *id.* at 425 ("it can be concluded that the basic function of FITR clauses is to prevent the various detrimental effects of parallel proceedings, namely (a) the conferral of an undue advantage upon the claimant; (b) the risk of overcompensation of the claimant; (c) inefficiency; and (d) the risk of conflicting decisions.).

[1877] Exhibit RA-17, *Hassan Awdi v. Romania*, Award at para. 203.

fundamental-basis test, which tribunals apply to ensure claims that are fundamentally grounded on the same dispute cannot be relitigated through arbitration (because allowing relitigation would give claimant an unfair advantage), is consistent with this purpose.[1878]

835. Here, if Claimant were permitted to submit to this Tribunal (on behalf of SMCV) claims of alleged breaches of the 1998 Stabilization Agreement, SMCV would be unfairly permitted to relitigate its previously submitted disputes that have been finally resolved—on many occasions—by SUNAT's Claims Division and the Tax Tribunal (as well as by the Peruvian courts). Indeed, Claimant and SMCV would be taking a second, or third, or fourth bite at the same apple, contrary to the text and the purpose of Article 10.18.4. Thus, Claimant should not be permitted to submit its claims of alleged breaches of the Agreement to this Tribunal.

836. In its Reply, Claimant argues that the fundamental-basis test has no support in the text of Article 10.18.4, which according to Claimant, only bars a claim for the "same alleged breach" previously submitted to other fora.[1879] In particular, Claimant argues that Article 10.18.4 does not refer to the term "same fundamental basis," or "dispute," or "subject matter."[1880] Claimant's arguments are without merit for several reasons. *First*, as discussed in paragraphs 825 to 830 above, the record is clear that SMCV alleged that SUNAT's Assessments violated the Stabilization Agreement before the Tax Tribunal and SUNAT's Claims Division.[1881] *Second*, Claimant's interpretation of Article 10.18.4 is not only inconsistent with the international arbitral tribunals' holdings, as discussed in Section III.D.1.b(i) above, but it would render the provision ineffective in preventing relitigation of the same dispute, which as discussed above, is the *raison d'être* of fork-in-the-road clauses. Claimant's fixation on the form of the dispute rather than its substance is contrary to the requirement to interpret treaty provisions in good faith and in accordance with the principle of *effet utile*. Indeed, the *H&H* tribunal held that "what matters therefore is the subject matter of the dispute rather than whether the parties are

[1878] *See*, *e.g.*, Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 61; Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 310; Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 367.

[1879] *See* Claimant's Reply at paras. 249-50.

[1880] Claimant's Reply at para. 250.

[1881] *See*, *e.g.*, Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 4, 29; Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1, paras. 7.4, 7.9; Exhibit RE-333, SMCV's Request for Reconsideration, 2006 General Sales Tax Assessment, January 27, 2011, at pp. 4, 6; Exhibit RE-334, SMCV's Appeal before the Tax Tribunal, 2006 General Sales Tax Assessment, September 15, 2011, at pp. 10, 12, 19, 30; Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 ("Resolution on Appeal of 2006 GST"), at p. 62; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at p. 8. *See also supra* at Table 4.

exactly the same . . . it would defeat the purpose of the Treaty and allow form to prevail over substance if the respondents were required to be strictly the same."[1882]

837. Claimant's other arguments regarding Perú's interpretation of Article 10.18.4 also have no merit. *First*, Claimant argues that Perú's interpretation of Article 10.18.4 would lead to an "absurd result" where the investor would forgo the opportunity to request reconsideration of an administrative act in local proceedings, and the government would be deprived of the opportunity to correct that act.[1883] Claimant gravely misunderstands the objective of a fork-in-the-road provision like Article 10.18.4 and the way it is intended to operate. As explained, the purpose of fork-in-the-road provisions, particularly those that contain the irrevocable-choice rule like Article 10.18.4, is to require a claimant to choose only one forum to resolve its dispute to the exclusion of all others.[1884] Thus, under similar provisions as Article 10.18.4, any claimant would be faced with the need to choose one forum over all others, with the result of depriving the unchosen forum the ability to hear and resolve the dispute. Because this result is inherent—and intended—in any fork-in-the-road provision with an irrevocable-choice rule, Claimant's suggestion that Perú's interpretation of Article 10.18.4 is somehow unreasonable or "absurd" is without merit.

838. *Second*, equally unpersuasive is Claimant's argument that Perú's interpretation of the fork-in-the-road provision, when applied to this case where Peruvian law affords limited time for SMCV to exercise its right to submit its dispute (*e.g.*, 20 days to submit a challenge to SUNAT's Claims Division; 15 days to submit an appeal to the Tax Tribunal), would leave SMCV with an "unreasonably short" time frame to exercise its right to choose a forum to the exclusion of the other.[1885] The timeframe to bring a claim before other dispute resolution fora is wholly irrelevant to a fork-in-the-road provision. Either the Claimant chooses to submit a claim

---

[1882] Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 367. *See also* Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 61.

[1883] Claimant's Reply at para. 245.

[1884] *See* Exhibit RA-16, Markus A. Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches," 18 *Wash. U. Global Stud. L. Rev.* 391 (2019), at pp. 397-98 (noting that there are generally three types of fork-in-the-road provisions: (i) "clauses that provide investors with a choice between several dispute settlement mechanisms, specifying that once the investor has made a choice, the choice is final"; (ii) "clauses that provide that investors may only resort to investor-state arbitration if they have not previously submitted the dispute to another court or tribunal"; (iii) "clauses [that] offer investors a choice between several dispute settlement mechanisms, without, however, stating that the choice made by the investor is final."). *See also* Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67; Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 181; Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 294; Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 370 (*citing* Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67).

[1885] Claimant's Reply at para. 245.

to other dispute resolution fora to the exclusion of international arbitration or it does not. Thus, Claimant's argument is frivolous at best.

839. *Third*, Claimant argues that the language in Article 10.18.4 is different, and more restrictive, than the language in the TPA's waiver provision in Article 10.18.2, and that this difference supports Claimant's interpretation of Article 10.18.4.[1886] However, these two provisions address two different issues. Article 10.18.4 concerns only claims for breaches of an investment agreement or investment authorization (not treaty), whereas Article 10.18.2 applies to all administrative or court proceedings regarding any measure that is the basis for the alleged breaches under Article 10.16, which include breaches under the Treaty, an investment agreement or an investment authorization.[1887] Because the purposes and the coverage of Articles 10.18.4 and 10.18.2 are different, Article 10.18.2 cannot be used to inform on the interpretation of Article 10.18.4 as Claimant attempts to do here.

840. *Fourth*, Claimant argues that the triple-identity test is equally unsupported by the text of Article 10.18.4 and, in any case, the test is not met here, since SMCV "did not seek a decision holding Peru liable for breaches of the Stability Agreement and ordering payment of corresponding damages (*petitum*) or make claims arising from Peru's breaches of the Stability Agreement governed by Peruvian civil law (*causa petendi*)."[1888] Claimant's argument is unavailing. As explained in Perú's Counter-Memorial, tribunals have also interpreted a fork-in-the-road provision in a treaty to prohibit submission of a claim to arbitration if the party submitting the claim, the cause of action, and the object or relief sought, are the same (the

[1886] Claimant's Reply at para. 251.

[1887] Exhibit CA-10, U.S.-Perú TPA at Art. 10.18.4 provides: "(a) No claim may be submitted to arbitration: (i) for breach of an investment authorization . . . , or (ii) for breach of an investment agreement . . . ."; whereas Art. 10.18.2 provides: "No claim may be submitted to arbitration under this Section unless: (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and (b) the notice of arbitration is accompanied, (i) for claims submitted to arbitration under Article 10.16.l(a), by the claimant's written waiver, and (ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16" (emphasis added). Article 10.16 provides: "In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, 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; . . . (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; . . . .") (emphasis added).

[1888] Claimant's Reply at para. 250.

"triple-identity test"),[1889] and that the triple-identity test is also met in this case[1890] (in addition to the fundamental-basis test) to bar Claimant's claims in these proceedings in accordance with Article 10.18.4. In any case, Perú explained that tribunals have increasingly abandoned the triple-identity test in favor of the more pragmatic and effective fundamental-basis test,[1891] which is increasingly adopted by investor-state tribunals.[1892] Thus, Claimant's argument is futile.

(iii) Perú's Interpretation of Article 10.18.4 is Consistent with the Intent of the TPA Parties

841. Relying on its expert, Mr. Sampliner, and its witness, Mr. Herrera, Claimant argues that Perú's interpretation of Article 10.18.4 is inconsistent with the intent of the TPA Parties.[1893] As already noted, consideration of the TPA's preparatory work is impermissible under Article 32 of the VCLT, unless the ordinary meaning of the term is unclear. That is not the case here for Article 10.18.4, which plainly provides that claims of the "same alleged breach" submitted previously to "an administrative tribunal . . . of the respondent, or to any other binding dispute settlement procedure" may not be resubmitted to arbitration under the TPA.[1894] Thus, the Tribunal should not consider the allegation by Claimant, Mr. Sampliner, and Mr. Herrera that, in negotiating the TPA, the United States sought broad access to dispute settlement for alleged breaches of an investment agreement, and that the understanding of the TPA parties was that Article 10.18.4 would apply only to previous submission of the "same alleged breach."[1895] But

[1889] Respondent's Counter-Memorial at para. 507.

[1890] *See* Respondent's Counter-Memorial at para. 507. Claimant satisfied the triple-identity test because (i) Claimant is proceeding in this arbitration on behalf of SMCV (the same party to the proceedings in Perú); (ii) SMCV's claimed rights are the same in both proceedings (right to stability under the 1998 Stabilization Agreement); (iii) SMCV's claimed relief is the same (in effect, relief from SUNAT's application of the non-stabilized regime on SMCV's Concentrator Project through the Assessments).

[1891] *See* Respondent's Counter-Memorial at para. 506. *See also* Exhibit RA-149, Fiona Marshall, "Commentary: Pantechniki v. Albania decision offers pragmatic approach to interpreting fork-in-the-road clauses," *International Institute for Sustainable Development: Investment Treaty News*, September 2, 2009; Exhibit RA-150, Gerhard Wegen & Lars Markert, "Chapter V: Investment Arbitration – Food for Thought on Fork-in-the-Road – A Clause Awakens from its Hibernation," in *Austrian Yearbook On International Arbitration* 269 (C. Klausegger *et. al.* ed., 2010), at p. 277 ("[t]he overall approach regarding the scope of fork-in-the-road clauses in the *Pantechniki v. Albania* award is convincing and the proposed solution points down the right road").

[1892] *See*, *e.g.*, Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 61; Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 310; Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 367 ("[T]he triple identity test is not the relevant test . . . , the language of Article VII [of the applicable investment treaty] does not require specifically that the parties be the same, but rather that the dispute at hand not be submitted to other dispute resolution procedures; what matters therefore is the subject matter of the dispute.").

[1893] Claimant's Reply at para. 252 (*citing* Exhibit CER-11, Sampliner Report at paras. 28, 34-35; Exhibit CWS-12, Herrera Statement at paras. 26, 28).

[1894] Exhibit CA-10, U.S.-Perú TPA at Art 10.18.4.

[1895] Claimant's Reply at para. 252; Exhibit CER-11, Sampliner Report at para. 35; Exhibit CWS-12, Herrera Statement at para. 28.

even if the Tribunal were to identify a basis under the Vienna Convention to turn to this negotiating history (it should not), two points are worth highlighting. *First*, SMCV's claims submitted to the Tax Tribunal and SUNAT's Claims Division, and SMCV's claims of alleged breaches of the 1998 Stabilization Agreement submitted (through Claimant) to this arbitration, are undeniably claims for "the same alleged breach," because all of those claims by SMCV allege breaches of the Agreement, as discussed above.[1896] Thus, by Claimant's, Mr. Sampliner's, and Mr. Herrera's accounts, Article 10.18.4 surely bars Claimant's claims of alleged breaches of the Agreement in this arbitration. *Second*, none of the documents that Claimant, Mr. Sampliner, or Mr. Herrera cite to support their assertions in fact do so (as discussed below).

842. Claimant, Mr. Sampliner, and Mr. Herrera suggest that Article 10.18.4 was an intentionally narrow exception to the general rule of granting broad access to dispute settlement for alleged breaches of investment agreements.[1897] Again, none of the documents they cite to support that assertion (as discussed below). Thus, Claimant's contention that Perú's interpretation of Article 10.18.4 is inconsistent with the TPA Parties' intent must fail.

a) Claimant cites to the U.S. Model BIT,[1898] and notes that the 2004 Model BIT does not contain a fork-in-the-road provision.[1899] But, the fact that a fork-in-the-road provision is <u>not</u> contained in a Model BIT does not dictate the interpretation of a fork-in-the-road provision that <u>is</u> contained in the TPA. Thus, Claimant's argument should be disregarded.

b) Mr. Herrera cites to a MINCETUR summary of the second round of the U.S.-Andean FTA negotiations dated June 2004.[1900] Mr. Herrera relies on a sentence in the summary that reads: "The US wishes the investor to have the option of

[1896] *See*, *e.g.*, Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 4, 29; Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1, paras. 7.4, 7.9; Exhibit RE-333, SMCV's Request for Reconsideration, 2006 General Sales Tax Assessment, January 27, 2011, at pp. 4, 6; Exhibit RE-334, SMCV's Appeal before the Tax Tribunal, 2006 General Sales Tax Assessment, September 15, 2011, at pp. 10, 12, 19, 30; Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 ("Resolution on Appeal of 2006 GST"), at p. 62; Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018 (2006 Income and General Tax Assessment), August 22, 2018, at p. 8. *See also supra* at Table 4.

[1897] *See* Claimant's Reply at para. 252 (*citing* Exhibit CER-11, Sampliner Report at para. 28, Exhibit CWS-12, Herrera Statement at para. 26).

[1898] Claimant's Reply at para. 252 (*citing* Exhibit CA-375, 2004 U.S. Model BIT, 2004).

[1899] Claimant's Reply at n.1204 ("U.S. Model BIT (2004) (containing no fork-in-the-road provisions)"). *See also* Exhibit CER-11, Sampliner Report at para. 28.

[1900] Claimant's Reply at para. 252 (*citing* Exhibit CWS-12, Herrera Statement at para. 26 (*citing* Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004))).

accessing the chapter's dispute resolution mechanism, even in the event that an internal lawsuit has been heard in local courts."[1901] But, the United States' "wishes" for its investor to "have the option of accessing the chapter's dispute resolution mechanism, even in the event that an internal lawsuit has been heard in local courts" is inconsistent with the TPA Parties' subsequent decision (in a departure from, *e.g.* the U.S. Model BIT) to include of a fork-in-the-road provision in the TPA, which was agreed to and signed by the United States nearly two years later on April 12, 2006 (after additional rounds of negotiation).[1902] Furthermore, Mr. Herrera omitted to quote the sentence that follows the quoted text, which reads: "The Andean countries have stated their preference for the forum to be is unique and exclusive."[1903] Whatever may have been the United States' "wish" at the outset, evidently it was not shared by the Andean side. Thus, Claimant's contention that Perú's interpretation of Article 10.18.4 is "inconsistent with the intent of the TPA [P]arties"[1904] is misleading, because the Andean countries (of which Perú is one, in addition to being one of the TPA Parties) expressly stated their preference that the dispute resolution forum available to the investors under the TPA be "exclusive." Accordingly, this document does nothing to support Claimant's argument.

c) Mr. Herrera also cites to a MINCETUR summary of the tenth round of the U.S.-Andean FTA negotiations dated June 2005.[1905] Mr. Herrera points to the statement: "As for the treatment of 'investment agreements', an issue discussed only at the bilateral level, the United States has reiterated that this is a very sensitive issue, especially due to the situations that affect various US companies in our country."[1906] But, this statement says nothing regarding the Parties' joint

[1901] Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004), at p. 25. *See also* Exhibit CWS-12, Herrera Statement at para. 26 (*citing* Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004), at p. 25).

[1902] *See* Exhibit RE-335, SICE: Trade Policy Developments: Peru-United States, *available at* http://www.sice.oas.org/tpd/and_usa/per_usa_e.asp (noting that the U.S. signed the US-Perú TPA on April 12, 2006).

[1903] Exhibit CE-1061, MINCETUR, Round II Summary (Atlanta, June 14-18, 2004), at p. 25 (emphasis added).

[1904] Claimant's Reply at para. 252.

[1905] Claimant's Reply at para. 252 (*citing* Exhibit CWS-12, Herrera Statement at para. 26 (*citing* Exhibit CE-1077, MINCETUR, Round X Summary (Guayaquil, June 6-10, 2005))).

[1906] Exhibit CE-1077, MINCETUR, Round X Summary (Guayaquil, June 6-10, 2005), at p. 22.

intent concerning the treatment of investment agreements. In fact, Perú (as a member of the Andean states) indicated in another document (a MINCETUR summary of the ninth round of negotiations in April 2005) that the treatment of "investment agreement" is also a sensitive issue for the Andean countries, but in the opposite direction from the United States.[1907] According to that document:

> [t]he treatment of the so-called "investment agreements" constitutes a matter of considerable sensitivity for all three Andean countries, which reiterated that only cases of non-compliance with investment agreements that constitute violations of the disciplines contained in Section A should be the subject of a lawsuit under the Investor-State dispute resolution mechanism contemplated by the chapter. For all other cases, the dispute resolution mechanism already agreed upon in each specific investment agreement will be applied.[1908]

Importantly, there is no indication that the statement to which Mr. Herrera cites was made in the context of discussing the fork-in-the-road provision. Based on the four-paragraph discussion under the heading entitled "Investment Agreements" (on the page following where the quote Mr. Herrera cites appears), it seems that reference to "investment agreement" in the cited statement was made in the context of negotiations over the definition of investment agreements—that is, the types of agreements that would fall within the scope of the TPA—not the fork-in-the-road provision.[1909] Thus, Claimant's reliance on the cited statement is misplaced.

d) Mr. Herrera also points to an e-mail from Mr. David Weiner dated November 9, 2005:[1910] "We cannot agree to include in the FTA language that seeks to limit the scope of the entities with which an investor may conclude an investment agreement to those 'national authorities' that have jurisdiction over all of a party's

[1907] *See* Exhibit CE-1074, MINCETUR, Round IX Summary (Lima, April 18-22, 2005), at p. 27.

[1908] Exhibit CE-1074, MINCETUR, Round IX Summary (Lima, April 18-22, 2005), at p. 27 (emphasis added).

[1909] *See* Exhibit CE-1077, MINCETUR, Round X Summary (Guayaquil, June 6-10, 2005), at p. 23 (discussing, in particular, whether certain legal stability agreements could be considered investment agreements and, if so, whether that would occur automatically).

[1910] Claimant's Reply at para. 252 (*citing* Exhibit CWS-12, Herrera Statement at para. 26 (*citing* Exhibit CE-1075, Email from David Weiner to Carlos Herrera *et. al,* May 12, 2005)).

territory."[1911] Upon review, the quoted language appears nowhere in the e-mail that is cited by Mr. Herrera.[1912] In any case, the quoted statement (wherever it might exist) does not appear to address the fork-in-the-road provision at all, but, rather, addresses some debate about the definition of investment agreement, and specifically what it might say about the types of entities with which an investor may conclude an investment agreement. This issue is entirely irrelevant to the fork-in-the-road provision debated here. Notably, in the email that Mr. Herrera did cite, the U.S. government offers to provide the Andean countries "an exclusive forum-selection clause for Section A claims [*i.e.*, claims under the FTA]."[1913] Thus, it is clear that the U.S. government was willing to negotiate and agree to significant changes in the scope of which types of disputes could be submitted to arbitration under the TPA. There is no basis for any *a priori* presumption about the narrowness or breadth of the final text on which those negotiations ultimately landed.

843. Additionally, Claimant, Mr. Herrera, and Mr. Sampliner allege that the Peruvian delegation understood Article 10.18.4 to apply only to claims of the "exact same breach of an investment agreement."[1914] But that assertion lacks support. *First*, Mr. Sampliner merely declares that he "do[es] not recall the Peruvian delegation expressing a contrary interpretation of the U.S. proposal," without providing any support.[1915] *Second*, the documents that Mr. Herrera cites do not support his claim about Perú's alleged intent. For example:

a) The four U.S.-Andean FTA drafts that Mr. Herrera cites do not indicate Perú's intent or understanding of Article 10.18.4. *First*, two of the U.S.-Andean FTA drafts dated May and July 2005 do not indicate Perú's proposal (but rather Ecuador's and Colombia's proposals) regarding Article 10.18.4.[1916] Thus, these

[1911] Claimant's Reply at n.1204 (*citing* Exhibit CWS-12, Herrera Statement at para. 26 (*citing* Exhibit CE-1075, Email from David Weiner to Carlos Herrera *et. al,* May 12, 2005)).

[1912] *See generally* Exhibit CE-1075, Email from David Weiner to Carlos Herrera *et. al,* May 12, 2005.

[1913] Exhibit CE-1075, Email from David Weiner to Carlos Herrera *et. al,* May 12, 2005.

[1914] Exhibit CWS-12, Herrera Statement at para. 29. *See* Claimant's Reply at para. 252 (*citing* Exhibit CER-11, Sampliner Report at para. 35, Exhibit CWS-12, Herrera Statement at para. 28).

[1915] Exhibit CER-11, Sampliner Report at para. 35. *See* Claimant's Reply at para. 252 (*citing* Exhibit CER-11, Sampliner Report at para. 35).

[1916] *See* Exhibit CE-1076, U.S.-Andean FTA Draft, May 13, 2005, at p. 16 ("3. [COLOMBIA/ECUADOR: When an investor opts for a dispute settlement mechanism to submit a claim of a breach of the disciplines contained under

drafts do not indicate Perú's intent concerning that provision. *Second*, for the FTA draft dated November 2004 (the earliest FTA draft out of the four FTA drafts cited), the text of the relevant Andean proposal is substantially different, both in content and length, compared to the relevant provision in the FTA draft dated December 2005 (the latest FTA draft out of the four FTA drafts cited) and compared to the current text of Article 10.18.4.[1917] Thus, whatever they might indicate about intentions earlier in the negotiations (which is not clear either), these FTA drafts do not indicate Perú's intent or understanding of Article 10.18.4 as it finally appeared in the TPA.

b) Mr. Herrera also cites to a MINCETUR document summarizing the tenth round of negotiations in June 2005, and claims that it shows the United States' agreement to "preclude an investor from submitting claims for international arbitration if the investor had previously submitted identical claims for adjudication."[1918] In particular, Mr. Herrera points to these statements: "Peru accepts the package as

---

Section A, such option shall be understood as excluding and definitive, in consequence: . . ."); Exhibit CE-1078, U.S.-Andean FTA Draft, July 15, 2005, at p. 16 ("3. [COLOMBIA/ECUADOR: When an investor opts for a dispute settlement mechanism to submit a claim of a breach of the disciplines contained under Section A, such option shall be understood as excluding and definitive, in consequence: . . ."); *see also* Exhibit CWS-12, Herrera Statement at para. 28 (*citing* to Exhibit CE-1076, U.S.-Andean FTA Draft, May 13, 2005, at p. 16 and Exhibit CE-1078, U.S.-Andean FTA Draft, July 15, 2005, at p. 16).

[1917] *Compare* Exhibit CE-1064, U.S.-Andean FTA Draft, November 23, 2004, at pp. 18-19 (Article X.17 {ANDEAN: 3. When an investor opts for a dispute settlement mechanism to submit a claim of a breach of the disciplines contained under Section A, such option shall be understood as excluding and definitive, in consequence: a) No claim may be submitted to arbitration under Section B, if it has been previously submitted to a judicial or administrative tribunal of the respondent b) No claim may be submitted to a judicial or administrative tribunal of the respondent if it has been previously submitted to arbitration under Section B. If the investor has obtained a final decision with respect to a claim submitted under any of the options provided in this Section, against which there does not exist the possibility of filing any recourse in order to challenge, revise or in any way modify such decision, the investor may not afterwards file a new claim against the respondent with the purpose of obtaining a new decision over the same request."), *with* Exhibit CE-1083, U.S.-Andean FTA Draft, December 12, 2005, at pp. 16-17 ("Article 10.18.5 (a) No claim may be submitted to arbitration: (i) for a breach of an investment authorization under Article 10 16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (ii) for a 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. (b) . . . .") *and* Exhibit CA-10, U.S.-Perú TPA at Art 10.18.4 ("Article 10.18.4 (a) No claim may be submitted to arbitration: (i) for a breach of an investment authorization under Article 10.16.1(a)(i)(B) or Article 10.16.1(b)(i)(B), or (ii) for a 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. (b) . . . ."). *See* also Exhibit CWS-12, Herrera Statement at para. 28 (*citing* Exhibit CE-1064, U.S.-Andean FTA Draft, November 23, 2004, at p. 18, and Exhibit CE-1083, U.S.-Andean FTA Draft, December 12, 2005, at pp. 16-17).

[1918] Exhibit CWS-12, Herrera Statement at para. 28 (*citing* Exhibit CE-1077, MINCETUR, Round X Summary (Guayaquil, June 6-10, 2005)).

proposed by the US (but it includes a proposal on the selection of a forum for violations of Section A and not investment agreements). . . . Regarding the exclusion of the forum for Investment Agreements, the US had proposed a text that included terminology that was not satisfactory to Peru. They agreed to amend it favorably for Peru."[1919] But, these statements do not indicate that Perú intended Article 10.18.4 to bar claims only if they alleged the exact same breach in the exact same legal form, because (i) the first sentence suggests that the language proposed by the United States that was purportedly accepted by Perú does not pertain to forum-selection for claims of breach of an investment agreement at all ("Peru accepts the package as proposed by the US (but it includes a proposal on the selection of a forum for violations of Section A and not investment agreements)."); and (ii) they do not specify what "terminology" was at issue that was amended favorably for Perú, and whether that terminology related to the fork-in-the-road issue debated here.

c) Similarly, none of the e-mail communications or the statements contained therein cited by Mr. Herrera indicate that the Peruvian delegation understood that Article 10.18.4 bars only claims of "identical" breaches of an investment agreement, much less with the particular meaning of "identical" that Mr. Herrera alleges here.[1920] For example, Mr. Herrera cites to this statement in an email dated May 12, 2005: "Under that proposed text package, the United States asked the Andean parties to drop their brackets on several provisions in exchange for the following

[1919] Exhibit CWS-12, Herrera Statement at para. 28 (*citing* Exhibit CE-1077, MINCETUR, Round X Summary (Guayaquil, June 6-10, 2005), at p. 22).

[1920] *See* Exhibit CWS-12, Herrera Statement at para. 28 (*citing* Exhibit CE-1067, Email from D. Weiner to C. Herrera, January 14, 2005 ("We may be able to offer some flexibility with respect to the procedures applicable to forum selection – e.g., the choice of domestic court vs. investor-state arbitration."); Exhibit CE-1075, Email from David Weiner to Carlos Herrera *et. al,* May 12, 2005 ("Under that proposed text package, the United States asked the Andean parties to drop their brackets on several provisions in exchange for the following items: . . . an exclusive forum-selection clause for Section A claims" and that "Peru agreed to drop its brackets on the provisions in the attached document on April 22."); Exhibit CE-1080, Email from David Weiner to Carlos Herrera *et. al.,* November 9, 2005 ("I am concerned about the two 'precisiones' in your message, however. It was our understanding, based upon our telephone discussion two weeks ago, that Peru was willing to abandon the Andean investment agreement brackets and close the investment chapter in exchange for acceptable U.S. proposals on six issues: juridical stability agreements, exclusive forum selection ('forks'), the first paragraph of the Expropriation Annex, the Maffezine footnote, and two other issues that we have not yet resolved with Colombia and Ecuador but in which Peru has an interest: capital controls and public debt. In the message below, you appear to be adding new requests to this package. We cannot agree to either proposal.")).

items: . . . an exclusive forum-selection clause for Section A claims . . . ."[1921] However, this statement appears to relate to an exclusive forum-selection provision for claims of breach of the TPA (*i.e.*, "Section A" claims, referring to the substantive legal protections set out in Section A of the investment Chapter, which is different from claims for breach of an investment agreement at issue here). That proposal, Mr. Herrera explained, "became Annex 10-G of the TPA"[1922] (not Article 10.18.4 at issue here).

844. *Third*, contrary to Claimant's, Mr. Sampliner's, and Mr. Herrera's assertions, contemporaneous evidence from the TPA negotiations shows that Perú did not intend to limit Article 10.18.4 to apply to claims of the "exact same breach."[1923] Rather, Perú understood Article 10.18.4 to exclude the same dispute previously submitted for resolution to "an administrative tribunal or court of [Perú], and any other binding dispute settlement procedure," such that if the dispute that determines the outcome of a claimant's arbitration claim was previously submitted to any of the aforementioned fora, then that dispute could not be submitted to arbitration. In other words, the Peruvian state did not wish to defend itself twice against a claim grounded in the same dispute. Notably, Respondent's interpretation is consistent with the TPA Parties' intent for Article 10.18.4, as the U.S. government stated in its non-disputing party submission filed in *Latam Hydro, LLC, CH Mamacocha S.R.L. v. Perú*, that "[t]hese provisions [Article 10.18.4 of the TPA] further underscore the Parties' intent to avoid issues of potentially inconsistent decisions and double recovery."[1924]

845. Indeed, contemporaneous documents show that Perú understood Article 10.18.4 of the TPA to preclude re-submission of a dispute that was submitted previously to other dispute resolution fora. According to the "Opinion on the Free Trade Agreement with the United States of America" dated June 1, 2006, prepared by the Directorate General for International Economic, Competition and Private Investment Affairs (an agency within the MEF): "Dispute settlement: . . . [I]t should be noted that the [investment] chapter includes the requirement for the investor to opt, from the outset and in an exclusionary and definitive manner, for a forum for the resolution

[1921] Exhibit CWS-12, Herrera Statement at para. 28 (*citing* Exhibit CE-1075, Email from David Weiner to Carlos Herrera *et. al,* May 12, 2005) (emphasis added).

[1922] Exhibit CWS-12, Herrera Statement at para. 28.

[1923] Exhibit CWS-12, Herrera Statement at para. 29. *See* Claimant's Reply at para. 252; Exhibit CER-11, Sampliner Report at para. 35.

[1924] Exhibit RA-174, *Latam Hydro LLC, CH Mamacocha S.R.L. v. Republic of Peru*, ICSID Case No. ARB/19/28, Submission of the United States of America, November 19, 2021, at n.10.

of the particular **dispute** (no "U-turn" from one forum to another) . . . ."[1925] This document shows that the Peruvian government understood that the dispute settlement procedures under Chapter Ten of the TPA, including those for alleged breach of an investment agreement, require that the forum chosen by the investor to resolve its "dispute" to be "exclusive," and that the choice is "definitive" such that the investor cannot "U-turn" from its chosen forum.[1926]

846. Another MEF document dated July 12, 2005 prepared for the negotiations with the U.S. also shows that the Peruvian government intended "**disputes** arising out of breaches of investment agreements" to be subject to an exclusive forum.[1927] Indeed, that same intent is also expressed in a MINCETUR summary related to the eighth round of the U.S.-Andean FTA negotiation dated March 2005 (a document also relied upon by Claimant and cited by Mr. Herrera), which provides:

> Exclusive and Final Election of Forum
>
> Regarding this issue, all three Andean countries confirmed their position to the effect that the election of forum made by the investor to submit the **controversy** should be exclusive both in cases of direct violation of the disciplines contained in Section A and in those cases where these violations clashed with the so-called "**investment agreements**."[1928]

847. These contemporaneous documents clearly contradict the claims made by Claimant, Mr. Sampliner, and Mr. Herrera about Perú's alleged intent regarding Article 10.18.4, *i.e.*, that the Peruvian delegation understood that Article 10.18.4 applies only to identically-framed claims alleging the "exact same breach of an investment agreement."[1929] Thus, Perú's interpretation that Article 10.18.4 bars submission of the same dispute underlying a claim of alleged breach of an investment agreement that was previously submitted to "an administrative

---

[1925] Exhibit RE-336, MEF, Report No. 2006-EF/67, "Opinion on the Free Trade Agreement with the United States of America," June 1, 2006, at p. 16 ("*Solución de controversias: . . . debe resaltarse que se ha incluido en el capítulo la exigencia al inversionista de optar, desde un inicio y de manera excluyente y definitiva, por un foro de solución de* ***la controversia*** *particular (no retorno en 'U' de un foro a otro.*") (emphasis added).

[1926] Exhibit RE-336, MEF, Report No. 2006-EF/67, "Opinion on the Free Trade Agreement with the United States of America," June 1, 2006, at p. 16.

[1927] Exhibit RE-337, MEF's Internal Free Trade Agreement Matrix, July 12, 2005 ("Include the aforementioned Annex, in additional to language in the chapter that establishes forum exclusion for disputes arising out of breaches of investment agreements.") ("*Inclusión de Anexo mencionado, además de un texto en el capítulo que establezca la exclusión de foro para* ***controversias*** *que surjan de violaciones de acuerdos de inversión.*") (emphasis added).

[1928] Claimant's Reply at para. 257 (*citing* Exhibit CWS-12, Herrera Statement at para. 31 (*citing* Exhibit CE-1073, MINCETUR, Round VIII Summary (Washington, 14-18 March 2005), at p. 14) (emphasis added).

[1929] Exhibit CWS-12, Herrera Statement at para. 29. *See* Claimant's Reply at para. 252; Exhibit CER-11, Sampliner Report at para. 35.

tribunal or court of the respondent, or any other dispute settlement procedures" is entirely consistent with Perú's position when it negotiated the TPA.

848. The facts in this case are clear: SMCV definitively elected to submit its claims to SUNAT's Claims division and the Tax Tribunal (*i.e.*, to administrative tribunals and binding dispute resolution procedures under Peruvian law) to challenge SUNAT's Royalty and Tax Assessments under the 1998 Stabilization Agreement. Once SMCV did so, Article 10.18.4 of the TPA prohibits SMCV from submitting those same claims (through Claimant) to this Tribunal. Claimant may not submit (on behalf of SMCV) claims that SUNAT's Assessments breached the 1998 Stabilization Agreement, and the Tribunal lacks jurisdiction over these claims.

2. Even If the Tribunal Were to Find SUNAT's Claims Division and Tax Tribunal Do Not Constitute an "Administrative Tribunal" or "Binding Dispute Settlement Procedure," SMCV Has Previously Submitted to Perú's Courts the Same Breaches of the 1998 Stabilization Agreement that It Alleges in These Proceedings

849. 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" under Article 10.18.4 (it should not), Claimant's claims of alleged breaches of the 1998 Stabilization Agreement submitted before this Tribunal 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.

850. For example, in its appeal before the Supreme Court regarding the 2006-2007 Royalty Assessment, SMCV alleged that the SUNAT Assessment (and the Tax Tribunal's decision that affirmed that Assessment) was invalid because:

> those administrative decisions have violated the clauses of the Agreement for Promotion and Guarantee of Investments that CERRO VERDE entered into with the Peruvian State on February 13, 1998 (the "Stability Agreement") [*i.e.*, the 1998 Stabilization Agreement].[1930]

SMCV's appeals to the Supreme Court (for the 2008 Royalty Assessment), and to the Superior Court of Lima (for the 2006-2007 Royalty Assessment) also contain that same alleged breach.[1931]

[1930] Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016, at p. 1 (emphasis added).

[1931] *See* Exhibit CE-697, SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment), August 9, 2017, at para. 1.1 ("In the current proceedings, CERRO VERDE has been challenging the

851. Claimant has strategically avoided presenting in these proceedings claims for any assessments that were submitted to the Peruvian courts. But, that does not alter the fact that the essence of Claimant's claims of alleged breaches of the Agreement submitted to the courts is the same as those submitted in these proceedings, *i.e.*, SUNAT inappropriately applied assessments against SMCV's Concentrator Project because SUNAT determined that that Project fell outside of the scope of the 1998 Stabilization Agreement, even if the claims here concern the application of that alleged breach to different measures (*e.g.*, other Royalty Assessments, Tax Assessments). Critically, the question of whether the Concentrator Project is outside of the scope of the Agreement has already been decided (repeatedly) by the Peruvian courts, which held that the Concentrator Project fell outside of the scope of the Agreement. The key for Article 10.18.4 is whether "the same alleged breach" has been submitted to a "court of the respondent." Here, SMCV has submitted the same alleged breach of the 1998 Stabilization Agreement to the Peruvian courts as it has in these proceedings. Accordingly, Claimant cannot re-submit (on SMCV's behalf) those same claims to this Tribunal under the TPA.

852. To be clear, Claimant's challenges to SUNAT's Assessments in this arbitration concern the correct interpretation of the scope of the 1998 Stabilization Agreement, which has already been decided by Peruvian courts as just discussed, as well as SUNAT's Claims Division and the Tax Tribunal as discussed in Section III.D.1 above. Claimant's attempt to differentiate the claims submitted to these arbitral proceedings from the claims submitted to the Peruvian fora by asserting that the latter claims do not concern the interpretation of the scope of the Agreement, but rather the validity of SUNAT's Assessments,[1932] is untenable. In order to decide the validity of SUNAT's Assessments, the Peruvian fora necessarily had to determine the scope of the Agreement (*i.e.*, whether or not the Concentrator Project is covered by the Agreement), which is the very same question Claimant has submitted to this Tribunal. As demonstrated in Table 4 and as just discussed above, the Peruvian courts, the Tax Tribunal, and SUNAT's Claims

validity of Tax Court Resolution No 08997-10-2013, and those of SUNAT, affirmed by the former, since those administrative resolutions have violated the legal framework applicable to Stability Agreements for the mining industry and the clauses of the Agreement for Promotion and Guarantee of Investments that CERRO VERDE entered into with the Peruvian State on February 13, 1998 (the 'Stability Agreement').") (emphasis added); Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016, at para. 1.1 ("In these proceedings, CERRO VERDE is challenging the validity of Tax Court Resolution No 08997-10-2013, as well as the resolutions issued by SUNAT, confirmed by the Tax Court, since those administrative resolutions are in breach of the laws and regulations applicable to Stability Agreements for the mining sector and the clauses of the Investment Guarantees and Promotion Measures Agreement that CERRO VERDE entered into with the Peruvian State on February 13, 1998 (hereinafter, the 'Stability Agreement').") (emphasis added).

[1932] *See* Claimant's Reply at para. 242.

Division have all—on many occasions—reviewed the scope of the Agreement and concluded that the Concentrator Project falls outside the Agreement's scope. Claimant cannot credibly claim otherwise.

853. In sum, Claimant's attempt to re-submit to this Tribunal the same claims previously submitted to—and decided by—the Peruvian courts, the Tax Tribunal, and SUNAT's Claims Division must fail in light of the restrictions to the Tribunal's jurisdiction provided in Article 10.18.4 of the TPA.

E. CLAIMANT'S CLAIMS (ON BEHALF OF SMCV) OF ALLEGED BREACHES OF THE 1998 STABILIZATION AGREEMENT ARE OUTSIDE THE TRIBUNAL'S JURISDICTION, BECAUSE CLAIMANT HAS NOT PROVEN THAT IT RELIED ON THE 1998 STABILIZATION AGREEMENT WHEN IT ESTABLISHED OR ACQUIRED ITS COVERED INVESTMENTS

854. Perú explained in its Counter-Memorial that the Tribunal lacks jurisdiction over Claimant's claims of alleged breaches of the 1998 Stabilization Agreement, because Claimant failed to show that it relied on that Agreement when it acquired its covered investments, as required under Article 10.16.1 of the TPA.[1933] Article 10.16 (entitled "Submission of a Claim to Arbitration"[1934]) sets the conditions under which a covered investor (here, Freeport) may submit a claim related to its covered investments (here, SMCV, the so-called "Cerro Verde production unit," and the "Mining and Beneficiation Concessions"[1935]) to arbitration under the TPA.

855. Article 10.16.1(b) provides, in pertinent 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 [("Investment")],
>
> (B) an investment authorization, or
>
> (C) an investment agreement;

[1933] *See* Respondent's Counter-Memorial at Section III.D.

[1934] Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.

[1935] Claimant's Notice of Arbitration at para. 93.

> 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** that was established or acquired, or sought to be established or acquired, **in reliance on the relevant investment agreement**.[1936]

856. Article 10.16.1 provides that, for a claimant (Freeport) to submit a claim of breach of an investment agreement on behalf of an enterprise that it owns or controls (SMCV), two requirements must be met: (i) the subject matter of the claim and the claimed damages must directly relate to the claimant's (Freeport's) covered investments (SMCV, the so-called "Cerro Verde production unit," and the "Mining and Beneficiation Concessions"[1937]); and (ii) the claimant (Freeport) must have relied on the investment agreement when it established or acquired the covered investment.[1938] Notably, under Article 10.16.1, a claimant's reliance is required only for submission of a claim of breach of an investment agreement, not for claims of breach of the TPA or of an investment authorization. As Perú explained in its Counter-Memorial, this distinction reflects the TPA Parties' deliberate intent in requiring a claimant's reliance on the investment agreement for which it is submitting a claim, regardless of whether it is bringing a claim on its own behalf or on behalf of an enterprise.[1939] Such a requirement is consistent with the definition of "investment agreement" under Article 10.28 of the TPA, which likewise requires reliance on the agreement when the investor acquired its covered investments.[1940] Accordingly, in order for the 1998 Stabilization Agreement to be considered an "investment agreement" under the TPA in the first place, Claimant must demonstrate that it relied on that Agreement in establishing or acquiring its covered investments. Thus, both for the purpose of demonstrating that the 1998 Stabilization Agreement is an "investment agreement" under the TPA and for the purpose of bringing a claim for breach of that Agreement in these

[1936] Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1 (emphasis added).

[1937] Claimant's Notice of Arbitration at para. 93.

[1938] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1. *See also* Respondent's Counter-Memorial at para. 519.

[1939] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1. *See also* Respondent's Counter-Memorial at para. 521.

[1940] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.28. *See also* Respondent's Counter-Memorial at para. 523.

arbitral proceedings, Claimant must show that it relied on the 1998 Stabilization Agreement when it established or acquired its covered investment. This, Claimant has not shown.[1941]

857. As Perú demonstrated in its Counter-Memorial and summarizes below, Claimant failed to prove that it relied on the purported investment agreement (the 1998 Stabilization Agreement) when it acquired its covered investments through its acquisition of Phelps Dodge on March 19, 2007.[1942] Not only did Claimant fail to submit any evidence to prove its reliance on the 1998 Stabilization Agreement when it established its investments, but instead there exists evidence, including industry reports and public statements made by Claimant's own executives, suggesting that Claimant likely did not rely on that Agreement when it acquired Phelps Dodge. That evidence shows that Claimant's acquisition of the entirety of Phelps Dodge, then the world's second largest copper producer,[1943] was driven by the motive to "transform FCX [Freeport] into the world's largest publicly traded copper producer,"[1944] as the merger between Claimant and Phelps Dodge would "make it [Freeport] the world's largest publicly traded copper

[1941] *See* Respondent's Counter-Memorial at para. 523.

[1942] *See* Respondent's Counter-Memorial at paras. 526-35.

[1943] *See*, *e.g.*, Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, "Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune," *The New York Times*, November 19, 2006.

[1944] Exhibit RE-110, "Freeport-McMoRan Copper & Gold Inc. and Phelps Dodge Corp. Shareholders Approve Acquisition," March 14, 2007, *available at* https://investors.fcx.com/investors/news-releases/news-release-details/2007/FCX-and-Phelps-Dodge-Corp-Shareholders-Approve-Acquisition/default.aspx ("We are pleased with the approval from shareholders which will allow us to complete the acquisition of Phelps Dodge. This is an exciting time for our company as we transform FCX into the world's largest publicly traded copper producer.") (emphasis added); *see also* Exhibit CE-563, Steve James, "Freeport Acquires Phelps Dodge, Launches Offering," *Reuters*, March 19, 2007 ("Freeport-McMoRan Copper & Gold Inc. (FCX.N) on Monday completed its $25.9 billion acquisition of Phelps Dodge Corp. PD.N—one of the most famous names in U.S. mining history—to form the world's largest publicly traded copper company.") (emphasis added); Exhibit RE-111, Associated Press, "Freeport-McMoRan's Acquires Phelps Dodge, Becomes World's Largest Publicly-Traded Copper Company," *Fox News*, January 13, 2015, *available at* https://www.foxnews.com/story/freeport-mcmorans-acquires-phelps-dodge-becomes-worlds-largest-publicly-traded-copper-company ("[T]he companies say the combination will make it the world's largest publicly traded copper company—and the largest metals and mining company based in North America— . . . . This is a competitive, global marketplace in which there is a number of significant producers," [Mr. Richard Adkerson] said. We will be a large company, but not anything like one that will cause any concerns.") (emphasis added); Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, "Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune," *The New York Times*, November 19, 2006 ("Like companies involved in other mining mergers, Freeport-McMoRan promoted the idea that increased size has become an important competitive factor in the mining industry.") (emphasis added); Exhibit RE-109, "Freeport-McMoRan to Buy Phelps Dodge for $25.9B," *Reliable Plant*, *available at* https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-$259b ("This transaction combines two leading mining companies to form a strong industry leader at a time when we see significant long-term opportunities in our industry . . . .") (emphasis added); Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, "Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune," *The New York Times*, November 19, 2006 ("Like companies involved in other mining mergers, Freeport-McMoRan promoted the idea that increased size has become an important competitive factor in the mining industry.") (emphasis added).

company—and the largest metals and mining company based in North America."[1945] This evidence, together with Freeport's failure to present any evidence to support its alleged reliance on the 1998 Stabilization Agreement when it acquired Phelps Dodge, shows that it is far more likely that Freeport would have purchased Phelps Dodge and thereby acquired its investments in Perú regardless of whether the Agreement existed or was potentially applicable to the Concentrator Project.[1946]

858. This reliance is a clear jurisdictional prerequisite—and it is Claimant's burden to prove that it meets the requirement. Because Freeport failed to prove that it relied on the 1998 Stabilization Agreement when it acquired its covered investments, as required under Article 10.16.1, the Tribunal has no jurisdiction to hear Claimant's claims (submitted on SMCV's behalf) of alleged breaches of the Agreement.

859. In its Reply, Claimant agrees that reliance on the purported investment agreement (1998 Stabilization Agreement) is required in order to submit a claim of breach of an investment agreement under Article 10.16.1 of the TPA, but it argues that the entity who relied on the agreement need not be the claimant, *i.e.*, Freeport, but that the reliance instead can (somehow) rest with other entities who are not a claimant in this arbitration, specifically, SMCV and Phelps Dodge.[1947] *First*, Claimant asserts that SMCV's reliance on the 1998 Stabilization Agreement is sufficient for purposes of Article 10.16.1 because, according to Claimant, Article 10.16.1 dictates that in a situation where a claimant is submitting a claim of breach of an investment agreement on behalf of an enterprise that it owns or controls (*i.e.*, under Article 10.16.1(b)(i)(C)), Claimant need only show that the enterprise on whose behalf it is submitting a claim (SMCV) relied on the investment agreement when it (SMCV) acquired its (SMCV's) covered investments, even if Claimant had no involvement at all at the time.[1948] Starting from that premise, Claimant contends that SMCV relied on the 1998 Stabilization Agreement when it invested in the Concentrator Project, and thus, the Treaty's reliance requirement is met.[1949] *Second*, Claimant asserts that even if the situation under Article 10.16.1(b)(i)(C) requires the claimant's reliance,

[1945] Exhibit RE-111, Associated Press, "Freeport-McMoRan's Acquires Phelps Dodge, Becomes World's Largest Publicly-Traded Copper Company," *Fox News*, January 13, 2015, *available at* https://www.foxnews.com/story/freeport-mcmorans-acquires-phelps-dodge-becomes-worlds-largest-publicly-traded-copper-company. *See also* Exhibit RE-109, "Freeport-McMoRan to Buy Phelps Dodge for $25.9B," *Reliable Plant*, *available at* https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-$259b.

[1946] *See* Respondent's Counter-Memorial at para. 534.

[1947] *See* Claimant's Reply at para. 276.

[1948] *See* Claimant's Reply at paras. 277-79.

[1949] *See* Claimant's Reply at paras. 276, 280.

Freeport is entitled to "invoke the reliance of its predecessor-in-interest, Phelps Dodge," because, according to Claimant, it inherited Phelps Dodge's legal interests as a result of its acquisition of Phelps Dodge.[1950] Each of Claimant's assertions must fail for the reasons discussed below.

1. To Submit a Claim of Breach of an Investment Agreement, Article 10.16.1 Requires a Claimant's Reliance on That Agreement When It Established Or Acquired Its Covered Investment(s), Not Reliance By the Enterprise For Whose Behalf the Claimant Submits a Claim

860. Contrary to Claimant's interpretation, Article 10.16.1 must be read to require a claimant's reliance on an investment agreement when it established or acquired its covered investment if the claimant wishes to bring a claim of breach of the agreement, whether on its own behalf or on behalf of an enterprise it owns or controls. As discussed below, Perú's interpretation of Article 10.16.1 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.

861. *First*, by its plain terms, Article 10.16.1 provides that the reliance on an investment agreement must relate to the claimant's (Freeport's) acquisition of its covered investments. Requiring reliance by the claimant, specifically, makes sense, because (i) Article 10.16, entitled "Submission of a Claim to Arbitration,"[1951] sets the specific conditions under which a claimant—not its covered investment on whose behalf it is asserting a claim (SMCV), nor its predecessor (Phelps Dodge), neither of which are claimants in this arbitration—may submit a claim to arbitration under the TPA; (ii) the TPA, under Article 10.16.1, only permits the claimant (not its investment) to submit an investment dispute, including for breach of an investment agreement, whether on its own behalf or on behalf of the enterprise it owns or controls;[1952] and (iii) the 2004 U.S. Model BIT (the model BIT on which, Claimant admits, the TPA is based[1953]), under Article 24.1 (the provision equivalent to Article 10.16.1 of the TPA[1954]),

[1950] *See* Claimant's Reply at para. 276. *See also id*. at 285.

[1951] Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.

[1952] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1 ("In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim . . .; and (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 . . . .").

[1953] *See* Claimant's Reply at para. 267.

[1954] *See* Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 24(1).

likewise permits only the claimant (not its investment) to submit a claim, either on its own behalf or on behalf of the enterprise it owns or controls.[1955]

862. According to Vandevelde's *U.S. International Investment Agreements* (an authority on which Claimant itself relies in its Reply[1956]), Article 24.1 of the 2004 Model BIT "imposes [an] additional condition that the subject matter of the claim and the claimed damages 'directly related to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.'"[1957] It further explains that "investment agreements" are limited to "written agreements between an investor or a covered investment and a national authority of the host state upon which **the investor relies** in establishing an investment and that grants rights to the investor or covered investment . . . ."[1958] Thus, the reference to "reliance" in Article 10.16.1 for submission of a claim alleging breach of an investment agreement and in Article 10.28's definition of "investment agreement" must be read to require the reliance on an investment agreement by the claimant or investor when it establishes or acquires its covered investments. Claimant's assertion that the provision is satisfied by the reliance of the local enterprise on whose behalf a claimant is bringing a claim of breach of an investment agreement is plainly contradicted by the authority on which Claimant relies in its Reply.

863. Significantly, Claimant admitted that Respondent's interpretation of Article 10.16.1(b) is the correct interpretation of that provision, when it argued in its Notice of Arbitration and then again in its Memorial that it—Freeport—relied on the 1998 Stabilization Agreement when establishing or acquiring its covered investments.[1959] Claimant affirmatively asserted its own reliance on the Agreement on multiple occasions:

[1955] Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 24.1 ("In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim . . .; and (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 . . . .") (emphasis added). *See also* Exhibit RA-102, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), at pp. 595-96 ("9.2.7.1 Submitting a claim to arbitration. . . . . Section B grants to the 'claimant' the right to seek arbitration. . . . . Under the 2004 model, an investment dispute may be initiated only by the investor, not by the investment." (emphasis added)).

[1956] Exhibit CA-390, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), Appendix G.

[1957] Exhibit RA-102, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), at p. 599.

[1958] Exhibit RA-102, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), at p. 599 (emphasis added).

[1959] *See*, *e.g.*, Claimant's Notice of Arbitration at paras. 4, 106; Claimant's Memorial at para. 297.

- "Freeport and SMCV relied on the Stability Agreement and invested hundreds of millions of dollars to develop the Cerro Verde mine, ..."[1960]

- "Freeport and SMCV relied on the Stability Agreement 'in establishing or acquiring a covered investment.'"[1961]

- "Freeport relied on the Stability Agreement in acquiring SMCV's shares and Freeport and SMCV relied on the Stability Agreement in making their investments in the Cerro Verde mine including, among other investments, the Leaching and the Flotation Plant."[1962]

- "Freeport, through its predecessors in interest, 'relied' on the Stability Agreement when 'establishing or acquiring' its covered investment in SMCV and its covered investments in the Cerro Verde Mining Unit, ..."[1963]

864. Claimant would not have asserted its own reliance on the Agreement (repeatedly) if it, too, did not interpret Article 10.16.1(b)(i)(C) as requiring Claimant's reliance on the purported investment agreement when it acquired its covered investments in order for Claimant to bring a claim of breach of the Agreement (on behalf of SMCV). Claimant is only changing its argument now, and claiming in effect that all of those declarations of Freeport's own reliance were superfluous and/or incorrectly included in its submissions, after Perú pointed out in its Counter-Memorial that Claimant failed to submit any evidence to demonstrate Freeport's own reliance on the 1998 Stabilization Agreement when acquiring its investments.[1964] Because Claimant could not produce any evidence demonstrating its own reliance (either during the document production phase or in its Reply), it now argues that no reliance by Freeport needs to be proven. Only now does Claimant contend that it is sufficient that other entities relied on the 1998 Stabilization Agreement in order to satisfy the reliance requirement under Article 10.16.1(b)(i)(C), pointing to alleged reliance by SMCV (the enterprise on whose behalf Freeport is bringing a claim) and Phelps Dodge (Freeport's predecessor).

865. And, to make its new argument work—particularly its argument that SMCV's reliance is sufficient for purposes of Article 10.16.1(b)(i)(C)—Claimant has also changed the description of its covered investments from (a) SMCV, the "Cerro Verde production unit," and the "Mining and Beneficiation Concessions," in its earlier briefing to (b) "the Concentrator" in

[1960] Claimant's Notice of Arbitration at para. 4 (emphasis added).

[1961] Claimant's Notice of Arbitration at para. 106 (emphasis added).

[1962] Claimant's Notice of Arbitration at para. 106 (emphasis added).

[1963] Claimant's Memorial at para. 297 (emphasis added).

[1964] *See* Respondent's Counter-Memorial at paras. 527-30.

its Reply.[1965] The following statement from Claimant's Reply shows its new position: "The covered investment that SMCV [notably, not Claimant] established or acquired in reliance on the Stability Agreement is the Concentrator."[1966] Because of its strained reading of Article 10.16.1, Claimant can no longer name SMCV as its investment, or claim to have invested in the Cerro Verde mine, or say that it has an investment in the Concessions—because if it did so, it would have to admit that it (Freeport) did not "establish or acquire" any of those investments "in reliance on" the 1998 Stabilization Agreement. Claimant's attempt to back-track on its own assertions and original understanding of Article 10.16.1 is futile; more importantly, it confirms that Perú's interpretation of Article 10.16.1 is the natural and correct reading, as Claimant itself originally understood and agreed.

866. *Second*, there is no merit to Claimant's argument that, based on the construction of Article 10.28 (the provision in the TPA that defines "investment agreement"), the reliance requirement under Article 10.16.1 can be met by either the claimant or by the enterprise on whose behalf a claim of breach of that agreement is submitted. TPA Article 10.28 defines an "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, ..."[1967] In its Reply, Claimant first argues that, because the reference to "reliance" in Article 10.28 uses a disjunctive term "or" between "covered investment" and the "investor," there can exist "parallel investment agreements": one entered into between the government and the "covered investment," and another between the government and the "investor."[1968] Next, Claimant asserts that because the term "covered investment" includes *inter alia* an "enterprise,"[1969] and here the "enterprise" is SMCV, which happens to be a covered investment of the claimant (Freeport), the "parallel investment agreements" can be viewed as such: one entered into between the Peruvian government and SMCV, and another between the government

[1965] *Compare* Claimant's Notice of Arbitration at paras. 91 ("Freeport has a 'covered investment' as defined by the TPA, *i.e.*, SMCV and the Cerro Verde mine; . . . .") (emphasis added), and 93 ("Freeport indirectly 'owns or controls' SMCV, an 'enterprise' constituted under the laws of Peru. It also indirectly 'owns or controls' the Cerro Verde production unit in the province of Arequipa, Peru, and the Mining and Beneficiation Concessions.") (emphasis added), *with* Claimant's Reply at para. 280 ("The covered investment that SMCV established or acquired in reliance on the Stability Agreement is the Concentrator.") (emphasis added).

[1966] Claimant's Reply at para. 280.

[1967] Exhibit CA-10, U.S.-Perú TPA at Art. 10.28.

[1968] Claimant's Reply at para. 279. *See also id.* at 282.

[1969] Claimant's Reply at para. 279. *See also* id. at para. 280. *See also* Exhibit CA-10, U.S.-Perú TPA at Arts. 1.3, 10.28.

and Freeport.[1970] Because the phrase "covered investment that was established or acquired . . . in reliance on the relevant investment agreement" in Article 10.16.1 "mirrors" the definition of investment agreement in Article 10.28, Claimant argues that Article 10.16.1 should be read to correspond with the so-called parallel structure of investment agreements embedded in Article 10.28.[1971] According to Claimant, where a claim is brought on behalf of an enterprise (SMCV), then it is the enterprise's reliance (not the investor's) on the investment agreement that is necessary in order to allow a claimant to bring a claim on the enterprise's behalf for breach of the agreement.[1972] And, because Claimant asserts (now) that the covered investment in this arbitration is "the Concentrator"[1973] (rather than SMCV, the Cerro Verde mine, or the Mining and Beneficiation Concessions[1974]), the reliance requirement in Article 10.16.1, specifically Article 10.16.1(b)(i)(C) for claims of breach of an investment agreement brought on behalf of an enterprise that Claimant owns or controls, is satisfied if SMCV relied on the 1998 Stabilization Agreement when it established or acquired "the Concentrator."[1975]

867. Claimant's convoluted explanation for its interpretation of Article 10.16.1 is unavailing, because its interpretation cannot be reconciled with the plain text of Article 10.16.1. To be clear, the provision that controls a claimant's right to submit a claim under the TPA, including for breach of an investment agreement, is Article 10.16.1 (not Article 10.28). 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. They did not. Indeed, Claimant admits as much when it states that "[t]he final paragraph of Article 10.16.1, or the *chausette*, applies to both Article 10.16.1(a)(i)(C) [for claims submitted on the claimant's own behalf] and Article 10.16.1(b)(i)(C) [for claims submitted on behalf of the enterprise that the claimant owns or controls]."[1976] Even assuming *arguendo* that Article 10.28 contemplates investment agreements entered into either by the investor or the covered investment (as Claimant alleges), that proposition in no way dictates how the reliance

[1970] *See* Claimant's Reply at paras. 279-80.

[1971] Claimant's Reply at para. 283.

[1972] *See* Claimant's Reply at para. 283.

[1973] Claimant's Reply at para. 280.

[1974] Claimant's Notice of Arbitration at para. 93.

[1975] *See* Claimant's Reply at paras. 276, 283.

[1976] *See* Claimant's Reply at para. 283 (emphasis added).

requirement should be read in a separate provision (Article 10.16.1) that sets out the conditions under which only a claimant (and not the covered investment) may submit a claim of breach of an investment agreement under the TPA.

868. Even if the Tribunal were to accept Claimant's argument that Article 10.16.1(b)(i)(C) requires reliance only by the "covered investment" when the investment agreement is between a national authority of a Party and the covered investment (it should not), that does not help Claimant's case for several reasons. First of all, when SMCV (owned by Phelps Dodge at the time) purportedly relied on the 1998 Stabilization Agreement when it invested in "the Concentrator" (which Claimant now argues is the relevant covered investment[1977]) in October 2004,[1978] the TPA did not exist. The TPA entered into force only on February 1, 2009.[1979] Thus, before that date, SMCV was not (and could not be) a covered investment (at all) under the TPA, whether of Phelps Dodge or of Freeport.[1980] 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. Claimant's assertion that "[t]he covered investment that SMCV established or acquired in reliance on the Stability Agreement is the Concentrator"[1981] is, therefore, incorrect, because the Concentrator simply cannot be a "covered investment" under the TPA before the TPA's entry into force. Thus, contrary to Claimant's assertion, SMCV's purported reliance on the Agreement when it invested in the Concentrator cannot satisfy the reliance requirement under the TPA Article 10.16.1(b)(i)(C). (For the same reason, Phelps Dodge's purported reliance on the Agreement when it invested in the Concentrator cannot satisfy the reliance requirement under the TPA Article 10.16.1(b)(i)(C), because that investment also occurred before the TPA entered into force, as discussed in Section III.E.2 below).

869. The Tribunal does not need to go further, because there is no question that there can be no covered investment before the TPA entered into force, and thus, Claimant's argument that reliance by the covered investment (*i.e.*, SMCV, according to Claimant) can satisfy the reliance requirement under the TPA Article 10.16.1(b)(i)(C) must fail. However, to be

[1977] Claimant's Reply at para. 280.

[1978] *See* Claimant's Memorial at para. 84.

[1979] *See* Exhibit CA-19, United Nations Conference on Trade and Development - Division of Investment and Enterprise, Table of Peru – Treaties with Investment Provisions, February 28, 2020.

[1980] *See* Claimant's Memorial at paras. 84, 158.

[1981] Claimant's Reply at para. 280.

comprehensive, SMCV's purported reliance on the Agreement also cannot satisfy the reliance requirement under Article 10.16.1(b)(i)(C) for a second reason: neither SMCV nor the Concentrator were "covered investments" of Freeport under the TPA at the time when SMCV made its investment in the Concentrator purportedly in reliance of the 1998 Stabilization Agreement. SMCV (through its owner at the time, Phelps Dodge) decided to invest in the Concentrator on October 11, 2004 and completed construction of the Concentrator in the fourth quarter of 2006.[1982] Freeport acquired Phelps Dodge (through which it acquired SMCV) several months later in March 2007. The TPA defines a "covered investment" as "an investment . . . in its territory of an investor of another Party . . . ."[1983] Freeport (the investor of another Party, *i.e.*, the United States) did not acquire its covered investments in Perú until March 2007. Thus, it was not until that date that SMCV and the Concentrator obtained the status as Freeport's "covered investments" under the TPA. Thus, any investments purportedly established or acquired in reliance on the 1998 Stabilization Agreement before March 2007, 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," and SMCV's purported reliance on the Agreement in constructing the Concentrator would not bring Claimant's claim on behalf of SMCV regarding breaches of the 1998 Stabilization Agreement within the scope of Article 10.16.1 of the TPA.

870. According to Claimant and Mr. Sampliner, Perú's interpretation of limiting the source of reliance under Article 10.16.1 to a claimant "would mean that investment agreement claims on behalf of an enterprise would be limited to investments that the enterprise made after the investor acquired it" which, to Claimant and Mr. Sampliner, would be contrary to the United States' "objective[s] of providing broad access to ISDS for investment agreement claims and . . . promoting investment in foreign enterprises."[1984] Regardless of whatever generalized goal the U.S. government may have with respect to "broad" (or any other amorphous adjective) access to investor-state dispute settlement, a vague motivation cannot change or usurp the operation of the specific language in the TPA. Here, the TPA specifically provides that a claimant may only bring a claim for a breach of an investment agreement on behalf of an enterprise it owns or

[1982] Claimant's Reply at para. 101, n.467 (*citing* Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5) ("On October 11, 2004, the Phelps Dodge board of directors announced conditional approval for an $850 million expansion of the Cerro Verde mine)); Claimant's Memorial at paras. 112, 155. *See also* Exhibit CE-470, SMCV, Board of Directors Meeting Minutes, October 11, 2004.

[1983] Exhibit CA-10, U.S.-Perú TPA at Art. 1.3.

[1984] Claimant's Reply at para. 284.

controls if "the subject matter of the claim . . . directly relate[s] to the covered investment" that was established or acquired in reliance on the investment agreement.[1985]

871. Including the word "covered" before "investment" was intentional, as Vandevelde explains in *U.S. International Investment Agreements*. According to Vandevelde, the 1994 U.S. Model BIT (which was the predecessor to the 2004 U.S. Model BIT) added the word "covered" before the word "investment" throughout the model BIT "to make clear that investment disputes were those arising out of or relating to an alleged breach of a treaty right with respect to a covered investment, not investment generally . . . because the only rights conferred, created, or recognized by the treaty were those with respect to the covered investment."[1986] Again, therefore, Claimant's assertion is contradicted by the same authority on which it relies in its Reply.

872. *Third*, as discussed in paragraph 791 above, interpreting treaty provisions by relying on the treaty's preparatory work is prohibited under Article 32 of the VCLT, unless the text's ordinary meaning is unclear. Here, Article 10.16 sets the conditions under which a claimant may submit a claim under the TPA, and Article 10.16.1 requires a claimant's reliance on an investment agreement if the claimant wishes to submit a claim for breach of the agreement, whether on its own behalf or on behalf of the enterprise that it owns or controls.[1987] Such ordinary meaning of Article 10.16.1 is clear and reasonable, and thus, the reliance on the TPA's preparatory work by Claimant, Mr. Herrera, and Mr. Sampliner is barred under the VCLT. But even if the Tribunal were to consider the TPA's preparatory sources on which Claimant, Mr. Herrera, and Mr. Sampliner rely, they do not support their assertion that prohibiting the reliance requirement under Article 10.16.1(b)(i)(C) from being met by the covered investment would be inconsistent with the intent of the TPA Parties. In particular, Claimant and Mr. Sampliner attempt to support Claimant's claim by comparing Articles 10.16.1 and 10.28 of the TPA with the analogous provisions contained in the 2004 U.S. Model BIT, and by comparing the definition of "investment agreement" in the 1994 and the 2004 U.S. Model BITs.[1988] But, all that the

[1985] Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1 (emphasis added).

[1986] Exhibit CA-390, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), Appendix G, at p. 591 (emphasis added).

[1987] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1 (emphasis added); Exhibit CA-10, U.S.-Perú TPA, Article 10.16 (entitled "Submission of a Claim to Arbitration").

[1988] *See* Claimant's Reply at para. 284, n.1319 (comparing Exhibit CA-10, U.S.-Perú TPA at Art. 10.28 and Art. 10.16.1, with Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 1 and Art. 24.1), and n.1320 (comparing Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 1 with Exhibit CA-390, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), Appendix G, at Art. 1(h)).

comparisons show is the similarity in the construction of the relevant model provisions and the TPA provisions.[1989] Further, contrary to Claimant's suggestion, the provision in the 2004 Model BIT analogous to Article 10.16.1(b)(i)(C) of the TPA does not provide different treatment of the reliance requirement between a claim brought on a claimant's own behalf and a claim brought on behalf of the enterprise that the claimant owns or controls—both provisions contain identical *chausettes* that read: "a claimant may submit pursuant to subparagraph (a)(i)(C) [(on its own behalf)] or (b)(i)(C) [(on behalf of the enterprise that the claimant owns or controls)] 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 that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement."[1990]

873. In fact, the absence of different treatment for those claims in both the 2004 U.S. Model BIT and the TPA confirms the correctness of Perú's interpretation of Article 10.16.1—the claimant's reliance on the investment agreement when it acquired its covered investments is required, regardless of whether it is submitting a claim on its own behalf or on behalf of the enterprise it owns or controls.

[1989] *Compare* Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1 ("In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section A claim . . .; and (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 . . . 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 that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.") (emphasis added), *with* Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 24.1 ("In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant, on its own behalf, may submit to arbitration under this Section A claim . . .; and (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 . . . 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 that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.") (emphasis added); *compare* Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 1 ("investment agreement" means a written agreement between a national authority of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment . . . .") (emphasis added), *with* Exhibit CA-10, U.S.-Perú TPA at Art. 10.28 ("investment agreement" means 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 . . . .") (emphasis added), *and* Exhibit CA-390, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), Appendix G, at Art. 1(h) ("investment agreement" means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment.") (emphasis added).

[1990] Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1; Exhibit CA-375, 2004 U.S. Model BIT, 2004, at Art. 24.1 (emphasis added).

874. Claimant and Mr. Herrera also claim that the Peruvian delegation understood that an investor's reliance on the investment agreement is required only if it brought a claim on its own behalf (under Article 10.16.1(a)(i)(C)), whereas the enterprise's reliance is required if a claim were brought on its behalf (under Article 10.16.1(b)(i)(C)).[1991] However, none of the documents on which Claimant and Mr. Herrera rely in making this claim support their assertions regarding Perú's intent or understanding of Article 10.16.1:

a) First, Mr. Herrera cites to a MINCETUR summary of the final round of the Perú-U.S. negotiations of the TPA held on November 14-22, 2005 and December 5-7, 2005.[1992] Rather than supporting Claimant's and Mr. Herrera's interpretation of Article 10.16.1 of the TPA, however, the summary indicates that Respondent's interpretation is correct. The summary demonstrates the TPA Parties' understanding that it is the investor's reliance on the investment agreement that is required for it to be able to bring a claim alleging breach of that agreement:

> Investor-State Dispute Resolution Mechanism: A mechanism is included for the resolution of disputes between the State and an investor, ... This mechanism also applies, by extension, to breaches, by the State, of any commitment assumed in a joint manner with an investor to whom it has granted rights regarding the exploitation of natural resources, the provision of public utilities or the development of infrastructure (investment agreements). Under this concept, the mining and hydrocarbon concession contracts are included, as well as the contracts related to the concession of airports, ports and other infrastructure, and all contracts related to these contracts, **on which the investor relies** for the development of his investment.[1993]

b) Second, Mr. Herrera cites to a MINCETUR summary of the seventh round of negotiations for the U.S.-Andean FTA held on February 7-11, 2005.[1994] The document also fails to support Claimant's interpretation of Article 10.16.1 of the US-Perú TPA. The summary shows that provisions relating to the "Submission

[1991] *See* Claimant's Reply at para. 284.

[1992] *See* Claimant's Reply at para. 284 (*citing* Exhibit CWS-12, Herrera Statement at para. 37 (*citing* Exhibit CE-1082, MINCETUR, Round XIII Summary (Washington, 14-22 November, 5-7 December 2005), December 7, 2005)).

[1993] Exhibit CE-1082, MINCETUR, Round XIII Summary (Washington, 14-22 November, 5-7 December 2005), December 7, 2005, at p. 56 (emphasis added).

[1994] *See* Claimant's Reply at para. 284 (*citing* Exhibit CWS-12, Herrera Statement at para. 37 (*citing* Exhibit CE-1071, MINCETUR, Round VII Summary (Cartagena, 7-11 February 2005), February 11, 2005)).

of a Claim to Arbitration" were considered during the negotiations.[1995] But it also states that, with respect to such provisions, the position of the Andean states was to exclude from the scope of claims that could be submitted to arbitration, "violation of investment agreements and authorizations."[1996] This indicates that Perú was interested more in limiting the scope of (or even eliminating altogether) claims brought with respect to investment agreements, not in expanding such provisions.

c) Third, Mr. Herrera cites to an e-mail dated January 31, 2005.[1997] This email merely shows Mr. Herrera asking the U.S. delegation "[h]ow should the last sentence of [Article 10.16.1] (. . . 'in reliance on the relevant investment agreement') be interpreted?" Here again, the document Mr. Herrera cites in support of his interpretation of the TPA fails to do so. In fact, the document says nothing one way or the other regarding how Perú understood that the reliance requirement in Article 10.16.1 should be read.

875. In sum, because (i) the TPA only permits a claimant to submit an investment dispute, including for breach of an investment agreement, (ii) neither Article 10.16.1 nor the analogous provision in the U.S.'s 2004 Model BIT differentiate the reliance requirement between claims brought on a claimant's own behalf and claims brought on behalf of an enterprise, and (iii) the documents Claimant and its witness and expert cite in support of Claimant's interpretation of the reliance requirement in Article 10.16.1 not only do not support Claimant's position but, instead, support Respondent's position,[1998] it is clear that Article 10.16.1 must be

---

[1995] *See* Exhibit CE-1071, MINCETUR, Round VII Summary (Cartagena, 7-11 February 2005), February 11, 2005, at pp. 34-35, 37, 39, 40.

[1996] Exhibit CE-1071, MINCETUR, Round VII Summary (Cartagena, 7-11 February 2005), February 11, 2005, at p. 37.

[1997] *See* Claimant's Reply at para. 284 (*citing* Exhibit CWS-12, Herrera Statement at para. 37 (*citing* Exhibit CE-1069, Email from C. Herrera to D. Weiner re: Consultas, January 31, 2005)).

[1998] *See* Exhibit CE-1082, MINCETUR, Round XIII Summary (Washington, 14-22 November, 5-7 December 2005), December 7, 2005 ("Investor-State Dispute Resolution Mechanism: A mechanism is included for the resolution of disputes between the State and an investor, ... This mechanism also applies, by extension, to breaches, by the State, of any commitment assumed in . . . the development of infrastructure (investment agreements). Under this concept, the mining and hydrocarbon concession contracts are included, as well as the contracts related to the concession of airports, ports and other infrastructure, and all contracts related to these contracts, **on which the investor relies** for the development of his investment" (emphasis added)); Exhibit RA-102, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), at p. 599 (explaining that "investment agreements" are limited to "written agreements between an investor or a covered investment and a national authority of the host state upon which **the investor relies** in establishing an investment and that grants rights to the investor or covered investment . . . .") (emphasis added)).

read to require a claimant's (that is, the claimant's own) reliance on an investment agreement when it acquired its covered investments. Thus, Claimant's assertions that the reliance requirement under Article 10.16.1 can be met by the enterprise on whose behalf a claimant brings a claim for breach of an investment agreement must fail.

876. Moreover, Claimant's assertion that the reliance requirement under TPA Article 10.16.1(b)(i)(C) can be satisfied by the enterprise on whose behalf the claimant is submitting a claim suggests that there are no boundaries or time limits on when the enterprise could have relied on a contract when making its investment, and that contracts that were not "investment agreements" can become investment agreements just because a U.S. entity acquires shares or ownership in the enterprise. To illustrate, on Claimant's theory, a Peruvian entity (like SMCV) could enter into a contract with the Peruvian government some 20 years ago when, at the time (or in the next 20 years of the contract's operation), none of the contracting parties (especially the government actors) had any inkling that the contract was going to become an "investment agreement" under a given treaty, potentially bringing with it international responsibility and international dispute resolution for claims of breach. Then, when the Peruvian entity is acquired by a U.S. investor (like Freeport), who did not even rely on the contract when acquiring that Peruvian entity, the 20-year-old entirely domestic contract suddenly can be adjudicated in an investor-state arbitration under a treaty that came into effect sometime during the contract's operation (like the TPA) just because some 20 years ago a Peruvian entity relied on that contract. Such a wild expansion of the scope of investment dispute settlement mechanism to bring in not only contracts with the government on which the foreign investor may or may not have relied, but also every other contract that the enterprise may have entered into with the government decades earlier simply cannot be correct.

877. But even if the Tribunal were to agree with Claimant that the reliance requirement under Article 10.16.1(b)(i)(C) can be satisfied by reliance by the enterprise on whose behalf a claimant brings a claim for breach of an investment agreement (it should not), Claimant has failed to prove that SMCV actually relied on the 1998 Stabilization Agreement when it invested in the Concentrator Project, as discussed previously in Section II.C of the Perú's Counter-Memorial, and reiterated above in Section II.D. In particular, Claimant has not put on the record any evidence showing that SMCV performed adequate due diligence regarding the scope of the 1998 Stabilization Agreement before it invested in the Concentrator; it has also failed to put on the record any contemporaneous documentary evidence showing that the Peruvian government

confirmed SMCV's alleged understanding regarding the scope of the Agreement.[1999] Thus, Claimant's assertion in its Reply that Perú does not seriously contest that SMCV relied on the 1998 Stabilization Agreement in establishing the Concentrator[2000] has no merit—Perú has specifically disputed that claim.[2001]

2. Claimant Cannot Rely on Its Predecessor-In-Interest's Purported Reliance on the 1998 Stabilization Agreement in Making its Investment in the Concentrator Project In Order To Satisfy the Reliance Requirement under Article 10.16.1

878. Claimant argues, in the alternative, that if the Tribunal were to require a claimant's reliance to satisfy Article 10.1.16(b)(i)(C), Claimant (Freeport) still does not need to meet that requirement itself because it can invoke instead Phelps Dodge's reliance due to Phelps Dodge's status as claimant's predecessor.[2002] Claimant's interpretation fails because it is not supported by the text of Article 10.16.1 or investment arbitration jurisprudence. As discussed above, the only fair reading of Article 10.16.1 is to require a claimant's own reliance on the investment agreement—there is no suggestion in the text that a predecessor's reliance is an acceptable substitute. Moreover, such a rule would be incompatible with the Treaty's scope, which provides protections to U.S. and Peruvian investors (only). One need only imagine a fact pattern in which the (U.S.) claimant's predecessor were a non-U.S. national (*e.g.*, a Chinese company): that Chinese company would not have any protection under the U.S.-Perú TPA that it could sell or pass to the U.S. company in the corporate acquisition process. In that scenario, whether or not the Chinese predecessor relied on the contract with the Peruvian government when it established or acquired its investment would be irrelevant, because that reliance would not have given the Chinese company any rights under the US-Perú TPA.[2003] Here, purely by happenstance, the predecessor could have had relied on an investment agreement and claimed coverage under the US-Perú TPA (because Phelps Dodge was a U.S. company)—but Claimant's argument is not limited to or based on that coincidental continuity of nationality. Claimant argues that reliance can be inherited in all cases of corporate succession, which simply cannot be the case (as the Chinese scenario illustrates).

[1999] *See supra* at Section II.E.

[2000] Claimant's Reply at para. 283.

[2001] *See* Respondent's Counter-Memorial at Section II.C.3. *See also supra* at Section II.D.

[2002] *See* Claimant's Reply at paras. 276, 285.

[2003] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.1.1.

879. Claimant argues that it should be allowed to satisfy the reliance requirement under Article 10.16.1 of the TPA using Phelps Dodge's purported reliance because "corporate successors inherit all legal interests of their predecessors."[2004] In support of its assertion, Claimant cites to the *Renée Rose Levy de Levi v. Republic of Perú* award.[2005] Not only does Claimant's argument lack merit, its reliance on the *Levy* award is unavailing. The text in *Levy* that Claimant cites in support of its assertion that corporate successors inherit all legal interests of their predecessors provides that "the transmission of legal rights [of ownership] could occur without affecting protection of the investment under the [applicable treaty] provided that the other requirements of that treaty were met."[2006] The text is not relevant to this case. It discusses a party's ability to transfer a legal right, such as ownership, to a third party. It says nothing about a predecessor's ability to transfer a historical fact or a behavior—in this case, the predecessor's purported reliance on an agreement to make an investment. But even if Claimant could step in the shoes of Phelps Dodge's alleged reliance (it cannot), Claimant would still not meet the reliance requirements under Article 10.16.1 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 at least three years later in February 2009, as discussed in paragraph 869 above. 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, again, is before the TPA's entry into force.

880. Even if the Tribunal were to accept that Freeport could "inherit" its predecessor's reliance on the 1998 Stabilization Agreement to meet the reliance requirement under Article 10.16.1 (it should not), Claimant would still fail on factual grounds. Claimant has not proved that Phelps Dodge actually did rely on the Agreement when it decided to invest in the Concentrator, as discussed in Section II.C of Perú's Counter-Memorial, and reiterated above in Section II.D. Here too, Claimant's assertion that Perú does not seriously contest that Phelps Dodge relied on the Agreement in establishing the Concentrator[2007] is meritless—Perú

[2004] Claimant's Reply at para. 285.

[2005] *See* Claimant's Reply at para. 285, n.1326.

[2006] Claimant's Reply at para. 285 (*citing* Exhibit CA-404, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, February 26, 2014, at para. 145).

[2007] *See* Claimant's Reply at paras. 276, 285.

specifically disputed that claim in its Counter-Memorial and maintains that same objection here.[2008]

881. To be clear, by arguing in its Reply that SMCV's and/or Phelps Dodge's purported reliance is sufficient to meet the reliance requirement under Article 10.16.1, and by not even attempting to defend its earlier assertions that Freeport relied on the 1998 Stabilization Agreement when it acquired its covered investments, Claimant concedes that Freeport did not rely on the Agreement when it acquired its covered investments on March 19, 2007. Thus, the debate on whether or not Freeport relied on the Agreement when it acquired its covered investments must end here. Importantly, the lack of reliance on the Agreement by Freeport when it acquired its covered investments is fatal to Claimant's defenses—Freeport does not have a right to submit a claim, on behalf of SMCV, for breaches of the 1998 Stabilization Agreement pursuant to Article 10.16.1 of the TPA.

IV. LEGAL ARGUMENTS ON THE MERITS

882. To recall, Claimant raises two broad sets of claims in this arbitration: (1) on behalf of SMCV, that Perú breached the 1998 Stabilization Agreement, and (2) on its own behalf and that of SMCV, that Perú violated its fair and equitable treatment obligations in Article 10.5 of the TPA. As Respondent explained in its Counter-Memorial and explains again, below, neither claim has any merit.

A. PERÚ DID NOT BREACH THE 1998 STABILIZATION AGREEMENT

883. Claimant's (or SMCV's) breach of contract claims are all premised on alleged breach of the 1998 Stabilization Agreement between MINEM and SMCV. As an initial matter, as discussed in Section III, the Tribunal does not have jurisdiction to hear these claims.[2009] But even were that not the case, the claims must fail for at least two independent reasons.[2010]

[2008] *See* Respondent's Counter-Memorial at Section II.C.3. *See also supra* at Section II.E.

[2009] Of particular relevance to this claim, as discussed in in Section III.D of Respondent's Counter-Memorial and again in Section III.E, above, the Tribunal does not have jurisdiction over this claim because Article 10.16(1)(b)(i)(C) of the TPA allows a U.S. investor to bring a claim to investor-state arbitration on behalf of a Peruvian juridical person that the investor owns or controls for breach of an "investment agreement" provided that, *inter alia*, the covered investment was acquired "in reliance on the relevant investment agreement." Exhibit CA-10, U.S.-Perú TPA at Art. 10.16(1)(b)(i)(C). The claimed "covered investment" here is Claimant's (the U.S. person's) investment in SMCV (or, when Claimant is thinking about jurisdiction, in "the Concentrator"), and Claimant argues that the Stabilization Agreement is an "investment agreement." Thus, Claimant must prove that it relied on the Stabilization Agreement in making its investment in SMCV in 2007 in order for the Tribunal to have jurisdiction over the claim (brought on behalf of SMCV) that Perú breached the Stabilization Agreement it signed with SMCV. Because Claimant has failed to make this showing, the Tribunal lacks jurisdiction over this claim.

[2010] *See* Respondent's Counter-Memorial at paras. 537 *et seq.*

884. First, as already discussed in Section II.C, the 1998 Stabilization Agreement simply does not extend to the Concentrator Project and therefore Perú did not breach its obligations under the Agreement. However, the Tribunal does not even need to independently determine the correct Peruvian-law interpretation of the 1998 Stabilization Agreement because, second, as explained in Section II.A, Perú's highest courts—in cases initiated by SMCV—have already (and repeatedly) decided under Peruvian law that the Agreement does not extend to the Concentrator Project. Claimant—bringing this claim on behalf of SMCV—is collaterally estopped from asserting otherwise and re-litigating this issue. And, even were that not the case, the Tribunal must (or, at a minimum, should) respect the Peruvian Supreme Court's conclusions in deciding a question of Peruvian law.

885. Claimant raises a number of arguments in its Reply trying to salvage its breach of contract claims.[2011] As discussed below, these arguments are wholly without merit.

1. Perú Did Not Breach the Stabilization Agreement

886. Before delving too deeply into the legal deficiencies of Claimant's breach of contract claims, Respondent first notes that, as explained at length in Section II.C and throughout Respondent's pleadings, the 1998 Stabilization Agreement only applies to the investment project defined in the feasibility study—*i.e.*, the Leaching Project—and does not apply to the Concentrator Project. Perú's imposition of Royalty and Tax Assessments with respect to the Concentrator Project, therefore, did not violate the Agreement. To briefly summarize:

- On January 25, 1996, SMCV filed an application before the General Mining Directorate of MINEM to enter a 15-year agreement pursuant to Article 82 of the Mining Law,[2012] which was accompanied by the 1996 Feasibility Study.[2013] As explained in Section II.B.1, above, a feasibility study is not a mere technical or paperwork requirement to apply for a stabilization agreement; the feasibility study delimits the scope of the stability guarantees under the agreement. 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.

[2011] *See* Claimant's Reply at paras. 104 *et seq.*

[2012] *See* Respondent's Counter-Memorial at para. 76

[2013] *See* Respondent's Counter-Memorial at para. 76; *see also* Exhibit CE-9, Feasibility Study, Executive Summary, 1996.

- As explained in Section II.C.1.b, 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 Stabilization Agreement was exclusively for the expansion of SMCV's leaching facilities to increase the processing of secondary sulfides and production of copper cathodes.[2014] These documents did not outline, analyze, or approve any investments with respect to any type of concentrator plant.[2015]

- As explained in Section II.C.1.a, above, the language of the 1998 Stabilization Agreement confirms that it does not extend to the Concentrator Project:

    - Clause 1 of the 1998 Stabilization Agreement defines the scope and the purpose of the Agreement:[2016]

        - Clause 1.1 provides that SMCV requested a mining stabilization agreement "in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3 . . . 'The leaching project of Cerro Verde.'"[2017]

        - Clause 1.2 indicates that the investment was made based on the content of the Feasibility Study.[2018]

        - Clause 1.3 provides that SMCV made such investment "to improve the leaching of the secondary sulfides."[2019]

        - Nothing in the text of Clause 1 (or in any other clause of the Agreement) mentions any other future investment project, much less a future investment in a concentrator plant to process primary sulfide ore (a different type of copper ore) to produce copper concentrate (a different copper end product).[2020]

    - Clause 3 of the 1998 Stabilization Agreement is not relevant to analyzing whether the Agreement covered the Concentrator Project.[2021]

[2014] *See generally* Respondent's Counter-Memorial at Section II.B.3.a.

[2015] *See generally* Respondent's Counter-Memorial at Section II.B.3.a.

[2016] *See* Respondent's Counter-Memorial at para. 87.

[2017] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1 (emphasis added).

[2018] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.2.

[2019] Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.3 (emphasis added).

[2020] *See* Respondent's Counter-Memorial at para. 88.

[2021] *See* Respondent's Counter-Memorial at paras. 91.

- The first paragraph of Clause 3 of the Agreement provides that "[a]ccording 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."[2022] That paragraph—including the cross reference to Exhibit I—simply identifies the location where the Leaching Project should be executed.[2023]

- The second paragraph of Clause 3 provides that the fact that the Leaching Project is "circumscribed" to the Mining and Beneficiation Concession "does not prevent [SMCV] from incorporating other mining rights to the Cerro Verde Leaching Project, after approval by the Directorate General of Mining."[2024] Under Clause 3, SMCV was allowed to apply to incorporate additional mining rights in relation "to Cerro Verde's Leaching Project."[2025] However, this provision does not allow the Agreement to cover an entirely new and unrelated investment (such as the Concentrator Project), nor does it allow SMCV to bring new mining rights within the Leaching Project without the DGM's approval.

- Clauses 4, 5, 7, and 8 of the 1998 Stabilization Agreement are linked and limit the scope of the Agreement to the investment that was outlined in the investment plan attached to the 1996 Feasibility Study (*i.e.*, the Leaching Project).[2026]

  - Clause 4.1 provides that the investment plan, which was prepared and approved for the purposes of the "execution" of the Agreement, "forms an integral part of it."[2027]

  - Clause 4.2 provides that any change to that investment plan required prior approval from the General Mining Directorate.[2028]

  - Clause 4.3 outlines the main works that were contained in the investment plan. None of them referred to a concentrator plant to process primary sulfides and produce copper concentrate.[2029]

[2022] Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

[2023] Respondent's Counter-Memorial at para. 91; *see also* Exhibit RWS-3, First Tovar Statement at paras. 26-27; Exhibit RWS-4, First Bedoya Statement at paras. 39-41.

[2024] Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

[2025] *See* Respondent's Counter-Memorial at para. 93; *see also* Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

[2026] *See* Respondent's Counter-Memorial at para. 94.

[2027] Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.1 .

[2028] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.2.

[2029] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.3.

- Clause 5.1 provides that the execution of the investment plan required an approximate investment of US $237,517,000.[2030]

- Clause 7.1 provides that, upon completion of the investment plan, SMCV had to submit to the General Mining Directorate an affidavit and financial statements detailing the works and acquisitions that were done to complete the investment plan.[2031]

- Clause 7.2 provides that if there were any discrepancies between the information provided to the General Mining Directorate and the investment plan, and if SMCV failed to provide a reasonable explanation for such differences, then the benefits of the Agreement would be suspended.[2032] This provision makes clear that the stabilization guarantees are intended for the project defined in the investment plan—and only the project defined in the investment plan.

- Clause 8.1 provides that the stabilization guarantees would extend for 15 years, beginning from the completion of the investment—*i.e.*, the investment that was outlined in the investment plan.[2033] This was to ensure that the defined project can enjoy the benefits of the stabilization guarantees only after the specific investment that was approved was actually completed.

- Clauses 9 and 10 are essentially irrelevant to analyzing the scope of the 1998 Stabilization Agreement.[2034] Neither Clause 9 nor 10 of the Agreement mentions the Concentrator Project. Respondent's legal expert, Dr. Morales notes that (i) Clause 9 merely lists the benefits that SMCV may enjoy in relation to the "Investment in its Concession"[2035]; and (ii) Clause 10 limits the effects of the laws that are enacted after the date of approval of the 1996 Feasibility Study.[2036] Perú's Supreme Court has described Clauses 9 and 10 as follows:

  - Clause 9: "clause nine only outlines all the benefits that will be enjoyed by [SMCV] in relation to the 'Investment in its Concession.'"[2037]

[2030] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 5.1.

[2031] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 7.1.

[2032] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 7.2.

[2033] *See* Exhibit CE-12, 1998 Stabilization Agreement at Clause 8.1.

[2034] *See* Exhibit RER-2, First Morales Report at para. 61.

[2035] Exhibit RER-2, First Morales Report at para. 61.

[2036] *See* Exhibit RER-2, First Morales Report at para. 61.

[2037] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at para. 35, p. 34.

- Clause 10: "[C]lause 10 of the Stability Agreement only contains one rule limiting the effects that the legal regulations will have, which are issued after the approval date of the Feasibility Study of the 'Cerro Verde Leaching Project', but not so for those corresponding to the Investment Project which gave rise to the 'Primary Sulfur Plant.'"[2038]

887. In sum, the only plausible interpretation of the 1998 Stabilization 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. Perú, therefore, did not violate the Agreement by imposing the Tax and Royalty Assessments on the Concentrator Project. Respondent has already addressed Claimant's arguments to the contrary[2039] in Sections II.C and II.J, above, and will not repeat those points here.

2. The Peruvian Supreme Court Has Already Decided that the Stabilization Agreement Does Not Apply to the Concentrator Project

888. Claimant alleges that "Peru repeatedly breached its obligations under the [1998 Stabilization] Agreement" by failing to grant tax and administrative stability to the Concentrator Project.[2040] The question of whether Perú breached its obligations under the 1998 Stabilization Agreement turns on a legal issue—the scope of the Agreement; the Parties do not contest the relevant facts (*i.e.*, that Perú imposed the Royalty and Tax Assessments). Rather, the question is whether the imposition of those assessments violated the 1998 Stabilization Agreement, which depends upon the interpretation of the scope of that Agreement. The Parties also agree that the Agreement is governed by Peruvian law.[2041] So the question is, under Peruvian law, what is the proper interpretation of the Agreement—is it limited to the investment project defined in the Feasibility Study (which only discusses the Leaching Plant) or does it extend to the Concentrator Project?

889. As Respondent explained in its Counter-Memorial,[2042] and Section II.A, above, the Tribunal does not need to search far for the answer, because this is a question of Peruvian law that has been directly answered by the most authoritative source possible, the Supreme Court

[2038] Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at para. 37, p. 34.

[2039] *See* Claimant's Reply at paras. 120-29.

[2040] Claimant's Reply at para. 104.

[2041] *See* Claimant's Reply at para. 105.

[2042] *See* Respondent's Counter-Memorial at paras. 555 *et seq.*

of Perú. Interpreting and applying Peruvian law, including the Mining Law and its Regulations, to that Peruvian-law contract, Perú's highest court held that the stabilization guarantees in the 1998 Stabilization Agreement are limited to the investment project defined in the feasibility study (*i.e.*, the Leaching Plant) and do not extend to the Concentrator Project.[2043]

890. Specifically, as discussed in Section II.A.1, SMCV appealed the 2006-2007 and the 2008 Royalty Assessments before the Tax Tribunal, which confirmed both assessments,[2044] and then before the Peruvian judiciary:[2045]

891. *2008 Royalty Assessment*: The Superior Court (the applicable appellate court) agreed with SUNAT's interpretation of the law and the 1998 Stabilization Agreement, and held that the 2008 Royalty Assessment had been issued in accordance with Peruvian law.[2046] SMCV appealed that decision to the Peruvian Supreme Court. On the exact same issues that are before this Tribunal (*i.e.*, whether the 1998 Stabilization Agreement covered the Concentrator Project and whether Claimant's interpretation of the Mining Law, the Mining Regulations, and the Agreement is correct),[2047] the Supreme Court issued an 80-page judgment confirming, as a matter of Peruvian law, the propriety and legality of SUNAT's 2008 Royalty Assessment. The Supreme Court, thus, agreed with SUNAT, the Tax Tribunal, and the appellate court and held that the 1998 Stabilization Agreement did not cover the Concentrator Project, and that the Concentrator Project was properly subject to royalties.[2048]

892. *2006-2007 Royalty Assessment*: The Superior Court again agreed with SUNAT's position and held that the 1998 Stabilization Agreement covered only the Leaching Project (*i.e.*, it held that SMCV was required to pay royalties with respect to the Concentrator Project for the 2006-2007 fiscal year).[2049] SMCV appealed the Superior Court's judgment to the Supreme Court, but withdrew its appeal on June 27, 2020, before the Supreme Court could issue a

---

[2043] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017.

[2044] *See* Respondent's Counter-Memorial at Section II.G.2.

[2045] *See* Respondent's Counter-Memorial at Section II.H.

[2046] *See* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016.

[2047] *See* Exhibit RER-1, First Eguiguren Report at para. 100; Exhibit RER-2, First Morales Report at para. 87.

[2048] *See generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017; *see also* Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016.

[2049] *See generally* Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017 (this decision became the final judgment on the matter after SMCV withdrew its challenge before the Supreme Court).

decision.[2050] As a result, the 2006-2007 Superior Court Judgment became a final judgment (*sentencia firme*) on the matter.[2051]

893. In sum, the Supreme Court (and Superior Court) analyzed the issues of Peruvian law that SMCV pled—and that Claimant has now raised again before this Tribunal—and reached conclusions consistent with Respondent's position in this arbitration: that, under Peruvian law, mining stabilization agreements only cover specific projects, and that, applying the same law, the 1998 Stabilization Agreement did not cover the Concentrator Project. And because, under Peruvian law, the 1998 Stabilization Agreement did not cover the Concentrator Project, Perú's imposition of Royalty and Tax Assessments did not violate the 1998 Stabilization Agreement.

894. This is fatal to Claimant's (or SMCV's) breach of contract claims for two reasons that we discuss next. *First*, SMCV, on whose behalf Claimant brought these contract claims, initiated the cases leading to the Superior Court's and Supreme Court's decisions and litigated the issue thoroughly. SMCV (and Claimant) should therefore be collaterally estopped from now re-litigating this issue. *Second*, even if that were not the case, the Tribunal still must apply Peruvian law to determine the scope of the 1998 Stabilization Agreement—which, in this case, is found in the Peruvian Supreme Court's decision.

a. Claimant Is Barred by Collateral Estoppel from Re-Litigating the Scope of the 1998 Stabilization Agreement

895. As Respondent explained in its Counter-Memorial,[2052] collateral estoppel (also known as issue preclusion or issue estoppel) is the principle that a party cannot contest, in subsequent proceedings, an issue of fact or law that has already been distinctly raised and finally decided by a court of competent jurisdiction in earlier proceedings between the same parties (or their privies).[2053] Under the doctrine of collateral estoppel, "a question may not be re-litigated . . . if, in a prior proceeding: (a) it was distinctly 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

[2050] SMCV withdrew its appeal on June 27, 2020, and on October 7, 2020, the Supreme Court issued a resolution approving SMCV's withdrawal. *See* Exhibit CE-789, Supreme Court, Resolution Approving SMCV's Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment), October 7, 2020, at Sections 1 and 6 (First and Sixth).

[2051] *See* Exhibit CE-789, Supreme Court, Resolution Approving SMCV's Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment), October 7, 2020, at Section 6; Exhibit RER-6, Second Eguiguren Report at para. 6.

[2052] *See* Respondent's Counter-Memorial at para. 542.

[2053] *See, e.g.*, Exhibit RA-18, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (redacted), August 25, 2014 ("*Apotex Holdings v. United States*, Award"), at para. 7.17.

court or tribunal"[2054]; and (d) the current case involves the same parties or privies of those parties.

896. Here, collateral estoppel applies to the Superior Court and Supreme Court determinations that the Stabilization Agreement does not cover the Concentrator Plant. Specifically, in SMCV's challenge to the 2008 Royalty Assessment, the Superior Court held that "the contractual benefits arising from the Stability Agreement . . . cover exclusively and inclusively the investment made in a specific mining concession" and "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."[2055] Therefore, "the benefits of legal Stability Agreements should not be applied broadly to the other activities of the title holders of mining activities; consequently, the so-called Primary Sulfide Project [*i.e.*, the Concentrator Project] is not covered by the guarantees granted by such contract for promotion and guarantee of investment, since the project was implemented after having concluded the Stability Agreement with the State in 1998."[2056]

897. As noted above, the Peruvian Supreme Court affirmed the Superior Court's decision, concluding that the Stabilization Agreement was limited to the investment project detailed in the 1996 Feasibility Study (the Leaching Plant).[2057] This analysis was the focus of the Court's 80-page opinion and, quite obviously, it was central to the Court's judgment as to whether the 2008 Royalty Assessment was correct. In fact, the scope of the 1998 Stabilization Agreement (*i.e.*, whether it covered the Concentrator Project) was the determinative issue before the Supreme Court: If the Stabilization Agreement did not cover the Concentrator Project (as the Superior Court and Supreme Court held), then the 2008 Royalty Assessment was correct, and conversely, had the courts held that the Stabilization Agreement did cover the Concentrator Project, then the Assessment would have been incorrect.

[2054] Exhibit RA-19, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, at para. 7.1.1.

[2055] Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at p.10.

[2056] Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at p. 10.

[2057] *See, e.g.*, Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at pp. 26-27, 72.

898. As Respondent explained in its Counter-Memorial,[2058] all of the requirements for collateral estoppel are therefore met with respect to the issue of whether the 1998 Stabilization Agreement covered the Concentrator Project: (a) it was put directly at issue in the court proceedings (initiated by SMCV); (b) it was conclusively decided by the Peruvian Superior and Supreme Courts; (c) the issue was necessary to those courts' resolutions of the claims before them; and (d) the case was between SMCV (on whose behalf Claimant asserts the breach of contract claims here) and SUNAT (a Peruvian agency and privy of Respondent). Claimant does not contest these points. SMCV has already thoroughly litigated the issue of whether the Stabilization Agreement covered the Concentrator Project—and lost, repeatedly. Claimant, on SMCV's behalf, asks this Tribunal to ignore those decisions and give SMCV a second (or, more accurately, a third and fourth) bite at the apple.

899. Below, Respondent addresses Claimant's attempt to avoid the application of collateral estoppel here. However, Respondent first takes note of the arguments that Claimant does not make in its Reply: (i) Claimant does not argue that Respondent has in any way misstated the conditions for when collateral estoppel should apply; and (ii) critically, Claimant does not argue that those conditions are in any way absent here.[2059] As discussed below, Claimant principally argues that international tribunals should not, as a general matter, apply collateral estoppel with respect to domestic court decisions. But if the Tribunal disagrees on this point, Claimant has presented no argument that collateral estoppel would not apply here to bar re-litigation of the scope of the 1998 Stabilization Agreement (and thus Claimant's breach of contract claims, in turn, must fail).

900. Turning to the arguments that Claimant does present in its Reply: *First*, according to Claimant, "it is by no means settled that collateral estoppel is a general principle applicable in international arbitration proceedings . . . in part because the doctrine of collateral estoppel is simply not recognized in civil law jurisdictions."[2060] Claimant provides no further

---

[2058] *See* Respondent's Counter-Memorial at para. 546.

[2059] Claimant does argue that *res judicata* (or claim preclusion) is inapplicable here. *See* Claimant's Reply at paras. 113-14. But its sole argument is that the challenges to the royalty assessments have a different object and cause of action than Claimant's breach of contract claims. *See id*. Object and cause of action, however, are not conditions for collateral estoppel, as noted above.

[2060] Claimant's Reply at para. 107 (internal citations omitted). With respect to Claimant's distinction between common and civil law jurisdictions, Respondent notes that the ILA Final Report on *Res Judicata* considered that "for reasons of procedural efficiency and finality," issue estoppel "seem[s] to be acceptable on a worldwide basis" (and therefore endorsed its application in international arbitrations). Exhibit RA-20, Filip J.M. De Ly and Audley Sheppard, "ILA Final Report on Res Judicata and Arbitration*Seventy-second International Law Association

analysis or discussion, and, notably, does not actually argue that international arbitral tribunals should not, as a generally matter, apply the doctrine of collateral estoppel (Claimant merely questions how "settled" the doctrine is). But, contrary to Claimant's position, a number of the sources on which Claimant relies—and the sources on which Respondent relied (that Claimant largely ignored) show that international tribunals often apply the doctrine of collateral estoppel.

901. For instance, Claimant first cites to *Caratube v. Kazakhstan.*[2061] While that tribunal did initially state that it could not "follow the Respondent's allegation that 'the doctrine of collateral estoppel, also known as 'issue preclusion' or 'issue estoppel,' is a firmly established 'principle of law applicable in the international courts and tribunals,'" it then conducted an analysis of past arbitral decisions, the ILA Final Report on *Res Judicata* and the ICSID Arbitration Rules and determined that, "[b]ased on the foregoing, the Tribunal is prepared to accept that there may be room for applying the doctrine of collateral estoppel in investment arbitration."[2062] The *Caratube* tribunal then proceeded to perform an analysis of whether collateral estoppel was established in its case (and ultimately determined that it was not, on factual grounds, because the previous decision dealt with different issues).[2063] The *Caratube* tribunal certainly did not reject the possibility of applying collateral estoppel in international arbitration, as Claimant would like to do.

902. Claimant's reliance on the ILA Interim Report on *Res Judicata* is similarly misplaced, because that source notes that arbitral awards "effectively implement[] issue estoppel" under the ICC Rules (and similar provisions in other rules).[2064] Moreover, the ILA, in its final Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration, ultimately recommended that arbitral awards should have conclusive and preclusive effects in subsequent

---

Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006," in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at para. 56 (emphasis added).

[2061] *See* Claimant's Reply at para. 107, n.489.

[2062] Exhibit CA-414, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017 ("*Caratube v. Kazakhstan*, Award"), at paras. 459, 464 (emphasis added)

[2063] Exhibit CA-414, *Caratube v. Kazakhstan*, Award at paras. 465-75 (applying the same conditions for collateral estoppel that Respondent has applied here).

[2064] Exhibit CA-307, International Law Association, International Commercial Arbitration Committee, *Res Judicata and Arbitration*: Interim Report (ILA Berlin Conference 2004), at p. 26 (of PDF). And while the Interim Report did note that "[t]here is a debate as to whether arbitral tribunals can and should apply issue or collateral estoppel," it explained that "the answer may depend on the applicable law" because the Report was on international commercial arbitration, *see id.* at p. 29 (of PDF), and was not considering whether arbitral tribunals should apply collateral estoppel as a matter of public international law.

arbitral proceedings both as to "determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto" (Recommendation 4.1) and as to "issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award" (Recommendation 4.2).[2065] Recommendation 4.1 endorses the more extensive notion "followed in public international law, under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning."[2066] And Recommendation 4.2 "endorses common law concepts of issue estoppel, which for reasons of procedural efficiency and finality, seem to be acceptable on a worldwide basis, notwithstanding the fact that they are yet unknown in civil law jurisdictions."[2067] The ILA Final Report further confirmed that issue estoppel applies regardless of whether the issue before the tribunal is brought within the same claim or a different claim.[2068]

903. In addition, Claimant (with respect to this point) simply ignores the cases to which Respondent cited.[2069] In its Counter-Memorial, Respondent cited to *Apotex Holdings v. the United States*,[2070] in which the parties "disagree[d] whether *res judicata* in international law includes the broader concept of or akin to issue estoppel, the principle that a party in subsequent proceedings cannot contradict an issue of fact or law not reflected in the *dispositif* if it has already been distinctly raised and finally decided in earlier proceedings between the same parties (or their privies)."[2071] Deciding that question, the *Apotex Holdings* tribunal held that "[i]t is clear that past international tribunals have applied forms of issue estoppel, without necessarily using

[2065] Exhibit RA-131, Filip J.M. De Ly and Audley Sheppard ILA, "Recommendations on *Lis Pendens* and *Res Judicata* and Arbitration," in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at Recommendation 4.

[2066] Exhibit RA-20, Filip J.M. De Ly and Audley Sheppard, "ILA Final Report on Res Judicata and Arbitration*Seventy-second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006," in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at para. 52 (internal citations omitted).

[2067] Exhibit RA-20, Filip J.M. De Ly and Audley Sheppard, "ILA Final Report on Res Judicata and Arbitration*Seventy-second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006," in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at para. 56.

[2068] *See* Exhibit RA-20, Filip J.M. De Ly and Audley Sheppard, "ILA Final Report on Res Judicata and Arbitration*Seventy-second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006," in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at para. 57.

[2069] *See* Respondent's Counter-Memorial at para. 542, n.1123 (*citing* Exhibit RA-18, *Apotex Holdings v. United States*, Award, Exhibit RA-19, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010); Claimant's Reply at para. 107.

[2070] *See* Respondent's Counter-Memorial at para. 542.

[2071] Exhibit RA-18, *Apotex Holdings v. United States*, Award at para. 7.17.

the term."[2072] One example of this is Umpire Plumey's award in the *Claim of Company General of the Orinoco Case*. Without explicitly using "collateral estoppel" or "issue estoppel," Umpire Plumey nevertheless held that "every matter and point distinctly in issue . . . and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgement . . . and the claimant[s] . . . are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in the said decree."[2073] Similarly, the *Amco Asia v. Indonesia* tribunal, quoting Professor W.M. Reisman's expert report, explained (also without using the specific terms) that "[t]he general principle, announced in numerous cases is that a right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed."[2074] Respondent also cited to (and Claimant also ignores[2075]) the *RSM v. Grenada II* decision,[2076] which noted that "[i]t is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one."[2077] The *President Allende Foundation v. Chile II* tribunal followed the *RSM* tribunal on this question.[2078] In sum, collateral estoppel is a well-established doctrine in international proceedings.

904. Implicitly acknowledging the futility of its first argument, Claimant argues, *second*, that "even assuming that collateral estoppel may apply in international arbitration proceedings as a general principle of law, there is absolutely no basis for its application based on prior decisions of domestic courts."[2079] This argument, however, highlights a distinction without a difference. As the Final ILA Report on *Res Judicata* explained, the purpose of collateral

[2072] Exhibit RA-18, *Apotex Holdings v. United States*, Award at para. 7.18 (emphasis added).

[2073] Exhibit RA-132, *Claim of Company General of the Orinoco Case*, Report of French-Venezuelan Mixed Claims Commission of 1902 (Jackson H. Ralston, ed.) (1906), at p. 186.

[2074] Exhibit CA-355, *Amco Asia Corp. v. Indonesia*, ICSID Case No. 81/1, Decision on Jurisdiction in Resubmitted Proceeding, May 10, 1988, at para. 30.

[2075] *See* Claimant's Reply at para. 107.

[2076] *See* Respondent's Counter-Memorial at para. 542, n.1123.

[2077] Exhibit RA-19, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, at para. 7.1.2.

[2078] *See* Exhibit RA-133, *"President Allende" Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, PCA Case No. 2017-30, Award, November 28, 2019, at paras. 217-20.

[2079] Claimant's Reply at para. 108.

estoppel (like *res judicata* more broadly) is to encourage procedural efficiency and finality.[2080] Professor Howell elaborated: "[I]t is founded on the principle of public policy that the public interest is served by finality in litigation, and on the rule of private justice that a defendant should not have to fight the same issue again."[2081] This reasoning is applicable regardless of whether the prior litigation occurred before a domestic court or international tribunal. The *RSM* tribunal explicitly held that "a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding[, not simply a prior arbitration,]: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal."[2082] And, as noted above, the *Amco Asia v. Indonesia* tribunal's formulation applied collateral estoppel to "a right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction."[2083] It is also telling that, while Claimant points out that the cases to which Respondent cited in its Counter-Memorial did address situations in which collateral estoppel was considered in the context of a previous arbitral award as opposed to a domestic court decision,[2084] Claimant has not been able to identify any cases in which a tribunal has rejected a party's collateral-estoppel argument based on the fact that the prior decision was issued by a domestic court of competent jurisdiction (rather than an arbitral tribunal).

905. *Third*, Claimant argues that "more generally, it is well-established that a domestic court decision does not have preclusive effect in international legal proceedings."[2085] But Claimant mischaracterizes the body of past arbitral decisions. For instance, the *Helnan v. Egypt* tribunal explained 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 applying and interpreting domestic law lies primarily with the

---

[2080] *See* Exhibit RA-20, Filip J.M. De Ly and Audley Sheppard, "ILA Final Report on Res Judicata and Arbitration*Seventy-second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006," in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at para. 56.

[2081] Exhibit RA-134, David Howell, "Issue Estoppel Arising out of Foreign Interlocutory Court Proceedings in International Arbitration" in *Journal of International Arbitration* Vol. 20 Issue 2, 153 (2003), at p. 155.

[2082] Exhibit RA-19, *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, at para. 7.1.1.

[2083] Exhibit CA-355, *Amco Asia Corp. v. Indonesia*, ICSID Case No. 81/1, Decision on Jurisdiction in Resubmitted Proceeding, May 10, 1988, at para. 30 (emphasis added).

[2084] *See* Claimant's Reply at para. 108.

[2085] Claimant's Reply at para. 109.

courts of the host country."[2086] According to the *Helnan* tribunal, "An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice."[2087] Similarly, the *América Móvil v. Colombia* tribunal held:

> The obligation of the international judge to comply with the interpretation and application of the national law accepted by the respective [legal] system is even more evident when the issue of domestic law being debated has been the subject of a domestic judicial decision.
>
> Indeed, as Colombia maintains, international law recognizes that the domestic judge is the only authorized interpreter of its own law, and that, therefore, the international judge is not empowered to act as an appellate judge with respect to the judgments issued by domestic judges. América Móvil does not seem to explicitly question this conclusion, as long as the compatibility of the domestic judges' decision with international law is not at stake, which, according to them, however, is the present case.[2088]

[2086] Exhibit RA-135, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, July 3, 2008, at para. 105.

[2087] Exhibit RA-135, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, July 3, 2008, at para. 106 (emphasis added).

[2088] Exhibit RA-136, *América Móvil S.A.B. de C.V. v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award, May 7, 2021, at paras. 336-37 ("La obligación del juez internacional de conformarse con la interpretación y aplicación de la ley nacional aceptada por el respectivo ordenamiento es aún más evidente cuando la cuestión de derecho doméstico debatida ha sido objeto de una decisión judicial doméstica. En efecto, como lo sostiene Colombia, el derecho internacional reconoce que el juez nacional es el único intérprete autorizado de su propio derecho y que, por ende, el juez internacional no está facultado a actuar como juez de apelación respecto a las sentencias de los jueces domésticos. América Móvil no parece cuestionar explícitamente esta conclusión, siempre y cuando no esté en juego la compatibilidad de la decisión de los jueces nacionales con el derecho internacional, lo que, sin embargo, según ella, ocurre en este caso."); *see also* Exhibit RA-137, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., October 7, 2011, at para. 9 ("The majority acknowledges the possible res judicata effect of a local court decision on a subsequent international proceeding but puts that to one side. This is an important issue that underlies the interaction between a 'prior recourse' proceeding and a subsequent international claim and helps to explain its rationale. The late Keith Highet's dissent in *Waste Management Inc. v. Mexico* set out how, through the application of *res judicata*, the decisions of the local courts can alter the scope of a subsequent international proceeding through the expansion or reduction of the international claim, depending upon how the local courts treat the investor's local law claim. In many investment treaty cases, prior proceedings between the disputing parties have been given *res judicata* effect by international tribunals."); Exhibit RA-6, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 ("*Mondev v. USA*, Award"), at para. 126 ("It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."); Exhibit RA-138, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion, June 2, 2000, at paras. 50-51.

906. And the *Binder v. Czech Republic* tribunal likewise explained that "[t]he Arbitral Tribunal derives its competence exclusively from the BIT and is not competent to decide how Czech law is to be interpreted, this being a matter for the Czech courts. Consequently, the Tribunal cannot review the interpretation of domestic law in Czech court decisions."[2089] Claimant's theory to the contrary would essentially have international tribunals act as *über* courts of appeals, even on questions of interpreting and applying domestic law. But, as Respondent explained in its Counter-Memorial, this is entirely inappropriate.[2090]

907. And *fourth*, Claimant argues that "[a] contrary result would undermine the contracting states' agreement to submit disputes to an international forum independent of the states' own courts."[2091] But this is overly simplistic. Of course, an investor protected by an investment treaty has the right to submit its dispute to an international forum, and to raise certain treaty (*i.e.* international law) claims and potentially certain domestic law claims, depending on the terms of the applicable treaty. But 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. As noted above, this provides finality, efficiency, and fairness to the prevailing party, and in no way undermines investment treaties.[2092]

[2089] Exhibit RA-139, *Rupert Joseph Binder v. Czech Republic*, UNCITRAL, Final Award (redacted), July 15, 2011 ("*Binder v. Czech Republic*, Final Award"), at para. 390.

[2090] *See* Respondent's Counter-Memorial at para. 549 (*citing* Exhibit RA-6, *Mondev v. USA*, Award at para. 127 ("The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal . . . ."); Exhibit RA-23, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, June 22, 2010, at para. 274 ("The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts."); Exhibit RA-24, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (redacted), March 5, 2011, at paras. 249-50 (The investor's claims are "based on the assumption that the present Tribunal would have the authority to correct or cure an error in law possibly made by a Slovak court as an appeal court would do. In other words, the Claimant seems to assume that international law prohibits 'wrong' judiciary decisions as such and that the State becomes automatically responsible in international law if one of its courts has made a decision which is (possibly) wrong under municipal law.")); *see also, e.g.*, Exhibit RA-116, *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, July 25, 2017 ("*Valores Mundiales v. Venezuela*, Award"), at para. 553; Exhibit CA-404, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, February 26, 2014, at para. 433.

[2091] Claimant's Reply at para. 109.

[2092] Claimant also asserts that Perú's arguments (both with respect to collateral estoppel and Perú's argument, in the following subsection, that even if collateral estoppel does not apply, the Tribunal must nevertheless apply the Peruvian Supreme Court's decision in the 2008 Royalty case as a prudential and evidentiary matter) "are a transparent attempt to get around the fact that Peru 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

908. In sum, collateral estoppel is a well-established doctrine in international proceedings, designed exactly for these circumstances: to prevent a party from re-litigating an issue that has already been decided by a court or tribunal of competent jurisdiction. SMCV has already thoroughly litigated (at its own initiation) the scope of the 1998 Stabilization Agreement. It lost. To allow Claimant (on SMCV's behalf) to re-litigate that issue here would undermine the finality of the Peruvian Supreme Court's decision (and all domestic court decisions on questions of domestic law, generally), would be inefficient, would be unfair to Perú (who, through SUNAT, has also thoroughly litigated this issue), and would improperly put the Tribunal in a position of some sort of Peruvian *über* court of appeals.

b. The Tribunal Must Apply the Peruvian Supreme Court's Decision

909. Notwithstanding the foregoing, even if the Tribunal were to determine that application of collateral estoppel is, for whatever reason, not appropriate here, the Tribunal must nevertheless apply the Peruvian Supreme Court's decision on the scope of the 1998 Stabilization Agreement, because it has an obligation to apply Peruvian law to Claimant's Peruvian-law breach of contract claims. This, of course, is fatal to such claims.

910. To recall, Claimant alleges that Perú violated its 1998 Stabilization Agreement obligations by imposing the Royalty and Tax Assessments on the Concentrator Project, *i.e.*, by treating the Concentrator Project as non-stabilized. Perú does not dispute that it imposed the Assessments; rather, Perú has argued that the imposition of those assessments did not violate the Agreement. Thus, the determinative issue is the interpretation of the Agreement—in particular, what the scope of the Agreement is and whether SMCV is obligated to pay royalties and taxes on the Concentrator Project. That Agreement, as noted above, is governed by Peruvian law.

911. Thus, whether the 1998 Stabilization Agreement extended to the Concentrator Project is a question of Peruvian law—not a question of international law (which Claimant concedes[2093]). And it is a question of Peruvian law that the Peruvian Supreme Court has already answered, finding that the 1998 Stabilization Agreement does not extend to the Concentrator Project. The Tribunal need not look any further.

---

domestic proceeding." Claimant's Reply at para. 110. According to Claimant, Article 10.18.4 of the TPA "defines the *only* set of circumstances under which the existence of a prior domestic court proceeding may deprive the Tribunal of its ability to hear and decide those claims." *Id.* at para. 110. Article 10.18.4 is indeed an additional, jurisdictional bar to these same claims, as Respondent establishes in Section III.D, above.

[2093] *See* Claimant's Reply at para. 110.

912. Claimant argues that "the fact that underlying investment agreement obligations 'are governed by local, not international law' is immaterial" because "the treaty parties explicitly intended for those claims to be heard by an international tribunal if the claimant so elected."[2094] But Claimant misses the point. Of course, Respondent acknowledges that the TPA provides the Tribunal with the power to decide certain domestic law contractual claims. But Respondent's argument here is not about the Tribunal's power to decide these breach of contract claims—it is about how the Tribunal must decide these claims. Claimant ignores that inherent in the Tribunal's power to decide these claims is an obligation to do so by applying domestic law. As the *Soufraki v. United Arab Emirates* annulment committee explained, "An international tribunal's duty to apply [municipal] law is a 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."[2095] Professor Jan Paulsson likewise 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."[2096] And, as already noted above, the *Helnan v. Egypt* tribunal explained:

> When, as in the present case, 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 applying and interpreting domestic law lies primarily with the courts of the host country. An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.[2097]

[2094] Claimant's Reply at para. 110.

[2095] Exhibit RA-140, *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, June 5, 2007, at para. 96 (emphasis added); *see also* Exhibit RA-141, *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, December 18, 2012, at para. 68 (agreeing with the *Soufraki v. United Arab Emirates* annulment committee).

[2096] Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), p. 73.

[2097] Exhibit RA-135, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, July 3, 2008, at paras. 105-06 (emphasis added); *see also* Exhibit RA-139, *Binder v. Czech Republic*, Final Award at para. 390. Claimant asserts, without citing to any authorities, that "[t]he general rule [is] that an international tribunal is not bound by domestic court decisions." Claimant's Reply at para. 111. Putting aside

913. Here, 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 Claimant's case (or more accurately, fatal to its breach of contract claims). If the Tribunal accepted 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. That would be wholly inappropriate.[2098]

914. While, in many cases, deciding a domestic law question may involve weighing evidence from legal experts and reviewing statutes or regulations or potentially analogous case law, here, the Tribunal's task could not be easier: the Peruvian Supreme Court (as well as the Superior Court) heard and decided the exact Peruvian law question that is at issue here and, in a thorough 80-page decision, held that the stabilization guarantees in the 1998 Stabilization Agreement are limited to the investment project defined in the feasibility study (*i.e.*, the Leaching Project) and do not extend to the Concentrator Project.[2099] Moreover, as already discussed, Claimant has not raised a denial of justice or due process claim (or anything similar) regarding the process by which the Supreme Court heard the case and reached that decision. The record is therefore unambiguous as to the interpretation of the scope of the 1998 Stabilization Agreement's guarantees under Peruvian law. The Tribunal need only make use of the answer already reached by the Supreme Court and apply it to Claimant's breach of contract claims in

---

Claimant's utter failure to support its assertion, even if true, Claimant's supposed "general rule" would provide the Tribunal little guidance here, because Claimant does not clarify whether the "general rule" applies to arbitral tribunals answering international law or domestic law questions (or both)—an important distinction. To be clear, Respondent is not arguing that the Tribunal would necessarily be bound by a domestic court decision answering a question of international law.

[2098] *See* Exhibit RA-6, *Mondev v. USA*, Award at para. 127 ("The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal . . . ."); Exhibit RA-23, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, June 22, 2010, at para. 274 ("The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts."); Exhibit RA-24, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (redacted), March 5, 2011, at paras. 249-50 (The investor's claims are "based on the assumption that the present Tribunal would have the authority to correct or cure an error in law possibly made by a Slovak court as an appeal court would do. In other words, the Claimant seems to assume that international law prohibits 'wrong' judiciary decisions as such and that the State becomes automatically responsible in international law if one of its courts has made a decision which is (possibly) wrong under municipal law."); Exhibit RA-116, *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, July 25, 2017 ("*Valores Mundiales v. Venezuela*, Award"), at para. 553; Exhibit CA-404, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, February 26, 2014, at para. 433.

[2099] *See generally* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017.

this proceeding as well. When it does so, the rest of the pieces fall into place, and the result is that Perú's imposition of the Royalty and Tax Assessments did not violate the 1998 Stabilization Agreement.

915. Claimant argues that the Supreme Court decision is not binding in other Peruvian legal proceedings involving other parties, so the Tribunal should not give it any weight.[2100] Perú has already addressed these arguments in Section II.A.2, explaining that, even if it does not have direct precedential effect, the Supreme Court's decision is a highly persuasive source—the most persuasive source possible—of Peruvian law and would strongly influence any decision-maker adjudicating issues of Peruvian law.[2101] In fact, as discussed in that section, the Tax Tribunal and SUNAT have themselves referred on multiple occasions to the particular relevance of the 2008 Supreme Court Judgment and its binding effect on SMCV.[2102] Moreover, regardless of whether the Peruvian Supreme Court decision's 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 Stabilization Agreement as a matter of Peruvian law (and

[2100] *See* Claimant's Reply at paras. 116-18. Claimant also argues that "'contentious administrative proceedings are structurally inadequate' for the resolution of contract claims . . . because they have 'very short procedural deadlines' and 'limited evidentiary methods," *id.* at para. 115 (*quoting* Exhibit CER-7, Second Bullard Report at para. 67), and pointed to certain pieces of evidence that it claims the Supreme Court did not have before it, *see id.* at para. 119. Perú has already addressed these arguments in Section II.A.2.b. To reiterate, Claimant's argument is meritless because Respondent is arguing that the Tribunal should rely on the Supreme Court decision for its interpretation of the 1998 Stabilization Agreement. That is a pure issue of Peruvian law, and the factual evidence to which Claimant points would have had no bearing on its resolution. The evidence to which Claimant cites (*e.g.*, supposed "evidence of due process violations tainting the Tax Tribunal resolution under review," Claimant's Reply at para. 119) would have no bearing on this purely (Peruvian) legal question.

[2101] Exhibit RER-6, Second Eguiguren Report at para. 120.

[2102] *See, e.g.*, Exhibit CE-165, Assessment No. 012-003-0092962, December 29, 2017 (notified on January 18, 2018), at Annex No. 3, pp. 3, 75, 79, 83, 94; Exhibit CE-166, Assessment No. 012-003-0092963, December 29, 2017 (notified on January 18, 2018), at Annex No. 3, pp. 3, 75, 79, 83, 94; Exhibit CE-174, SUNAT Assessment No. 012-003-0092685, Q4 2011 Royalty Assessments, December 29, 2017 (notified on January 18, 2018), at Annex No. 4, pp. 4, 81, 85, 91, 107; Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018 (notified to SMCV on April 18, 2018), at Annex No. 4, pp. 86, 90, 96-97, 112; Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018), at pp. 15, 61, 66; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at pp. 3, 38; Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018 (notified to SMCV on October 10, 2018), at pp. 4, 89, 93, 115; Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 8, 29; Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018), at pp. 8, 31; Exhibit CE-205, Tax Tribunal Resolution No. 10372-9-2018, December 14, 2018 (notified to SMCV January 7, 2019), at pp. 2, 6; Exhibit CE-215, SUNAT Resolution No. 0150140014560 (2012 Royalty Assessment), January 11, 2019 (notified to SMCV on January 23, 2019), at pp. 9, 33; Exhibit CE-221, SUNAT Resolution No. 0150140014815, May 28, 2019, at pp. 23, 31; Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019 (Q4 2011-2012 Special Mining Tax Assessments), June 20, 2019, at pp. 1, 4, 11, 13; Exhibit CE-232, SUNAT Assessment No. 012-003-0108051, November 26, 2019, at Annex 2, p. 3 (of PDF); Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at pp. 2, 7, 10.

there are no other final decisions (*sentencia firme*) from any other Peruvian court that has reached the opposite conclusion).

916. In sum, even if the Tribunal were to decline to apply collateral estoppel, Claimant's claims (on behalf of SMCV) for breach of contract ultimately and inevitably come down to an interpretation of the 1998 Stabilization Agreement under Peruvian law. There can be no better evidence of how a State's highest court "would" rule on a domestic law question than that highest court's own ruling directly answering the question. The fact that that ruling may not be binding as against other parties in other, future proceedings in Perú does nothing to undermine its evidentiary value here, in this international proceeding adjudicating claims from SMCV under the same contract. Claimant cannot avoid the determinative fact that SMCV has thoroughly litigated the scope of the 1998 Stabilization Agreement and the Peruvian Supreme Court has already decided that very question. Again: the Tribunal need not look any further.

B. RESPONDENT HAS NOT BREACHED ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT, LIMITED TO THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT

917. Claimant claims that Perú has breached its FET obligation—limited to the customary international law minimum standard of treatment—under Article 10.5 of the TPA.[2103] Specifically, Claimant argues that Perú's actions violated its FET obligation because, according to Claimant, they (i) violated Claimant's (or, SMCV's and Phelps Dodge's) legitimate expectations; (ii) were arbitrary and based on political calculations; (iii) were inconsistent and non-transparent; and (iv) denied SMCV due process.

918. In its Counter-Memorial, Respondent first explained that Article 10.5, which guarantees investors fair and equitable treatment limited to the customary international law minimum standard of treatment, provides far narrower protection than an autonomous FET provision and, in particular, does not provide any of the specific protections or obligations that Claimant seeks to invoke here (except for the right to due process).[2104] Nevertheless, Respondent then set out the relevant standards for those protections in the event that the Tribunal disagrees with Respondent on the limited scope of Article 10.5 (it should not).[2105] And, finally, Respondent applied those standards to the facts to show that Claimant's Article 10.5 claims are

[2103] *See* Claimant's Memorial at paras. 358 *et seq.*

[2104] *See* Respondent's Counter-Memorial at paras. 617 *et seq.*

[2105] *See* Respondent's Counter-Memorial at paras. 639 *et seq.*

wholly without merit because, at all times, Perú provided SMCV and Claimant with fair and equitable treatment and acted in accordance with Peruvian law.[2106]

919. Claimant, in its Reply, continues to argue that Article 10.5 essentially provides the protections of an autonomous FET clause—despite acknowledging that Article 10.5 is not such a clause.[2107] Respondent addresses this point in subsections 1.a and 1.b, below. Claimant, however, largely concedes Respondent's explanations of the relevant legal standards (though the Tribunal should not need to apply those standards, with the exception of due process), and, instead, needlessly raises various semantic arguments and often insists that the legal standards Respondent discusses (while correct) "miss[] the point"[2108] or "mischaracterize[] the basis"[2109] for Claimant's claims. Perú addresses these arguments in subsection 1.c, below.

920. In subsection 2, Respondent addresses Claimant's (unfounded) arguments that Perú violated Article 10.5 by: (i) imposing non-stabilized Royalty and Tax Assessments against SMCV (subsection 2.a); (ii) failing to waive assessments of penalties and interest against SMCV (subsection 2.b); and (iii) refusing to refund certain of SMCV's GEM payments (subsection 2.c). As explained in Respondent's Counter-Memorial,[2110] and again below, none of these measures constitutes a breach of Perú's FET obligations, because Claimant misconstrues (or outright ignores) the relevant facts and applicable legal standards.

1. The FET Standard in Article 10.5, Limited to the Customary International Law Minimum Standard of Treatment, Provides Far Narrower Protection Than Claimant Seeks to Invoke

921. In addition to the factual and evidentiary deficiencies that Respondent has discussed throughout its pleadings, Claimant's Article 10.5 claim suffers from two fatal legal deficiencies.[2111] As addressed in subsections (a) and (b) below, Claimant attempts to invoke the protections of an autonomous FET provision—whereas Article 10.5 is explicitly limited to the customary international law minimum standard of treatment. And, as discussed in subsection (c), below, even were that not the case, the standards that the Tribunal must apply to the specific

[2106] *See* Respondent's Counter-Memorial at paras. 668 *et seq.*

[2107] *See* Claimant's Reply at paras. 132 *et seq.*

[2108] Claimant's Reply at para. 140.

[2109] Claimant's Reply at para. 141.

[2110] *See* Respondent's Counter-Memorial at paras. 668 *et seq.*

[2111] Respondent notes that these legal deficiencies are in addition to the myriad of jurisdictional bars that Respondent has discussed in Section III, above.

FET strands or protections on which Claimant relies are far more rigorous than Claimant argues. When those standards are properly applied to the facts provided in Section II, above (if the Tribunal reaches that point), it is clear that Claimant comes nowhere close to establishing a breach of Article 10.5.

a. Article 10.5 of the TPA Does Not Provide the Protections Afforded By An Autonomous FET Standard

922. The analysis of the protections to which Claimant is entitled pursuant to Article 10.5 of the TPA must, of course, begin with the actual text of the treaty. As Respondent explained in its Counter-Memorial,[2112] Article 10.5.1 requires Perú to provide U.S. investors with "fair and equitable treatment and full protection and security" "in accordance with customary international law."[2113] Article 10.5.2 further provides that, "[f]or greater certainty," customary international law refers to the "customary international law minimum standard of treatment" ("MST"), and, thus, "[t]he 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."[2114] Tellingly, this emphasized language is conspicuously absent from Claimant's Reply. Article 10.5 therefore is not what many arbitral tribunals refer to as an "autonomous" FET provision.

923. In its Reply, Claimant itself acknowledges that Article 10.5 is not an autonomous FET provision.[2115] Yet, in almost the same breath, Claimant claims "that the *content* of the customary international law minimum standard of treatment's fair and equitable treatment obligation is, today, largely co-extensive with the 'core components' of fair and equitable treatment that tribunals have repeatedly recognized when interpreting autonomous, treaty-based fair and equitable treatment provisions."[2116] In other words, Claimant acknowledges that, under the TPA, it is only entitled to fair and equitable treatment limited to the customary international law minimum standard of treatment, but then asserts it should nevertheless receive a level of protection consistent with an autonomous FET provision. That is simply not what the language in the TPA provides.

[2112] *See* Respondent's Counter-Memorial at para. 617.

[2113] Exhibit CA-10, U.S.-Perú TPA at Art. 10.5.1.

[2114] Exhibit CA-10, U.S.-Perú TPA at Art. 10.5.2 (emphasis added).

[2115] *See* Claimant's Reply at para. 133 (agreeing "that Article 10.5 incorporates by reference obligations under customary international law and does not create an autonomous treaty-based standard").

[2116] Claimant's Reply at para. 133 (emphasis in the original).

924. In its Counter-Memorial,[2117] Respondent explained that Claimant's position that the FET standard in the TPA is essentially the same as an autonomous FET standard would deprive both (i) the phrase "in 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. Had the drafters of the TPA intended for an autonomous FET standard to apply, they could simply have left out any reference to the customary international law minimum standard of treatment. They did not. And the Tribunal must respect that choice.

925. Claimant offers no rebuttal to this in its Reply. It simply argues that its position is "fully consistent with the text of Article 10.5" because Article 10.5 "specifically references 'fair and equitable treatment' as a component of the minimum standard of treatment."[2118] But, again, Claimant entirely ignores the language in Article 10.5.2 ("[t]he 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 [*i.e.*, the customary international law minimum standard of treatment], and do not create additional substantive rights"[2119]), and offers no explanation for how this language (or, for that matter, Annex 10-A, which is discussed further below) would have any meaning under its interpretation. Claimant essentially seeks to ostensibly acknowledge that Article 10.5 is not an autonomous FET provision, on the one hand, and then to deprive it of any significance, on the other hand. But to deprive the Contracting Parties' explicit choice to limit FET protections to the customary international law minimum standard of treatment of significance would run contrary to the Tribunal's mandate (to say nothing of its obligation under Article 31 of the VCLT to interpret Article 10.5 in accordance with its ordinary meaning, in context[2120]).

926. Claimant, likely realizing the futility of engaging with the text of Article 10.5, instead primarily focuses in its Reply on past arbitral decisions.[2121] But this reliance is misplaced (not that such decisions would supersede the actual text of the treaty in any event).

927. Contrary to Claimant's position, the past arbitral decisions it discusses in its Reply show that tribunals do, generally, give meaning to the distinction between autonomous

[2117] *See* Respondent's Counter-Memorial at para. 619.

[2118] Claimant's Reply at para. 133.

[2119] Exhibit CA-10, U.S.-Perú TPA at Art. 10.5.2.

[2120] *See* Exhibit CA-49, VCLT at Art. 31.

[2121] *See* Claimant's Reply at paras. 132-35.

FET provisions and those limited to the customary international law minimum standard of treatment.[2122] As Respondent noted in its Counter-Memorial, the 2007 UNCTAD Report on Fair and Equitable Treatment found that "[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."[2123] The opposite approach is required here, where the FET obligation is expressly linked to the MST.

928. The cases that Claimant cites in its Reply[2124] in support of its position that the "customary obligation of fair and equitable treatment is today understood to be 'not materially different' from the treaty-based obligation to afford 'fair and equitable treatment,'"[2125] can be quickly dispatched.

929. *First*, Claimant cites to *S.D. Myers v. Canada*, quoting *inter alia* its statement that "[t]he minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs."[2126] But this decision was issued before the United States, Mexico, and Canada, through

[2122] *See, e.g.*, Exhibit RA-28, *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015 ("*Al Tamimi v. Oman*, Award"), at para. 386; Exhibit RA-29, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 (Redacted) ("*Cargill v. Mexico*, Award"), at para. 278; Exhibit RA-30, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009 ("*Glamis Gold v. USA*, Award"), at para. 611; Exhibit RA-35, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, January 26, 2006 ("*Thunderbird v. Mexico*, Award"), at para. 194.

[2123] Exhibit RA-31, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 2012, at p. xiv (emphasis added).

[2124] *See* Claimant's Reply at para. 132, n.574 (*citing* Exhibit RA-33, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL/NAFTA), Partial Award, November 13, 2000 ("*S.D. Myers v. Canada*, Partial Award"), at paras. 259, 265; Exhibit RA-57, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 ("*Biwater Gauff v. Tanzania*, Award"), at para. 592; Exhibit RA-70, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008 ("*Duke v. Ecuador*, Award"), at paras. 336-37; Exhibit RA-74, *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012 ("*Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability"), at para. 7.158); *id.* at para. 134(e), n.599 (*citing* Exhibit CA-237, *Rumeli v. Kazakhstan*, Award at para. 611); *id.* at para. 134(e), n.601 (*citing* Exhibit CA-279, *Murphy v. Ecuador*, Partial Final Award at para. 208 and Exhibit CA-108, *Occidental Exploration & Production Co. v. Ecuador*, LCIA Case No. UN3467, Award, July 1, 2004 ("*Occidental v. Ecuador*, Award"), at para. 190).

[2125] Claimant's Reply at para. 132.

[2126] Claimant's Reply at para. 132, n.574 (*citing* Exhibit RA-33, *S.D. Myers v. Canada*, Partial Award at para. 259).

the NAFTA Free Trade Commission, issued a joint, binding note of interpretation on July 31, 2001, clarifying that "[t]he 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 the customary international law minimum standard of treatment of aliens"[2127] (language almost identical to Article 10.5.2 of the TPA). In fact, some commenters have explained that the joint interpretative note was issued, in part, because the NAFTA parties (including the United States) disagreed with the *S.D. Myers* tribunal's decision.[2128] Thus, the context of this case actually shows that, like Perú, the United States (the other Contracting Party to the Perú-U.S. TPA here) believes that there is a meaningful distinction between autonomous FET provisions and those limited to the customary international law minimum standard of treatment.

930. *Second*, as it did in its Memorial,[2129] Claimant cites to a number of cases[2130] that were not brought under treaties with FET provisions textually limited to the customary international law minimum standard of treatment (in particular, *Biwater Gauff v. Tanzania*, *Duke Energy v. Ecuador*, *Occidental Exploration v. Ecuador*, *Electrabel v. Hungary*, *Rumeli Telekom v. Kazakhstan*, and *Murphy v. Ecuador*),[2131] which Respondent pointed out in its Counter-

---

[2127] Exhibit RE-338, NAFTA Free Trade Commission, "North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions," July 31, 2001, *available at* http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

[2128] *See* Exhibit RA-151, Mujeeb Emami, "The Minimum Standard of Treatment in International Investment Law: Interpretation and Evolution," *South East Asia Journal of Contemporary Business, Economics and Law*, Vol. 24, Issue 1 (April 2021), at p. 78.

[2129] *See* Claimant's Memorial at para. 361, n.965. As noted in Respondent's Counter-Memorial, Claimant actually cites one additional case in that footnote: Exhibit CA-276, *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012 ("*Railroad Development v. Guatemala*, Award"), at para. 218. However, Claimant appears to have cited that case to support its contention earlier in the same sentence that "the minimum standard of treatment is an evolving concept," not to support its contention that the MST "obligation of fair and equitable treatment is today 'not materially different' from the treaty-based 'fair and equitable treatment' standard." Claimant's Memorial at para. 361. For the avoidance of any doubt, the *RDC* tribunal did not find that the MST FET standard and the autonomous FET standard are the same. *See* Exhibit CA-276, *Railroad Development v. Guatemala*, Award at paras. 216-19.

[2130] *See* Claimant's Reply at para. 132, n.574, and para. 134(e), n.599 and n.601.

[2131] *See* Exhibit RA-57, *Biwater Gauff v. Tanzania*, Award at paras. 586 (*quoting* the applicable FET provision, which provided "Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment . . . "), 591 ("Given the wording of Article 2(2) of the BIT here, the Arbitral Tribunal sees force in the argument that the Contracting States here ought to be taken to have intended the adoption of an autonomous standard . . . ."); Exhibit RA-70, *Duke v. Ecuador*, Award at paras. 333-37 (considering whether the Ecuador-United States BIT contains an autonomous FET provision); Exhibit RE-115, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on August 27, 1993, entered into force on May 11, 1997, at Art. 2(3)(a) ("Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."); Exhibit CA-108, *Occidental v. Ecuador*, Award at para. 180 (providing the applicable FET provision: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less favorable than that

Memorial.[2132] In its Reply, Claimant argues this "misses the point" and that these cases are nevertheless "instructive to the Tribunal."[2133] To the contrary, it is Claimant that "misses the point."[2134] Other than *S.D. Myers*—which was repudiated by the contracting parties to the instrument under which that case was brought—Claimant still has not pointed to any case in which a tribunal was tasked with applying an FET provision limited to the customary international law minimum standard of treatment and abandoned that duty by applying an autonomous FET standard. Yet that is exactly what Claimant is asking the Tribunal to do here.

931. In sum, Claimant's argument that Article 10.5 is not materially different from an autonomous FET provision (i) is blatantly inconsistent with the actual text of Article 10.5, and (ii) relies almost entirely on *dicta*, including *dicta* that has been repudiated by the States who negotiated and adopted texts like Article 10.5. The Tribunal must give meaning to the Contracting Parties' deliberate choice to limit the FET provision in Article 10.5 to the customary international law minimum standard of treatment. In the subsection below, Respondent explains what that meaning should be.

b. Article 10.5 Provides Far Narrower Protection to Investors than Claimant Argues

932. In its Counter-Memorial, Respondent presented two broad points on how an FET provision limited to the customary international law minimum standard of treatment is narrower than an autonomous FET provision. First, Respondent explained that only particularly egregious conduct breaches the customary international law minimum standard of treatment. Article 10.5 therefore, generally, imposes a high bar for Claimant to meet in order to succeed on its FET claims.[2135] And, second, by limiting its FET protections to the customary international law minimum standard of treatment, Article 10.5 only provides protections that have crystallized into

required by international law."); Exhibit CA-237, *Rumeli v. Kazakhstan*, Award at para. 575 (importing FET provision from United Kingdom-Kazakhstan BIT through MFN provision); Exhibit RE-114, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kazakhstan for the Promotion and Protection of Investments, signed and entered into force on November 23, 1995, at Art. 2(2); Exhibit CA-279, *Murphy v. Ecuador*, Partial Final Award at para. 208 (relying on Ecuador-United States BIT); Exhibit RA-74, *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability at para. 7.72 (applying Article 10(1) of the ECT); Exhibit RE-168, Consolidated Energy Charter Treaty (ECT), Last Updated on January 15, 2016, at Art. 10(1).

[2132] *See* Respondent's Counter-Memorial at paras. 620-22.

[2133] Claimant's Reply at para. 134(e).

[2134] Claimant's Reply at para. 134(e).

[2135] *See* Respondent's Counter-Memorial at paras. 624 *et seq.*

customary international law. Notably for present purposes, these do not include many of the protections upon which Claimant attempts to rely in this case.[2136]

933. More specifically, with respect to the first point, Respondent explained in its Counter-Memorial that the minimum standard sets an absolute floor of treatment, which ensures that States' treatment of aliens does not fall below "a civilized standard."[2137] Respondent also quoted the articulation of the customary international law minimum standard of treatment from the *Neer v. Mexico*, *Thunderbird*, *Glamis Gold*, and *Cargill* decisions to show (i) that the *Neer* standard remains the foundation of the modern customary international law minimum standard of treatment; and (ii) that this standard places an exceedingly high burden on claimants hoping to demonstrate a breach.[2138] For instance, as the *Thunderbird v. Mexico* tribunal explained:

> 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 given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.[2139]

934. In its Reply, Claimant fails to rebut these points. Instead, Claimant spills a great deal of ink rebutting a straw-man argument (that Respondent did not make) that the *Neer* tribunal's articulation is the current and only appropriate standard for the customary international law minimum standard of treatment.[2140] The entire premise of Claimant's discussion, however,

---

[2136] *See* Respondent's Counter-Memorial at paras. 630 *et seq.*

[2137] Respondent's Counter-Memorial at para. 625 (*quoting* Exhibit RA-32, Edwin Borchard, "The 'Minimum Standard' of the Treatment of Aliens," in 33 A*M. Soc'y INT'L. PROC.* 51 (1939), at p. 58); *see also* Exhibit RA-33, *S.D. Myers v. Canada*, Partial Award at para. 259 ("[t]he 'minimum standard' is a floor below which treatment of foreign investors must not fall").

[2138] *See* Respondent's Counter-Memorial at paras. 625-29.

[2139] Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 194 (emphasis added).

[2140] *See* Claimant's Reply at paras. 132 ("Peru nevertheless argues that the fair and equitable treatment obligation under customary international law is limited to the 'particularly egregious state conduct' described by the 1926 decision in *Neer v. Mexico*"), 134 ("Peru's argument that the 'full scope' of the minimum standard of treatment that states must provide to investors and their investments under customary international law remains the 1926 *Neer* tribunal's standard . . . has been repeatedly rejected by tribunals and authorities interpreting the minimum standard of treatment"), 134(a) ("Article 10.5 itself thus makes clear that the customary standard today does not remain frozen in time to *Neer*"), 134(b) ("Peru provides only one decision that purports to adopt the *Neer* standard . . . ."), 134(c) ("Peru conveniently ignores the fact that the heavy weight of authority in cases interpreting the minimum standard of treatment . . . have found that the customary international law minimum standard of treatment today has evolved beyond the *Neer* standard to protect a broader range of conduct . . . .").

rests on a mischaracterization of Respondent's argument. Respondent explained that tribunals have "relied upon *Neer*" and that "the *Neer* standard remains the foundation of the modern customary international law minimum standard of treatment."[2141] But that is obviously not the same as arguing, *e.g.*, "that the customary standard today . . . remain[s] frozen in time to *Neer*," as Claimant implies.[2142] At one point, Claimant even seems to acknowledge that Perú is not as reliant on *Neer* as Claimant portrays, noting that "Peru itself recognizes" that the *Cargill* and *Al Tamini* tribunals "merely 'looked to *Neer* to explain the scope of the obligation.'"[2143] Moreover, as noted above, Respondent quoted articulations of the standard from three other arbitral decisions—articulations that consistently show an extremely high burden on claimants hoping to demonstrate a breach of the customary international law minimum standard of treatment. Claimant does not contest these articulations, only that of the *Neer* tribunal.

935. With respect to the second point, Respondent explained in its Counter-Memorial that the customary international law minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, have crystallized into customary international law.[2144] Thus, the FET obligation under the TPA includes only those rules of treatment that have crystallized into customary international law.[2145]

936. Respondent further explained that, as stated in Annex 10-A to the TPA (which Claimant notably does not mention or cite at any point in its Reply), "customary international law" "results from a general and consistent practice of States that they follow from a sense of legal obligation."[2146] In other words, evidence of both State practice and *opinio juris* is necessary to show that a rule has crystallized into customary international law.[2147] The burden is on the party seeking to rely on the rule (in this case, Claimant)[2148] to establish both of those

---

[2141] Respondent's Counter-Memorial at paras. 626, 629 (emphasis added).

[2142] Claimant's Reply at para. 134(a).

[2143] Claimant's Reply at para. 134(b).

[2144] *See* Respondent's Counter-Memorial at paras. 630 *et seq.*

[2145] The customary international law minimum standard of treatment "provid[es] for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property." Exhibit RA-37, "Fair and Equitable Treatment Standard in International Investment Law," *OECD Working Papers on International Investment*, 2004/03, at p. 8, n.32.

[2146] Exhibit CA-10, U.S.-Perú TPA at Annex 10-A.

[2147] *See* Respondent's Counter-Memorial at para. 633.

[2148] *See, e.g.*, Exhibit RA-43, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005 ("*Methanex v. USA*, Award"), at Part IV, Chapter C, para. 26; Exhibit RA-29, *Cargill v. Mexico*, Award at para. 273; Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 21.

elements.[2149] And, as the *Glamis Gold* tribunal explained, "[a]rbitral awards . . . do not constitute State practice and thus cannot create or prove customary international law."[2150] Thus, except for denial of justice (which is explicitly provided for in the TPA), Claimant—who still to this day has provided no evidence of State practice and *opinio juris*, even with its Reply—has failed to carry its burden to prove that the FET protections on which it seeks to rely have crystallized into customary international law.

937. Claimant, in its Reply, leaves most of the above uncontested. Claimant only argues that arbitral awards are sufficient, on their own, to show State practice and *opinio juris* and that, therefore, the cases that it cites prove that the FET elements on which it relies have crystalized into customary international law.[2151] Claimant is mistaken. To clarify, arbitral awards cannot create customary international law—only States can do that. As Professor Hersch Lauterpacht wrote, "Decisions 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."[2152] Judge Mohamed Shahabuddeen has likewise explained, "The development of customary international law depends on state practice. It is difficult to regard a decision of the Court as being in itself an expression of State practice. . . . A decision made by it is an expression not of the practice of the litigating States, but of the judicial view taken of the relations between them on the basis of legal principles which must necessarily exclude any customary law which has not yet crystallised. The decision may recognize the existence of a new customary law and in that limited sense it may no doubt be regarded as the final stage of development, but, by itself, it cannot create one."[2153] In sum, arbitral awards may contain helpful analysis of State practice and

[2149] *See* Exhibit RA-38, Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission, May 22, 2014, at paras. 22-23 (considering these requirements "indispensable for any rule of customary international law properly so called").

[2150] Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605; *see also* Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217; Exhibit RA-152, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of The Congo)*, Judgment on Preliminary Objections, 2007 I.C.J. 582 (May 24), at paras. 88-91.

[2151] *See* Claimant's Reply at para. 135.

[2152] Exhibit RA-167, Hersch Lauterpacht, *The Development of International Law by the International Court* (1958) (excerpts), at pp. 20-21.

[2153] Exhibit RA-169, Mohamed Shahabuddeen, *Precedent in the World Court* (1997), at pp. 71-72.

opinio juris, and can be considered for that purpose,[2154] but they cannot by themselves substitute for actual evidence of State practice and *opinio juris*.[2155]

938. The cases on which Claimant relies do not undermine these points—they reinforce them. Specifically, Claimant cites to a number of cases that relied upon previous arbitral decisions' articulation of the minimum standard of treatment for guidance in articulating the standard themselves.[2156] But, in the passages to which Claimant cites, none of the tribunals were addressing whether a specific rule (such as, *e.g.*, the protection of an investor's legitimate expectations), actually challenged by one party, has been crystallized into customary international law, and none of those tribunals relied upon previous arbitral decisions as evidence of State practice or *opinion juris*.[2157] Further, Claimant cites to *RDC* and *Glamis Gold*[2158] for the proposition that claimants "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.'"[2159] Those cases, however, are consistent with Respondent's position: They both explicitly acknowledge that arbitral awards do not constitute State practice and thus cannot create or prove customary international law,[2160] but that the arbitral decisions can provide helpful analysis of State practice and *opinio juris* where "[t]here is ample evidence of such [State] practice in these proceedings."[2161] As the *Cargill* tribunal explained, "[T]he evidentiary weight to be afforded

---

[2154] *See* Exhibit RA-29, *Cargill v. Mexico*, Award at para. 277; Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 611.

[2155] *See, e.g.*, Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605; *see also* Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217; Exhibit RA-152, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of The Congo)*, Judgment on Preliminary Objections, 2007 I.C.J. 582 (May 24), at paras. 88-91.

[2156] *See* Claimant's Reply at para. 135(a), n.602.

[2157] *See* Exhibit CA-278, *Clayton v. Canada*, Award at para. 441 (Respondent notes that Claimant erroneously cited to paragraph "411" instead); Exhibit RA-53, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para. 184; Exhibit CA-269, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 ("*Waste Management v. Mexico*, Award"), at para. 98; Exhibit CA-202, *TECO Guatemala Holdings LLC v. Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013 ("*TECO v. Guatemala*, Award"), at para. 455; Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 219.

[2158] *See* Claimant's Reply at para. 135(a), n.603 and n.604.

[2159] Claimant's Reply at para. 135(a).

[2160] *See* Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605; Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217 ("The Tribunal notes further that, as such, arbitral awards do not constitute State practice . . . .").

[2161] Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217.

[arbitral awards] is greater if the conclusions therein are supported by evidence and analysis of custom."[2162]

939. Here, Respondent has already explained in its Counter-Memorial[2163] that the cases on which Claimant (improperly) relies as evidence[2164] did not actually examine State practice

[2162] Exhibit RA-29, *Cargill v. Mexico*, Award at para. 277.

[2163] *See* Respondent's Counter-Memorial at para. 634.

[2164] *See* Claimant's Memorial at para. 362 (*citing* Exhibit CA-278, *Clayton v. Canada*, Award at para. 445 (*citing* to other tribunals for potential breach where reliance has been induced by authorized state officials, but not evaluating state practice or *opinio juris*); Exhibit CA-279, *Murphy v. Ecuador*, Partial Final Award at paras. 206-08 (*citing* to other tribunal decisions to find that the protection of legitimate expectations is part of the customary international law standard without evaluating State practice or *opinio juris*); Exhibit CA-277, *Abengoa, S.A. et al. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013 ("*Abengoa v. Mexico*, Award"), at para. 641 (*citing* to other tribunal decisions to find that the protection of legitimate expectations from "shocking[]" violations is part of the customary international law standard without evaluating State practice or *opinio juris*); Exhibit CA-285, *Eco Oro v. Colombia*, Decision on Jurisdiction at para. 754 (*citing* to other tribunal decisions to find that the protection of legitimate expectations is part of the customary international law standard without evaluating State practice or *opinio juris*)); Claimant's Memorial at para. 363 (*citing* Exhibit CA-277, *Abengoa v. Mexico*, Award at para. 641 ("The Arbitral Tribunal holds that . . . the minimum level of treatment compels the State, at least, not to act in a manifestly and grossly arbitrary and unfair manner . . . ." (emphasis added)); Exhibit CA-222, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016 ("*Crystallex v. Venezuela*, Award"), at para. 530 ("The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the 'international minimum standard of treatment' under customary international law, but rather constitutes an autonomous treaty standard."); Exhibit CA-213, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014 ("*Gold Reserve v. Venezuela*, Award"), at paras. 564 *et seq* (considering the claimant's FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-122, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, August 19, 2005 ("*Eureko v. Poland*, Award"), at paras. 231-35 (considering the claimant's FET claim without analyzing the customary international law minimum standard of treatment as tribunal was dealing with an autonomous FET standard); Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 219 (considering content of minimum standard of treatment without evaluating State practice or *opinio juris*)); Claimant's Memorial at para. 364 (*citing* Exhibit CA-280, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016, at para. 351 (considering content of minimum standard of treatment without evaluating *opinio juris* because, while the tribunal determined "the content of a rule of customary international law such as the minimum standard of treatment can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*)," "neither Party has produced such evidence in this arbitration"); Exhibit CA-78, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, at para. 76 (finding that the FET provision in NAFTA included an element of transparency because of the reference to transparency as a general objective in NAFTA Article 102(1)); Exhibit CA-222, *Crystallex v. Venezuela*, Award at para. 530 ("The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the 'international minimum standard of treatment' under customary international law, but rather constitutes an autonomous treaty standard."); Exhibit CA-213, *Gold Reserve v. Venezuela*, Award at paras. 564 *et seq* (considering the claimant's FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-234, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award, December 13, 2017 ("*Deutsche Telekom v. India*, Interim Award"), at para. 331 (considering the claimant's FET without analyzing the customary international law minimum standard of treatment because the tribunal "observe[d] that the BIT does not refer to 'international minimum standard' or similar formulations, unlike other treaties"). *But see* Exhibit RA-46, *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529, Reasons for Judgment of the Honourable Mr. Justice Tysoe, May 2, 2001, at paras. 70-72 (setting aside, in part, arbitral award because the tribunal's determination that the FET provision, limited to the MST, in Article 1105 of NAFTA included a transparency obligation).

and *opinio juris* to establish that protections that Claimant seeks to prove are crystallized in international law (and, in fact, as Responded has already explained,[2165] a number of those cases were not actually operating under a treaty with an FET provision limited to the customary international law minimum standard of treatment, nor were they considering whether a particular rule was a part of customary international law[2166]). Claimant has not even argued otherwise, let alone shown where in the arbitral decisions it cites there might be found any "ample evidence of [State] practice"[2167] (because there is none).

940. In sum, because Claimant has failed to provide any evidence of State practice, or *opinio juris*, with respect to any of the specific FET protections that it seeks to invoke (except for due process, which is explicitly provided in the TPA), it cannot rely upon alleged breaches of these protections for its Article 10.5 claim.

c. Even If Article 10.5 Were Read to Provide the Specific Protections that Claimant Seeks to Invoke, the Applicable Standards Are Still Rigorous

941. Even if the Tribunal were nevertheless to allow Claimant to invoke the specific FET protections that it has alleged were breached here (*i.e.*, legitimate expectations, arbitrariness, and consistency and transparency), then, at a minimum, the Tribunal would have to apply the stringent standards that Respondent has articulated. In its Counter-Memorial, Respondent first discussed the fair and equitable treatment provision, generally, and then addressed the specific strands or elements of fair and equitable treatment on which Claimant seeks to rely. Respondent will proceed in the same sequence here.

942. With respect to the general FET standard, as Respondent has already explained in its Counter-Memorial, the fair and equitable treatment standard does not require a State to provide an investor with perfect fairness or equity. Thus, not every act that could possibly be

[2165] *See* Respondent's Counter-Memorial at paras. 634(b)-(c).

[2166] *See* Claimant's Memorial at para. 363 (*citing* Exhibit CA-222, *Crystallex v. Venezuela*, Award at para. 530 ("The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the 'international minimum standard of treatment' under customary international law, but rather constitutes an autonomous treaty standard."); Exhibit CA-213, *Gold Reserve v. Venezuela*, Award at paras. 564 *et seq* (considering the claimant's FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-122, *Eureko v. Poland*, Award at paras. 231-35 (considering the claimant's FET claim without analyzing the customary international law minimum standard of treatment as tribunal was dealing with an autonomous FET standard)); Claimant's Memorial at para. 364 (*citing* Exhibit CA-234, *Deutsche Telekom v. India*, Interim Award at para. 331 (considering the claimant's FET without analyzing the customary international law minimum standard of treatment, because the tribunal "observe[d] that the BIT does not refer to 'international minimum standard' or similar formulations, unlike other treaties")).

[2167] Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217.

labeled as minimally unfair will constitute a breach of the Treaty. It would not be sufficient for Claimant to prove some modicum of unfairness. Rather, "Claimant must demonstrate much more than that: it must show that it suffered 'unjust or arbitrary . . . treatment [that] rises to [a] level that is unacceptable from the international perspective.' Put another way, Claimant must establish that Perú's treatment of SMCV fell 'far below international standards.'"[2168] Claimant appears to agree with, or, at a minimum, does not contest, this formulation.[2169]

943. Respondent also quoted the oft-cited *Waste Management* description of the FET standard, under which "a claimant must prove not just general unfairness, but conduct that is 'grossly unfair'; not merely an inconsistent or opaque administrative process, but 'a complete lack of transparency and candor'; or, not just an incorrect judicial decision, but a flat 'lack of due process' that results in a 'manifest failure of . . . justice.'"[2170] Claimant does not contest this formulation of the standard, either. Claimant, instead, takes issue with Respondent's characterization of the aforementioned conduct as "sever[e],"[2171] but, Respondent considers that a fair characterization given the strong adjectives that the *Waste Management* tribunal used. And, in any event, Respondent doubts that such a debate on semantics is useful to the Tribunal.

944. Claimant does argue that Perú is wrong for "suggest[ing] that the fair and equitable treatment obligation requires a 'wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.'"[2172] But this is another straw man argument. Respondent never argued that the FET provision "requir[ed] . . . a showing of '*wilful* neglect of duty, an insufficiency of action falling *far below* international standards, or even subjective *bad faith*.'"[2173] Rather, quoting the *Genin v. Estonia* tribunal (among the other

---

[2168] Respondent's Counter-Memorial at paras. 639-40 (*quoting* Exhibit RA-33, *S.D. Myers v. Canada*, Partial Award at para. 263 and Exhibit RA-56, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 ("*Genin v. Estonia*, Award"), at para. 367).

[2169] *See* Claimant's Reply at para. 137(a) (calling Perú's statement that "not every act that could possibly be labeled as minimally 'unfair' will constitute a breach of the Treaty" "uncontroversial"). Claimant did not comment on the statements quoted above, which the Tribunal should accept as agreement.

[2170] Respondent's Counter-Memorial at para. 641 (*quoting* Exhibit CA-269, *Waste Management v. Mexico*, Award at para. 98 (emphasis added)).

[2171] Claimant's Reply at para. 137(a). Respondent explained in its Counter-Memorial that "[w]hat is notable in *Waste Management* is not only the type(s) of State misconduct that must be shown, but also the severity." Respondent's Counter-Memorial at para. 641.

[2172] Claimant's Reply at para. 137(b); *see also id.* at para. 137 ("Peru's attempt to stretch the fair and equitable treatment obligation into one requiring 'sever[e]' conduct or a showing of 'wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith' is inconsistent with the bulk of fair and equitable treatment decisions, including those on which Peru relies.").

[2173] Claimant's Reply at para. 137 (emphasis added (for the word "require[d]")).

formulations of the FET standard already discussed), Respondent explained that "[a]cts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith."[2174] Obviously, "include" is not the same as "require." And Claimant agrees that "this type of conduct certainly would violate the obligation of fair and equitable treatment."[2175]

945. Claimant also argues that, under past arbitral decisions, 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."[2176] But, even assuming *arguendo* that the Tribunal determines that these "core concepts" are part of customary international law (it should not), where the parties (slightly) differ is in articulating the specific standards for those concepts (and, in some cases, whether they are independent strands or are more appropriately folded into other strands). Respondent turns now to the specific strands on which Claimant relies, below.

946. *Legitimate Expectations:* Respondent explained in its Counter-Memorial[2177] that "the purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[2178] In particular, "basic expectations" are only those expectations that were fundamental to a claimant's decision to make their investment, not any and all assorted expectations that claimants might have developed over the course of their investment. And Respondent explained[2179] that any such basic expectation must also be objectively reasonable;[2180] it is not a question of the investor's subjective hopes for its investment. Rather, it is an objective standard that is to be applied as of the time the investment

[2174] Respondent's Counter-Memorial at para. 640 (*quoting* Exhibit RA-56, *Genin v. Estonia*, Award at para. 367) (emphasis added).

[2175] Claimant's Reply at para. 137(b) (emphasis omitted).

[2176] Claimant's Reply at para. 137(a) (internal quotations omitted).

[2177] *See* Respondent's Counter-Memorial at paras. 643-47.

[2178] Exhibit RA-57, *Biwater Gauff v. Tanzania*, Award at para. 602 (emphasis added).

[2179] *See* Respondent's Counter-Memorial at paras. 645-47.

[2180] *See, e.g.*, Exhibit RA-61, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, July 21, 2017, at para. 667 ("as long as those expectations were objectively reasonable").

is made.[2181] Thus, 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), Claimant still must prove that (1) it held specified, objectively reasonable, and legitimate expectations about the treatment they would receive from Perú at the time it made the investment;[2182] (2) it made its investment in reliance on those legitimate expectations;[2183] and (3) Perú's subsequent actions frustrated those basic and legitimate expectations that led to the investment.

947. In its Reply, Claimant does not oppose Respondent's formulation of the applicable standard (which the Tribunal should therefore adopt).[2184] Claimant instead argues that, on the facts, it has "clearly satisf[ied] the standard put forward by Peru."[2185] Claimant is wrong, as Respondent explains in Section IV.B.2.a.i, below.

948. *Arbitrariness*: As Respondent explained in its Counter-Memorial,[2186] Professor Christoph Schreuer outlined the generally accepted standard for arbitrariness in *EDF v. Romania*, characterizing the following kinds of measures as arbitrary:

[2181] *See* Exhibit RA-62, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009 ("*EDF v. Romania*, Award"), at para. 219; *see also* Exhibit CA-125, *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, March 17, 2006 ("*Saluka v. Czech Republic*, Partial Award"), at para. 304 ("[T]he scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations."); Exhibit RA-63, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011 ("*El Paso v. Argentina*, Award"), at para. 358; Exhibit RA-64, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018 ("*Gavrilovic v. Croatia*, Award"), at para. 956 ("The reasonableness of an asserted expectation is to be determined objectively at the time the investment is made, with due regard to the circumstances of the case.").

[2182] *See* Exhibit RA-62, *EDF v. Romania*, Award at para. 219; Exhibit RA-67, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, November 3, 2008, at para. 173; Exhibit RA-68, *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, at para. 127; Exhibit CA-163*, Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010 ("*Lemire v. Ukraine*, Decision on Jurisdiction and Liability"), at para. 265 (asking "[w]hich were the legitimate expectations of Claimant at the time he made his investment?"); Exhibit RA-69, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, at para. 287 ("Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment. They have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment.").

[2183] *See* Exhibit RA-57, *Biwater Gauff v. Tanzania*, Award at para. 602; *see also* Exhibit CA-150, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, at para. 259; Exhibit RA-70, *Duke v. Ecuador*, Award at paras. 339-40; Exhibit RA-71, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 ("*Enron v. Argentina*, Award"), at para. 262; Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 146; Exhibit CA-269, *Waste Management v. Mexico*, Award at para. 98.

[2184] *See* Claimant's Reply at para. 138.

[2185] Claimant's Reply at para. 138.

[2186] *See* Respondent's Counter-Memorial at para. 649.

> [1] a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
>
> [2] a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> [3] a measure taken for reasons that are different from those put forward by the decision maker; [and]
>
> [4] a measure taken in wilful disregard of due process and proper procedure.[2187]

949. Respondent further explained[2188] that Claimant, therefore, 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." And Respondent quoted:

(i) the *ELSI* tribunal, which described arbitrariness as "something opposed to the rule of law" rather than "something opposed to a rule of law," and which explained that arbitrariness required "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"[2189];

(ii) the *Cargill v. Mexico* tribunal, which likewise held that an arbitrary action requires more than merely "inconsistent or questionable application of administrative or legal policy," and instead must demonstrate "an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subvert[] a domestic law or policy for an ulterior motive"[2190]; and

---

[2187] Respondent's Counter-Memorial at para. 649 (*quoting* Exhibit RA-62, *EDF v. Romania*, Award at para. 303).

[2188] *See* Respondent's Counter-Memorial at para. 650.

[2189] Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (*citing* Exhibit RA-72, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, 1989 I.C.J. Reports 15 (July 20) ("*ELSI* Judgment"), at para. 128) (emphasis added); *see also* Exhibit CA-163, *Lemire v. Ukraine*, Decision on Jurisdiction and Liability at para. 262 ("[a]rbitrariness has been described as founded on prejudice or preference rather than on reason or fact;" "contrary to the law because . . . [it] shocks, or at least surprises, a sense of juridical propriety; or wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety; or conduct which manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination" (internal citations and quotations omitted)).

[2190] Exhibit RA-29, *Cargill v. Mexico*, Award at para. 293.

(iii) the *Casinos Austria v. Argentina* tribunal, which, consistent with the *ELSI* tribunal's distinction between an act that is inconsistent with "the" rule of law versus an act that is inconsistent with "a" rule of law, explained that not even a violation of domestic law will necessarily constitute arbitrary conduct under international law, because "arbitrariness requires a qualitatively significant breach, an abuse of power, that imposes harm on a foreign investor contrary to the rule of law"[2191] and that "[i]ndicators for arbitrariness in this sense can be, for example, a manifest lack of competence of the host State's authority for taking the measure in question, bad faith applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an abuse of power."[2192]

950. Finally, Respondent explained that a State's action is not arbitrary just because it is based on political considerations.[2193] Political considerations—*i.e.* a State responding to the democratic will of its populace—may well be a legitimate basis for State action.

951. Other than objecting to Respondent's characterization that, based on all of the foregoing, Claimant faces a "high bar," Claimant, in its Reply, does not generally disagree with Respondent's discussion of the appropriate standard, calling the Parties' perceived disagreements "a distinction without a difference."[2194] Claimant argues instead that the conduct it challenges does breach this standard[2195] (and that certain aspects of the standard are irrelevant[2196]), which, as Perú explains in the following sections, is simply not true.

[2191] Exhibit RA-73, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, November 5, 2021 ("*Casinos Austria v. Argentina*, Award"), at para. 348.

[2192] Exhibit RA-73, *Casinos Austria v. Argentina*, Award at para. 348.

[2193] *See* Respondent's Counter-Memorial at paras. 654-55.

[2194] Claimant's Reply at para. 139(a); *see also id*. at paras. 139(b) (accepting that arbitrariness requires conduct "opposed to the rule of law," not simply "something opposed to a rule of law," but arguing that its claims go further than "simply . . . violating a local law"), 139(c) (accepting that "for a measure to be arbitrary, it is insufficient merely to show that the measure could have been better or is not perfect" but arguing that its claims are not based on conduct that could have been better), and 139(d) (accepting that "'political or public controversy' in government decision-making as a general matter is not inherently arbitrary" but arguing that "this has absolutely no bearing on the present case").

[2195] *See* Claimant's Reply at para. 139(b).

[2196] *See* Claimant's Reply at paras. 139(c)-(d).

952. One point is worth clarifying: later in its Reply, Claimant wrongly asserts that "[t]he parties agree that conduct is arbitrary if it is 'not based on legal standards' but rather 'on political calculations,' or if it is 'taken for reasons that are different from those put forward by the decision maker.'"[2197] But, as noted above, Perú was very clear in its Counter-Memorial that State action based on political considerations alone is not inherently improper.[2198] And Claimant has not even attempted to rebut this point in its Reply.[2199] Rather, as Respondent has explained (quoting Professor Schreuer), an action may be arbitrary if it is "not based on legal standards but on discretion, prejudice or personal preference."[2200] In a democracy, political considerations—taking into account the will of the electorate—are not a matter of discretion, prejudice or personal preference.[2201]

953. *Consistency and Transparency*: Respondent explained in its Counter-Memorial that consistency and transparency are not distinct FET requirements or strands.[2202] Rather, their analysis is often framed in terms of "arbitrary" or "unjustifiable" acts, which implies State conduct far more severe and reproachable than mere "inconsistency" (or they are considered as part of a legitimate expectations framework).[2203] Respondent further explained that, in fact,

---

[2197] Claimant's Reply at para. 155 (internal citations omitted) (emphasis added).

[2198] *See* Respondent's Counter-Memorial at paras. 654-55.

[2199] *See* Claimant's Reply at para. 139(d) (acknowledging Perú's argument and, instead of arguing to the contrary, asserting that "this has absolutely no bearing on the present case, which does not involve decisions taken in accordance with the existing legal framework but rather an extra-legislative repudiation of existing law in response to political pressure").

[2200] Respondent's Counter-Memorial at para. 649 (emphasis added).

[2201] *See* Exhibit RA-74, *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability at para. 8.23 ("[t]here is no doubt that by late 2005 and early 2006 there was political and public controversy in Hungary over the perceived high level of profits made by Hungarian Generators, including [the claimant's investment]," "politics is what democratic governments necessarily address; and it is not, *ipso facto*, evidence of irrational or arbitrary conduct for a government to take into account political or even populist controversies in a democracy subject to the rule of law."); *cf.* Exhibit RA-75, *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. Slovak Republic*, PCA Case No. 2017-08, Award, October 7, 2020, at para. 555 ("State intent is often the product of a mix of factors, including political compromises, partisan considerations, and competing interests.").

[2202] *See* Respondent's Counter-Memorial at paras. 656 *et seq.*

[2203] *See* Respondent's Counter-Memorial at para. 658 (*citing* Exhibit RA-57, *Biwater Gauff v. Tanzania*, Award at para. 602; Exhibit CA-163, *Lemire v. Ukraine*, Decision on Jurisdiction and Liability at para. 284; *see also* Exhibit RA-77, *Bosh International, Inc and B & P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, October 25, 2012, at para. 212 (following the *Lemire* reasoning); Exhibit RA-58, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, at para. 547; Exhibit CA-125, *Saluka v. Czech Republic*, Partial Award at para. 306; Exhibit CA-222, *Crystallex v. Venezuela*, Award at paras. 576 *et seq*.); *see also* Exhibit RA-153, *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, September 13, 2021, at para. 618 ("To determine the content of the obligation to act in a transparent manner under customary international law, the Tribunal identifies this principle as a fundamental aspect of the notion of due process."); Exhibit RA-154, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, September

tribunals have routinely held that an investor cannot prove a breach of an FET obligation simply by labeling certain State acts or statements by State actors as "inconsistent."[2204] Thus, the Tribunal must consider whether the claimed inconsistencies breach other accepted tenets of the FET standard. The question, for example, would be whether the putative inconsistency is sufficiently egregious that it may be considered arbitrary, in bad faith, or a contravention of legitimate investment-backed expectations.

954. Finally, Respondent explained that, as held by the *Urbaser* tribunal, the transparency requirement "cannot mean that [the State] has to act under complete disclosure of any aspect of its operation."[2205] The question would be "whether the State acted secretively to conceal its plans or announced those plans openly and with reasonable explanation and detail."[2206] In fact, one tribunal, in *IC Power Asia Development v. Guatemala*, held that "the standard of transparency in FET is limited to situations where 'the law has been changed to the detriment of the investor following the making of its investment'" and "is not expansive enough

---

4, 2020 ("*Eskosol v. Italy*, Award"), at para. 418 (noting overlap between transparency and legitimate expectations strand); Exhibit RA-155, *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, August 31, 2020, at para. 408 ("Transparency is plainly linked with stability" and "will enable the investor to be shielded from arbitrary change and from the frustration of legitimate expectations").

[2204] *See* Respondent's Counter-Memorial at para. 657 (*citing* Exhibit CA-245, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019 ("*Glencore v. Colombia*, Award"), at para. 1420 (explaining that "[t]here is no inconsistency and no breach of legitimate expectations, however, when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency"); Exhibit RA-76, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016 ("*Philip Morris v. Uruguay*, Award"), at para. 528 (the tribunal did not find a violation of the FET claim after two Uruguayan courts, the TCA and the SCJ, issued contradictory decisions that operated to bar claimants from judicial review because "[u]nder the Uruguayan judicial system, the SCJ can uphold the constitutionality of a law based on an interpretation of the scope of that law, in application of constitutional principles. That interpretation, however, does not bind the TCA when it determines, on the basis of the principles provided by administrative law, the legality of decrees rendered under that same law. That position does not seem to be manifestly unjust or improper, either in general or in the context of this case. Here both courts separately upheld the legality of the measure the Claimants sought to challenge, each under its own jurisdiction and applying its own legal criteria.")).

[2205] Respondent's Counter-Memorial at para. 660 (*quoting* Exhibit RA-78, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016 ("*Urbaser v. Argentina*, Award"), at para. 628); *see also* Exhibit CA-201, *Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 at para. 533 ("Whether a state has been unfair and inequitable by failing to be transparent with respect to its laws and regulations, or being ambiguous and inconsistent in their application, must be assessed in light of all of the factual circumstances surrounding such conduct. For example, it would be unrealistic to require Romania to be totally transparent with the general public in the context of diplomatic negotiations. The question before the Tribunal is thus not whether Romania has failed to make full disclosure of or grant full access to sensitive information; it is whether, in the event that Romania failed to do so, Romania acted unfairly and inequitably with respect to the Claimants.").

[2206] Exhibit RA-154, *Eskosol v. Italy*, Award at para. 418.

to encompass a disagreement over the scope of a binding tax opinion"[2207] (like the disagreement over the scope of the 1998 Stabilization Agreement here).

955. Claimant presents a number of arguments related to the consistency and transparency concepts, but each is either meritless or irrelevant. *First*, Claimant argues that the "argument that 'consistency and transparency . . . are not distinct FET elements' misses the point," because the Tribunal must consider Claimant's claims together, not the individual elements separately.[2208] Respondent does not disagree that the Tribunal can consider Claimant's FET claims holistically, as a general matter, but, to be clear, the fact that consistency and transparency are not distinct FET elements is relevant, because it underscores Respondent's point that mere inconsistency or some lack of transparency, on their own, do not breach an FET obligation; much more is required to approach the level of gross arbitrariness or some other specific FET element.

956. *Second*, Claimant implies (though does not explicitly argue) that consistency and transparency are distinct FET elements.[2209] But a number of the cases to which Claimant cites (but does not discuss) belie its argument.[2210]

957. *Third*, Claimant argues that "Peru's argument that 'inconsistencies or even disagreements among, or within, [government] agencies, without something more, cannot be grounds to find a breach of the FET obligation,' is both overly simplistic and once again mischaracterizes the basis for Freeport's allegations."[2211] Without citing any cases, Claimant declares that the "*volte-face* [that Claimant alleges, but does not prove] followed by inconsistent and nontransparent conduct is exactly what prior tribunals have concluded gives rise to breaches

---

[2207] Exhibit RA-156, *IC Power Asia Development v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award, October 7, 2020, at paras. 606-07.

[2208] Claimant's Reply at para. 140.

[2209] *See* Claimant's Reply at para. 140(b).

[2210] *See* Claimant's Reply at para. 140(b), n.634 (*citing*, *e.g.*, Exhibit CA-213, *Gold Reserve v. Venezuela*, Award at para. 591 (finding an FET violation based on "conduct evidencing . . . a lack of transparency, consistency and good faith in dealing with an investor," *i.e.*, not "transparency" or "consistency" on their own (emphasis added)); Exhibit CA-108, *Occidental v. Ecuador*, Award at paras. 183-85 (considering consistency and transparency under the "stability of the legal and business framework" FET strand). Claimant also cited *Deutsche Telekom v. India* at paragraph 387 for the "lack of transparency and forthrightness" language, Claimant's Reply at para. 140(b), n.634 (*citing* Exhibit CA-234, *Deutsche Telekom v. India*, Interim Award at para. 387), but this quote is misleading; the *Deutsche Telekom* tribunal merely used this language to describe India's conduct. The actual basis for the FET violation was the tribunal's conclusion that the respondent "acted in 'wilful disregard of due process of law' through conduct 'which shocks, or at least surprises, a sense of juridical propriety.'" Exhibit CA-234, *Deutsche Telekom v. India*, Interim Award at para. 389).

[2211] Claimant's Reply at para. 141.

of the fair and equitable treatment obligation."[2212] Perú will respond to the merits (or not) of Claimant's claims in the next subsection 2, below.[2213] For the purposes of this discussion of the applicable standards, the key point is that (with regard to the actual standard to be applied) Claimant asserts only that "tribunals have repeatedly recognized that a state's inconsistent treatment of investors or investments may give rise to violations of the obligation of fair and equitable treatment."[2214] But, to be clear, Respondent has not argued that it would be impossible for inconsistency to give rise to an FET violation (though it would more likely merge into, *e.g.*, the stability or arbitrariness strand). And Claimant's own "overly simplistic" statement tells the Tribunal nothing about what circumstances could actually give rise to a treaty breach.

958. Claimant does discuss the *PSEG v. Turkey* case, in which the tribunal found an FET violation because of (i) "negligence on the part of the administration in the handling of the negotiations with the Claimants"[2215]; (ii) the State's abuse of authority in its attempts to renegotiate terms of a contract already agreed to (on the basis of a change in law that did not affect those terms)[2216] and in its refusal to abide by a court decision favorable to the investor[2217]; and (iii) the "'roller-coaster' effect of the continuing legislative changes."[2218] As is evident, the tribunal did not find an FET violation simply (or even primarily) because of a single change in administrative policy, as Claimant would have this Tribunal believe.[2219] And, as discussed in subsection 2 below, Claimant's claims, even if true, would fail to meet the standard laid down by the tribunal in *PSEG*.

959. *Fourth*, and finally, Claimant contends that "Peru's argument that the transparency requirement cannot mean that [the State] has to act under complete disclosure of any aspect of its operation is equally irrelevant, since . . . Freeport's allegations are not about a

[2212] Claimant's Reply at para. 141(d).

[2213] *See* Claimant's Reply at para. 141(b) (attempting to distinguish *Glencore v. Colombia* by arguing that Perú did not follow the pre-existing legal framework here), para. 141(c) (attempting to distinguish *Philip Morris v. Uruguay* because that case involved differing court decisions), para. 141(d) (arguing that "Freeport's claims are not based on 'mere inconsistencies' or 'disagreements' arising out of the state's legitimate division of responsibilities within an existing legal framework").

[2214] Claimant's Reply at para. 141(a).

[2215] Exhibit CA-133, *PSEG Global Inc. et al. v. Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007 ("*PSEG v. Turkey*, Award"), at para. 246.

[2216] *See* Exhibit CA-133, *PSEG v. Turkey*, Award at para. 247.

[2217] *See* Exhibit CA-133, *PSEG v. Turkey*, Award at para. 249.

[2218] Exhibit CA-133, *PSEG v. Turkey*, Award at para. 250.

[2219] *See* Claimant's Reply at para. 141(a).

lack of complete disclosure, but rather a pervasive lack of transparency by Peruvian Government officials."[2220] Again, Respondent will address the application of the legal standards in the next section (subsection 2), but it emphasizes for the moment that Claimant has not contested Respondent's point about the appropriate standard to be applied. Claimant also argued that "tribunals have repeatedly recognized that 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."[2221] Again, though, Respondent has not argued that a lack of transparency, as a rule, cannot possibly rise to a treaty violation (though, again, most likely as part of a different strand of FET, if at all). The Parties simply disagree on whether sufficient circumstances are present here.

960. *Procedural Denial of Justice*: In its Counter-Memorial, Respondent explained that Claimant's "absence of fair procedure" or "serious procedural shortcoming in administrative . . . proceedings" claims were essentially claims for denial of justice.[2222] Respondent further explained that the burden for denial of justice claims is high; it 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. As the *RosInvestCo* 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."[2223] And one commentator has stated that "[o]nly if there is clear evidence of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law."[2224]

[2220] Claimant's Reply at para. 142 (internal quotation marks omitted).

[2221] Claimant's Reply at para. 142 (internal citations omitted). Claimant also argues that its position is consistent with Chapter 19 of the TPA, which, according to Claimant, "expressly establishes general requirements of transparency on the treaty parties." *Id*. To be clear, Chapter 19's (to use Claimant's words) "general requirements of transparency" are completely irrelevant to this dispute, as Claimant implicitly acknowledges by failing to explain these "general requirements" or to even cite to these "general requirements" at any other point in its Reply—including in Section II.C.3.iii (in which Claimant argues that "Peru Withheld Key Documents and Information from SMCV Even as Government Officials Affirmed SMCV's Position and Induced Significant Additional Payments."). Respondent further notes that, in any event, Article 10.16.1 of the TPA does not authorize an investor to bring a claim based on an alleged violation of Chapter 19.

[2222] Respondent's Counter-Memorial at para. 661 (*citing* Claimant's Memorial at para. 365).

[2223] Exhibit RA-81, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, September 12, 2010, at para. 279.

[2224] Exhibit RA-82, Christopher Greenwood, "State Responsibility for the Decisions of National Courts," in *Issues of State Responsibility Before International Judicial Institutions* (Malgosia Fitzmaurice, *et al.* eds.) (2004), at p. 58.

961. Respondent also noted that Claimant has limited its denial of justice claims to procedural denial of justice (or a lack of due process)—and even as to that, Claimant complains only about the Tax Tribunal proceedings, *i.e.*, administrative proceedings. As Respondent explained, "The standard of review of the State measure will also vary according to the nature of the decision-making process at issue: administrative proceedings trigger less stringent due process obligations than judicial proceedings."[2225]

962. In its Reply, Claimant disagrees with Respondent's characterization of its claim as a claim for denial of justice.[2226] Claimant argues that "while the fair and equitable treatment obligation *includes* the standard of denial of justice, it is not limited to that standard. Rather, 'conduct which . . . interferes with the legitimate exercise of rights,' such as serious procedural shortcomings in administrative proceedings, 'equally' violates the obligation."[2227] To be clear, Respondent has not argued that due process violations can never violate an FET provision without also earning the label "denial of justice." Respondent's point was, and is, that allegations of due process violations are often treated essentially the same, and evaluated under the same standards, as procedural denial of justice claims.[2228]

963. In fact, as Professors Schreuer and August Reinisch have explained, "[i]n substance, the due process [FET] element largely corresponds to the customary international law guarantee prohibiting a denial of justice."[2229] The *Siag v. Egypt* tribunal likewise confirmed that "[t]he concepts of 'due process' and 'denial of justice' are closely linked"—"[a] failure to allow a party due process will often result in a denial of justice."[2230] And that tribunal ultimately did

---

[2225] Respondent's Counter-Memorial at para. 698 (*citing* Exhibit RA-84, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, June 21, 2019 ("*United Utilities v. Estonia*, Award"), at para. 870; Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 200; Exhibit RA-76, *Philip Morris v. Uruguay*, Award at para. 569; Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1319) (internal quotations omitted).

[2226] *See* Claimant's Reply at paras. 143, 143(a), 143(b).

[2227] Claimant's Reply at para. 143(b) (*quoting* Exhibit CA-211, *PAO Tatneft (formerly OAO Tatneft) v. Ukraine*, PCA Case No. 2008-08, Award, July 29, 2014 ("*PAO Tatneft v. Ukraine*, Award"), at para. 411).

[2228] *See, e.g.*, Exhibit RA-157, *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Award, February 22, 2021, at paras. 209-10; Exhibit RA-112, *Waguih Elie George Siag and Chlorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009 ("*Siag v. Egypt*, Award"), at paras. 452-56; Exhibit RA-158, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 7, 2011 ("*Roussalis v. Romania*, Award"), at para. 315; Exhibit RA-159, *David R. Aven et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Final Award, September 18, 2018 ("*Aven v. Costa Rica*, Award"), at para. 356.

[2229] Exhibit RA-160, August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (2020) (excerpts), at para. 630.

[2230] Exhibit RA-112, *Siag v. Egypt*, Award at para. 452.

find that the respondent "failed to afford the Claimants due process of law" and, therefore, "further considers that the failure to provide due process constituted an egregious denial of justice to Claimants."[2231] The *Spyridon Roussalis v. Romania* tribunal went even further, explaining that "[d]enial of justice - that is, a failure of due process - constitutes a violation of the Fair and Equitable Treatment standard."[2232] Likewise the *Thunderbird* tribunal considered "the alleged failure to provide due process" as "constituting an administrative denial of justice" claim.[2233] And the *Aven v. Costa Rica* tribunal also acknowledged that "'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."[2234] This is all to say that past arbitral decisions considering denial of justice claims, particularly those involving allegations of impropriety by an administrative body, are equally instructive for the Tribunal's analysis, regardless of whether those decisions used the terminology "procedural denial of justice" or "due process."

964. In any event, ultimately, this veers toward yet another debate on semantics. The relevant issue is the appropriate standard that the Tribunal should apply (regardless of the label given to the claim). And in this respect, it is not clear that Claimant contests the standard proposed by Respondent. Claimant spends all of three sentences in its two-page discussion on this claim (whatever one wishes to call it) actually addressing the legal standard—and does not cite a single case for those three sentences.[2235] First, Claimant asserts that "[t]he fact that administrative proceedings typically have different procedural protections than judicial proceedings has no bearing on whether the legal standard for assessing those claims should be a 'heightened' version of the standard applicable to judicial proceedings, as Peru appears to suggest."[2236] While Respondent disagrees with this statement (because if an administrative proceeding is required to offer fewer procedural protections than a judicial proceeding, it would therefore take a "heightened" level of egregiousness for an administrative body's conduct to amount to a treaty violation relative to that of a judicial body), Claimant seems to concede Respondent's point in its very next sentence: "Rather, the level of procedural protections

[2231] Exhibit RA-112, *Siag v. Egypt*, Award at para. 455.

[2232] Exhibit RA-158, *Roussalis v. Romania*, Award at para. 315 (emphasis added).

[2233] Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 197.

[2234] Exhibit RA-159, *Aven v. Costa Rica*, Award at para. 356 (emphasis added).

[2235] *See* Claimant's Reply at para. 143(c), n.652 (only *citing* to Respondent's Counter-Memorial).

[2236] Claimant's Reply at para. 143(c).

required in administrative proceedings is simply relevant to whether the challenged conduct violates Peru's obligation to accord due process as part of its fair and equitable treatment obligation."[2237]

965. Claimant's statement that "the level of procedural protections required in administrative proceedings is . . . relevant to whether the challenged conduct violates Peru's obligation to accord due process as part of its fair and equitable treatment obligation" is entirely consistent with Respondent's argument that "[t]he standard of review of the State measure will also vary according to the nature of the decision-making process at issue: administrative proceedings trigger less stringent due process obligations than judicial proceedings."[2238] Claimant does not contest that there is a lower level of protection owed to a party by an administrative body (as opposed to a judicial body) or that this is relevant because, naturally, it would then take a higher level of egregiousness in the State's conduct to violate the FET obligations (hence Respondent's use of the word "higher"[2239]). Thus, Claimant does not appear to disagree with Respondent's standard—only, again, with Respondent's characterization that it is a high bar.

966. But, to be certain, as confirmed by Professors Schreuer, Rudolf Dolzer, and Ursula Kriebaum, "the standard for a finding of procedural impropriety is a high one under the FET."[2240] And the *Thunderbird* tribunal held that "[t]he administrative due process requirement is lower than that of a judicial process" (which means that there is higher bar to showing a treaty violation) and, partially on that basis, found that certain procedural "irregularities" in the administrative proceeding did not amount to a violation of NAFTA Article 1105 (containing

---

[2237] Claimant's Reply at para. 143(c). Respondent did not quote the introductory sentence to this subparagraph (*i.e.*, the third sentence). For the sake of completeness, this sentence provides that: "Peru's argument that 'the bar for Claimant is even higher' because 'administrative proceedings trigger less stringent due process obligations than judicial proceedings' likewise inappropriately conflates the denial of justice framework with the separate question of whether Peru has complied with its procedural obligations." *Id*.

[2238] Exhibit RA-84, *United Utilities v. Estonia,* Award at para. 870; *see also* Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 200; Exhibit RA-76, *Philip Morris v. Uruguay*, Award at para. 569.

[2239] Respondent's Counter-Memorial at para. 666. Respondent notes that it did not use the word "heightened" that Claimant quotes (without citation) in paragraph 143(c) of its Reply. *See* Claimant's Reply at para. 143(c) ("The fact that administrative proceedings typically have different procedural protections than judicial proceedings has no bearing on whether the legal standard for assessing those claims should be a 'heightened' version of the standard applicable to judicial proceedings, as Peru appears to suggest.").

[2240] Exhibit RA-161, Rudolf Dolzer, Ursula Kriebaum, and Christoph Schreuer, *Principles of International Investment Law* (2022), at p. 218 (*quoting* Exhibit CA-24, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, August 6, 2019, at para. 609); *see also* Exhibit RA-76, *Philip Morris v. Uruguay*, Award at para. 569 ("when considering procedural improprieties arbitral tribunals have adopted a high threshold for a denial of justice").

NAFTA's FET provision).[2241] The *Thunderbird* tribunal also explained that administrative proceedings can afford less due process—and accordingly have a higher bar to find a treaty violation—because they are subject to judicial review.[2242] Similarly, as Respondent noted in its Counter-Memorial, the *Glencore* tribunal explained (notably, in considering "due process") that "the due process standard operates differently in different settings. 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 decision-maker) 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."[2243]

967. In sum, while Claimant disagrees with Respondent's labeling of its claim as a procedural denial of justice claim, Claimant does not appear to contest the actual standard that the Tribunal must apply. As Respondent explained in its Counter-Memorial,[2244] that standard requires much more than a showing that the courts or administrative bodies in the host state made the "wrong" decision, or made a decision that the tribunal would not have made had it been in the decisionmaker's place. The question is whether the judiciary or administrative body afforded the investor a meaningful and fundamentally fair opportunity to adjudicate its claims—taking into account the procedural protections that are expected under the particular (administrative, judicial, legislative, etc.) circumstances.

968. As discussed in subsection 2.a.iv, below, Claimant's complaints about the Tax Tribunal's procedures and proceedings—the result of which SMCV appealed all the way up to the Peruvian Supreme Court—comes nowhere close to breaching Perú's obligations under the FET provision.

2. Perú Did Not Breach Its Fair and Equitable Treatment Obligations

969. Even if the Tribunal determines that Article 10.5 provides the protections that Claimant seeks to invoke here, it must nevertheless reject Claimant's Article 10.5 claim, because

[2241] Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 200; *see also* Exhibit RA-84, *United Utilities v. Estonia,* Award at para. 870 ("administrative proceedings trigger less stringent due process obligations than judicial proceedings").

[2242] Exhibit RA-35, *Thunderbird v. Mexico*, Award at paras. 200-01.

[2243] Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1319.

[2244] *See* Respondent's Counter-Memorial at para. 664.

the facts unquestionably show that at all times Perú acted consistent with its FET obligations, Peruvian law, and the 1998 Stabilization Agreement.

970. Below, Respondent addresses Claimant's (unfounded) arguments that Perú violated Article 10.5 by: (i) imposing non-stabilized Royalty and Tax Assessments against SMCV (subsection a); (ii) failing to waive assessments of penalties and interest against SMCV (subsection b); and (iii) refusing to refund certain of SMCV's GEM payments (subsection c).

a. Perú Did Not Breach Its Fair and Equitable Treatment Obligations by Imposing Royalty and Tax Assessments on SMCV

(i) Perú Did Not Frustrate Claimant's Legitimate Expectations

971. Claimant first claims that Perú frustrated SMCV's and Freeport's legitimate expectations.[2245] According to Claimant, "SMCV, and Freeport's predecessor, Phelps Dodge, invested in the Concentrator in reliance on the stability guarantees set forth in the Stability Agreement, which they understood would apply to the Concentrator based on the existing legal framework and specific assurances given by Peruvian officials."[2246]

972. Respondent explained in its Counter-Memorial that this claim is both fatally flawed and contrary to the record evidence. Specifically, Respondent first explained that Claimant is seeking to rely on the expectations that other entities (*i.e.*, SMCV and Phelps Dodge) supposedly held when they invested in the Concentrator years before Claimant ever made its investment (and, again, years before the TPA was signed or entered into force), but has entirely failed to explain why it has any right to rely on those other entities' alleged expectations.

973. In its Reply, Claimant argues that Perú provides insufficient support and explanation for its argument.[2247] Claimant's argument is, essentially, that Perú failed to provide sufficient support for its argument that Claimant failed to provide sufficient support for its claim; that is obviously nonsensical. Perú does not need support to point out that Claimant failed to adequately explain and support its claim. And the burden is on Claimant to prove its claims,[2248]

[2245] *See* Claimant's Memorial at paras. 368-72; Claimant's Reply at paras. 145-47.

[2246] Claimant's Memorial at para. 368.

[2247] *See* Claimant's Reply at para. 146 ("Peru provides absolutely no support for this proposition"), para. 146(b) ("Peru has provided no explanation for why this corporate restructuring should render its conduct prior to the Concentrator investment . . . irrelevant . . . .").

[2248] *See, e.g.*, Exhibit CA-411, *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, March 16, 2017, at para. 109 ("apply[ing] the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving it").

which it has, yet again, failed to do—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.

974. Moreover, as Respondent explained in its Counter-Memorial, even if Claimant could "inherit" the expectations of others, Claimant's legitimate expectations claim would nevertheless fail because any expectation that Phelps Dodge or SMCV had that the 1998 Stabilization Agreement would cover the Concentrator Project was not objectively reasonable[2249]—the evidence does not support such an expectation. Claimant's arguments to the contrary either mischaracterize the evidence or ignore it altogether. Specifically, Claimant, both in its Memorial and its Reply, cited to the following in support of the supposed reasonableness of SMCV's/Phelps Dodge's expectations:

a) The existing legal framework, and, in particular, the Mining Law and Regulations[2250]: Respondent has already explained in detail in Section II.A.2 of its Counter-Memorial and Section II.B, above, that the Mining Law clearly provided that the stability guarantees are limited to the investment project outlined in the feasibility study and will not repeat that argument here.[2251] SMCV and Phelps Dodge could not reasonably have relied upon the Mining Law and Regulations in forming their expectations.

b) A statement by the President of Perú "laud[ing]" the investment in the Concentrator and confirming that Perú would "fulfill [its] responsibility to maintain economic and legal stability"[2252]: Claimant, however, concedes that this statement came after SMCV's decision to invest in the Concentrator (according to Claimant, it was "laud[ing]" that very decision). And Claimant does not contest Respondent's argument that for a legitimate expectations claim to succeed, a claimant must show, *inter alia*, that the investor relied on that expectation in making its investment, *i.e.*, the expectation must have been formed at (or before)

[2249] *See, e.g.*, Exhibit RA-64, *Gavrilović v. Croatia*, Award at para. 956 ("The reasonableness of an asserted expectation is to be determined objectively at the time the investment is made, with due regard to the circumstances of the case.").

[2250] *See* Claimant's Memorial at para. 369; Claimant's Reply at para. 147(a).

[2251] *See, e.g.*, Exhibit CA-1, General Mining Law at Arts. 79, 83 ("*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión*.") (emphasis added).

[2252] Claimant's Memorial at para. 370(c) (internal citation omitted).

the time that the investment is made.[2253] As Respondent explained in its Counter-Memorial, 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.[2254]

In its Reply, Claimant argues in response that the statement was issued only "one day after SMCV and Phelps Dodge's Boards of Directors conditionally approved the Concentrator investment" and before construction of the Concentrator commenced in December 2004.[2255] This is, of course, irrelevant. As the *SunReserve v. Italy* tribunal explained, "[T]he temporal analysis should focus on the legitimate expectations that existed, if any, at the time the investor decided to make that investment"[2256]—not at the time that that decision was implemented. SMCV and Phelps Dodge clearly decided to construct the Concentrator on October 11, 2004. It does not matter whether the statement came one day, one month, or one year after SMCV and Phelps Dodge made their decisions to invest. The determinative point is that in no way could those companies have relied on a statement that was issued on October 12, 2004, in making a decision on October 11, 2004.

c) DGM's approval of the expansion of the Beneficiation Concession to include the Concentrator[2257]: Respondent has already explained in Section II.D.4.b of its Counter-Memorial and again in Section II.E.4, above, that this decision had no bearing whatsoever on the scope of the stability guarantees under the 1998 Stabilization Agreement (which was limited to the Leaching Project as described in the feasibility study).

[2253] *See, e.g.*, Exhibit RA-70, *Duke v. Ecuador*, Award at para. 340.

[2254] *See* Respondent's Counter-Memorial at para. 670.

[2255] Claimant's Reply at para. 147(b).

[2256] Exhibit RA-162, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, March 25, 2020, at para. 720 (emphasis added); *see also* Exhibit RA-163, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, at para. 190 ("Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest."); Exhibit RA-90, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, February 15, 2018, at para. 539 ("The Tribunal is of the view that the timing of the investor's *decision* to invest sets a backstop date for the evaluation of legitimate expectations.").

[2257] *See* Claimant's Memorial at para. 370(b); Claimant's Reply at para. 147(c).

d) Certain statements allegedly made by Ms. Chappuis to SMCV officials[2258]: According to Claimant, "Ms. Chappuis *explicitly confirmed* to SMCV that the Concentrator would be entitled to benefit from the stabilized regime."[2259] In its Counter-Memorial, however, Respondent noted that Claimant does not point to any contemporaneous evidence that these statements were made and, in fact, the contemporaneous evidence actually shows that on September 8, 2003, the DGM sent a report to SMCV—signed by Ms. Chappuis—officially notifying it that "the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company."[2260] Claimant completely ignores these facts (at least, with respect to its arguments in support of its legitimate expectations claim) in its Reply.

975. Claimant also 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:

- September 23, 2002: SUNAT issued a public report in response to an inquiry of a taxpayer (the 2002 SUNAT Report) 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."[2261] As explained in Section II.D.3, SMCV's 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.[2262]

[2258] *See* Claimant's Memorial at para. 370(a).

[2259] Claimant's Reply at para. 147(d) (emphasis in the original); *see also* Claimant's Memorial at para. 370(a).

[2260] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, p. 1, numeral 4 (emphasis added).

[2261] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa.*") (emphasis added).

[2262] *See* Exhibit CE-453, SMCV, Justification of Request for Formal Inclusion of Benefit Concession in the Current Stability Agreement, August 2004, at slide 39.

- September 15, 2003: As noted above, DGM sent a report 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."[2263]

- March 11, 2004: Mr. Polo's presentation at the Royalties Forum (a public event[2264] organized by the Energy and Mines Commission of Perú's Congress), 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."[2265]

976. In essence, Claimant almost entirely relies on Ms. Chappuis's witness statements,[2266] which, as Respondent also pointed out, 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's 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

[2263] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1 ("*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8 del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado esta [sic] otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato.*" (emphasis added)).

[2264] *See* Exhibit RWS-8, Second Polo Statement at paras. 29-31; Exhibit RE-219, Press Release from the Congress of Perú Regarding the Royalties Forum, March 11, 2004.

[2265] Exhibit RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts), at timestamps 00:09:36-00:10:03 ("*Los contratos de estabilidad no se dan por empresa, eso es importante aclarar. Una empresa puede tener [un] contrato de estabilidad por un proyecto y no tenerlo por otro [proyecto], o [puede] tener una actividad antigua que no tiene contrato de estabilidad y una nueva que sí lo tiene. Eso es así, no se da para toda la empresa. Se hace una inversión arriba de 20 millones o arriba de 50, según sea el caso, y eso da derecho a estabilidad por esa inversión, por ese desarrollo, no a toda la empresa*." (emphasis added)).

[2266] *See* Claimant's Memorial at para. 370(a), n.1003; Claimant's Reply at paras. 147(d)-(e).

1998 Stabilization Agreement.[2267] Claimant does argue in its Reply that, as the Director General of Mining, Ms. Chappuis's opinion somehow mattered more than her boss's opinion.[2268] But Claimant provides no support for that illogical position (other than Ms. Chappuis's self-serving statement).

977. Nevertheless, the Tribunal need not delve into a trivial analysis about MINEM's hierarchy. Rather, considering all the evidence together, the Tribunal can plainly conclude that no reasonable, objective person would rely on the informal, oral statement[2269] of a single official (even assuming Ms. Chappuis's 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 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.

978. In sum, even assuming that (i) Claimant can rely upon the expectations of Phelps Dodge and/or SMCV, (ii) SMCV and/or Phelps Dodge did actually believe that the Concentrator Project would be covered by the stabilization guarantees in the 1998 Stabilization Agreement, and (iii) Phelps Dodge and/or SMCV relied on that belief in making its investment in the Concentrator, Claimant's legitimate expectations claim cannot succeed, because the evidence shows that there could be no reasonable, objective basis for that belief.

[2267] *See* Exhibit CWS-11, First Torreblanca Statement at para. 25 ("Around the same time, I remember that Vice-Minister of Mines Cesar Polo had expressed doubts about whether the Stability Agreement would actually apply to our investment in the Concentrator."); Exhibit CWS-5, First Davenport Statement at para. 38 ("We were also aware that César Polo, who then served as Vice-Minister of Mines, expressed doubt about whether the Stability Agreement would apply to the concentrator."); Exhibit CWS-3, First Chappuis Statement at para. 53 ("Vice-Minister Polo had a different view").

[2268] *See* Claimant's Reply at para. 147(d).

[2269] Claimant also argues that "there is no basis for Peru's suggestion that a representation must be written rather than oral in order for an investor to reasonably rely on it." Claimant's Reply at para. 147(e). But this is yet another straw-man argument. Respondent never argued that "a representation must be writted rather than oral." *See* Respondent's Counter-Memorial at para. 674. Rather, Respondent argued, first, that the evidence on which Claimant relies for its legitimate expectations claim—alleged oral statements (the only evidence for which are witness statements submitted in this arbitration) contradicted by contemporaneous evidence—is (at best) extremely weak. *See* Respondent's Counter-Memorial at para. 674. And second, Respondent argued that, considering the totality of the facts, these alleged oral statements, even if true, are insufficient to prove that SMCV and/or Phelps Dodge's alleged expectations regarding the scope of the 1998 Stabilization Agreement were objectively reasonable, particularly given that SMCV sought confirmation in writing but never received it.

(ii) Perú Did Not Act in an Arbitrary Manner in Interpreting the Scope of the 1998 Stabilization Agreement

979. Claimant claims that "after SMCV commenced construction of the Concentrator, the Government arbitrarily changed its long-held position that stability guarantees apply to concessions or mining units to the much more restrictive position that stability guarantees apply only to the initial investment set forth in the feasibility study submitted to access stability guarantees."[2270] According to Claimant, "MINEM had assured SMCV that the stability guarantees applied to its Concentrator because it was part of its stabilized Beneficiation Concession, [but] MINEM then took the position that the Concentrator was not entitled to stability guarantees," and "[t]his *volte-face* was 'not based on legal standards,'" but, rather, "was the result of significant and unrelenting political pressure to extract additional economic contributions from Cerro Verde."[2271]

980. Claimant's claim, thus, entirely depends on it proving (i) that Perú did in fact change its interpretation of the 1998 Stabilization Agreement, and (ii) that Perú made that change "not based on legal standards," but, instead, (iii) based "on excess of discretion, prejudice or personal preference."[2272] As Perú has already forcefully explained in its Counter-Memorial and again in Sections II.E, II.F, and II.G, Perú has consistently and transparently interpreted the 1998 Stabilization 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). Perú will not repeat that recitation of the mountain of evidence here. But, to recall, as just a sampling:

- On September 23, 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."[2273]

[2270] Claimant's Reply at para. 148.

[2271] Claimant's Reply at para. 148.

[2272] Claimant's Reply at para. 139(b) (*citing* Exhibit CA-222, *Crystallex v. Venezuela*, Award at para. 578).

[2273] Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm, at p. 3 ("*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa.*" (emphasis added)).

- Perú communicated its interpretation to SMCV as early as September 2003 (three and a half years before Claimant's investment)—DGM sent a report 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."[2274] Notably, this report was signed by Claimant's own witness, Ms. Chappuis.

- On March 11, 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."[2275]

- On March 8, 2005, Mr. Tovar met with Mr. Harry Conger (Phelps Dodge) at the PDAC 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

[2274] Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, at p. 1 ("*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8 del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado esta [sic] otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato.*" (emphasis added)).

[2275] Exhibit RE-185, Audio of César Polo's Presentation, Mining Royalties Forum, Congress of the Republic, March 11, 2004 (excerpts), at timestamps 00:09:36 - 00:10:03 ("*Los contratos de estabilidad no se dan por empresa, eso es importante aclarar. Una empresa puede tener [un] contrato de estabilidad por un proyecto y no tenerlo por otro [proyecto], o [puede] tener una actividad antigua que no tiene contrato de estabilidad y una nueva que sí lo tiene. Eso es así, no se da para toda la empresa. Se hace una inversión arriba de 20 millones o arriba de 50, según sea el caso, y eso da derecho a estabilidad por esa inversión, por ese desarrollo, no a toda la empresa.*" (emphasis added)).

Leaching Project, but would pay royalties for the Primary Sulfide Concentrator, as this was not covered by any mining stabilization agreement."[2276]

- On April 14, 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 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."[2277] This last sentence could not be any more clear.
- On June 8, 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

[2276] Exhibit RWS-10, Second Tovar Statement at para. 88 ("*estaba claro que Cerro Verde no pagaría regalías por el Proyecto de Lixiviación pero sí por el de la Concentradora de Sulfuros Primarios, pues éste no estaba cubierto por ningún contrato de estabilidad minero.*").

[2277] Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 ("*Debe ponerse énfasis en este último aspecto: La estabilidad que otorgan los contratos de Garantías y Medidas de Promoción a la Inversión garantizan el régimen jurídico referido a materia tributaria, cambiaria y administrativa,* ***del proyecto de inversión, al cual están referidos****. Si un titular minero tuviera unidades económicas administrativas, o concesiones mineras, que no forman parte del proyecto objeto de la estabilidad, la norma establece que dicho titular deberá mantener la contabilidad del proyecto en forma separada. En consecuencia, no es el titular minero (persona natural o jurídica) el que estará exento o no del pago de las regalías, integralmente como empresa, sino que lo serán las concesiones mineras de las que es titular, dependiendo si estas integran o no un proyecto materia de contrato de estabilidad suscrito, antes de la vigencia de la Ley No. 28258. Así pues, únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía*." (bold in original; other emphasis added)).

for all of their projects."[2278] 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."[2279]

- Minister of Mines Sánchez sent a letter, dated November 8, 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."[2280]

- Mr. Isasi gave a presentation on May 3, 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 is a new project that does not benefit from tax, exchange rate and administrative stability.

[2278] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 26 ("*Entonces, ¿quiénes pagan regalía? Todos los titulares mineros pagan, pero no por todos sus proyectos*." (emphasis added)); *see also* Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at timestamp 08:54.

[2279] Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29 ("*no hay que confundir lo que es sujeto obligado, que es la empresa, con cuánto tiene que pagar; o sea, el sujeto obligado es una empresa minera pero al momento de determinar cuánto es lo que debe pagar, la administración tributaria tiene que determinar cuál es la base de referencia, y para determinar cuál es la base de referencia tiene que determinar cuáles son los proyectos mineros estabilizados y cuáles son los proyectos no estabilizados*." (emphasis added)).

[2280] Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at para. 1 ("*En primer lugar hay que distinguir el tratamiento legal del proyecto de "Lixiviación Cerro Verde" que está amparado por el Contrato de Garantías y de Medidas de Promoción a la Inversión del que corresponde al nuevo Proyecto de Sulfuros Primarios en el que se reinvertirán las utilidades provenientes del aquel antiguo proyecto de Lixiviación. El proyecto de Sulfuros Primarios no goza de la protección en virtud de ningún contrato de Garantías o de Estabilidad*.") (emphasis added).

In consequence, the sulfides project will pay royalties when it enters into production.[2281]

- MINEM officials gave presentation during the June 23, 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 Stabilization Agreement (and using identical language as the May 3, 2006, presentation).[2282]

981. The fact that Perú has been consistent in its interpretation of the 1998 Stabilization Agreement—as detailed at length in Sections II.E, II.F, and II.G above—obviously is directly fatal to this claim.

982. In addition, to succeed on this claim, Claimant would still have to prove that Perú's alleged change in interpretation (which, again, the evidence shows did not happen) was (i) "not based on legal standards," but, instead, (ii) was based "on excess of discretion, prejudice or personal preference." Claimant cannot make these showings either, not least because Perú never changed its interpretation.

983. In the course of trying to prove changes in Perú's positions, Claimant repeatedly claims to have spotted the hobgoblin of "political pressure" and to have identified it as the driver of MINEM's or SUNAT's actions. Even though there was no *volte-face*, and therefore, necessarily, there was no political cause of the (nonexistent) *volte-face*, it is worth pausing to respond more generally to Claimant's claims that Perú took certain positions about the 1998 Stabilization Agreement due to political pressure (setting aside the question of whether those positions changed or not).

984. Claimant has failed to show that Peruvian mining and tax authorities interpreted the 1998 Stabilization Agreement as they did because of any political pressure. Political

[2281] Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, at slide 12 ("*El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaria ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción*.").

[2282] *See* Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006, at slide 15 ("*El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaria ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción*.").

pressure could have existed for MINEM to interpret stabilization guarantees a certain way,[2283] 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 Perú's interpretation is documented well before any alleged political pressure (on which Claimant relies so heavily) began sometime in 2005 or 2006.[2284] (As discussed in Section II.E, Claimant keeps changing the dates when it says the alleged political pressure occurred and purportedly drove MINEM and SUNAT to take positions adverse to SMCV.[2285])

985. Similarly, to the extent that, when it uses the term "politically-motivated,"[2286] Claimant means that Perú acted with prejudice against SMCV and specifically targeted it, Claimant has failed to provide any evidence of such animus on the part of the Peruvian authorities. Claimant has nothing other than pure speculation based on the statements of certain individual legislators (whose conduct is not the subject of any claim). Thus, Claimant has 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."

986. Moreover, given that, as explained in Section II.B, Perú's interpretation of the 1998 Stabilization Agreement is consistent with Peruvian law, it is absolutely "based on legal standards" and therefore cannot be labeled arbitrary.

987. In sum, to succeed on this claim, Claimant would need to prove (i) that Perú did in fact change its interpretation of the 1998 Stabilization Agreement, (ii) that its interpretation was not based on legal standards, and (iii) that the interpretation was applied as it was in order to target SMCV (or based on discretion, prejudice, or personal prejudice). Claimant has failed to show each of these points—first and foremost, because, as discussed in Sections II.E, II.F, and II.G, Perú's interpretation has been consistent and transparent from the outset.

[2283] Respondent notes that the "political pressure" Claimant cites was not just, or even mostly, about MINEM's interpretation about whether the 1998 Stabilization Agreement covered the Concentrator Project but also included issues related to whether the stabilization guarantees protected investors from the new royalties at all (including on actually stabilized investment projects that were defined in the feasibility studies)—pressure that MINEM resisted in supporting and protecting the investors and their legitimate contractual rights. *See, e.g.*, Claimant's Memorial at para. 374(c).

[2284] *See* Claimant's Reply at para. 150(ii) (first *citing* a request from Congressman Diez Canseco in January 2005).

[2285] *See* Claimant's Memorial at paras. 375, 375(a) (arguing that SMCV became a political target after MINEM approved SMCV's profit reinvestment request, with the first evidence cited being in August 2005).

[2286] Claimant's Reply at para. 155.

(iii) Perú Was Transparent Regarding Its Interpretation of the 1998 Stabilization Agreement

988. Claimant alleges that Perú acted with a "total lack of transparency in its dealings with SMCV."[2287] This claim fails, because Claimant misconstrues (or ignores) key facts, and because the facts, when considered as a whole, show that Perú was more than sufficiently transparent with SMCV regarding the scope of the 1998 Stabilization Agreement.

989. To recall, as discussed in subsection 1 above, any transparency obligation under Article 10.5 "cannot mean that it has to act under complete disclosure of any aspect of its operation."[2288] The question would be "whether the State acted secretively to conceal its plans or announced those plans openly and with reasonable explanation and detail."[2289]

990. According to Claimant, Perú (i) "withheld key documents from SMCV," and (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) officials "did not object when SMCV stated its position that the stability guarantees also applied to its Concentrator investment."[2290] Respondent has already addressed Claimant's factual allegations[2291] in Sections II.D, II.E, II.F, and II.G above.[2292] However, a handful of points are worth repeating to underscore the deficiencies in Claimant's claim.

991. *First*, Claimant's assertion that Perú "withheld key documents from SMCV" is wrong. Claimant specifically points to 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 Canesco in November 2005.[2293] As an initial matter, Respondent notes that

---

[2287] Claimant's Reply at para. 156.

[2288] Exhibit RA-78, *Urbaser v. Argentina*, Award at para. 628.

[2289] Exhibit RA-154, *Eskosol v. Italy*, Award at para. 418.

[2290] Claimant's Reply at para. 157.

[2291] *See* Claimant's Reply at paras. 158-61.

[2292] Included in those discussions is a rebuttal to Claimant's argument in paragraph 160 that "MINEM officials kept their new position on the scope of stability guarantees and SMCV's Concentrator close to their chest: the Government sought to induce SMCV to pay hundreds of millions of dollars in 'voluntary' contributions in the belief that its Concentrator was exempt from royalties," *see supra* at Sections II.F.1 and II.F.2, and a rebuttal to Claimant's argument in paragraph 161 that "Peru also 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," *see supra* at Section II.F.3.

[2293] *See* Claimant's Reply at para. 158.

all of these documents show that Perú has been consistent regarding its interpretation of the 1998 Stabilization Agreement.

992. With respect to transparency, though, Claimant's argument fails because Respondent was under no obligation to disclose these particular documents to SMCV. Claimant cannot credibly assert that a State is required to send to an investor every document it creates that has, or might have, any bearing on the investor's investment. Putting aside the obvious impracticality of Claimant's position, governments often create documents in the normal course of business that, for any number of reasons, are internal and are kept confidential. This is why the *Urbaser v. Argentina* tribunal explained that transparency "cannot mean that [the State] has to act under complete disclosure of any aspect of its operation."[2294] And it is why the *Eskosol v. Italy* tribunal looked at the transparency issue not with respect to the disclosure of any specific document, individually, but, rather, "at the more general level," considering "whether the State acted secretively to conceal its plans."[2295] Thus, Perú is not obligated to turn over every piece of paper it generates that has any bearing on SMCV's or Claimant's investment. Respondent's only obligation was to not hide its interpretation of the 1998 Stabilization Agreement. As discussed in Sections II.D, II.E, and II.F, above, the evidence shows that Perú absolutely did not hide or withhold its interpretation of the 1998 Stabilization Agreement from SMCV or anyone else. Respondent has already listed a number of examples in support of this point in paragraphs 975 and 980. In the interest of brevity, Respondent will not repeat those examples again.

993. As Respondent noted in its Counter-Memorial,[2296] Claimant even 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[2297] and that "[o]ne of [Ms. Chappuis's] colleagues, César Polo," *i.e.*, her boss, took "the position that the Concentrator would have to pay royalties"[2298] (which Claimant says SMCV (self-servingly) disregarded on the grounds that it was supposedly "politically motivated"[2299]). These facts—including Claimant's own admissions—are fatal to its transparency claim.

[2294] Exhibit RA-78, *Urbaser v. Argentina*, Award at para. 628.

[2295] Exhibit RA-154, *Eskosol v. Italy*, Award at para. 418.

[2296] *See* Respondent's Counter-Memorial at para. 693.

[2297] *See* Claimant's Memorial at para. 381(a).

[2298] Claimant's Memorial at para. 108.

[2299] Claimant's Memorial at para. 108.

994. *Second*, Claimant's assertion that "Government officials repeatedly declined to clarify their intentions regarding assessing royalty payments against SMCV when SMCV requested them to do so" and "did not object when SMCV stated its position that the stability guarantees also applied to its Concentrator investment" is simply not true.[2300]

995. Claimant relies on the following events, none of which support Claimant's argument:

- Claimant relies on a March 8, 2005, meeting at the PDAC Conference in Toronto—but, during that meeting, Mr. Tovar told Phelps Dodge representatives that SMCV would have to pay royalties on the Concentrator, because it was not stabilized.[2301] Claimant, without any direct evidence, argues that Mr. Tovar's testimony is untrue.[2302] But Respondent has already rebutted those arguments in Section II.E.5, above.

- 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."[2303] Claimant's assertion is again misleading. As Respondent has already explained in Section II.G.2.a, 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,[2304] and, on March 4, 2005, SMCV asserted in response that it was not obliged to pay royalties, because it was exempted by the 1998 Stabilization Agreement.[2305] SMCV's Vice President Ms. Torreblanca met with Mr. Cruz to communicate SMCV's understanding of the 1998 Stabilization Agreement shortly thereafter.[2306]

  As Mr. Cruz explains in his witness statement, he did not confirm Ms. Torreblanca's interpretation regarding the scope of the 1998 Stabilization

[2300] Claimant's Reply at para. 157.

[2301] *See* Claimant's Reply at para. 158(b).

[2302] *See* Claimant's Reply at para. 158(b).

[2303] Claimant's Reply at para. 158(a).

[2304] *See* Exhibit CE-482, Letter from SUNAT to SMCV, February 17, 2005.

[2305] *See* Exhibit CE-486, Letter from SMCV to SUNAT, Letter No. SMCV-AL-279/2005, March 4, 2005.

[2306] *See* Exhibit RWS-14, Second Cruz Statement at para. 22.

Agreement during that meeting.[2307] If SMCV wanted to confirm its 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 Stabilization Agreement cannot be understood as an endorsement of Ms. Torreblanca's interpretation. As explained in Section II.E, the government informed SMCV on numerous occasions that SMCV's Concentrator Plant was not covered by the Agreement.

- Finally, Claimant relies on the Roundtable Discussions, which took place on June 23, June 29, and July 10, 2006.[2308] As Mr. Tovar discusses in his witness statement, during the June 23, 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."[2309] Claimant (again, without any direct evidence) argues that this presentation did not happen[2310] but, as explained in Sections II.E.14 and II.F, those arguments are without merit (and, in fact, the presentation was handed out to meeting participants, including representatives of SMCV).

996. Implicitly recognizing that the evidence is against it, Claimant next argues, essentially, that SMCV should not be responsible for knowing anything that was not told to it directly (*i.e.*, that Perú's argument that SMCV should have known the State's position based on, *inter alia*, multiple MINEM presentations to Congress is "ludicrous").[2311] But it is Claimant's argument that the Tribunal should somehow reward SMCV for burying its head in the sand that is "ludicrous." 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). To the

[2307] *See* Exhibit RWS-14, Second Cruz Statement at paras. 2, 22.

[2308] *See* Exhibit RE-51, Proinversión Congressional Committee, Meeting Minutes, June 29, 2006; Exhibit CE-541, "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay 13 Million," *El Heraldo*, July 10, 2006; *see also* Respondent's Counter-Memorial at paras. 153-55.

[2309] Exhibit RWS-3, First Tovar Statement at para. 67; *see also* Exhibit RE-107, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," June 2006, at slide 15.

[2310] *See* Claimant's Reply at para. 158(g).

[2311] Claimant's Reply at para. 159. In support of this argument, Claimant makes certain, unconvincing, factual attacks on the evidence of these Congressional presentations. Respondent has already rebutted these arguments in Sections II.E.7 and II.E.12.

contrary, the *M.C.I. Power v. Ecuador* tribunal rejected certain of the claimant's alleged legitimate expectations that were based on ignorance,[2312] and the *Eskosol* tribunal specifically rejected a transparency-based FET claim, because there was "ample public debate" to put the claimant on notice of the respondent's impending action.[2313] Moreover, even if that were not the case, the evidence detailed above shows that Peruvian officials did explicitly inform SMCV of the State's interpretation of the 1998 Stabilization Agreement on multiple occasions—and Claimant has admitted that SMCV was aware of the State's position.[2314]

997. Thus, while Claimant is correct that the "relevant question is . . . whether *Peru's* conduct lived up to its obligation of fair and equitable treatment to be transparent to SMCV about its intentions,"[2315] the evidence shows that Perú absolutely satisfied any reasonable obligation of transparency towards SMCV. MINEM officials (i) directly informed SMCV of its interpretation of the 1998 Stabilization Agreement and, (ii) on multiple occasions, publicly stated Perú'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.

(iv) The Tax Tribunal Did Not Commit Due Process Violations

998. Claimant's third and final FET claim with respect to Perú's imposition of the Royalties and Tax Assessments is its contention that the Tax Tribunal committed serious due process violations.[2316] But, as Respondent explained in its Counter-Memorial,[2317] this claim also fails both on the facts and on the law. Respondent has already rebutted Claimant's factual allegations (most of which rests on no more than speculation) in Section II.H. But, moreover,

---

[2312] *See* Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 303.

[2313] Exhibit RA-154, *Eskosol v. Italy*, Award at para. 419 ("Given this prior public debate, the Tribunal sees no transparency violation . . ."); *see also* Exhibit RA-164, *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, at para. 128 (explaining that transparency requires that "all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors" (emphasis added)).

[2314] Claimant also argues that Perú hid its (non-existent) change in interpretation of the 1998 Stabilization Agreement to extract additional monies from SMCV. *See* Claimant's Reply at paras. 160-61. Respondent has already addressed these factual arguments in Section II.F, but, of course, these arguments fail because as already discussed in this section and in Sections II.D, II.E, II. F, and II.G, Perú did not change its interpretation of the 1998 Stabilization Agreement and has at all times been transparent about its interpretation (and its interpretation about the relevant Mining Law and Regulations, generally).

[2315] Claimant's Reply at para. 158.

[2316] *See* Claimant's Memorial at paras. 384 *et seq*.; Claimant's Reply at paras. 163 *et seq*.

[2317] *See* Respondent's Counter-Memorial at paras. 697 *et seq.*

even if the facts had been as Claimant alleges them (they were not), those facts simply would not rise to a Treaty violation in any event. A quick review, separated as Claimant does between (a) the 2008 and 2006-2007 Royalty Assessment cases; and (b) the 2009 and 2010-2011 Royalty Assessment cases, confirms that Claimant has not established a Treaty breach and could not possibly establish one on any version of the events.

999. *2008 and 2006-2007 Royalty Cases*: To recall, here are the facts on which Claimant relies:

- President Olano appointed Ms. Villanueva as a temporary assistant (*asesor*) to Chamber No. 1 for its deliberations on the 2008 Royalty Case.[2318]
- Ms. Villanueva sent President Olano an email stating: "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."[2319] And President Olano responded: "Ok, thank you."[2320]
- Chamber No. 1 issued its resolution on the 2008 Royalty Case before Chamber No. 10 issued its resolution on the 2006-2007 Royalty Case, despite the fact that the 2006-2007 Royalty Case was filed nine months earlier.[2321]
- Over the course of May 21 and 22, 2013 (the day that Chamber No. 1 issued its resolution on the 2008 Royalty Case and the following day), there was an exchange of five emails between President Olano, the presiding *vocal* of Chamber No. 1, and the presiding *vocal* of Chamber No. 10.[2322] The emails indicate that the presiding *vocal* for Chamber No. 10 was unhappy that there was not better coordination between the two chambers given that they were dealing with the

[2318] *See* Claimant's Reply at para. 166(a).

[2319] Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET); *see also* Claimant's Reply at para. 166(b).

[2320] Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

[2321] *See* Claimant's Reply at para. 167.

[2322] *See* Claimant's Reply at para. 167(b); Exhibit CE-652, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 8:58 AM PET); Exhibit CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET).

same taxpayer and same issue.[2323] The presiding *vocal* for Chamber No. 1 apologized to President Olano for any inconvenience, and indicated that she had spoken with someone from Chamber No. 10 and thought they were in agreement that the "terms of the resolution were quite clear," and that she had "sen[t] them a copy of the draft to coordinate any adjustments."[2324]

- The resolution for the 2006-2007 Royalty Case uses similar language to the resolution for the 2008 Royalty Case.[2325]
- The resolution for the 2006-2007 Royalty Case does not include a law clerk's initials.[2326]

1000. That is the entirety of the evidence on which Claimant relies to prove a due process violation. The rest of Claimant's argument is pure speculation: that Ms. Villanueva essentially decided the 2008 Royalty Case herself; that she was acting entirely under the direction of President Olano who, for some unknown reason, wanted SMCV to lose; that President Olano, somehow (Claimant makes no attempt to actually explain[2327]) made sure that the 2008 Royalty Case was decided first; and that none of the *vocales* in Chamber Nos. 1 or 10 actually had any real role in deciding the 2006-2007 Royalty Case or the 2008 Royalty Case. The evidence simply does not support Claimant's speculation.

1001. Rather, as explained in Section II.H, the evidence shows that President Olano appointed an experienced assistant (*asesora*) to assist Chamber No. 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. Claimant has simply failed to show any impropriety.

[2323] Exhibit CE-652, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 8:58 AM PET); Exhibit CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET).

[2324] Exhibit CE-652, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 8:58 AM PET); *see also* Exhibit CE-992, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 11:09 AM PET).

[2325] *See* Claimant's Reply at para. 168.

[2326] *See* Claimant's Reply at para. 168(d)

[2327] *See* Claimant's Reply at paras. 165, 167(a).

1002. *2009, 2010-2011, and Q4 2011 Royalty Assessment Cases*: The facts on which Claimant relies are:

- Mr. Mejía Ninacondor participated in the 2010-2011 Royalty Case as a *vocal* after SMCV's recusal request was denied.[2328]
- Mr. Mejía Ninacondor had previously worked at SUNAT, but did not work on the 2010-2011 Royalty Case.[2329]
- President Olano, as the *vocal ponente* of the Plenary Chamber, drafted the Plenary Chamber resolution rejecting SMCV's recusal request.[2330]
- The resolutions for the 2009 and 2010-2011 Royalty Cases used language similar to the 2008 Royalty Case.[2331]
- Ms. Villanueva acted as a *vocal* on SMCV's Q4 2011 Royalty Case.[2332]

1003. Again, that is it. Claimant relies on unsupported speculation (or downright mischaracterizations): that Mr. Mejía Ninacondor's work at SUNAT made him biased against SMCV; that President Olano somehow forced otherwise unwilling Chambers to accept her draft Plenary Chamber resolution denying SMCV's request for Mr. Mejía Ninacondor's recusal (notwithstanding the fact that Chamber No. 5 evidently felt free to dissent); that the respective *vocales* did not actually consider SMCV's 2009 and 2010-2011 Royalty challenges (which seemingly conflicts with Claimant's concern that Mr. Mejía Ninacondor was involved in the 2010-2011 Royalty Case). Respondent has difficulty even articulating what Claimant's concern might be with Ms. Villanueva working on the Q4 2011 Royalty Case. In any event, Respondent has already addressed Claimant's speculation and mischaracterizations in Section II.H. As discussed there, the evidence simply is not on Claimant's side.

1004. But Claimant's claim would fail even if its version of the facts were substantiated. On the law, this claim is also wholly insufficient to amount to a breach of Perú's FET obligations. Claimant is complaining about who decided SMCV's 2008 and 2006-2007 Royalty Cases (which Claimant apparently believes, without evidence, was President Olano) and who

[2328] *See* Claimant's Reply at paras. 169-70.

[2329] *See* Claimant's Reply at para. 170.

[2330] *See* Claimant's Reply at para. 171.

[2331] *See* Claimant's Reply at para. 172.

[2332] *See* Claimant's Reply at para. 173.

decided SMCV's 2009 and 2010-2011 Royalty Cases (which Claimant cannot seem to settle on[2333]). This is, at most, a complaint about independence and impartiality.[2334]

1005. The problem for Claimant is that although investors are entitled to some measure of due process in administrative proceedings, as discussed in Respondent's Counter-Memorial[2335] and again in subsection 1.c, above, less is demanded of administrative proceedings, particularly with respect to the independence of their adjudicators. As the *Glencore* tribunal explained, "[I]n 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 decision-maker) 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."[2336] Here, of course, SMCV both had and took full advantage of ample opportunities for judicial review of the Tax Tribunal's decisions.

1006. Notably, 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. Claimant argues that *Glencore* is distinguishable—specifically and only with respect to Mr. Mejía Ninacondor's failure to recuse—because the administrative bodies in *Glencore* were operating in accordance with Colombian law while, according to Claimant, Mr. Mejía

[2333] Claimant confusingly expresses concern that decisions were made by Mr. Mejía Ninacondor (with respect to the 2010-2011 case), *see* Claimant's Reply at para. 170, but then seems to suggest that it was President Olano who decided them, given that the decisions were consistent with the 2008 Royalty Case resolution, *see id.* at para. 172, but then also seems to point the finger at Ms. Villanueva in her new position as *vocal,* which Claimant alleges was inappropriate on some unspecified ground, *see id.* at para. 173.

[2334] *See* Claimant's Reply at para. 174.

[2335] *See* Respondent's Counter-Memorial at paras. 698-701.

[2336] Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1319; *see also* Exhibit RA-35, *Thunderbird v. Mexico*, Award at paras. 200-01.

Ninacondor's failure to recuse was unlawful.[2337] As an initial matter, as explained in Section II.H.3, Mr. Mejía Ninacondor was not required to be recused under Peruvian law.[2338]

1007. But, regardless, even assuming *arguendo* that Mr. Mejía Ninacondor should have been recused under Peruvian law, that alone is nowhere near sufficient to constitute an FET breach. First, Claimant's reading of *Glencore* 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 Claimant is (incorrectly) alleging Mr. Mejía Ninacondor did here. Moreover, in addition to failing to show that Mr. Mejía Ninacondor actually did work on the 2010-2011 Royalty Case while at SUNAT (he did not), Claimant has not shown (or even alleged) that Mr. Mejía Ninacondor had any bias against SMCV. And this is important because, to recall, Claimant has a high bar to show a due process or procedural denial of justice claim. To succeed, Claimant must show more than a single mistake (which, in any case, Respondent did not do here); rather, it must show that Perú 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.[2339] Again, Claimant has come nowhere close to meeting its burden.

b. Perú Did Not Breach Its Fair and Equitable Treatment Obligations with Respect to the Penalties and Interest Assessed Against SMCV

1008. Claimant claims that Perú violated its obligation to provide fair and equitable treatment under Article 10.5 of the TPA each time that it declined to waive penalties and interest with respect to SUNAT's Royalty and Tax Assessments.[2340] Specifically, Claimant alleges in its Reply that the various SUNAT, Tax Tribunal, and court decisions rejecting SMCV's requests to

[2337] *See* Claimant's Reply at para. 170(a). It is telling that Claimant quickly turns to a subsequent amendment, under which it alleges Mr. Mejía Ninacondor would have been required to have been recused had it actually been in force at the relevant time to somehow argue Perú believes that Mejía Ninacondor should have been recused (even though it was not actually required by the law in force at the time). *See id.* at para. 170(c). Respondent has again already explained in Section II.H.3 that (i) Mr. Mejía Ninacondor would not have had to recuse himself under the new amendment; and (ii) the amendment in no way indicates that Perú believes that Mr. Mejía Ninacondor should have been recused.

[2338] And Perú notes that SMCV had the opportunity to appeal the Tax Tribunal's decision on the 2010-2011 Royalties before the Contentious Administrative Court (as it did with the 2008 Royalty Case and the 2006-2007 Royalty Case).

[2339] *See* Respondent's Counter-Memorial at para. 662 (*citing* Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at pp. 77, 84-87).

[2340] *See* Claimant's Memorial at paras. 400 *et seq*.; *see also* Claimant's Reply at paras. 175 *et seq*.

waive penalties and interest were arbitrary, unreasonable, disproportionate, procedurally improper, and fundamentally inequitable.[2341]

1009. To recall, arbitrariness is "something opposed to the rule of law" rather than "something opposed to a rule of law," and requires that the Tribunal find Perú's actions constituted "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[2342] Claimant's claim must fail because SUNAT, the Tax Tribunal, and the Peruvian courts all acted appropriately and in accordance with Peruvian law in dismissing SMCV's waiver requests. Even if the Tribunal were to disagree with any of the decisions rejecting SMCV's waiver requests, at a minimum there is no possible basis for finding that those decisions rise to the level of "something opposed to the rule of law" or that they constituted acts that shock a sense of juridical propriety.

1010. Contrary to Claimant's allegations, Perú acted fairly and reasonably with respect to its assessment of penalties and interest against SMCV. SUNAT, the Tax Tribunal, and the Peruvian courts denied SMCV's requests to waive penalties and interest related to its Royalty and Tax Assessments in accordance with Peruvian law. SUNAT and the Tax Tribunal also appropriately applied the statutory interest rate required by Peruvian law to SMCV's Royalty Assessments. Moreover, SMCV has only itself to blame for the penalties and interest it accrued, because they resulted from SMCV's failure to mitigate its damages by paying the Assessments it knew were due and then challenging them before Peruvian administrative and judicial bodies. Thus, Perú cannot be said to have breached its FET obligations under the Treaty, as discussed in the sections that follow.

(i) Peruvian Authorities Denied SMCV's Requests to Waive Penalties and Interest in Accordance with Peruvian Law

1011. As Respondent explained in its Counter-Memorial,[2343] and again in Section II.I.2 above, Peruvian law allows penalties and interest to be waived for a taxpayer under certain, very specific conditions. A taxpayer must timely submit its waiver requests, and the taxpayer's situation must meet the specific requirements for a waiver under Article 170 of the Tax Code. With respect to the 2006-2007 and 2008 Royalty Assessments, SMCV—by its own admission—

[2341] *See* Claimant's Reply at para. 177.

[2342] Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (*citing* Exhibit RA-72, *ELSI* Judgment at para. 128) (emphasis added).

[2343] *See* Respondent's Counter-Memorial at paras. 721 *et seq*.

failed to timely file its waiver requests.[2344] For that reason (which was entirely of SMCV's own making), the waiver requests were denied and then the denials were upheld at all subsequent stages of administrative and judicial review.[2345] With respect to the remaining waiver requests for certain Royalty and Tax Assessments, SUNAT and the Tax Tribunal denied SMCV's requests on the merits, because none of the requirements for a waiver under Article 170 were met.[2346]

1012. Thus, for each of SMCV's waiver requests, SMCV failed to meet the conditions under which the penalties and interest could be waived. The Peruvian government, therefore, acted reasonably and in accordance with Peruvian law when it denied SMCV's waiver requests. The Peruvian government did not act arbitrarily or unreasonably as Claimant alleges, let alone act in breach of its treaty obligations to treat Claimant in a fair and equitable manner. Respondent discusses each category of waiver requests (*i.e.*, those that were time-barred, and those that were dismissed on the merits) below.

1013. *The 2006-2007 and 2008 Royalty Assessments*. As discussed in Section II.I.2.a, above, SMCV's waiver requests relating to the 2006-2007 and 2008 Royalty Assessments were time-barred, and, therefore, the Peruvian government properly rejected them in accordance with Peruvian law. Specifically, Article 147 of the Tax Code requires an appellant to raise at the outset of its complaint all issues that it wishes the Tax Tribunal to consider.[2347] And, by Claimant's own admission, it failed to raise the waiver issue until after the Tax Tribunal ruled against it on the merits: In paragraph 409 of Claimant's Memorial, Claimant states that "[i]n the

[2344] *See* Claimant's Memorial at para. 409.

[2345] The Tax Tribunal found that that SMCV's requests were untimely. *See* Exhibit CE-91, Tax Tribunal Decision No. 11667-10-2013 (2006-2007 Royalty Assessment), July 15, 2013, at p. 4; Exhibit CE-92, Tax Tribunal Decision No. 11669-1-2013 (2008 Royalty Assessment), July 15, 2013, at p. 5. The Contentious Administrative First Instance Court and the Superior Court of Lima agreed with the Tax Tribunal, holding that SMCV's waiver requests were filed too late and, thus, could not be considered. *See* Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016, at pp. 29-30, paras. 12.1-12.3; Exhibit CE-274, Superior Court Decision No. 48, File No. 7649-2013 (2006/07 Royalty Assessment), July 12, 2017, at p. 27, para. 20; Exhibit CE-137, Superior Court Decision No. 51, File No. 7650-2013 (2008 Royalty Assessment), January 29, 2016, at pp. 14-15, para. 12. And the Supreme Court then confirmed the first and second instance courts' decisions with respect to the 2008 Royalty Assessment (SMCV withdrew its appeal of the 2006-2007 Royalty Assessment before the Supreme Court could take the necessary votes to reach a decision). *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at p. 79.

[2346] *See, e.g.*, Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016 (notified to SMCV on March 1, 2017), at pp. 125-29; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018 (2010/11 Royalty Assessment), August 28, 2018, at p. 38; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019 (Q4 2011 Royalty Assessment), November 18, 2019, at pp. 9-10.

[2347] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 147.

2006-2007 and 2008 Royalty Cases, SMCV requested that the Tax Tribunal waive penalties and interest immediately after it was notified of the Tax Tribunal's decisions in those cases."[2348] Furthermore, SMCV's waiver requests, which are dated June and July 2013, post-date the Tax Tribunal's decisions dated May 2013,[2349] which further confirms the fact that SMCV's waiver requests were untimely filed.

1014. After essentially conceding the untimeliness of SMCV's waiver requests, Claimant first argues that even if SMCV's waiver requests were untimely, the Peruvian government should still have considered those requests, because it was obligated to consider waiving the penalties and interest *sua sponte* (*i.e.*, even if SMCV had never made a request).[2350] But, as discussed in Section II.I.2.a above, no such *sua sponte* obligation exists under Peruvian law. None of the laws or regulations cited by Claimant lends any support to its argument regarding *sua sponte* obligations to review untimely waiver requests.

1015. Then, Claimant argues that Article 170's alleged status as a "peremptory norm" provides a basis for such *sua sponte* obligations.[2351] However, Claimant's argument is, again, unavailing, because Article 170 would only apply "if its conditions are met"[2352]—a fact which Claimant concedes—and thus, Article 170 did not apply because none of the conditions were met.

1016. In sum, without an obligation to consider untimely waivers or unraised issues *sua sponte*, Perú cannot possibly be said to have acted arbitrarily, unreasonably, or unfairly by dismissing SMCV's requests that were untimely filed. Certainly, Perú did not breach its FET obligations by acting in opposition to the rule of law, willfully disregarding due process of law, or committing an "act which shocks, or at least surprises, a sense of juridical propriety."[2353]

[2348] Claimant's Memorial at para. 409 (emphasis added); *see also* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 147 (Article 147 of the Tax Code requires an appellant to raise at the outset of its complaint all issues that it wishes the Tax Tribunal to consider).

[2349] *See* Exhibit CE-656, SMCV, Letter to the President of Chamber No. 10 (2006/07 Royalty Assessment), June 26, 2013; Exhibit CE-90, SMCV, Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (2008 Royalty Assessment), June 26, 2013; Exhibit CE-658, SMCV, Supplemental Brief to Tax Tribunal (2006/07 Royalty Assessment), July 9, 2013; Exhibit CE-659, SMCV, Supplemental Brief to Tax Tribunal (2008 Royalty Assessment), July 9, 2013; *see also* Claimant's Memorial at para. 402, n.1134; Claimant's Reply at para. 180, n.967.

[2350] *See* Claimant's Reply at paras. 189 *et seq.*

[2351] Claimant's Reply at para. 190.

[2352] Claimant's Reply at para. 190.

[2353] Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (*citing* Exhibit RA-72, *ELSI* Judgment at para. 128).

1017. *Remaining waiver requests relating to other Royalty and Tax Assessments*. Perú also did not breach its FET obligations when SUNAT and the Tax Tribunal denied SMCV's remaining waiver requests relating to other Royalty and Tax Assessments in accordance with Peruvian law (which were timely filed). Claimant agrees that Articles 92(g) and 170 of the Tax Code are the relevant provisions that determine whether a taxpayer is eligible for a waiver of penalties and interest for non-payment.[2354] Article 92(g) is clear that the applicable ground for a waiver based on "reasonable doubt" (and "conflicting criteria") must be interpreted in accordance with Article 170 of the Tax Code.[2355] As explained in Section II.I.2.b, above, none of the applicable grounds for a waiver under Article 170 were met.

1018. In particular, Claimant argues that SMCV should be entitled to a waiver based on "reasonable doubt" under Article 170.1, because the language of the provisions in question is "on its face ambiguous," "objectively ambiguous," or "unclear."[2356] However, Claimant's argument is untenable. Article 170.1 allows penalties and interest to be waived based on "reasonable doubt" only if the taxpayer's non-payment is "a result of misinterpretation of a provision" for which an official clarification was issued and published in *El Peruano*.[2357]

1019. *First*, there was no ambiguous regulation relevant to the Royalty and Tax Assessments that would have provided a basis for a misinterpretation of a provision such that there might be a "reasonable doubt," as Perú explains above in Section II.I.2.b.i. Contrary to Claimant's assertion, Article 83 of the Mining Law and Article 22 of the Mining Regulations are not ambiguous, as evidenced by the same interpretation repeatedly held by various government entities, including by MINEM and SUNAT, discussed in Sections II.E and II.G.3 above. The Peruvian government has consistently maintained—through multiple reports, communications, congressional presentations, and the Royalty and Tax Assessments—that the scope of a mining stabilization agreement (such as the 1998 Stabilization Agreement) is limited to the specific investment project set out in the feasibility study and identified in the agreement consistent with Article 83 of the Mining Law and Article 22 of the Mining Regulations. Thus, Claimant's

[2354] *See* Claimant's Reply at para. 179, n.923 (*citing* to Arts. 92(g) and 170 of the Tax Code); Claimant's Memorial at para. 403, n.1121 (*citing* to Arts. 92(g) and 170 of the Tax Code).

[2355] Art. 92(g) was amended in 2016 to provide that taxpayers are entitled to "[r]equest the non-application of interest and adjustment for inflation based on the Consumer Price Index, if applicable, and of penalties in cases of reasonable doubt or conflicting criteria in accordance with the provisions of Article 170." Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 92(g).

[2356] Claimant's Reply at para. 179.

[2357] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 170.

assertions that MINEM and SUNAT had, at some point, changed their position thereby indicating that the relevant provisions are ambiguous, has no merit.

1020. Also lacking in merit is Claimant's assertion that the 2014 and 2019 amendments to Article 83 of the Mining Law and Article 22 of the Mining Regulations somehow show that the existing provision was ambiguous.[2358] The amendments provided that stability guarantees in stabilization agreements would be extended to "additional activities" that were not set out in the feasibility study or the stabilization agreement, provided that those activities meet certain conditions. Thus, contrary to Claimant's arguments, the amendments show that the pre-existing scope of stability guarantees was narrower, *i.e.*, that the scope was limited to only the specific investment projects set out in the feasibility study and identified in the stabilization agreement. Because there are no ambiguous regulations relating to SMCV's Royalty and Tax Assessments to begin with, there could be no "misinterpretation of a provision," and thus, no "reasonable doubt" about an interpretation of a relevant regulation as required under Article 170.1. And without the presence of "reasonable doubt" (and the accompanying conditions) under Article 170.1, SUNAT and the Tax Tribunal could not properly have waived penalties and interest under Article 170.1.[2359]

1021. *Second*, Claimant's complaints about the alleged ambiguity in Article 83 of the Mining Law and Article 22 of the Mining Regulations for purposes of a waiver based on "reasonable doubt" under Article 170.1[2360] are misleading. To be clear, the key dispute in SMCV's challenges to the Royalty and Tax Assessments was the proper interpretation of the 1998 Stabilization Agreement—not the proper interpretation of the Mining Law or Regulations. As demonstrated in Section II.I.2.b.i, the Peruvian government agrees that the main issue in dispute with regard to SMCV's challenges of the Royalty and Tax Assessments was the correct interpretation of the 1998 Stabilization Agreement, *i.e.*, whether the stability guarantees under the 1998 Stabilization Agreement apply to SMCV's Concentrator Project.[2361] As the Tax Tribunal stated with respect to SMCV's challenges of the 2009 Royalty Assessment: "This

[2358] *See* Claimant's Reply at para. 183.

[2359] SMCV also failed to meet the requirements under Article 170.2, as discussed in Respondent's Counter-Memorial. Respondent's Counter-Memorial at paras. 744-45.

[2360] *See* Claimant's Reply at para. 183.

[2361] *See* Exhibit CE-153, Supreme Court Decision No. 5212-2016 (2008 Royalty Assessment), August 18, 2017, at paras. 152, 174; Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 37 ("the aforementioned rules are clear when establishing the scope of the agreements executed under their protection.").

dispute did not originate in a doubt arising from the interpretation of the scope of Article 83 of the General Mining Law or Article 22 of its Regulations, but in the verification of the scope of the agreement executed, in other words, to establish what was agreed to therein."[2362] The dispute was about the content of the contract, not about the meaning of the underlying laws and regulations. Because SMCV's non-payment of the Assessments are not based on a claimed misinterpretation of a legal provision (*i.e.*, a law or regulation), SMCV is not eligible for a waiver based on "reasonable doubt" under Article 170.1 of the Tax Code. Again, SUNAT and the Tax Tribunal acted appropriately and consistently under Peruvian law by denying SMCV's waiver requests due to SMCV's failure to meet the conditions set out in Article 170.1 (and Article 170.2) of the Peruvian Tax Code.

1022. *Third*, Article 170 can only apply if there has been an official clarification (of the ambiguous law or regulation) issued and published in *El Peruano*.[2363] And, importantly, the Peruvian government has discretion whether or not to issue an official clarification with respect to a law or regulation even if it considers that there has been a misinterpretation of a legal provision. Thus, the fact that the government did not issue a clarification to assist SMCV in qualifying for a waiver under Article 170.1 does not indicate that the government acted arbitrarily, unreasonably, or unfairly. Contrary to Claimant's assertion, the government has no obligation to issue a clarification, as discussed in Section II.I.2.b.ii, above. Indeed, neither Article 170.1 nor any other provision under Peruvian law obligates the government to issue a clarification. Notably, Claimant has not pointed to any Peruvian law or regulation expressly providing for such an obligation. Furthermore, there was no ambiguous regulation relevant to SMCV's challenges with respect to its Royalty and Tax Assessments that would have created a need for an official clarification, in the first place. As discussed in Sections II.A.2 and II.A.3 of Respondent's Counter-Memorial, and reiterated above in Section II.B, Article 83 of the Mining Law and Article 22 of the Mining Regulations are clear in limiting stability guarantees to the investment project that gave rise to the related stabilization agreement—the same interpretation uniformly held by various government entities, including MINEM and SUNAT, consistently over time, as discussed in Sections II.E and II.G.3 above.

[2362] Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018 (2008 Royalty Assessment), August 15, 2018, at p. 31.

[2363] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 170.

1023. To be clear, even if a relevant law were somehow ambiguous (it is not), the fact remains that the discretion to issue a clarification (or not) belongs to the Peruvian government. To the extent that Claimant suggests that the Peruvian government abused its discretion by not issuing a clarification to support SMCV's waiver requests, those claims are entirely unfounded. As explained in Section II.I.2.b.ii, the Peruvian government has reasonably exercised its discretion and issued clarifications in cases where it deemed appropriate and necessary.[2364]

1024. Additionally, even if Claimant perceives a relevant law to be unclear, the clarification that is specifically required under Article 170.1 to qualify for a waiver must correspond to an actual misinterpretation of a legal provision. In other words, even if a law or regulation were, according to Claimant, "*on its face ambiguous*," "*objectively ambiguous*," or "*unclear*,"[2365] that would not meet the threshold required under Article 170 to trigger a discretionary clarification.[2366]

1025. Therefore, Claimant cannot accuse Perú of acting unfairly, unreasonably, or arbitrarily by not issuing a clarification, when Perú is not obligated to issue a clarification under law, and when there exists no ambiguous law or regulation resulting in a misinterpretation of law that would have prompted a need for a clarification. In any case, Perú'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"[2367] such that Perú's FET obligations were violated.

1026. Because Article 170 is not applicable in this case,[2368] SMCV was not entitled to a waiver of penalties and interest. Any conclusion to the contrary would be wholly inconsistent with, and thus, impermissible under Peruvian law. In fact, Claimant's assertions that SMCV is otherwise entitled to a waiver of penalties and interest is inconsistent with Claimant's own acknowledgment that Articles 92(g) and 170 of the Tax Code are determinative with respect to the question of whether SMCV is entitled to a waiver of penalties and interest.[2369]

[2364] *See* Exhibit RER-8, Second Bravo and Picón Report at paras. 119-21.

[2365] Claimant's Reply at para. 179 (emphasis added).

[2366] *See* Respondent's Counter-Memorial at paras. 740, 743-44.

[2367] Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (*citing* Exhibit RA-72, *ELSI* Judgment at para. 128).

[2368] *See supra* at Section II.I.2.b. Claimant did not invoke Article 170.2 of the Tax Code in support of its waiver requests.

[2369] *See* Claimant's Reply at para. 179, n.923 (*citing* to Arts. 92(g) and 170 of the Tax Code); Claimant's Memorial at para. 403, n.1121 (*citing* to Arts. 92(g) and 170 of the Tax Code).

(ii) SUNAT and the Tax Tribunal Applied the Interest Rate Required by Peruvian Law to SMCV's Royalty and Tax Assessments

1027. Peruvian law requires the application of the statutory interest rate to royalty assessments. Nevertheless, Claimant alleges that SUNAT and the Tax Tribunal should have applied a more favorable interest rate—the Consumer Price Index ("CPI") rate—to SMCV's 2009 and 2010-2011 Royalty Assessments. Additionally, Claimant alleges that the Tax Tribunal arbitrarily refused to adjust the interest rate and recalculate SMCV's interest on those Assessments.[2370] Claimant further blames Perú for the amount of interest accrued on its Royalty and Tax Assessments, because, according to Claimant, SUNAT and the Tax Tribunal incurred delays in issuing the Royalty Assessments and in deciding SMCV's challenges on the Royalty and Tax Assessments.[2371] As discussed below, Claimant's complaints are invalid, and as such, Perú did not breach its treaty obligations to treat Claimant fairly and equitably.

1028. *First*, Claimant's demand to apply the CPI rate provided under Article 33 of the Tax Code to SMCV's 2009 and 2010-2011 Royalty Assessments is impermissible under Peruvian law. Claimant and its Peruvian tax expert Dr. Hernandez wrongly conflate the rules governing taxes with the rules for royalties.[2372] But, as Perú's tax experts Drs. Bravo and Picón explain, Article 33 of the Tax Code applies to tax assessments, not royalty assessments, which are governed by a separate regulatory framework (namely, the Mining Royalty Law and Royalty Law Regulations).[2373] Drs. Bravo and Picón further explain that royalties are governed by a different set of rules because royalties, unlike taxes, are treated as economic consideration that is paid in exchange for the right to explore mineral resources, as established under Article 2 of the Mining Royalty Law.[2374] Thus, SUNAT and the Tax Tribunal appropriately applied the statutory interest rate that is applicable to royalty assessments.

1029. *Second*, the Tax Tribunal appropriately denied SMCV's request to recalculate the interest rate for its 2009 and 2010-2011 Royalty Assessments (which would have been incorrect

[2370] *See* Claimant's Reply at paras. 175, 197.

[2371] *See* Claimant's Reply at paras. 175, 197.

[2372] *See* Claimant's Memorial at para. 420; Exhibit RER-3, First Bravo and Picón Report at paras. 129-30 (*citing* to Exhibit CA-6, Mining Royalty Law, Law No. 28258, June 23, 2004, Art. 2).

[2373] *See* Respondent's Counter-Memorial at para. 749; Exhibit RER-3, First Bravo and Picón Report at paras. 129-30.

[2374] *See* Exhibit RER-3, First Bravo and Picón Report at para. 51; Exhibit CA-6, Mining Royalty Law, Law No. 28258, June 23, 2004, at Art. 2.

on the merits anyway, as just explained), because Peruvian law prohibits the Tax Tribunal from considering claims with respect to assessments for which the related collection proceedings have concluded. Claimant nonetheless claims that the Tax Tribunal's denial of SMCV's request to recalculate interest was arbitrary and unfair.[2375] This claim lacks merit. Perú's experts, Drs. Bravo and Picón, explain that the Tax Tribunal's decision is consistent with Peruvian law, including a precedent set by the Tax Tribunal, which provides that claims relating to a tax administration's resolution must be made while the collection proceeding is pending.[2376] SMCV requested the Tax Tribunal to recalculate the interest too late, because 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. Contrary to Claimant's allegation, the Tax Tribunal did not act unfairly or arbitrarily towards SMCV and did not breach its FET obligations.

1030. *Lastly*, Claimant faults the Peruvian government for interest that SMCV accrued owing to alleged delays in SUNAT's issuance of the Royalty Assessments as well as alleged delays in the Tax Tribunal's resolution of SMCV's challenges on its Royalty and Tax Assessments.[2377] SUNAT and the Tax Tribunal acted as expeditiously as they could, given the volume of work and the available resources at the time. As explained in Respondent's Counter-Memorial, the delay affected all matters that SUNAT and the Tax Tribunal were dealing with at the time; thus, the delays were not unique to SMCV's assessments or challenges and cannot be said to have been arbitrary, unreasonable, or unfair to SMCV.[2378]

(iii) SMCV Is Responsible for Failing to Mitigate the Accrual of Penalties and Interest

1031. Claimant cannot blame Perú for the penalties and interest owed by SMCV for certain taxes and royalties, because SMCV deliberately chose not to mitigate its damages by paying those obligations when due (and then challenging them and seeking refunds). Claimant blames Perú for imposing penalties and interest as a result of SMCV's initial failure to pay the applicable royalties and taxes for its Concentrator Project, and then for allowing the penalties and interest to accrue as a result of SMCV's subsequent refusal to pay the Assessments when

[2375] *See* Claimant's Reply at para. 201.

[2376] *See* Respondent's Counter-Memorial at para. 342; Exhibit RER-3, First Bravo and Picón Report at paras. 137-38.

[2377] *See* Claimant's Reply at para. 176.

[2378] *See* Respondent's Counter-Memorial at para. 747.

they became due. Claimant's complaints are unfounded. The Peruvian government did not treat SMCV unfairly by acting in accordance with the law when it charged penalties and interest in response to a taxpayer's continued and repeated failure to pay its tax and royalty obligations.

1032. As discussed in more depth in Section V.A, below, 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.[2379] By Claimant's own admission, SMCV knew how to mitigate damages (and eventually did so, to a minor degree,[2380] for certain assessments),[2381] SMCV knew the financial benefits of mitigating damages ("to reduce interest due"[2382]), and SMCV had the opportunity to mitigate damages for the remaining Assessments, as discussed in Section II.I.1 above. However, SMCV chose not to mitigate damages by paying its obligations when due and then taking the appropriate steps to challenge the obligations and/or assessments. Claimant has only SMCV to blame for that.

1033. Claimant attempts to justify SMCV's choice not to take this fairly obvious step because of (i) the alleged rarity of advance payment, (ii) the alleged length of time needed to secure reimbursement in the event it were to prevail, (iii) its alleged lack of knowledge of the government's position regarding the scope of the stability guarantees, and (iv) its alleged concern that advance payment would result in a waiver of its right to challenge SUNAT's decision on the applied interest rate.[2383] However, all of these arguments are unsubstantiated (or, with respect to SMCV's knowledge of Perú's position, plainly wrong, as discussed in Section II.E), and thus, all of them are futile.[2384] The facts are clear: SMCV knew it could mitigate the penalties and interest, but it affirmatively chose not to. Claimant cannot fault Perú for SMCV's deliberate and knowing failure to mitigate its damages.

[2379] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 182; Exhibit RER-3, First Bravo and Picón Report at para. 61; Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 38, 136.

[2380] *See* Exhibit RER-10, Second Expert Valuation Report of Isabel Kunsman of Alix Partners, November 8, 2022 ("Second AlixPartners Report"), at para. 49.

[2381] *See* Claimant's Reply at para. 198(c).

[2382] Claimant's Reply at para. 311(c).

[2383] *See* Claimant's Reply at paras. 198, 201(c).

[2384] Claimant's argument that "SMCV was not required under Peruvian law to pay assessments and penalties before challenging them" is entirely beside the point. Claimant's Reply at para. 198(b). Respondent has never argued that SMCV was "required under Peruvian law to pay assessments and penalties before challenging them"—just that not doing so is unreasonable, because it runs the entirely unnecessary risk that the SMCV would lose and accrue significant penalties and interest during the pendency of its challenges (as SMCV ultimately did).

c. Perú Did Not Breach Its Fair and Equitable Treatment Obligations by Denying SMCV's Untimely Requests to Refund Certain of Its GEM Payments

1034. Claimant has claimed that Perú "breached Article 10.5 when it refused to reimburse SMCV's GEM overpayments for Q4 2011 through Q3 2012 with respect to its operations in the Concentrator."[2385] To recall, as explained in Section II.F.3 above and in Respondent's Counter-Memorial,[2386] initially, on December 28, 2017, SMCV submitted requests to SUNAT for refunds of GEM contributions that it had paid in relation to the Concentrator Plant with respect to payments for the Q4 2012 to Q4 2013 periods. Those requests were timely,[2387] and SUNAT approved the refunds.[2388] However, SMCV waited to submit a second set of GEM refund requests until December 28, 2018, an entire year later.[2389] Those requests were for refunds of the GEM payments that SMCV had made in relation to the Concentrator Plant for an even earlier period, Q4 2011 to Q3 2012.[2390] SUNAT denied those requests because the statute of limitations to submit the requests had expired.[2391] 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.[2392] SMCV made the payments related to Q4 2011 to Q3 2012 in 2012; therefore, the statute of limitations to request any refunds started to run on January 1, 2013, and expired on January 1, 2017.[2393]

[2385] Claimant's Memorial at para. 421.

[2386] *See* Respondent's Counter-Memorial at paras. 754-55.

[2387] As explained in Respondent's Counter-Memorial, *see* Respondent's Counter-Memorial at para. 754, n.1562, under 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. *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 43, 44.3. For the Q4 2012 to Q4 2013 GEM payments, the clock therefore started to run on January 1, 2014, and expired on January 1, 2018. SMCV's December 2017 request was therefore timely and, accordingly, approved.

[2388] *See* Claimant's Memorial at para. 264.

[2389] *See* Claimant's Memorial at para. 265; 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.

[2390] *See* Claimant's Memorial at para. 265.

[2391] *See* Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019).

[2392] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 43, 44.3.

[2393] *See* Exhibit CE-218, SUNAT Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019), at p. 4.

1035. Claimant has argued that SUNAT's denial of its refund request for the GEM contributions related to the Q4 2011 to Q3 2012 period was "arbitrary and unsupported by Peruvian law."[2394] Notably, Claimant does not dispute the above chronology. Nevertheless, Claimant argued in its Memorial that SUNAT improperly used this "procedural defect" as an excuse to avoid "considering the merits of SMCV's request"[2395] and that, in any event, SUNAT's decision relying on the limitations period was "entirely baseless: under both the Tax Code and the Civil Code, the statute of limitations on a claim does not begin to run until the claimant learns that the challenged payment was improper."[2396]

1036. Respondent explained in its Counter-Memorial that these arguments were meritless.[2397] First, applying the statute of limitations is not an attempt to avoid ruling on the merits of an issue based on some technicality—it is Perú applying its law, which sets reasonable time limits for the submission of refund requests.[2398] Second, Claimant's argument that SUNAT was looking for a procedural get-out-of-jail-free card is belied by the simple fact that SUNAT, without issue, did refund all of the GEM payments for which a timely request was made.[2399] SMCV made its initial (timely) requests in December 2017.[2400] Those requests were approved.[2401] But, inexplicably, SMCV did not submit its second set of refund requests until December 28, 2018, an entire year later. Claimant has never—not in its Memorial nor its Reply—explained why SMCV waited (much less why it waited a year) to make these additional requests.[2402] However, the simple fact that SUNAT did approve the timely requests proves that

[2394] Claimant's Memorial at para. 424.

[2395] Claimant's Memorial at para. 424(b).

[2396] Claimant's Memorial at para. 424(c).

[2397] *See* Respondent's Counter-Memorial at paras. 752 *et seq.*

[2398] *See* Respondent's Counter-Memorial at para. 760.

[2399] *See* Respondent's Counter-Memorial at paras. 754-55.

[2400] *See* Claimant's Memorial at para. 264.

[2401] *See* Claimant's Memorial at para. 264.

[2402] As explained in Respondent's Counter-Memorial, *see* Respondent's Counter-Memorial at para. 762, Claimant implied in its Memorial that SMCV was waiting for the Supreme Court to decide the 2008 Royalty case before submitting its requests, *see* Claimant's Memorial at para. 424(a). But that still does not explain why SMCV's second batch of requests—the ones that were untimely—came more than a year after the Supreme Court's decision. And Claimant has not explained—in its Memorial or Reply—why SMCV took no action to protect its rights during the pendency of the litigation. As Respondent has already noted, "Parties often have rights or claims that could potentially expire during the pendency of litigation, and courts have procedures to protect those rights when requested. Perú cannot be held responsible for the fact that SMCV did not make a timely request, and instead rolled the dice that it would win at the Supreme Court. That is on SMCV, not Perú." Respondent's Counter-Memorial at para. 762 (emphasis omitted).

SUNAT was not acting with any malice or hostility toward SMCV. Third, Respondent explained that Claimant's argument that "under both the Tax Code and the Civil Code, the statute of limitations on a claim does not begin to run until the claimant learns that the challenged payment was improper"[2403] is plainly wrong and, frankly, nonsensical.[2404] The notion that the statute of limitations—meant to provide finality—somehow relies on the subjective knowledge of a taxpayer would undermine the entire point of the statute of limitations.[2405]

1037. In its Reply, Claimant makes a number of factual arguments, including a new argument that a longer 5-year statute of limitations from the Civil Code, not the Tax Code, applies.[2406] Perú has already addressed those arguments in Section II.F.3.e and, for brevity's sake, will not repeat that discussion here. However, Claimant also argues that "Peru is wrong" in arguing that "'enforcing a statute of limitations' cannot give rise to a breach of the fair and equitable treatment."[2407] Notably, Claimant provides no explanation or support for this statement (and has not identified a single case in which a tribunal found that a State violated its FET obligations by enforcing a statute of limitations).

1038. To be clear, Claimant is wrong: applying, without discrimination, a generally applicable and reasonable statute of limitations (of which SMCV was or should have been well aware[2408]) cannot give rise to a breach of an FET obligation. Almost by definition, applying such a law cannot be arbitrary, unreasonable, non-transparent, discriminatory, or lack due process. To the contrary, the equal application of the statute of limitations is itself due process of law—for both the party whose claim is at issue and for all other parties in the system who are subject to the same laws. Showing favoritism and not applying the statute of limitations is what could give rise to an FET violation (*vis-à-vis* some other foreign investor). Claimant's failure to substantiate its one-sentence argument implicitly concedes this point.

[2403] Claimant's Memorial at para. 424(c).

[2404] *See* Respondent's Counter-Memorial at paras. 763-66.

[2405] In any event, as explained throughout this Rejoinder, SMCV was aware of Perú's interpretation of the 1998 Stabilization Agreement well before the statute of limitations to request any refunds started to run on January 1, 2013.

[2406] *See* Claimant's Reply at paras. 202-09.

[2407] Claimant's Reply at para. 204 (internal citation omitted).

[2408] *See* Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 43, 44.5.

1039. Perú notes, though, that past arbitral decisions go even further, holding that even a misapplication of law does not, without more, amount to an FET violation.[2409] Rather, to implicate treaty standards, the error must be akin to a "blatant disregard" of the applicable law,[2410] a "clear and malicious" misapplication of the law,[2411] or "a complete lack of candor or good faith" in applying the law.[2412]

1040. Thus, even assuming *arguendo* that the Tribunal were to agree with Claimant that SUNAT applied the wrong statute of limitations (it did not), Claimant still would have to show more than that in order to make out an FET breach. It would have to show that SUNAT's mistake constituted a "blatant disregard" of the applicable law,[2413] a "clear and malicious" misapplication of the law,[2414] or "a complete lack of candor or good faith" in applying the law.[2415] Claimant has not, and cannot, make that showing on this record. Claimant has not shown, for instance, that SUNAT applied the Civil Code's statute of limitations with respect to any other party's request for a refund of GEM payments. And, critically, Claimant concedes that SUNAT approved SMCV's requests that it considered timely, which, as noted, undercuts any argument that SUNAT was acting with any malevolence toward SMCV (otherwise, it stands to reason that SUNAT would have denied those requests as well). Therefore, regardless of whether Claimant is correct that the Civil Code's statute of limitations is applicable (it is not), Claimant's claim that Perú's failure to refund certain GEM payments violated Perú's FET obligations must fail.

1041. In sum, the Tribunal cannot find that Perú acted arbitrarily in violation of its FET obligations by following Peruvian law and applying the statute of limitations to certain of

---

[2409] *See, e.g.*, Exhibit RA-165, *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award, November 15, 2004, at para. 91 ("It is in this sense that a government's failure to implement or abide by its own law in a manner adversely affecting a foreign investor may but will not necessarily lead to a violation of Article 1105. Much depends on context."); Exhibit RA-166, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, at para. 174 ("it is well established that a breach of local law injuring a foreigner does not, in and of itself, amount to a breach of international law").

[2410] Exhibit CA-174, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011 ("*Lemire v. Ukraine*, Award"), at para. 43.

[2411] Exhibit RA-170, *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999 ("*Azinian v. Mexico*, Award"), at para. 103.

[2412] Exhibit CA-202, *TECO v. Guatemala*, Award at para. 458.

[2413] Exhibit CA-174, *Lemire v. Ukraine*, Award at para. 43.

[2414] Exhibit RA-170, *Azinian v. Mexico*, Award at para. 103.

[2415] Exhibit CA-202, *TECO v. Guatemala*, Award at para. 458.

SMCV's GEM refund requests. As explained in Respondent's Counter-Memorial[2416] and Section II.E above, SMCV knew, at a minimum, by 2005 that MINEM took the position that the Concentrator-related activities were not covered by SMCV's 1998 Stabilization Agreement. And SUNAT started issuing assessments against SMCV on that basis in 2009—and argued that position to the Tax Tribunal and various courts starting in 2010. Yet for some reason that Claimant refuses to disclose, SMCV chose not to account for the royalty payments it owed for the Concentrator-related activities when determining its GEM payments after those dates; SMCV chose not to request refunds for its GEM overpayments until December 2017 and December 2018; and SMCV chose to do nothing to obtain any interim protection of its refund rights during the pendency of the 2008 Royalty Assessment litigation. When SMCV made a timely request for certain GEM refunds, SUNAT granted it. But when—an entire year later—SMCV made a second, untimely request, SUNAT of course rejected it. There was nothing unfair, unequitable, or arbitrary—and certainly nothing even close to violative of the Treaty—about SUNAT's actions.

V. DAMAGES

1042. As discussed in the foregoing sections and in Respondent's Counter-Memorial, the Tribunal should not reach the question of damages, because the Tribunal has no jurisdiction to hear Claimant's claims and Perú did not breach its obligations under the 1998 Stabilization Agreement or the TPA. However, even if the Tribunal were to determine that it had jurisdiction to hear Claimant's claims and to find liability on some basis (it should not) and proceed to consider the quantum of Claimant's alleged damages, it must disregard Claimant's damages calculation, because it suffers from numerous defects and substantially overstates Claimant's alleged losses.

1043. Perú and its damages expert, Ms. Isabel Kunsman of AlixPartners, pointed out a number of these defects in its initial submissions, most of which Claimant and its experts opposed in their Reply and Second Expert Report. Below, Perú rebuts Claimant's arguments related to these defects.

1044. To recall, Claimant calculates its damages using the free cash flow to equity approach, *i.e.*, calculating "the dividend distributions that SMCV would have made but-for

[2416] *See* Respondent's Counter-Memorial at para. 767.

Peru's [alleged] unlawful conduct."[2417] And Claimant applies this methodology to two alternative scenarios: its "main claim" for damages in connection with all of SUNAT's Royalty and Tax Assessments (including the associated penalties and interest), and a claim in the alternative that is limited to damages in connection with only SUNAT's imposition of penalties and interest on those Assessments (along with the unrefunded GEM payments and adjustments to certain taxes, based on Claimant's allegation that SUNAT improperly applied the non-stabilized tax regime to certain Leaching Project activities).

1045. For its main claim, Claimant assumes that the Tribunal will find that all, and the entirety of each, of the challenged SUNAT Assessments breached either the 1998 Stabilization Agreement or Article 10.5 of the TPA (or both).[2418] In its Reply, Claimant values its main claim at US $942.4 million (up from US $909 million as of its Memorial[2419]), which includes US $121.6 million in pre-award interest up to the date Claimant's Reply was filed, September 13, 2022.[2420]

1046. In its "alternative claim," Claimant imagines a scenario in which, even if SUNAT's Assessments of royalties and taxes on the Concentrator Project entailed no breach of the 1998 Stabilization Agreement or the TPA, the Tribunal nonetheless were to find that Perú violated the TPA when it refused to waive all of the penalties and interest on those Assessments and refused to refund certain GEM payments, and that Perú breached the 1998 Stabilization Agreement by applying the non-stabilized regime to certain Leaching Project activities (discussed in Section II.J, above).[2421] Claimant values its alternative claim at US $719.9 million (up from US $682.1 million as of its Memorial[2422]), which includes US $89.5 million in pre-award interest up to September 13, 2022.[2423]

[2417] Claimant's Reply at para. 289.

[2418] *See* Exhibit CER-1, Expert Report of Pablo T. Spiller and Carla Chavic of Compass Lexecon, October 19, 2021 ("First Compass Lexecon Report"), at para. 4.

[2419] *See* Claimant's Memorial at para. 438.

[2420] *See* Claimant's Reply at para. 289; Exhibit CER-6, Reply Expert Report of Pablo T. Spiller and Carla Chavich of Compass Lexecon, September 13, 2022 ("Second Compass Lexecon Report"), at para. 27, n.42.

[2421] *See* Exhibit CER-1, First Compass Lexecon Report at para. 5.

[2422] *See* Claimant's Memorial at para. 438.

[2423] *See* Claimant's Reply at para. 289; Exhibit CER-6, Second Compass Lexecon Report at para. 33, n.47. Dr. Spiller and Ms. Chavich also note a supposed "Standalone" CPI claim, Exhibit CER-6, Second Compass Lexecon Report at Appendix F, but acknowledge that the issue has no bearing on Claimant's main or alternative claim because Claimant already requests all statutory interest in those claims, *see id.* at para. 51. Claimant, however, makes no mention of this supposed "Standalone" CPI claim in its requested relief. *See* Claimant's Reply at

1047. As explained in Respondent's Counter-Memorial,[2424] Claimant thus leaves completely open all questions of what damages would be appropriate if the Tribunal were to find liability on some limited basis that did not correspond precisely to either (i) all of SUNAT's Assessments, penalties, and interest, or (ii) all of SUNAT's penalties and interest, unrefunded GEM payments, and certain tax adjustments. The Tribunal would be left to its own devices if it were to find liability in connection, for example, with Perú's handling of only some of the Royalty Assessments, or with Perú's denial of SMCV's timely penalty-and-interest waiver requests but not the untimely ones, or with the GEM payments standing alone. Claimant also makes no distinction in the damages claimed for its different Treaty and contract breach claims, leaving it to the Tribunal to determine whether, for example, a breach of due process by the Tax Tribunal in one of its proceedings would correspond to the same damages as an umbrella clause breach arising out of SUNAT's interpretation of the 1998 Stabilization Agreement, and to calculate any differences for itself.

1048. Because the burden is on Claimant to establish its damages, however, Respondent focuses here on responding to the damages claims that Claimant has advanced. As Ms. Kunsman identified in her first report submitted with Respondent's Counter-Memorial[2425] and again in her second report submitted with this Rejoinder,[2426] and as discussed below, Claimant's calculation of its damages for each of its two alternative all-or-nothing scenarios is significantly inflated. In particular, Claimant and its experts, Dr. Spiller and Ms. Chavich of Compass Lexecon, have (1) refused to take into account SMCV's failure to mitigate its damages by avoiding the accumulation of penalties and interest (subsection A); (2) improperly included amounts related to the penalties and interest on taxes, which are explicitly excluded from protection under the TPA, and certain tax adjustments (subsection B); (3) improperly included amounts that SMCV has never paid (subsection C); (4) assumed, without evidentiary support, that, in the but-for scenario, SMCV would have almost immediately distributed 100% of the assessments as dividends to its shareholders (subsection D); (5) inappropriately used SMCV's cost of equity as the pre-award interest rate (subsection E); and (6) inappropriately used SMCV's

---

para. 319. Moreover, Respondent has already explained in Sections II.I.1 and IV.B.2.b.ii that SUNAT and the Tax Tribunal properly applied the interest rate required by Peruvian law to the 2009 and 2010-2011 Royalty Assessments.

[2424] *See* Respondent's Counter-Memorial at para. 775.

[2425] *See* Exhibit RER-5, First AlixPartners Report.

[2426] *See* Exhibit RER-10, Second AlixPartners Report.

cost of equity as the discount rate for depreciation mitigation (subsection F). In subsection G, Perú summarizes the corrections for these defects.[2427]

1049. Before addressing the specific errors in Claimant's damages calculation, however, Perú must again remind the Tribunal that Claimant's damages are duplicative of those requested by SMM Cerro Verde Netherlands B.V. ("SMM Cerro Verde"), a minority shareholder (21%), in ICSID Case No. ARB/20/14 (the "SMM Cerro Verde Arbitration").[2428] To recall, SMM Cerro Verde is prosecuting that arbitration based on the exact same facts and measures at issue in this case and is claiming for its (21%) share of SMCV's lost cash flows.[2429] That amount overlaps with Claimant's claim here for 100% of SMCV's lost cash flows. Thus, were this Tribunal to award full damages to be paid to Claimant and/or SMCV, and were the tribunal in the SMM Cerro Verde Arbitration to award SMM Cerro Verde the damages that it seeks, Perú would be faced with double-paying the 21% attributable to SMM Cerro Verde (and if the award were to be paid to SMCV, some of SMCV's equity holders would double-recover). Claimant does not dispute this point in its Reply[2430]—and shockingly, Claimant offers the Tribunal no solution. Claimant apparently sees nothing wrong with exposing Respondent to excess liability and seeking excess recovery for SMCV's shareholders, leaving Respondent (and this Tribunal) no choice but to assume that Claimant is colluding with its co-shareholder precisely to try to achieve that result.

1050. Respondent turns now to specific defects in Claimant's damages calculation, which are also discussed in greater detail in the second expert report of Ms. Isabel Kunsman of AlixPartners (Exhibit RER-10).

A. SMCV FAILED TO MITIGATE ITS DAMAGES

1051. As Respondent explained in its Counter-Memorial,[2431] any damages awarded must be reduced to account for SMCV's failure to mitigate its damages. "The duty to mitigate

[2427] Both parties have requested costs and fees. *See* Claimant's Reply at para. 319(G); Respondent's Counter-Memorial at para. 823; *infra* at para. 1108.

[2428] *See* Exhibit RER-5, First AlixPartners Report at para. 36.

[2429] *See* Exhibit RER-5, First AlixPartners Report at para. 36.

[2430] *See* Claimant's Reply at para. 318 (merely stating that this issue is "premature because the tribunal in the SMM Cerro Verde Arbitration has not yet rendered an award").

[2431] *See* Respondent's Counter-Memorial at paras. 808-10.

damages is a well-established principle in investment arbitration."[2432] The *Clayton v. Canada* tribunal explained that, "[u]nder international law, a failure by an injured State to take reasonable steps to limit the losses it incurred as a result of an internationally wrongful act by another State may result in a reduction of recovery to the extent of the damage that could have been avoided. This principle has been affirmed by the ILC and applied by international tribunals."[2433] The *Clayton* tribunal further explained:

> By its nature, the duty to mitigate is a restriction on compensatory damages. The rationale of the duty to mitigate damages is to encourage efficiency and to minimize the consequences of unlawful conduct (such as a breach of treaty). The duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty.
>
> The first limb of the mitigation principle concerns the unreasonable failure by the claimant to act subsequent to a breach of treaty, where it could have reduced the damages arising (including by incurring certain additional expenses). The second limb, conversely, concerns the unreasonable incurring of expenses by the claimant subsequent to a treaty breach, which results in increasing the size of its claim.[2434]

1052. Here, as Respondent explained in its Counter-Memorial,[2435] SMCV engaged in "unreasonable conduct" that "increase[ed] the size of its claim" by deciding to wait until after it lost its challenges to the various Assessments to pay most of its obligations, resulting in further months and years of significant, additional penalties and interest. Even putting aside the many instances dating back as far as 2002 in which Peruvian officials made clear the State's position on the scope of the 1998 Stabilization Agreement, at an absolute minimum, SMCV knew SUNAT's position after it was notified of its first Royalty Assessment for the 2006-2007 years on August 18, 2009.[2436] SMCV therefore could have filed all returns after that date in

---

[2432] Exhibit CA-189, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, June 11, 2012, at para. 1302; *see also* Exhibit RA-106, *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019 ("*Clayton v. Canada*, Award on Damages"), at paras. 195 *et seq.*; Exhibit RA-85, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, at para. 482; Exhibit RA-86, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, October 7, 2003 ("*AIG v. Kazakhstan*, Award"), at para. 10.6.4; Exhibit RA-87, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, at para. 167.

[2433] Exhibit RA-106, *Clayton v. Canada*, Award on Damages at para. 196.

[2434] Exhibit RA-106, *Clayton v. Canada*, Award on Damages at paras. 204-05.

[2435] *See* Respondent's Counter-Memorial at paras. 808-10.

[2436] *See infra* at Resubmitted Annex A, p. 1.

compliance with the government's position (and paid any outstanding obligations for already-filed returns), and then challenged SUNAT's position through the appropriate administrative and judicial means (by, *e.g.*, requesting a refund for those returns properly filed (but with which SMCV disagreed) or challenging any assessments).[2437] If SMCV had won, then it would have been refunded the amount of any overpayment, with interest. If SMCV lost (as it did repeatedly), then it would have at least avoided all penalties and interest after that date. Thus, SMCV had a straightforward means to avoid significant penalties and interest without real downside. Had it taken this obvious step, SMCV could have avoided years and years of penalties and interest that were imposed after SMCV failed to pay the Assessments.

1053. SMCV chose not to take this obvious step and, instead, took the risk that SUNAT, the Tax Tribunal, and/or the courts would disagree with its interpretation of the 1998 Stabilization Agreement and that SMCV would therefore have to bear all of the penalties and interest that were continuing to accrue on the Assessments. Claimant cannot be permitted to claim "damages" (on SMCV's behalf) for these self-inflicted extra costs. Perú should not be held liable for SMCV's unnecessarily risky decision.

1054. Ms. Kunsman has calculated that, had SMCV taken this fairly obvious step, it would have cut Claimant's damages by more than half. Had SMCV paid the Assessments (and then contested them and sought refunds), rather than choosing to let massive penalties and interest accrue, Claimant's damages claim would have been reduced for its main claim by US $584.9 million and for its alternative claim by US $521.3 million.[2438]

1055. In its Reply, Claimant *first* argues that SMCV did take certain steps to mitigate its damages. In particular, Claimant argues that SMCV (i) "challenged most of the Assessments"; (ii) entered into deferral and installment plans for certain Assessments; (iii) obtained reimbursement of certain GEM payments; (iv) adopted a (now correct) tax depreciation schedule

[2437] *See* Exhibit RER-8, Second Bravo and Picón Report at para. 182; Exhibit RER-3, First Bravo and Picón Report at para. 61 ("SMCV could have paid the amounts and penalties it was assessed and, at the same time, dispute[d] their collection, requesting reimbursement in the event SUNAT or the Tax Tribunal agreed with its interpretation of the Stabilization Agreement and the Mining Law."); Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 38, 136.

[2438] *See* Exhibit RER-10, Second AlixPartners Report at para. 51. Notably, to be conservative, Ms. Kunsman actually uses as the "Cut-Off-Date," the date on which SMCV receives the first assessment for that particular Royalty or Tax (not August 18, 2009, for all assessments). *See id.* at paras. 44-45. As Ms. Kunsman explains, "SMCV should have known about SUNAT's interpretation of the Stability Agreement—that it does not cover the Concentrator—at a minimum, upon receiving notice of the first Royalty Assessment in August 2009, which precedes all other Tax Assessments. However, given that certain Taxes were based on different laws enacted at varying points in time, I assume SMCV should have known about the consequence of its obligations upon receiving the first Assessment for each of the Royalty and Taxes." *Id.* at para. 43.

applying the non-stabilized depreciation rates to the Concentrator Project related activities; and (v) paid certain relatively insignificant[2439] taxes before challenging them.[2440] As Ms. Kunsman explains, Claimant grossly exaggerates its supposed mitigation efforts. For example, Claimant seeks credit for the fact that SMCV entered into payment plans for all Royalty Assessments, except Q4 2011 which it paid directly to reduce interest due.[2441] However, as Ms. Kunsman explains, "Claimant does not mention that SMCV paid its Q4 2011 Royalty Assessment in December 2019, nearly [seven] years after the original due date in February 2012, at which point substantial Interest had already accrued."[2442] Ms. Kunsman further notes that, "at the time of the payment in December 2019, SMCV owed more Interest than the originally assessed principal and penalties"[2443] and that SMCV's payment of the 2011 Q4 Royalty Assessment nevertheless "only accounts for 2.5% of the total Royalty payments that Claimant is claiming for damages."[2444]

1056. Moreover, the fact that SMCV took certain limited steps to mitigate its damages does not extinguish its obligation to take other steps as well, if not taking those additional steps would be unreasonable. The question for the Tribunal is not whether SMCV took any steps to mitigate its damages. Rather, the question is whether SMCV had an obligation to take the mitigation step that Perú has identified, which turns on whether not taking that step was unreasonable (*i.e.*, whether SMCV's decision to wait until after it lost its challenges to the various assessments to pay most of its obligations was unreasonable). If not taking this step was unreasonable, and if its failure to do so exacerbated its quantum of damages, then Claimant (on behalf of SMCV) cannot recover the value of that increase.

1057. *Second*, Claimant argues that "SMCV did not have an obligation to mitigate the damages caused by Peru's breaches."[2445] Claimant is seemingly arguing that because the damages, in general, are allegedly Perú's fault (as opposed to SMCV's fault or the fault of a third party)—because Perú imposed the Assessments—this means that SMCV did not have a duty to

[2439] *See* Exhibit RER-10, Second AlixPartners Report at paras. 48-50.

[2440] Claimant's Reply at para. 311.

[2441] Claimant's Reply, Paragraph 311(c).

[2442] Exhibit RER-10, Second AlixPartners Report at para. 49.

[2443] Exhibit RER-10, Second AlixPartners Report at para. 49.

[2444] Exhibit RER-10, Second AlixPartners Report at para. 49.

[2445] Claimant's Reply at para. 313.

mitigate those damages.[2446] This is obviously a ridiculous argument. It is axiomatic that any potential damages in an investment-treaty arbitration for which an investor could recover from the State are damages caused by the State (causation is, after all, a prerequisite for a damages award[2447]). The duty of an investor to mitigate its damages is, almost by definition, about mitigating damages caused by the State—the fact that the damages (allegedly) derived from the State's actions cannot excuse an investor from its duty to mitigate, or else no investor would ever have any mitigation obligation in any investor-state case.

1058. *Third*, Claimant argues that "a significant portion of the Penalties and Statutory Interest accrued not because of SMCV's failure to preemptively pay the Assessments, but as a result of Peru's own delays in issuing the Assessments and, as Peru admits, because of its own delays in resolving SMCV's administrative challenges."[2448] But these arguments are red herrings. As explained above and in Ms. Kunsman's second expert report,[2449] Perú is not arguing that the Tribunal should reduce Claimant's damages as if SMCV had an obligation to pay the assessments correctly from the outset (though, it absolutely should have done so). Rather, Ms. Kunsman has conservatively defined as the "Cut-off Date" the date on which SMCV received the first Assessment for that particular Royalty or Tax.[2450]

1059. A hypothetical can demonstrate the significance of this point and show why Claimant's arguments are without merit. Let us assume that SMCV first received an assessment for a particular tax ("Tax X") for the 2008 fiscal year on, *e.g.*, July 1, 2010 (because, in its original Tax X filing for 2008, SMCV failed to appropriately account for the Concentrator Project as non-stabilized). Perú's argument is that, starting on July 1, 2010, SMCV was on notice of how SUNAT believed SMCV should account for Tax X. At that point, even if it had not yet received all of the assessments for Tax X, SMCV would reasonably be expected to (i) correct previous filings, pay the amount that it knows SUNAT believes is owed, and take the appropriate measures to challenge SUNAT's interpretation and request refunds; and (ii) file any

[2446] *See* Claimant's Reply at para. 313 ("The damages here are not lost profits or out-of-pocket expenses paid to third parties—they are Penalties and Statutory Interest that SMCV had to pay to Peru as a result of Peru's breaches of the Stability Agreement and the TPA.").

[2447] *See, e.g.*, Exhibit RA-107, *Cargill, Incorporated v. Republic of Poland*, UNCITRAL, Award, March 5, 2008, at para. 632 ("compensation will only be awarded if there is a sufficient causal link between the breach of the BIT and the loss sustained by the Claimant").

[2448] Claimant's Reply at para. 313.

[2449] *See* Exhibit RER-10, Second AlixPartners Report at para. 44.

[2450] *See* Exhibit RER-10, Second AlixPartners Report at para. 44.

future Tax X filings in accordance with SUNAT's interpretation (again, paying the amount that it knows SUNAT believes is owed and then taking the appropriate measures to challenge SUNAT's interpretation and request refunds). Thus, applying Perú's proposed mitigation does not penalize Claimant (or SMCV) for the time before which SMCV received the first assessment for Tax X, which put SMCV on notice of SUNAT's position with respect to Tax X. And with respect to any delays in resolving SMCV's administrative and legal challenges, Perú's very point is that SMCV should have paid its obligations and then pursued its challenges, in which case any delays in resolving the disputes would have had no impact on SMCV, because no penalties or interest would be accruing during any such delays.

1060. *Fourth*, Claimant argues that SMCV was under no legal obligation to pay the Assessments before challenging them[2451]—but Perú has never argued to the contrary. The issue is not whether SMCV had a legal obligation to pay the Assessments first; the issue is whether not doing so—and running the risk that it would lose its challenges and accrue significant penalties and interest during the course of its multi-year litigation—was unreasonable. Because the answer is yes, SMCV had a duty to mitigate its damages and cannot claim for damages that would have been avoided by such mitigation.

1061. And *fifth*, Claimant's reliance on past arbitral decisions is misplaced. Claimant quotes from four decisions[2452]—all of which are completely factually inapposite—for basic propositions that provide the Tribunal with absolutely no guidance:

- Claimant cites to *Cairn v. India*[2453] for the proposition that a respondent pointing to a failure to mitigate must "show that a claimant's conduct (action or inaction) following the Respondent's breach was unreasonable, abusive or against its own economic interests"[2454]—which is exactly what Perú is arguing here (*i.e.*, that SMCV's decision to wait until after it lost its challenges to the various assessments to pay most of its obligations was "unreasonable" and "against its own economic interest[]").

[2451] *See* Claimant's Reply at para. 314(a).

[2452] *See* Claimant's Reply at para. 314(a).

[2453] *See* Claimant's Reply at para. 314(a); Exhibit CA-426, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Final Award, December 21, 2020 ("*Cairn v. India*, Final Award").

[2454] Exhibit CA-426, *Cairn v. India*, Final Award at para. 1888.

- Claimant cites to *Magyar v. Hungary* in arguing that "it is not for the tribunal to 'speculate whether the Claimants would have exercised a better business judgement.'"[2455] But the types of "business judgement" about which the *Magyar v. Hungary* tribunal declined to speculate were far more in-the-weeds, *e.g.*, "growing certain crops on specific parcels of land."[2456] Here, Perú is not arguing that the Tribunal should critique SMCV's day-to-day business decisions related to the running of Cerro Verde in search of operational changes that might have reduced its tax or royalty burdens, for example. Rather, again, Perú is arguing that SMCV's decision to wait until after it lost its challenges to the various assessments to pay most of its obligations was "unreasonable," given that it unnecessarily ran the perfectly obvious and easily understood risk of accruing significant penalties and interest if SMCV lost (whereas SMCV could have recouped any overpayment plus interest had it won).

- Claimant cites to *Union Fenosa Gas v. Egypt* to argue that the Tribunal cannot review SMCV's conduct with the benefit of hindsight.[2457] Perú does not take issue with this proposition, as a general matter, but it is completely irrelevant here. Claimant argues that "Peru's mitigation defense rests solely on speculation with the benefit of hindsight."[2458] But that is simply not true. Perú's argument is, again, that SMCV's decision to wait until after it lost its challenges to pay most of its obligations had entirely foreseeable and entirely avoidable consequences of increasing its damages, and was therefore "unreasonable." SMCV needlessly ran the risk that it would lose its challenges and accrue significant additional penalties and interest, and any reasonable business in SMCV's position at that time—knowing the risks involved in not paying the obligations in a more timely fashion, knowing the risks of losing its challenges in the face of MINEM's and SUNAT's interpretation of the 1998 Stabilization Agreement, and knowing that, conversely, if it did pay its obligations first and ultimately succeed, it would be able to recover

[2455] Claimant's Reply at para. 314(a) (*quoting* Exhibit CA-425, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, November 13, 2019 ("*Magyar v. Hungary*, Award"), at para. 427).

[2456] Exhibit CA-425, *Magyar v. Hungary*, Award at para. 427 (emphasis added).

[2457] *See* Claimant's Reply at para. 314(b); Exhibit CA-421, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018.

[2458] Claimant's Reply at para. 314(b).

its overpayment plus interest, SMCV should have taken the simple, safe step of paying the obligations according to SUNAT's interpretation and then challenged the taxes, avoiding any further penalties and interest.

- Finally, Claimant cites to *AIG Capital Partners v. Kazakhstan* to argue that "the duty to mitigate damages is not intended to 'encourage Governments to breach with impunity solemn provisions of an international treaty and weaken the protection of foreign investors – which such a treaty is expressly designed to safeguard.'"[2459] Claimant further argues that "that is the precise effect Peru seeks to achieve here by imposing on SMCV a duty that required it to take extraordinary steps to prevent Peru from wrongfully extracting Penalties and Statutory Interest."[2460] This is false. While Perú does not take issue with the basic proposition from *AIG Capital Partners v. Kazakhstan* that Claimant has highlighted, Perú's argument here, if accepted by the Tribunal, would in no way encourage "Governments to breach [investment-treaty provisions] with impunity." If the Tribunal determines that Perú breached its treaty obligations by imposing the Assessments, it will still be liable for a significant award to Claimant (or SMCV); there is no incentive for Perú to breach the Treaty in the future.

1062. The Parties' differences on this issue can be aptly illustrated by Claimant's assertion that a taxpayer timely paying its tax assessments—even where it disagrees with the assessment—is an "extraordinary step[]."[2461] To Perú, that is a fairly ordinary obligation. Nor does Perú consider it "extraordinary" that, if the taxpayer wishes to challenge an assessment (which it has every right to do), but not pay its obligations in the interim, the taxpayer runs the risk that it will lose its challenge and incur additional penalties and interest because of its delay in paying. Perú therefore provides taxpayers with avenues to pay their obligations—and easily avoid that risk—and then to recover their overpayment with interest should they succeed in their challenges (which Claimant does not dispute). SMCV recklessly chose not to do so, and Claimant—not Perú—must bear the consequences of that choice.

[2459] Claimant's Reply at para. 314(d) (*quoting* Exhibit RA-86, *AIG v. Kazakhstan*, Award).

[2460] Claimant's Reply at para. 314(d).

[2461] Claimant's Reply at para. 314(d).

B. CLAIMANT HAS IMPROPERLY INCLUDED IN ITS DAMAGES CALCULATION CERTAIN TAX ASSESSMENTS THAT ARE EXPLICITLY NOT ACTIONABLE UNDER THE TPA

1063. As discussed in Respondent's Counter-Memorial and again in Section III.B, above, Article 22.3 of the TPA expressly excludes taxation measures from the scope of protection under the TPA.[2462] Nevertheless, Claimant has continued to improperly include in its FET claim (and, therefore, its damages calculation) certain penalties and interest relating to Tax Assessments against SMCV (not just Royalty Assessments), on the basis that "penalties and interest [on tax assessments] do not constitute 'taxation measures' under the TPA."[2463] Respondent has already explained the absurdity of that argument in Section III.B, above—penalties and interest imposed upon a failure to pay taxes is obviously a taxation measure enforcing the tax obligation. Excluding these amounts reduces Claimant's calculated damages by US $ 372.9 million for its main damages claim with respect to its Article 10.5 legal claim (it does not affect the main damages claim for Claimant's breach of contract legal claims[2464]) and US $ 258.6 million for its alternative claim.[2465]

1064. In addition, as discussed in both Ms. Kunsman's first[2466] and second[2467] expert reports, Claimant also made certain tax adjustments in calculating its damages for its alternative claim.[2468] These adjustments related to Claimant's complaint that the non-stabilized regime was improperly applied to certain Leaching Project activities. As explained in Section II.I of Respondent's Counter-Memorial and Section II.J, above, that complaint has no merit because, to the extent that SUNAT applied the non-stabilized regime to any stabilized activities, it did so only because SMCV (by its own admission[2469]) failed to keep separate accounts and therefore did not provide SUNAT with the information it needed to separate the stabilized and non-stabilized activities. If the Tribunal agrees with Perú that SUNAT's assessments with respect to

[2462] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.

[2463] Claimant's Reply at para. 315.

[2464] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.6.

[2465] *See* Exhibit RER-10, Second AlixPartners Report at para. 56.

[2466] *See* Exhibit RER-5, First AlixPartners Report at paras. 66-82.

[2467] *See* Exhibit RER-10, Second AlixPartners Report at paras. 83-89.

[2468] *See* Claimant's Memorial at paras. 348-50.

[2469] *See* Exhibit CWS-4, Witness Statement of Pedro Choque Ticona, October 19, 2021 ("First Choque Statement"), at para. 23.

these taxes did not violate the 1998 Stabilization Agreement, according to Ms. Kunsman, Claimant's damages for its alternative claim must be reduced by US $23.5 million.[2470]

C. CLAIMANT CONTINUES TO IMPROPERLY INCLUDE UNPAID OBLIGATIONS IN ITS DAMAGES CALCULATION

1065. Claimant has acknowledged in its submissions that it is claiming for amounts that have never been paid to SUNAT and are still sitting in SMCV's pockets today. In its Memorial, Claimant noted that "[t]he total liabilities [Perú owes to SMCV] include US$1,170.6 million in paid amounts and US$36.9 million in still outstanding amounts, which Dr. Spiller and Ms. Chavich assume are paid as of 19 October 2021."[2471] In its Reply, Claimant further notes that, "[t]o account for additional payments that SMCV has made since the First Spiller-Chavich Report, the Second Spiller-Chavich Report updates that figure to US$33.2 million in Outstanding Liabilities, as of 13 September 2022."[2472]

1066. As Perú explained in its Counter-Memorial,[2473] the problem with including these outstanding obligations in Claimant's damages calculation is that there is no evidence that—if Claimant is successful in this arbitration—SMCV will actually pay these outstanding obligations. Claimant argues that "Peru does not and cannot deny that SMCV is under an obligation to pay the Outstanding Liabilities and is subject to compulsory collection processes in Peru until the Outstanding Liabilities are discharged in full."[2474] But that is irrelevant. A legal obligation can only be considered a "damage" if that legal obligation will actually result in the victim making the payments; if not, then the victim has not suffered (and will not suffer) any actual damage. "[I]t is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered."[2475]

1067. The inclusion or exclusion of the outstanding obligations here must turn on whether Claimant will actually suffer damages in those amounts, *i.e.*, whether SMCV will ever

---

[2470] *See* Exhibit RER-10, Second AlixPartners Report at para. 89.

[2471] Claimant's Memorial at para. 442 (emphasis added) (*citing* Exhibit CER-1, First Compass Lexecon Report at para. 86, Figure 7); *see also* Exhibit CER-1, First Compass Lexecon Report at para. 86, n.117.

[2472] Claimant's Reply at para. 292. Perú provided an overview of the specific assessments that remain outstanding in its Counter-Memorial. *See* Respondent's Counter-Memorial at para. 781.

[2473] *See* Respondent's Counter-Memorial at paras. 778-83.

[2474] Claimant's Reply at para. 293.

[2475] Exhibit RA-108, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015, at para. 238 (considering the so-called pass-on defense: whether the claimant would likely have recovered any increase in costs from consumers through price adjustment and thereby have recovered through its revenues any potential loss incurred as a result of the measures at issue).

actually pay the outstanding obligations if Claimant succeeds in this arbitration and the Tribunal determines that the basis for the obligations was wrongful. But, to reiterate, Claimant simply has presented no evidence to suggest that SMCV will pay those obligations—some of which, again, have stood unpaid for more than 15 years.[2476] Claimant has not explained why SMCV would now pay these obligations, particularly if Claimant were to prevail in this arbitration and establish that the obligations should never have been due in the first place. And, critically, Claimant—SMCV's majority shareholder—never actually promises or even claims that, win or lose, SMCV will pay these outstanding obligations.[2477] Claimant could have put this issue to bed by making, or obtaining from SMCV, a binding commitment to the Tribunal that SMCV will pay all of the outstanding amounts before any award is paid to Claimant, or by pledging to deduct them from the award. The Tribunal should draw adverse inferences from the fact that, even after being squarely confronted with the problem in Respondent's Counter-Memorial, Claimant and SMCV have made no such offer. That deafening silence is strong evidence that SMCV does not intend ever to pay the obligations, and is hoping instead that this Tribunal (and/or the SMM Cerro Verde tribunal) will issue a windfall award of an extra US $33.2 million in "losses" that SMCV will never pay and therefore will never suffer.

1068. The Tribunal cannot include these outstanding obligations in any damages calculation. Claimant is not entitled to compensation for monies that SMCV never paid and very likely never will pay. Excluding these outstanding obligations from SMCV's claimed losses reduces Claimant's damages by US $25.7 million under its main claim and US $1.2 million under its alternative claim.[2478]

[2476] *See* Exhibit RER-10, Second AlixPartners Report at para. 76; Exhibit RER-5, First AlixPartners Report at para. 64, Table 8.

[2477] *See* Claimant's Reply at paras. 292-94.

[2478] *See* Exhibit RER-10, Second AlixPartners Report at para. 82. Respondent also notes that Claimant, at the time of its Memorial, included in its unpaid obligations amounts related to GST for Non-Residents ("GST NR"). *See* Exhibit CER-1, First Compass Lexecon Report at Appendix K. These amounts were the difference between the 19% rate that SUNAT imposed and the 18% rate that SMCV actually paid. *See* Exhibit CER-1, First Compass Lexecon Report at paras. 68-73. Claimant has since paid the outstanding amounts related to GST NR. *See* Exhibit CER-6, Second Compass Lexecon Report at Appendix C. Nevertheless, as Drs. Bravo and Picón explain, SUNAT was correct in imposing the 19% rate (regardless of whether the 1998 Stabilization Agreement covers the Concentrator Project). *See* Exhibit RER-8, Second Bravo and Picón Report at Section IX. These amounts, therefore, must still be excluded.

D. CLAIMANT CONTINUES TO ASSUME, WITHOUT EVIDENTIARY SUPPORT, THAT, IN THE BUT-FOR SCENARIO, SMCV WOULD HAVE IMMEDIATELY DISTRIBUTED AS DIVIDENDS 100% OF THE ASSESSMENTS IMPOSED

1069. As explained in Perú's Counter-Memorial, Claimant's damages calculation erroneously assumes, without adequate foundation, that in the but-for scenario where SMCV did not have to pay the Assessments, SMCV would have distributed as dividends 100% of the Assessment amounts, and would have done so immediately on the next available dividend distribution date.[2479] In its Reply, Claimant presents two arguments in response.

1070. *First*, Claimant argues that this point is "of little consequence because SMCV has incurred damages as a result of Peru's wrongful conduct irrespective of whether the disputed payments would have been distributed as dividends."[2480] Claimant misunderstands the ramifications of Perú's argument: As Ms. Kunsman explains in her second report and Perú explains below, the issue is not whether Claimant allegedly suffered damages, at all, but, rather, the calculation of its damages.

1071. *Second*, Claimant argues that "there is no merit to Peru's assertion that Freeport is required to show that SMCV would have been 'mandate[d]' to distribute the disputed payments as dividends"[2481] and that "there is no merit to Peru's assertion that Freeport is required to show that SMCV distributed 'all available cash' as dividends during the relevant times."[2482]

1072. As an initial matter, Claimant mischaracterizes Perú's arguments. Perú never argued that Claimant was "required" to show these points.[2483] Rather, Perú argued (fairly uncontroversially) that the burden is on Claimant to prove its damages[2484] and that Claimant did not meet its burden with respect to whether, how, and when the Assessment amounts would have reached SMCV's shareholders (including Claimant) in the but-for scenario.[2485] Claimant, in applying the "free cash flows to equity" approach (which, as it explained, "model[s] the dividend

[2479] *See* Respondent's Counter-Memorial at paras. 784-88.

[2480] Claimant's Reply at para. 296.

[2481] Claimant's Reply at para. 297.

[2482] Claimant's Reply at para. 298 (*quoting* Respondent's Counter-Memorial at para. 786).

[2483] *See* Respondent's Counter-Memorial at paras. 784-88.

[2484] *See* Respondent's Counter-Memorial at para. 788; *see also, e.g.*, Exhibit RA-109, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, at para. 451; Exhibit RA-33, *S.D. Myers v. Canada*, Partial Award, at para. 316.

[2485] *See* Respondent's Counter-Memorial at para. 788.

distributions that SMCV would have made but-for Peru's [allegedly] unlawful conduct"[2486]) is claiming lost dividends to SMCV's shareholders as its damages.[2487] It therefore has the burden of proving those lost dividends, which includes proving that, but for the Assessments, (i) SMCV would have had more money; (ii) SMCV would have distributed all of that money to its shareholders; and (iii) according to Claimant's theory, SMCV would have distributed all of that money immediately at the next actual dividend distribution date. Claimant could have proven these latter two points by showing that SMCV would have been required to distribute the entirety of the "disputed payments" immediately at the next distribution date, and that SMCV had a consistent practice and history of doing so. But Claimant did neither (nor, as discussed below, would the record support those arguments).

1073. Instead, Claimant (and its experts) merely assume that all of the "disputed payments" would have been distributed to SMCV's shareholders immediately at the next distribution date because (i) "nothing would have prevented" SMCV from doing so,[2488] and (ii) "during the relevant times, SMCV continued to distribute dividends while making the disputed payments."[2489] However, first, the historical record does not support point (ii). Dr. Spiller and Ms. Chavich acknowledge that SMCV suspended dividend distributions for more than seven years between Q4 2010 and April 2018 and then again in 2020 (the latter due to the COVID-19 pandemic).[2490] And Ms. Kunsman's review of SMCV's financial statements "shows that SMCV's cash balance from 2012-2013 and 2017 could have supported a dividend payment consistent with 2018 and 2019 levels, but management decided not to pay a dividend."[2491] So the evidence does not support Claimant's claim (ii).

1074. But, even if they were true, Claimant's arguments (i) and (ii) do not actually prove that SMCV would have distributed the entirety of the "disputed payments" immediately at the next distribution date. Proving that "nothing would have prevented SMCV from distributing the disputed payments as dividends" is a far cry from proving that SMCV actually would have distributed 100% of the "disputed payments" immediately at the next distribution. And showing that SMCV distributed some cash as dividends during some years does not prove that SMCV

[2486] Claimant's Reply at para. 289.

[2487] *See, e.g.*, Claimant's Reply at para. 289.

[2488] Claimant's Reply at para. 297.

[2489] Claimant's Reply at para. 298.

[2490] *See* Exhibit CER-6, Second Compass Lexecon Report at paras. 84(b)-(c).

[2491] Exhibit RER-10, Second AlixPartners Report at para. 64 (emphasis omitted).

would have distributed all of the "disputed payments" as dividends immediately at the next distribution date.

1075. In fact, as Ms. Kunsman explains, "[e]ven when SMCV distributed dividends, it didn't distribute the available cash and retained earnings that remained undistributed from prior years (when SMCV chose not to distribute dividends)."[2492] As shown in Table 10 of Ms. Kunsman's second report, below, in both 2018 and 2019 (two years in which SMCV actually made distributions and were not (in Dr. Spiller's words) "accumulating cash for major capital investments"[2493]), SMCV distributed far less in dividends than the available retained earnings balance,[2494] "indicating that SMCV management instead chose to retain most of its profit in the form of cash."[2495]

Table 1. Profit, Dividends, Cash, and Retained Earnings ($US thousands)[2496]

In $US thousands	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Profit	796,584	613,262	377,606	33,284	340,907	349,881	119,710	390,377	274,544	1,191,474
Dividends							200,000	150,000		700,000
Cash	1,427,528	854,570	19,574	5,952	29,951	600,027	501,182	481,491	533,730	937,680
Retained Earnings	2,285,431	2,898,693	3,276,299	3,309,583	3,650,490	4,000,371	3,920,081	4,160,458	4,435,002	4,926,476

1076. Table 11 of Ms. Kunsman's second report shows how SMCV's retained earnings balance grew significantly during the relevant times, in part because no dividends were paid.

[2492] Exhibit RER-10, Second AlixPartners Report at para. 65.

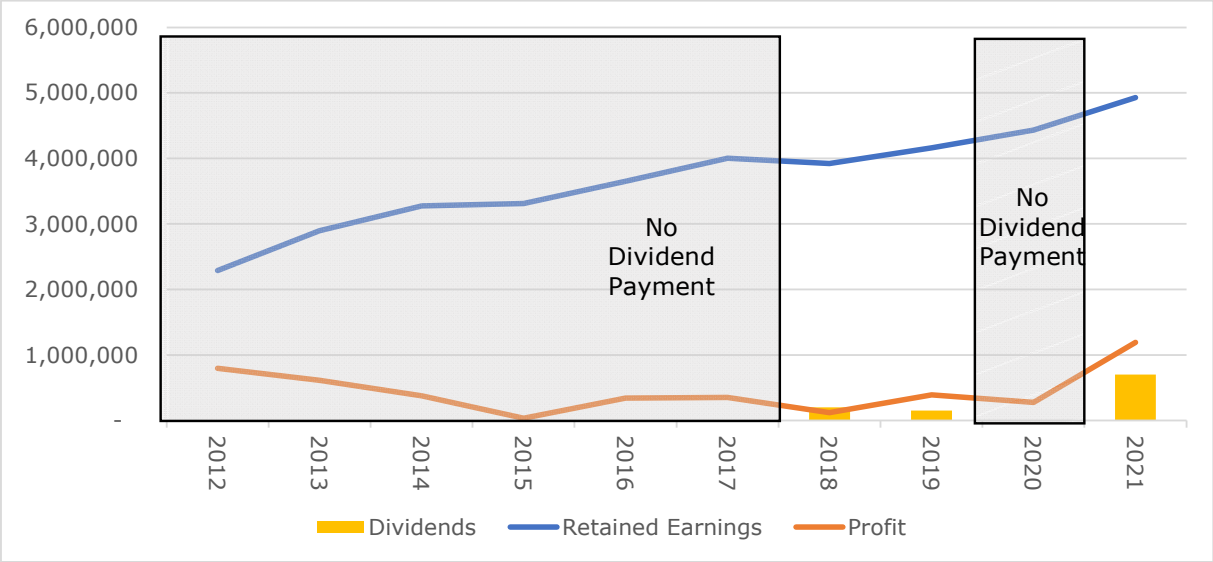
[2493] Exhibit CER-6, Second Compass Lexecon Report at para. 84.

[2494] Ms. Kunsman explains that "[i]n financial statements, retained earnings represent the income a company has left over after paying all its direct costs, indirect costs, income taxes, and dividends to shareholders. If a company could but chooses not to pay a dividend, then the retained earnings balance grows." Exhibit RER-10, Second AlixPartners Report at para. 67, n.81.

[2495] Exhibit RER-10, Second AlixPartners Report at para. 65.

[2496] Exhibit RER-10, Second AlixPartners Report at para. 66, Table 10.

Table 11. Chart Showing SMCV's Retained Earnings, Profit, and Dividends ($US thousands)[2497]



1077. Ms. Kunsman further explains that "[t]he growing retained earnings balance means that cash was available (or could have been made available) for distribution, but SMCV decided not to distribute it to shareholders. Even after SMCV accumulated earnings for seven years and grew its retained earnings balance from $US 2.29 billion in 2012 to $US 3.92 billion in 2018, it only distributed $US 200 million, or 5.1% of SMCV's retained earnings balance in 2018."[2498] Claimant simply has not met its burden of showing that SMCV would have distributed all of the "disputed payments" immediately at the next actual dividend distribution date.[2499]

1078. As Ms. Kunsman explains, "Because (1) the record contains no evidence that SMCV management would have paid the But-for Cash Flows as dividends but-for the Assessments and (2) SMCV management did not pay dividends even when its net income and

[2497] Exhibit RER-10, Second AlixPartners Report at para. 67, Table 11.

[2498] Exhibit RER-10, Second AlixPartners Report at para. 68.

[2499] The Parties appear to largely agree on the standard of proof. Claimant argues that it does not need to prove its damages with "absolute certainty." Claimant's Reply at para. 298. But Perú has never argued that Claimant's burden requires "absolute certainty." Rather, past arbitral jurisprudence suggests (and Claimant appears to agree, *see id.* at para. 298) that the standard of proof for Claimant's quantum of damages is more akin to reasonable certainty, *see, e.g.*, Exhibit CA-168, *Gemplus S.A., SLP, S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, June 16, 2010, at paras. 13-82 to 13-91—a standard to which Claimant, again, falls far short.

retained earnings would have supported such payments, the most appropriate payout assumption is to treat an award as a one-time payout."[2500] This is because the evidence suggests that, in the but-for scenario, "SMCV would not have distributed [the But-for Cash Flows] as Compass Lexecon suggests, and instead would have retained them."[2501] This adjustment reduces Claimant's damages by approximately US $114.2 million under its main claim and US $83.4 million under its alternative claim.[2502]

1079. Respondent notes that, as Ms. Kunsman explains, this correction would obviate the need for any pre-award interest (because the one-time payout would be calculated as of the valuation date).[2503] Therefore, if the Tribunal agrees with Respondent on this point, the discussion in the following section (on the appropriate pre-award interest rate) would only be relevant to the extent that the Tribunal ordered any post-award interest.[2504]

E. CLAIMANT CONTINUES TO IMPROPERLY USE SMCV'S COST OF EQUITY AS ITS PRE-AWARD INTEREST RATE

1080. As Respondent explained in its Counter-Memorial,[2505] Claimant improperly inflates its claims by using SMCV's cost of equity as its pre-award interest rate.[2506] Doing so, first and foremost, ignores the TPA's explicit direction to use a "commercially reasonable rate."[2507] And Claimant's proposed rate overcompensates SMCV's shareholders (including Claimant), because there is no evidence that, but for the assessments, SMCV's shareholders would have actually earned the interest rate Claimant proposes. Using this rate would actually put SMCV's shareholders in a <u>better</u> position than they would have been in if SUNAT had never issued any of the Assessments. Claimant is essentially trying to sneak consequential damages in

[2500] Exhibit RER-10, Second AlixPartners Report at para. 70.

[2501] Exhibit RER-10, Second AlixPartners Report at para. 71.

[2502] *See* Exhibit RER-10, Second AlixPartners Report at para. 71.

[2503] *See* Exhibit RER-10, Second AlixPartners Report at para. 94.

[2504] *See* Exhibit RER-10, Second AlixPartners Report at para. 94.

[2505] *See* Respondent's Counter-Memorial at paras. 790-804.

[2506] Claimant also argues that the Tribunal should use SMCV's cost of equity for any post-award interest as well. *See* Claimant's Memorial at para. 454; Claimant's Reply at para. 319(F). As Claimant noted in its Memorial, "Post-award interest should also be calculated using SMCV's cost of equity, as the same principles apply." Claimant's Memorial at para. 454. Respondent, in its Counter-Memorial, agreed that the same methodology should apply for pre- and post-award interest but, for the reasons discussed in this section, that interest rate cannot be SMCV's cost of equity. *See* Respondent's Counter-Memorial at para. 774, n.1595.

[2507] Exhibit CA-10, U.S.-Perú TPA at Art. 10.7.3.

through a back door (*i.e.*, interest), without ever actually proving those consequential damages. That is not appropriate for a damages award.

1081. As an initial (and determinative) matter, Article 10.7.3 of the TPA provides that "[i]f the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment."[2508] And, as Respondent explained in its Counter-Memorial,[2509] although Article 10.7.3 deals with expropriation, investment treaties (or investment chapters of free trade agreements) often include the interest provision in the expropriation section (*e.g.*, the ECT[2510] and the NAFTA[2511]), and tribunals commonly find that the interest provision in the expropriation section provides guidance for the interest to be awarded for non-expropriation breaches of the treaty as well.[2512]

1082. In its Reply, Claimant appears to concede that the Tribunal must apply a "commercially reasonable rate."[2513] However, Claimant (shockingly) argues that SMCV's cost of equity is "the most commercially reasonable rate 'in these circumstances.'"[2514] This argument is absurd. As Ms. Kunsman explains, a "commercially reasonable rate" is a market (or "commercial") rate, *i.e.*, a rate available to all participants in the market—"[i]t is not a company-

[2508] Exhibit CA-10, U.S.-Perú TPA at Art. 10.7.3 (emphasis added).

[2509] *See* Respondent's Counter-Memorial at para. 791.

[2510] *See* Exhibit RE-168, Consolidated Energy Charter Treaty (ECT), Last Updated on January 15, 2016, at Art. 13(1) ("Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.").

[2511] *See* Exhibit RE-113, North American Free Trade Agreement (NAFTA), signed on December 17, 1992, entered into force on January 1, 1994, at Arts. 1110(4)-(5) (providing for interest "at a commercially reasonable rate" "from the date of expropriation until the date of actual payment").

[2512] *See, e.g.*, Exhibit RA-89, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, November 21, 2007 ("*Archer Daniels v. Mexico*, Award"), at paras. 295-96 (applying a "commercially reasonable rate" (as provided in NAFTA Article 1110, for expropriation) to a compensation due for breach of Article 1102 NAFTA (national treatment) and 1106 NAFTA (performance requirements)); Exhibit CA-286, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, September 20, 2021, at paras. 873-74 (finding that the "commercially reasonable rate" (as provided in NAFTA Article 1110, for expropriation) guides the interest rate that the tribunal should apply for damages awarded for a breach of Article 1105 (fair and equitable treatment)); Exhibit RA-90, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, February 15, 2018, at paras. 844-46 (applying "a commercial and risk-free yield interest rate" on damages award for breach of the FET obligation in Article 10(1) of the ECT after noting the interest provision in Article 13(1) of the ECT).

[2513] Claimant's Reply at para. 302 (not arguing that the Tribunal should not apply a commercially reasonable rate but, instead, that SMCV's cost of equity "is the most commercially reasonable rate under the circumstances").

[2514] Claimant's Reply at para. 302.

specific rate."[2515] Claimant (unsurprisingly) points to no case in support of its position that the Tribunal can or should select a company-specific cost of equity when it is obliged under the applicable treaty to apply a "commercially reasonable rate."

1083. To the contrary, as the Tribunal is surely well aware, arbitral tribunals routinely use short-term commercial rates like those proposed by Respondent and Ms. Kunsman (even in cases where the applicable treaty does not specify that the rate must be commercially reasonable or a normal commercial rate).[2516] In fact, numerous tribunals have specifically relied upon U.S.

[2515] Exhibit RER-10, Second AlixPartners Report at para. 98, n.110 (emphasis added).

[2516] *See, e.g.*, Exhibit RA-110, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, November 13, 2000, at para. 96 (using LIBOR rate for Spanish peseta); Exhibit RA-91, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, at para. 250 ("This being an international tribunal assessing damages under a bilateral investment treaty in an internationally traded currency related to an international transaction, it would seem in keeping with the nature of the dispute that the applicable rate of interest be the annual LIBOR . . . ."); Exhibit RA-111, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007, at para. 396 (applying the average rate of interest applicable to U.S. six-month certificates of deposit rates); Exhibit CA-142, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, at para. 486 (applying 6-month LIBOR rate, plus a 2% annualized premium); Exhibit CA-271, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, December 24, 2007, at para. 455 (applying US six-month certificates of deposit); Exhibit CA-237, *Rumeli v. Kazakhstan*, Award, at para. 818 (applying 6-month average LIBOR, plus 2% per year); Exhibit CA-150, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, at para. 314 (applying "U.S.$ 6 months Libor (as published in the Financial Times) plus 2 per cent"); Exhibit RA-67, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, November 3, 2008, at para. 294 (applying LIBOR plus 2%); Exhibit RA-112, *Siag v. Egypt*, Award, at para. 598 (applying applicable 6 month LIBOR rates); Exhibit CA-167, *Chevron Corp. et al. v. Ecuador*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, March 30, 2010 ("*Chevron v. Ecuador I*, Partial Award on the Merits"), at para. 555 (applying New York Prime Rate); Exhibit RA-63, *El Paso v. Argentina*, Award, at para. 745 (applying LIBOR plus 2%); Exhibit RA-113, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, February 10, 2012, at para. 188 (applying LIBOR plus 1%); Exhibit CA-276, *Railroad Development v. Guatemala*, Award, at paras. 278-79 (applying LIBOR plus 2%); Exhibit CA-211, *PAO Tatneft v. Ukraine*, Award, at para. 627 (applying LIBOR plus 3%); Exhibit RA-114, *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, October 9, 2014, at para. 396 (applying US prime rate); Exhibit RA-17, *Hassan Awdi v. Romania*, Award, at para. 518 (applying EURIBOR +2%); Exhibit CA-218, *Quiborax S.A. & Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015, at para. 526 (applying "the rate of one-year LIBOR plus two percent"); Exhibit CA-216, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, at para. 948 (applying the six-month USD LIBOR rate plus 2%); Exhibit CA-222, *Crystallex v. Venezuela*, Award, at para. 938 (applying LIBOR plus 1%); Exhibit RA-115, *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award (redacted), August 12, 2016, at para. 941 (applying EURIBOR plus 2%); Exhibit RA-116, *Valores Mundiales v. Venezuela*, Award at para. 817 (applying LIBOR plus 2%); Exhibit CA-414, *Caratube v. Kazakhstan*, Award at para. 1222 (applying LIBOR plus 2%); Exhibit RA-117, *Manchester Securities Corp. v. Republic of Poland*, PCA Case No. 2015-18, Award (redacted), December 7, 2018, at para. 522 (applying the average WIBOR annual rate of interest for Polish zloty plus 2%, which amounts to 3.88%); Exhibit CA-349, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic*, SCC Case No. V 2015/095, Award, December 23, 2018, at para. 577 (applying LIBOR plus 2%); Exhibit RA-118, *CEF Energia BV v. Italian Republic*, SCC Case No. V2015/158, Award, January 16, 2019, at para. 285 (applying LIBOR plus 2%); Exhibit RA-119, *Stabil LLC and others v. Russian Federation*, PCA Case No. 2015-35, Final Award, April 12, 2019, at para. 412 (applying LIBOR for three month deposits in U.S. dollars plus 1%); Exhibit RA-120, *Etrak Insaat Taahut ve Ticaret Anonim Sirketi v. State of Libya*, ICC Case No. 22236/ZF/AYZ, Final Award, July 22, 2019, at para. 438 (applying LIBOR plus 3%); Exhibit CA-425, *Magyar v. Hungary*, Award at para. 431 (applying LIBOR plus 2%); Exhibit RA-121, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA

Treasury rates (as Ms. Kunsman proposes).[2517] Given the phasing out of LIBOR and the nationality of Claimant,[2518] U.S. Treasury rates are a practical and appropriate choice.

1084. As the *Deutsche Telekom v. India* tribunal explained, "While the practice of investment tribunals is not entirely uniform with regard to the rate of interest awarded, one widely accepted approach is to award interest at a commercial rate, such as LIBOR (for loans of a given period) plus some percentage points, frequently 2%" because "[s]uch a rate would adequately compensate [the claimant] for the loss of the use of the principal in the relevant time period."[2519] The *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I* tribunal similarly found "that in a recent study of ICSID awards, three broad categories of interest rates were used: base rates plus a spread (the base rate being a market rate of some kind and usually US Treasury bill rate, or interbank lending rate such as LIBOR, EURIBOR, ROBOR, BRIBOR); a base rate without a spread; and a number specified by the tribunal."[2520] Notably, Claimant's proposal here, the investment's cost of equity, was not one of the "three broad categories" of interest rates identified in the study.

Case No. 2012-07, Final Award, December 23, 2019 ("*Mohamed Abdel Raouf Bahgat v. Egypt I*, Award"), at para. 542 (applying LIBOR plus 2%); Exhibit RA-168, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Final Award, May 27, 2020 ("*Deutsche Telekom v. India*, Final Award"), at para. 319 (applying "LIBOR (or any other comparable rate in case LIBOR should be discontinued in the future), plus 2%"); Exhibit RA-122, *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Award, August 5, 2020, at para. 148 (applying "one-year EURIBOR plus 1%"); Exhibit RA-123, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India*, PCA Case No. 2013-09, Award on Quantum, October 13, 2020, at para. 625 (applying LIBOR plus 2%); Exhibit RA-124, *BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Award, January 25, 2021, at para. 62 (applying six-month EURIBOR rate); Exhibit RA-125, *PACC Offshore Services Holdings Ltd. v. United Mexican States*, ICSID Case No. UNCT/18/5, Award (redacted), January 11, 2022, at para. 278 (applying "LIBOR without any additional percentage point").

[2517] *See, e.g.*, Exhibit RA-126, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, at para. 471 (applying interest rate of "2.51% which corresponds to the annualized average rate for the U.S. Treasury Bills as reported by the Federal Reserve Bank of St. Louis"); *see also, e.g.*, Exhibit RA-127, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, at para. 115; Exhibit RA-89, *Archer Daniels v. Mexico*, Award at paras. 295-96; Exhibit CA-194, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012, at para. 842; Exhibit RA-128, *Anatolie Stati and others v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, December 19, 2013, at para. 1854; Exhibit RA-129, *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. 2005-03/AA226, Final Award, July 18, 2014, at para. 1685; Exhibit CA-213, *Gold Reserve v. Venezuela*, Award, at para. 855; Exhibit RA-28, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, October 27, 2015, at para. 481; Exhibit RA-130, *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, November 9, 2021, at para. 802.

[2518] *See* Exhibit RER-5, First AlixPartners Report at para. 115.

[2519] Exhibit RA-168, *Deutsche Telekom v. India*, Final Award at para. 316.

[2520] Exhibit RA-121, *Mohamed Abdel Raouf Bahgat v. Egypt I*, Award at para. 532.

1085. Even if the TPA did not explicitly provide for a "commercially reasonable rate," Claimant's proposed cost of equity would still be nonsensical.[2521] The central flaw in Claimant's position is highlighted by its argument that "speculation about what SMCV's shareholders would have done with the dividends they would have received but-for Peru's breaches is wholly irrelevant" because, in reality, "Peru's breaches resulted in a delay in the distribution of dividends that SMCV's shareholders expected to receive."[2522] This directly contradicts Claimant's entire theory of damages—the goal of which, it has claimed, is "to restore the injured party to the position it would have been in if the illegal act had not occurred."[2523] What happened in reality[2524]—which Claimant says was distorted by Respondent's alleged unlawful conduct—has no bearing on the position in which SMCV's shareholders would have been in the but-for scenario. "[W]hat SMCV's shareholders would have done with the dividends they would have received but-for Peru's breaches"[2525] is (under Claimant's damages theory, and assuming *arguendo* that the Tribunal declined to apply a commercially reasonable rate) the only relevant question, because it provides the information necessary for the Tribunal to craft an award that "restore[s] [SMCV's shareholders] to the position [they] would have been in" but for the assessments.

1086. The *Chevron v. Ecuador* tribunal addressed this point, explaining that "[t]he guiding principle in the determination of pre-award interest is that what should be charged is not the amount of the Respondent's enrichment as a result of its non-payment, nor the actual cost incurred by the Claimant as a result of non-payment, but rather the lost investment income the Claimants otherwise could have realized had the claim been paid in a timely manner."[2526]

[2521] As Respondent explained in its Counter-Memorial, Claimant's comparison between its proposed cost-of-equity interest rate and its cherry-picked alternatives, *see* Claimant's Reply at paras. 290, 296, is irrelevant. *See* Respondent's Counter-Memorial at para. 802. There is simply no basis in the TPA, international, or logic to use these rates, so Claimant's comparison between these rates and its proposed rate—in a blatant attempt to frame its proposal as reasonable—is entirely meaningless. It is nothing but a distraction from the determinative fact that Article 10.7.3 of the TPA's requires the "commercially reasonable rate." Exhibit CA-10, U.S.-Perú TPA at Art. 10.7.3. Ms. Kunsman confirms these points again in her second expert report. *See* Exhibit RER-10, Second AlixPartners Report at para. 8, n.6.

[2522] Claimant's Reply at para. 303.

[2523] Claimant's Memorial at para. 431.

[2524] *See* Claimant's Reply at para. 304 (admitting that its supposed but-for scenario is actually intended to correspond with what happened in the actual scenario).

[2525] Claimant's Reply at para. 303.

[2526] Exhibit CA-167, *Chevron v. Ecuador I*, Partial Award on the Merits at para. 555.

1087. As Ms. Kunsman explains, Claimant has not provided any evidence of what SMCV's shareholders would have done with the hypothetical dividends (and what returns they would have likely gotten on any potential investment).[2527] Claimant has not provided any evidence that SMCV's shareholders (including Claimant) would have reinvested in SMCV, nor has it provided any evidence of alternative investment opportunities (nor has it shown that SMCV's shareholders were forced to forgo any opportunity because of the assessments).[2528] In fact, Claimant has not even argued that (or how) SMCV's shareholders would have invested the lost dividends.

1088. In addition, the sources on which Claimant relies do not support its position.[2529] With respect to the Senechal and Gotanda article[2530] (discussed in Respondent's Counter-Memorial at paragraph 801), Claimant simply states that "Peru's proposal is inconsistent with [the article's] conclusion," because "Peru and Ms. Kunsman do not account for the risk associated with an investment in SMCV."[2531]

1089. To the contrary, though, the article explicitly states that "the trend in investment disputes has been for tribunals to award interest at market savings or lending rates, such as the U.S. T-bill rate or the LIBOR rate"[2532]—exactly as Perú argues. Moreover, even if the premise of the article is to advocate for the opportunity cost approach (*i.e.*, basing the interest rate on the claimant's opportunity cost of the lost cash flow), Claimant has not even tried to prove SMCV's shareholders' opportunity costs. Claimant has not shown that, but for the assessments, SMCV's shareholders would have, or even had the opportunity to, reinvest in SMCV (or any project with similar returns) at the rate that Claimant claims. SMCV's cost of equity therefore is not SMCV's shareholders' opportunity cost, even if that were the correct metric. The article itself acknowledges that, at a minimum, "a claimant seeking interest as damages will need to show if the claimant had access to the principal amounts at issue that in the likely course of events it

[2527] *See* Exhibit RER-10, Second AlixPartners Report at para. 100.

[2528] *See* Exhibit RER-10, Second AlixPartners Report at paras. 100-01.

[2529] *See* Claimant's Reply at paras. 307-08.

[2530] *See* Exhibit CA-152, T. J. Senechal & J. Y. Gotanda, "Interest as Damages," 47 *Columbia J. Transnat'l L.* 491 (2009).

[2531] Claimant's Reply at para. 308.

[2532] Exhibit CA-152, T. J. Senechal & J. Y. Gotanda, "Interest as Damages," 47 *Columbia J. Transnat'l L.* 491 (2009), at p. 508.

would have earned the interest above a risk-free rate."[2533] Again, Claimant has utterly failed to make this showing.

1090. With respect to Claimant's (mis)reliance on *ConocoPhillips*, Claimant argues that "[n]owhere in the award did the *ConocoPhillips* tribunal make findings about what the claimants would actually have done with the delayed dividends."[2534] Rather, according to Claimant, "the tribunal rejected the same arguments that Peru makes here that 'it cannot be known what the Claimants would have willingly chosen to do with dividends from the Projects in a but-for world' and that 'pre-award interest should be based on a short-term, risk-free rate, reflecting the borrowing costs that the Claimants would normally expect to incur on a commercial basis in a 'but-for' world."[2535]

1091. Claimant, however, ignores the *ConocoPhillips* tribunal's explanation for rejecting those arguments: "In other words, the Claimants are to be restored to the position they would have had if the collection of dividends had not been interrupted through the expropriation," and "they would have decided willingly to retain those dividends within the Project."[2536] The latter statement is a factual determination by the tribunal. The *ConocoPhillips* tribunal therefore did "make findings about what the claimants would actually have done with the delayed dividends,"[2537] and that finding (properly) underlies the rate of interest applied. Had Claimant here shown that, in the but-for scenario, SMCV's shareholders would have retained their lost dividends in SMCV, then the rate of return SMCV's shareholders (or SMCV) would have expected on that investment might have become relevant (under Claimant's approach). But Claimant has not done so.

[2533] Exhibit CA-152, T. J. Senechal & J. Y. Gotanda, "Interest as Damages," 47 *Columbia J. Transnat'l L.* 491 (2009), at p. 520.

[2534] Claimant's Reply at para. 307(a).

[2535] Claimant's Reply at para. 307(a). To be clear, the passages that Claimant quotes are from the section in which the tribunal described the respondent's arguments, but the tribunal did not find that "it cannot be known what the Claimants would have willingly chosen to do with dividends from the Projects in a but-for world." Exhibit CA-242, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., and ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, March 8, 2019 ("*ConocoPhillips v. Venezuela*, Award"), at paras. 794 ("The Respondent objects to this approach and submits that it cannot be known what the Claimants would have willingly chosen to do with dividends from the Projects in a but-for world."), 803 (within the section "The Respondent's Position").

[2536] Exhibit CA-242, *ConocoPhillips v. Venezuela*, Award at para. 819.

[2537] Claimant's Reply at para. 307(a).

1092. Claimant's reliance on *Phillips v. Petroleos de Venezuela* is equally misplaced.[2538] The tribunal there explained that, "[w]hile interest rates may serve different purposes, the purpose of such rates with regard to compensation of damages for contractual breach is generally to ensure full compensation of a claimant by restoring it to the position it would have enjoyed if the contractual breach he suffered had not occurred."[2539] Perú takes no issue with that statement in the abstract. The difference between *Phillips* and the present case (and the reason the tribunal in *Phillips* applied a cost of equity and the Tribunal here, even if it wanted to use the opportunity cost approach, should not) is that, in *Phillips*, the tribunal found that, if the claimant had received the cash flows to which it was entitled, "it would have had the opportunity to apply them to the Project or some alternative productive use."[2540] Again, Claimant has utterly failed to show (or even argue) that that was the case here; it has not shown an opportunity to reinvest in SMCV, and it has not shown any other potential investment opportunity.

1093. Finally, Claimant relies on *Vivendi II*. But its characterization of that case is particularly egregious.[2541] Claimant argues that "the tribunal did not question whether the claimants were entitled to interest at a rate corresponding to the return they reasonably expected to earn and expressly factored 'the anticipated 11.7% rate of return on investment reflected in the Concession Agreement' into the calculation of pre-award interest."[2542]

1094. *First*, the claimants in *Vivendi II* did not even argue for interest based on their cost of equity; rather, "Claimants contend[ed] that compound interest should be awarded at the rate of 9.7%, corresponding to the discount rate applied in Claimants' DCF analysis and the quoted rate on the Argentine Treasury bond."[2543] The phrase "cost of equity" does not appear anywhere in the *Vivendi II* decision. *Second*, the tribunal rejected the claimants' proposed rate because of a factual determination: the tribunal was "not persuaded that Claimants would have earned 9.7%, compounded, on their respective shares of damages awarded, had such sums been timely paid at

---

[2538] *See* Claimant's Reply at para. 307(b).

[2539] Exhibit CA-193, *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.*, ICC Case No. 16848/JRF/CA (C-16848/JRF/CA), Final Award, September 17, 2012 ("*Phillips v. Petroleos de Venezuela*, Award"), at para. 295(ii).

[2540] Exhibit CA-193, *Phillips v. Petroleos de Venezuela*, Award at para. 295(ii).

[2541] *See* Claimant's Reply at para. 307(c).

[2542] Claimant's Reply at para. 307(c) (emphasis in the original).

[2543] Exhibit CA-140, *Compañia de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ("*Vivendi v. Argentina II*, Award"), at para. 9.2.7 (emphasis added).

the date of Argentina's expropriation of the concession."[2544] The tribunal did not hold that cost of equity was appropriate; rather, it found that the claimants had not proven that they would have earned 9.7% on the lost cash flow. The tribunal concluded:

> Having regard to Claimants' business of investing in and operating water concessions, to the anticipated 11.7 % rate of return on investment reflected in the Concession Agreement (which the parties had agreed to be appropriate having regard to the nature of the business, the term and the risk involved) and the generally prevailing rates of interest since September 1997, the Tribunal concludes that a 6% interest rate represents a reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost in the Tucumán concession.[2545]

1095. Thus, the tribunal determined in that case that 6% represented a "reasonable proxy" for the return the claimants could otherwise have earned. Here, however, Claimant has not even stated, much less provided evidence in support, what SMCV's shareholders investment opportunities could be.

1096. Furthermore, as Ms. Kunsman explained in her first report, the "Cost of Equity represents the average return investors expect to earn from investments in the common shares of companies over a multi-decade period of time."[2546] But, under both Claimant's main and alternative claims, SMCV's shareholders would have had the capital in hand only for three and a half years, or less. In essence, in addition to the problems already discussed, "[u]sing the Cost of Equity as a pre-award interest rate assumes that very long-term rates of return can be earned over very short periods of time."[2547] Ms. Kunsman explains that that is not an appropriate or realistic assumption.[2548]

1097. In sum, as Ms. Kunsman explains, the appropriate interest rate should be "a commercially reasonable rate such as a 1-Year US Treasury Bill ('US T-Bill') rate plus 2%, compounded annually, . . . to compensate SMCV's shareholders for the time value of money."[2549] Correcting the interest rate on the quantum of damages claimed by Claimant

---

[2544] Exhibit CA-140, *Vivendi v. Argentina II*, Award at para. 9.2.7.

[2545] Exhibit CA-140, *Vivendi v. Argentina II*, Award at para. 9.2.8 (emphasis added).

[2546] Exhibit RER-5, First AlixPartners Report at para. 108.

[2547] Exhibit RER-5, First AlixPartners Report at para. 108.

[2548] *See* Exhibit RER-5, First AlixPartners Report at paras. 108-14.

[2549] Exhibit RER-10, Second AlixPartners Report at para. 95.

reduces the accrued interest on Claimant's main claim by US $70.7 million and on Claimant's alternative claim by US $51.8 million.[2550]

F. SMCV'S COST OF EQUITY IS ALSO NOT AN APPROPRIATE RATE TO DISCOUNT CERTAIN FUTURE AMOUNTS (DEPRECIATION MITIGATION)

1098. Claimant also continues to improperly use SMCV's cost of equity to discount future sums related to depreciation that are projected to offset, and therefore reduce, Claimant's damages. By over-discounting those sums using SMCV's cost of equity, Claimant tries to shrink the offsets, and thus to increase its claims.

1099. As Ms. Kunsman explained in her first report:

> To calculate their taxable base, companies include a deduction related to the depreciation of their assets ("Depreciation Deduction"). For fiscal years 2006 to 2011, SMCV calculated the Depreciation Deduction for the Concentrator based on the stabilized tax depreciation rates ("Stabilized Depreciation Rates") in the Stability Agreement of up to 20% per year (i.e., a depreciation over five years). On the grounds that the investment in the Concentrator Plant was not stabilized, SUNAT calculated the Depreciation Deduction for the Concentrator in the Assessments using the lower Non-Stabilized Depreciation Rates with the longest depreciation over 20 years. This had the effect of increasing SMCV's annual taxable base for the initial five years but decreasing it for the remaining useful life of the assets under the non-stabilized regime. Due to the time value of money, the Stabilized Depreciation Rate[] benefit[s] SMCV because it pays [fewer] taxes in the initial 5 years even though it then pays higher taxes in the remaining useful life of the assets.
>
> In December 2017 and December 2018, SMCV filed amended tax filings for 2012 and 2013, adopting the Non-Stabilized Depreciation Rates for the Concentrator which it then adopted starting with the 2017 tax filings. Compass Lexecon refers to the reduction in income taxes (for the post-2011 tax years) from the Depreciation Deduction using the Non-Stabilized Depreciation Rates as Depreciation Mitigation. Compass Lexecon calculates a Depreciation Mitigation for the amended tax filings and for each year between 2017 and 2026 as follows: Depreciation Deduction with Non-Stabilized Depreciation Rates x Income Tax Rate.[2551]

[2550] *See* Exhibit RER-10, Second AlixPartners Report at para. 104. Respondent again notes, though, that the correction for the appropriate pre-award interest rate is mutually exclusive with its proposed correction for Claimant's unsupported assumption that SMCV would have distributed all of the "disputed payments" immediately at the next actual dividend distribution date. *See id.* at para. 94.

[2551] Exhibit RER-5, First AlixPartners Report at paras. 47-48.

1100. As Ms. Kunsman notes, the Depreciation Deduction extends out until the tax year 2026. Therefore, Dr. Spiller and Ms. Chavich had to discount the future depreciation's impacts on cash flows back to the Valuation Date of July 1, 2022. Dr. Spiller and Ms. Chavich continue to apply SMCV's cost of equity to discount these future depreciation impacts.[2552]

1101. However, as Ms. Kunsman explains in her second report, "Excess payments should be refunded according to the applicable statutory rate ("0.50% monthly (i.e. 6% annually)."[2553] There is "no need to deviate from this established rate" as "Claimant applying the cost of equity rate (which is greater than the statutory rate) would effectively punish Peru by the difference between the cost of equity and the statutory rate."[2554] Ms. Kunsman further noted "that the provision on statutory rates for interest when reimbursing overpayments has been in place since 2000; i.e. since before the investment was first made. The process for applying the rate has not changed over time."[2555] Thus, Claimant was (or at least should have been) well aware that this would be the applicable process for determining the rate on overpayments when it made its investment.

1102. The correction of this discount rate reduces Claimant's calculated damages by US $0.7 million for its main claim and US $0.1 million for its alternative claim.[2556]

G. CLAIMANT'S DAMAGES ARE MATERIALLY REDUCED AFTER CORRECTION FOR THE AFOREMENTIONED DEFECTS

1103. In total, as discussed above, Ms. Kunsman makes seven corrections to Compass Lexecon's damages calculation: (1) reducing Claimant's damages to account for the penalties and interest that SMCV should have mitigated (correction A); (2) excluding amounts related to taxes, generally (which are explicitly excluded from protection under the TPA) (correction B); (3) excluding certain tax adjustments (correction E); (4) excluding damages for alleged losses that have not yet materialized (*i.e.*, the unpaid obligations) (correction D) ; (5) correcting the date on which the lost dividends would have been distributed in the but-for scenario (correction C);

[2552] *See* Exhibit CER-6, Second Compass Lexecon Report at para. 52.

[2553] Exhibit RER-10, Second AlixPartners Report at para. 91. Ms. Kunsman adjusted this rate to 0.5% (from 0.25%) in her Second Report, pursuant to Dr. Spiller and Ms. Chavich's correction, *see id.* at para. 90; Exhibit CER-6, Second Compass Lexecon Report at para. 53, n.76.

[2554] Exhibit RER-10, Second AlixPartners Report at para. 91.

[2555] Exhibit RER-10, Second AlixPartners Report at para. 92.

[2556] *See* Exhibit RER-10, Second AlixPartners Report at para. 93.

(6) using an appropriate pre-award interest rate (correction G); and (7) using an appropriate rate to discount future depreciation mitigation (correction F).

1104. The standalone impact on damages for each of the seven corrections is summarized in Table 13 of Ms. Kunsman's second report:

Table 13. Summary of AlixPartners Individual Corrections "A" through "G"[2557]

USD Million, %		Main Claim	Alternative Claim
Compass Lexecon's Updated Calculation	**Damages**	**942.4**	**719.9**
A. "Mitigation of Penalties & Interest"	**Damages**	**357.5**	**198.6**
	Change in Damages	(584.9)	(521.3)
	% Change	-62.1%	-72.4%
B. "Taxes Not Allowed for Damages Under the Treaty"	**Damages**	**569.5**	**461.3**
	Change in Damages	(372.9)	(258.6)
	% Change	-39.6%	-35.9%
C. "But-for Cash Flows Distributed at Valuation Date"	**Damages**	**828.2**	**636.6**
	Change in Damages	(114.2)	(83.4)
	% Change	-12.1%	-11.6%
D. "Outstanding Liabilities"	**Damages**	**916.7**	**718.8**
	Change in Damages	(25.7)	(1.2)
	% Change	-2.7%	-0.2%
E. "Sales-Based Tax Correction"	**Damages**	**942.4**	**696.5**
	Change in Damages	-	(23.5)
	% Change	-	-3.3%
F. "Depreciation Mitigation Discount Rate"	**Damages**	**941.7**	**719.8**
	Change in Damages	(0.7)	(0.1)
	% Change	-0.1%	-0.02%
G. "Pre-Award Interest at Risk-Free Rates"	**Damages**	**871.7**	**668.2**
	Change in Damages	(70.7)	(51.8)
	% Change	-7.5%	-7.2%

1105. Because of interactions in the modeling (and the fact that certain adjustments are specific to certain claims[2558]), the combined impact of the corrections (or any subset of them) is not simply additive. With respect to its Article 10.5 claim, when Ms. Kunsman makes the first six of the corrections together (excluding correction G because it is mutually exclusive with correction C[2559]), Claimant's damages for its main claim are reduced from US $942.4 million to US $119 million, and Claimant's damages for its alternative claim are reduced from US $719.9

[2557] Exhibit RER-10, Second AlixPartners Report at para. 108, Table 13.

[2558] For instance, as noted above, correction B is only applicable to Claimant's Article 10.5 claim. *See supra* para. 1063; *see also* Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.6.

[2559] As noted above, Correction C—treating the award as a one-time payout valued as of the valuation date—obviates any pre-award interest. *See* Exhibit RER-10, Second AlixPartners Report at para. 94. Therefore, Correction G (applying a more appropriate pre-award interest rate, consistent with the TPA) is only relevant to the extent that the Tribunal rejects Correction C.

million to US $69.3 million.[2560] This is summarized in Table 14 of Ms. Kunsman's second report, reproduced below:

Table 2. Impact of AlixPartners' Corrections on Compass Lexecon's Damage Calculation - Combined, Treaty Claim[2561]

USD Million, %		SMCV Equity Holders (100%)	
		Main Claim	Alternative Claim
Compass Lexecon's Updated Calculation	**Damages**	**942.4**	**719.9**
AlixPartners' Corrections (A, B, C, D, and F)	**Damages**	**119.0**	**69.3**
	Change in Damages	823.3	650.7
	% Change	87.4%	90.4%

1106. With respect to Claimant's breach of contract claims, when Ms. Kunsman makes corrections A, C, D, E and F,[2562] Claimant's damages for its main claim with respect to its breach of contract claims are reduced from US $942.4 million to US $288.1 million, and Claimant's damages for its alternative claim are reduced from US $719.9 million to US $163.5 million.[2563] This is summarized in Table 15 of Ms. Kunsman's second report, reproduced below:

Table 3. Impact of AlixPartners' Corrections on Compass Lexecon's Damage Calculation - Combined, Stability Agreement Claim[2564]

USD Million, %		SMCV Equity Holders (100%)	
		Main Claim	Alternative Claim
Compass Lexecon's Updated Calculation	**Damages**	**942.4**	**719.9**
AlixPartners' Corrections (A, C, D, E, and F)	**Damages**	**288.1**	**163.5**
	Change in Damages	654.3	556.5
	% Change	69.4%	77.3%

[2560] *See* Exhibit RER-10, Second AlixPartners Report at para. 109, Table 14.

[2561] Exhibit RER-10, Second AlixPartners Report at para. 109, Table 14.

[2562] Correction B is excluded because it is inapplicable to Claimant's breach of contract claims, *see supra* at para. 1063, and correction G is excluded because it is mutually exclusive with correction C and correction, *see supra* at para. 1079.

[2563] *See* Exhibit RER-10, Second AlixPartners Report at para. 109, Table 15. Perú reiterates that these figures are the maximum that Claimant should be awarded. As noted above, these figures assume either that all of the assessments, including penalties and interest (for its main claim), are deemed to violate the Treaty, or that, in its alternative claim, all of the penalties and interest and unrefunded GEM payments violate the Treaty. But if the Tribunal determines that, *e.g.*, the imposition of only certain assessments violate the Treaty, the damages would have to be reduced accordingly. And Perú again notes that any award in this arbitration may need to take into account any award in the SMM Cerro Verde Arbitration.

[2564] *See* Exhibit RER-10, Second AlixPartners Report at para. 109, Table 15.

1107. Of course, Ms. Kunsman stands ready to recalculate the interactive impact of any other combination(s) of the above adjustments, should the Tribunal decide to make only some of them.

VI. REQUEST FOR RELIEF

1108. 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, that it has incurred in this arbitration.

Respectfully submitted,

Stanimir A. Alexandrov
Stanimir A. Alexandrov PLLC

Jennifer Haworth McCandless
Marinn Carlson
María Carolina Durán
Sidley Austin LLP

Counsel for Respondent

Resubmitted Annex A

Annex A
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.