

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport-McMoRan Inc.

v.

Republic of Peru

(ICSID Case No. ARB/20/8)

PROCEDURAL ORDER NO. 5

On the Use of the Transcript and Recording from the *SMM Cerro Verde* Arbitration

Members of the Tribunal

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

Assistant to the Tribunal

Ms. Charlotte Matthews

Secretary of the Tribunal

Ms. Marisa Planells-Valero

23 March 2023

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The Tribunal hereby issues its Procedural Order No. 5 on the use of the transcript and recording from the *SMM Cerro Verde* arbitration.

- In **Section A**, the Tribunal recalls the procedural history of the Parties' respective requests;
- In **Section B**, the Tribunal sets out the Parties' positions on the Parties' respective requests;
- In **Section C**, the Tribunal sets out its considerations and decisions on the Parties' respective requests, and
- In **Section D**, the Tribunal sets out the Tribunal's order.

I. SECTION A - PROCEDURAL HISTORY

1. On 9 March 2023, the Respondent sought leave from the Tribunal to use the transcript from the *SMM Cerro Verde* arbitration in this arbitration and asked the Tribunal "*to establish a set of ground rules to govern both Parties' use thereof.*"¹ In particular, the Respondent requested that the Parties be permitted to use the *SMM Cerro Verde* transcript for the specific and limited purpose of impeaching witnesses and experts in the course of their cross-examination at the Hearing.
2. On the same day, the Tribunal invited the Claimant to comment on the Respondent's letter dated 9 March 2023 by 13 March 2023.
3. In its letter dated 13 March 2023, the Claimant sought leave to submit the full transcript and recording of the hearing in the *SMM Cerro Verde* arbitration into the record pursuant to Section 25.1 of Procedural Order No. 1 (**PO1**), without limiting their use to impeachment purposes.
4. On the same day, the Tribunal invited the Respondent to comment on the Claimant's letter dated 13 March 2023 by 17 March 2023.
5. On 17 March 2023, the Respondent submitted comments to the Claimant's letter dated 13 March 2023. The Respondent requested that the Tribunal deny the Claimant's request and, instead, limit the Parties' use of the *SMM Cerro Verde* hearing transcript and audio to the limited purpose of impeaching witnesses and experts in the course of their cross-examination at the Hearing.
6. On 20 March 2023, the Tribunal conducted the Pre-Hearing Call and heard, the Parties, among others, on the use of the *SMM Cerro Verde* transcript and recording.

¹ Respondent's letter to the Tribunal dated 9 March 2023, p. 1.

II. SECTION B - THE PARTIES' POSITIONS

A. The Respondent's position

7. The Respondent submits that the *SMM Cerro Verde* transcript and audio have no place in this arbitration other than, if necessary, to ensure the consistency of the testimony of the witnesses and experts that participate in both the *Freeport* and *SMM Cerro Verde* cases. In the Respondent's view, this Tribunal should independently listen to the Parties' arguments and witness and expert testimony at the Hearing and assess for itself the credibility of those arguments and testimony without consideration of the testimony or issues discussed, raised, or decided by the *SMM Cerro Verde* tribunal. Such limited use would, in the Respondent's view, serve to protect the integrity of the testimony to be presented to the Tribunal, without jeopardizing the independent standing of the arbitration or turning the Hearing into a rehashing of the *SMM Cerro Verde* hearing.
8. The Respondent submits that the Claimant's proposal to enable unfettered use of the transcript and audio raises significant due process issues. In particular, the Respondent asserts that the issues before each Tribunal are not the same, different treaties apply to each arbitration with different standards and obligations for the Parties. Accordingly, the Respondent concludes that the *SMM Cerro Verde* transcript and audio are only relevant to the Tribunal to the extent that a witness or expert modifies his or her testimony and needs to be impeached.
9. In addition, the Respondent asserts that the Parties should not be allowed to extensively use the transcript and audio of the *SMM Cerro Verde* arbitration during their oral and written submissions in this arbitration because that would allow them to submit new arguments before the Tribunal to which the Parties would not have a chance to respond to. According to the Respondent, such unpredictable use of those documents would prejudice the Respondent and its due process rights.
10. Furthermore, the Respondent contends that the Claimant's alleged concerns that the Respondent's proposal is impractical and disruptive is incorrect. The Respondent's proposal is that the transcript and audio in full be available and admissible for use at the Hearing only for purposes of impeachment and that, if and when a portion of the transcript or audio is invoked, that portion and any other portion necessary for context shall be designated at the time as "*Hearing Exhibit XX.*" No procedural interventions will be needed, unless the other party considers that a larger excerpt should be so designated in order to ensure that the context of the quoted testimony is clear, a question that can be resolved quickly, with minimal discussion, if any.
11. Thus, the Respondent requests that the Tribunal instruct the Parties that the *SMM Cerro Verde* transcript and audio can only be used for the specific and limited purpose of impeaching witnesses and experts in the course of their cross examination and that only the

portions of the transcript used for impeachment purposes (and, if necessary, those portions needed to provide context for impeachment) can be added to the record in these proceedings.

B. The Claimant's position

12. The Claimant submits that while it agrees with the Respondent that the *SMM Cerro Verde* transcript should be used for impeachment purposes, its use should not be limited to that narrow purpose. Instead, the Claimant submits that the Tribunal should admit both the transcript and recording of the *SMM Cerro Verde* hearing into the record pursuant to Section 25.1 of PO1 and the Parties should be able to use them for any evidentiary purpose they wish. In particular, Section 25.1 of PO1 does not limit the use of *SMM Cerro Verde* documents to the impeachment of the witnesses and experts and such documents can thus be used for any evidentiary purposes.
13. In addition, according to the Claimant, the transcript and recording of the *SMM Cerro Verde* hearing are highly relevant and material to the issues before this Tribunal given the overlapping facts, legal issues, arguments, experts, and witnesses in this and the *SMM Cerro Verde* arbitration. Claimant further submits that the witness and expert testimony in both arbitrations is largely identical and highly credible because it was given under oath, was subject to cross-examination, and was given very recently. Admitting the transcript and recording of the *SMM Cerro Verde* hearing into evidence will ensure efficiency and consistency between the proceedings.
14. The Claimant also submits that the use of the transcript and recording of the *SMM Cerro Verde* hearing does not require any prior leave of the *SMM Cerro Verde* tribunal. The Claimant proposes that the Parties confer and agree on the redaction of the limited portions of the transcript and recording in which the contents of any documents subject to the *SMM Cerro Verde* tribunal's confidentiality order are discussed before submitting them into the record.
15. The Claimant also contends that there is no prejudice to the Respondent as the Respondent is a party to both arbitrations, has the same counsel team in both arbitrations and is, thus, already familiar with the transcript and recording of the *SMM Cerro Verde* hearing.
16. Furthermore, the Claimant submits that the Respondent's proposal to submit only "portions" of the *SMM Cerro Verde* transcript as hearing exhibits each and every time the transcript is used for impeachment purposes would withhold relevant evidence from the Tribunal and be inefficient and disruptive to the orderly conduct of the proceedings. Specifically, the Claimant asserts that the Parties should be free to direct the Tribunal to passages of the *SMM Cerro Verde* transcript that are relevant to the Tribunal's assessment of arguments and testimony presented in this proceeding, as is the case with all other documents in the record. In addition, the Claimant sustains that identifying the relevant "portions" to be submitted into the record would result in exchanges between the Parties

that would seriously disrupt the flow of, and limit the time available for, cross-examinations.

III. SECTION C - THE TRIBUNAL'S CONSIDERATIONS

17. The Tribunal recalls that Section 25.1 of Procedural Order No. 1 provides as follows:

Each Party may submit written submissions, transcripts, recordings, witness statements, expert reports, produced documents, orders, awards and decisions from the SMM Cerro Verde arbitration in this Proceeding subject to a written reasoned request and leave from the Tribunal in this Proceeding.

18. The Tribunal notes that it is uncontroversial between the Parties that they should be able to use the transcript and recording of the *SMM Cerro Verde* hearing at the Hearing. Accordingly, given the Parties' agreement to this effect, the Tribunal finds that the transcript and recording should be submitted to the record. The Parties only disagree on the extent to which such documents can be used and the Tribunal's decision is thus limited to this issue.

19. In this regard, the Tribunal takes note of the Parties' diverging requests:

- On the one hand, the Respondent requests the Tribunal to instruct the Parties that the *SMM Cerro Verde* transcript and audio can only be used for the specific and limited purpose of impeaching witnesses and experts in the course of their cross examination and that only the portions of the transcript and audio used for impeachment purposes (and, if necessary, those portions needed to provide context for impeachment) can be added to the record in these proceedings.
- On the other hand, the Claimant requests that the Tribunal admit both the transcript and recording of the *SMM Cerro Verde* hearing into the record pursuant to Section 25.1 of PO1 and the Parties should be able to use them for any evidentiary purpose they wish.

20. The Respondent's principal objections to the admission and use of the *SMM Cerro Verde* hearing transcript and recording to the record for any evidentiary purpose are that (i) this Tribunal and the *SMM Cerro Verde* tribunal are separate and independent tribunals and this Tribunal should independently assess the evidence presented before it, and (ii) that an unrestricted admission would prejudice the Respondent and its due process rights.

21. However, the Respondent has neither substantiated the alleged violation of due process, nor has it provided any legal authority supporting its argument that, against the all-encompassing wording of Section 25.1 PO1, only the limited use of the *SMM Cerro Verde* transcript and recording in this arbitration should be admitted.

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22. Rather, the Tribunal finds that the most efficient way to ensure both Parties' due process rights is to admit the full transcript and recording of the *SMM Cerro Verde* hearing to the record and that the transcript and recording may be used by the Parties at their discretion in these proceedings.
23. This does not affect in any way the independence of this Tribunal to fully assess the evidence presented before it.
24. The Tribunal will conduct its own independent review and assessment of the facts and the law relevant for this case.

IV. SECTION D - THE TRIBUNAL'S ORDER

25. In light of the foregoing and pursuant to Section 25.1 of PO1, the Tribunal:
 - admits to the record both the transcript and recording of the *SMM Cerro Verde* hearing without limitation as to their use at the Hearing;
 - requests the Parties to confer and agree on any redactions as required by the *SMM Cerro Verde* tribunal's confidentiality order **by 28 March 2023** at the latest;
 - produce the redacted transcript and recording to the record by **31 March 2023** at the latest.

For and on behalf of the Tribunal,

[signed]

Dr. Inka Hanefeld
President of the Tribunal
Date: 23 March 2023