

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Freeport-McMoRan Inc.**

**v.**

**Republic of Peru**

**(ICSID Case No. ARB/20/8)**

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**PROCEDURAL ORDER NO. 6  
On Documentary Evidence Issues**

***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

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13 April 2023

***Freeport-McMoRan Inc. v. Republic of Peru***  
(ICSID Case No. ARB/20/08)

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The Tribunal hereby issues Procedural Order No. 6 on documentary evidence issues.

- 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 14 March 2023, the Tribunal issued Procedural Order No. 3 on Documentary Evidence Issues (**PO3**), including a draft Confidentiality Protocol to ensure the protection of any protected information used during the Hearing, for the Parties' consideration.
2. On 16 March 2023, the Claimant submitted a letter to the Tribunal requesting the Tribunal to (i) order the Respondent to submit nine SUNAT documents into the record immediately and (ii) grant the Claimant's application to introduce the following documents into the record: (a) nine SUNAT and Tax Tribunal Resolutions applying Milpo's stability agreements that the Claimant obtained from Nexa on 10 March 2023; and (b) Chapter 1 of Mr. Bravo's book, *Tax Law Legal Bases (Fifth Edition)* (2017).
3. On 17 March 2023, the Tribunal invited the Respondent to comment on the Claimant's letter of 16 March 2023 by 21 March 2023.
4. On 18 March 2023, the Parties submitted the documents ordered to be produced by virtue of PO3.
5. On 18 and 19 March 2023, the Parties submitted their comments on whether written comments should be submitted in advance of the Hearing in relation to the documents submitted to the record in accordance with PO3.
6. On 20 March 2023, the Pre-Hearing Call took place, during which the Parties *inter alia* commented on whether written comments should be submitted in advance of the Hearing in relation to the documents introduced to the record in accordance with PO3. In addition, the Claimant reserved the right to bring a claim in relation to alleged discrimination. The Respondent replied that such claim would be inappropriate at such a late stage of the proceedings.
7. On 22 March 2023, the Respondent submitted a letter dated 21 March 2023 in which it requested that the Tribunal (i) deny the Claimant's requests set out in its letter of 16 March

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- 2023 and (ii) grant the Respondent leave to submit into the record the United States' non-disputing party submission in the *Koch v. Canada* case.
8. On 23 March 2023, the Claimant requested leave from the Tribunal to submit a short response to the Respondent's letter dated 21 March 2023 by 29 March 2023, to which the Respondent objected.
  9. On the same day, the Tribunal decided to grant the Claimant the opportunity to respond to the Respondent's letter dated 21 March 2023 by 29 March 2023 and the Respondent to reply by 5 April 2023.
  10. On 23 March 2023, the Tribunal issued Procedural Order No. 4 on the Hearing Organization (**PO4**).
  11. On the same day, the Tribunal issued Procedural Order No. 5 on the Use of the Transcript and Recording from the *SMM Cerro Verde* Arbitration (**PO5**).
  12. On 24 March 2023, further to the issuance of PO4 and PO5, the Tribunal advised the Parties that there would be no written submissions on the new evidence submitted to the record prior to the Hearing and that the Parties would have the opportunity to be heard on all of the evidence on the record during the Hearing and in any post-Hearing briefs.
  13. On the same day, the Parties provided the Tribunal with their joint and unilateral positions on amendments to the draft Confidentiality Protocol.
  14. On 24 March 2023, having considered the Parties' positions, the Tribunal issued the Confidentiality Protocol as Annex A to Procedural Order No. 3.
  15. On 30 March 2023, the Claimant submitted further comments dated 29 March 2023. In its letter, the Claimant reiterated its request that the Tribunal (i) grant Freeport's application to introduce the following documents into the record: (a) the nine SUNAT and Tax Tribunal Resolutions applying Milpo's stability agreements that Freeport obtained from Nexa on 10 March 2023; and (b) Chapter 1 of Mr. Bravo's book, *Tax Law Legal Bases* (Fifth Edition) (2017); and (ii) order Peru to submit the nine SUNAT documents into the record immediately.
  16. On 6 April 2023, the Respondent submitted further comments dated 5 April 2023. In its letter, the Respondent reiterated its request that the Tribunal deny each of the Claimant's requests and requested that the Tribunal grant the Respondent leave to submit into the record (i) the United States' non-disputing party submission in the *Koch* case, and (ii) procedural order no. 7 in the *Legacy Vulcan* case.

## II. SECTION B - THE PARTIES' POSITIONS

### A. The Claimant's position

17. **The Claimant's request to submit nine Milpo resolutions into the record**: The Claimant submits a first request seeking leave to submit into evidence nine SUNAT and Tax Tribunal resolutions it has received from Compañía Minera Milpo S.A.A. (**Milpo**), now operating as Nexa Resources Perú S.A.A (**Nexa**), on 10 March 2023, for which Nexa has waived any right to tax secrecy (the **Milpo resolutions**).
18. The Claimant submits that the nine Milpo resolutions are highly relevant and material to the issues before the Tribunal because they show that the Government (i) understood that the Mining Law and Regulations applied stability guarantees to concessions or mining units; (ii) consistently applied each of Milpo's two stability agreements to the respective mining units covered by each stability agreement and not to specific investment projects, as the Respondent claims; and (iii) consistently applied stability guarantees to new investments made within Milpo's mining units that could not have formed part of the investment program or feasibility study submitted to obtain the stability agreements. The Claimant further submits that the nine Milpo resolutions further show that the Respondent treated SMCV differently and less favorably than Milpo. The Claimant avers that the nine Milpo resolutions will assist the Tribunal in resolving the Claimant's existing claims that the Respondent's assessment of royalties and new taxes on SMCV's Concentrator breached the Stability Agreement and Article 10.5 of the TPA. The Claimant adds that the Respondent has repeatedly recognized that the Government's practice in applying stability guarantees to other mining companies is highly relevant to resolving the Claimant's existing claims and that the Respondent and its witness Mr. Camacho put the Government's application of Milpo's stability agreements directly at issue in the Counter-Memorial.
19. The Claimant notes that the Respondent makes submissions opposing discrimination claims that the Claimant has not yet made. According to the Claimant, such submissions are premature, improper and irrelevant to the Claimant's application to submit the nine Milpo resolutions into the record.
20. The Claimant adds that its request to submit the nine Milpo resolutions into the record is timely under the circumstances as the Claimant's request is the result of the Respondent's own obstructive conduct. According to the Claimant, the Respondent should have submitted those resolutions into evidence with its Counter-Memorial and Mr. Camacho's first witness statement claiming that Milpo simultaneously had multiple stability agreements in force in the same mining unit. The Claimant further states that the Respondent refuses to produce the two Milpo resolutions subject to paragraph 94(a) of PO3 in this proceeding, in violation of its document production obligations, and also defied its obligation to produce those two Milpo resolutions in the *SMM Cerro Verde* proceeding for

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seven months, only doing so on 6 December 2022 and 11 January 2023 after four orders by the *SMM Cerro Verde* tribunal.

21. The Claimant contests the relevance of the Respondent's argument that the Claimant should have obtained the nine Milpo resolutions earlier because Nexa is a "*key and long-standing client*" of Freeport's counsel, Estudio Rodrigo Elias & Medrano Abogados, and because a partner of the firm previously served as "*Milpo's head of Mining Legal Issues.*"<sup>1</sup>
22. According to the Claimant, two of the nine Milpo resolutions are already covered by the Tribunal's order in paragraph 94(a) of PO3 but the Claimant seeks leave to submit the unredacted copies of these two resolutions into evidence now to expedite the development of the evidentiary record contemplated in PO3.
23. The seven additional resolutions were not produced in the *SMM Cerro Verde* arbitration and hence are not covered by the Tribunal's order in paragraph 94(a) of PO3. However, the Claimant *inter alia* submits that they will assist the Tribunal's understanding of the case and the factual matrix prior to the Hearing as they bear directly on the critical merits question of whether the Government extended stability guarantees to all investments in a mining unit or limited them to a single investment project. In addition, the Claimant argues that the introduction of the Milpo resolutions into the record will not result in unfair prejudice to the Respondent, which (i) should be deemed to be familiar with documents created by its own agencies; and (ii) has had the opportunity to make submissions concerning the Government's application of the very same stability agreements to Milpo's mining units at the hearing in the *SMM Cerro Verde* arbitration.
24. The Claimant submits that the Respondent has failed to address the Claimant's argument that the nine resolutions are critical to the Claimant's right to be heard. Furthermore, according to the Claimant, the Respondent's arguments that the admission of the Milpo resolutions would result in unfair prejudice is meritless. The Claimant notes that it must be entitled to submit any available evidence in its possession contradicting the Respondent's unsubstantiated arguments concerning its application of the stability agreements of third-party mining companies, including Milpo.
25. Finally, the Claimant submits that the Tribunal should reject the Respondent's request that, even if the Tribunal admits the nine Milpo resolutions into the record, it should order the Claimant to stop "*discussing*" them until the date on which Peru finally submits the 105 unredacted SUNAT documents into the record as the purpose of submitting evidence into the record is to allow the Parties to rely on such evidence in their arguments.<sup>2</sup>

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<sup>1</sup> Claimant's letter to the Tribunal dated 29 March 2023, p. 4, referring to the Respondent's letter to the Tribunal dated 21 March 2023, pp. 2, 5.

<sup>2</sup> Claimant's letter to the Tribunal dated 29 March 2023, p. 6, referring to the Respondent's letter to the Tribunal dated 21 March 2023, p. 7 and the Respondent's letter to the Tribunal dated 18 March 2023, p. 2.

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26. **The Claimant’s request that the Respondent submit unredacted versions of nine SUNAT documents into the record**: The Claimant submits a second request seeking that the Tribunal orders the Respondent to submit into the record in unredacted form nine documents of the 105 SUNAT documents subject to the Tribunal’s order in PO3. In particular, the Claimant submits that Nexa (formerly Milpo), Antapaccay (formerly Tintaya), and Yanacocha have provided the Claimant and SMCV with written statements consenting to the disclosure and use of eleven<sup>3</sup> documents in this proceeding and waiving any right to tax secrecy. According to the Claimant, the statements eliminate any alleged Peruvian law requirement that Peru obtains a Supreme Decree prior to submitting these documents into evidence. The Claimant submits that Supreme Decree No. 058-2004-EF, the regulation that allegedly requires Peru to obtain a Supreme Decree prior to disclosing the SUNAT documents, applies solely to tax records covered by tax secrecy under Article 85 of the Peruvian Tax Code. The Claimant submits that now that Nexa, Antapaccay, and Yanacocha have expressly stated in writing that they have waived any tax secrecy or reserve with regard to the SUNAT documents at stake, the Peruvian Decree allegedly requiring the Respondent to obtain a Supreme Decree for the documents no longer applies.
27. According to the Claimant, Article 85 of the Tax Code protects tax secrecy (“*reserva tributaria*”), i.e., “*confidential information*” “*contained in the returns and information obtained by any means from taxpayers*”, against disclosure of tax records “*without the approval of the relevant person.*”<sup>4</sup> Furthermore, the exceptions in Article 85 allow the Government to suspend its obligation to observe “*private interests*” in tax secrecy in favor of the “*common good*” in various circumstances.<sup>5</sup> However, those exceptions are irrelevant because Nexa, Antapaccay and Yanacocha have waived any tax secrecy and reserve and thus there is no private interest to protect. The Claimant submits that the Respondent’s arguments resisting immediate disclosure of such documents are meritless. According to the Claimant, the nine SUNAT documents no longer qualify as information protected by Article 85. Moreover, the fact that the waivers were addressed to the Claimant’s counsel and not to the Respondent is irrelevant in the Claimant’s view as the waivers authorize the disclosure of the documents to Freeport and SMCV and consent to their use in this arbitration. The Claimant adds that the companies provided such waivers because the Claimant is not in possession of those documents.
28. Finally, the Claimant avers that the Respondent’s reliance on its internal law is incompatible with “*the well established rule that no State may have recourse to its own*

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<sup>3</sup> The Claimant states that should the Tribunal not grant the Claimant’s request for leave to submit the two Milpo resolutions ordered to be submitted by PO3 into the record, the Claimant requests that the Tribunal order the Respondent to submit these two resolutions into the record (Claimant’s letter to the Tribunal dated 16 March 2023, p. 8).

<sup>4</sup> Claimant’s letter to the Tribunal dated 29 March 2023, p. 6, referring to CA-14, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 85 and Annex 1, Ombudsman, Advocacy Report No. 45: The Tax Secrecy and the Scope of the Ombudsman’s Resolution No. 058-99/DP, ¶ 1.1.

<sup>5</sup> Claimant’s letter to the Tribunal dated 29 March 2023, p. 7, referring to Annex 1, Ombudsman, Advocacy Report No. 45: The Tax Secrecy and the Scope of the Ombudsman’s Resolution No. 058-99/DP, ¶¶ 2.1-2.2.

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*internal law as a means of avoiding its international responsibilities.*"<sup>6</sup> The Claimant thus requests that the Tribunal draw the adverse inference that all 105 of the SUNAT documents conclusively disprove the Respondent's principal defense that SUNAT consistently limited the application of stability agreements to specific investment projects if the Respondent does not comply with PO3 before the Hearing.

29. **The Claimant's request to submit an additional excerpt of Mr. Bravo's book to the record**: The Claimant submits a third request seeking leave to submit into the record Chapter 1 of *Tax Law Legal Bases* by the Respondent's tax expert, Mr. Bravo. The Claimant submits that in the Respondent's Rejoinder and Reply on Jurisdiction, the Respondent and its experts, Mr. Bravo and Mr. Picón, introduced new evidence and arguments concerning SMCV's ability to maintain separate accounts for its investments in response to arguments that the Claimant made in its Memorial. According to the Claimant, the Respondent should have addressed these arguments in its Counter-Memorial and Memorial on Jurisdiction and, by waiting until the Rejoinder and Reply on Jurisdiction to do so, the Respondent deprived the Claimant of the opportunity to present rebuttal evidence and arguments in its Reply and Counter-Memorial on Jurisdiction.
30. The Claimant submits that the Respondent selectively submitted sections of Mr. Bravo's book as RE-330 with the Rejoinder and Reply on Jurisdiction, which Mr. Bravo and Mr. Picón cited in their second report. However, the Respondent failed to submit Chapter 1, in which Mr. Bravo addresses issues relevant to SMCV's ability to separate its accounts and determine its fiscal obligations. Since Mr. Bravo himself authored the book and the chapter is directly relevant to matters that the Respondent disputes in this arbitration, both Mr. Bravo and the Respondent should be familiar with the contents and should have no objection to the Claimant introducing them into the record.
31. Accordingly, the Claimant submits that it should be entitled to submit the evidence into the record.
32. **The Respondent's request to submit the United States' Non-Disputing Party submission in the Koch case**: The Claimant submits that the Respondent's request should be dismissed because it is based on a potential discrimination claim and the Tribunal cannot rule on the propriety nor the merit of hypothetical claims that the Claimant has not made. In any event, the Respondent's arguments about the Claimant's potential claims are premature and meritless.

**B. The Respondent's position**

33. **The Claimant's request to submit nine Milpo resolutions to the record and the Respondent's requests to add the non-disputing party submission in the Koch case**

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<sup>6</sup> *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 2 (24 May 2006), ¶ 18.



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**and a procedural order from the *Legacy Vulcan* case to the record:** With respect to the Claimant’s first request relating to the Milpo resolutions, the Respondent first submits that the Claimant has not made a discrimination claim, it cannot amend its claims at this point in time, and consequently, should not be granted leave to submit new documents on the record related to a claim it has not even made.

34. In this regard, the Respondent contends that Rule 40(1) of the 2006 ICSID Arbitration Rules allows parties to submit ancillary claims only to the extent (i) they arise directly out of the subject matter of the dispute and (ii) they are within the scope of the consent of the parties and the jurisdiction of the Centre. ICSID’s Explanatory Notes to the 1968 Arbitration Rules provide the authoritative test for determining whether an ancillary claim arises out of the subject-matter of the dispute—namely, whether “*the factual connection between the original and the ancillary claim is so close as to require the adjudication of the latter in order to achieve the final settlement of the dispute.*”<sup>7</sup> The Respondent submits that a discrimination claim in this case does not directly arise out of the subject-matter of the dispute because an adjudication of a claim of discrimination is not required in order to achieve final settlement of the dispute that has been presented to the Tribunal. In addition, the Respondent argues that any discrimination claim arising out of Milpo’s resolutions would not be within the consent of the Parties nor within the jurisdiction of the Centre. The Respondent submits that the tribunal in *Legacy Vulcan v. Mexico*, stated in its procedural order no. 7 that “*the (undisputed) requirement [is] that the original and ancillary claim must be closely connected, in the sense that the Tribunal cannot decide on the first without resolving the second.*”<sup>8</sup> Given the recency of this procedural order and its relevance to the ancillary claims issue in this case, pursuant to Section 17.3 of Procedural Order No. 1, the Respondent requests leave to add that procedural order to the record as a legal authority.
35. Furthermore, even if the Tribunal were to decide that the Claimant’s intended discrimination claim arises directly out of the subject-matter of the dispute, according to the Respondent, the discrimination claim does not fall within the scope of the Parties’ consent to jurisdiction of ICSID within the meaning of Rule 40(1). Article 10.18.1 of the TPA provides that a claimant may not submit a claim to arbitration if more than three years have elapsed from the date on which the claimant knew or should have known of the alleged breach and consequential damage and, according to the Respondent, six of the Milpo resolutions were issued before the cut-off date. The Respondent adds that Milpo has been a longstanding client of the Claimant’s local counsel, Estudio Rodrigo, which has also represented SMCV on issues related to the Concentrator since at least 2002 and one of Rodrigo’s partners was Milpo’s Head of Mining Legal Issues until April 2013. Given SMCV’s and the Claimant’s connections to Milpo, the Claimant’s argument that it should

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<sup>7</sup> Respondent’s letter to the Tribunal dated 21 March 2023, p. 2, referring to 1968 ICSID Arbitration Rules, Rule 40, Note B(a)); Respondent’s letter to the Tribunal dated 5 April 2023, p. 3.

<sup>8</sup> Respondent’s letter to the Tribunal dated 5 April 2023, p. 3, referring to: *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, 11 July 2022, ¶ 127.

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not have known about the differential treatment allegedly accorded to Milpo until roughly six years after the cut-off date is unpersuasive.

36. The Respondent further submits that Rule 40(2) of the 2006 ICSID Arbitration Rules provides that any ancillary claims must be submitted “*no later than the reply*” and that the Tribunal may only allow the submission of ancillary claims upon justification of the requesting party and after considering the other party’s objection. In this regard, the Respondent asserts that the Claimant has not submitted any justification that would allow it to submit now a new discrimination claim and the Respondent’s rights would be gravely prejudiced if the Claimant were allowed to do so.
37. The Respondent further contends that the Claimant has so far not made any claims concerning Articles 10.3 (National Treatment), 10.4 (Most-Favored Nation Treatment), or 10.5 (Minimum Standard Treatment) of the TPA. With respect to Articles 10.3 and 10.4 of the TPA, the Respondent submits that any such claims would be without merit. With respect to Article 10.5 of the TPA, the Respondent submits that the TPA does not provide protections with respect to alleged discriminatory treatment. In this respect, the Respondent contends that the United States recently submitted a non-disputing party submission in the *Koch Industries, Inc. et al. v. Canada* case in which it stated that non-discrimination was not incorporated in the customary international law minimum standard of treatment. As this submission is not part of the evidentiary record, the Respondent requests that the Tribunal allow the Respondent to add it as a legal authority to the record.
38. Moreover, the Respondent submits that the Claimant has not established the factual predicates for any potential discrimination claim. For example, the Respondent submits that SMCV and Milpo were not in like circumstances when the allegedly differential treatment was accorded. As a result, even if the Claimant’s discrimination claim were permissible, it would fail on the merits.
39. The Respondent submits that, in any event, the Claimant has not justified its request to submit these new documents at this late stage in the proceedings with respect to its existing claims. According to the Respondent, the Claimant has not, in fact, established the relevance of the Milpo resolutions to its existing claims. Specifically, the Respondent disputes that the issue of whether the Government applied stability guarantees to mining units or limited them to specific investment projects is critical to the issues that the Tribunal must resolve. Furthermore, the Respondent contends that the Claimant failed to provide any reasonable explanation regarding why it did not try to obtain the resolutions from Milpo months or even years before now. The Respondent adds that it would be prejudiced if these documents were allowed to be added to the record, as these documents deal with entirely new issues that the Respondent and its counsel would have to review. Moreover, while the documents are in the Respondent’s possession, its counsel does not have access to them in their unredacted form because SUNAT is strictly bound by tax secrecy provisions, which

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do not allow it to provide the unredacted documents to the Respondent's own counsel, unless the Supreme Decree has been issued.

40. The Respondent concludes that the Claimant should not be allowed to submit such new documents on the record with respect to a claim which the Claimant has not brought before the Tribunal and which cannot be newly submitted at this late stage in the proceedings. The Respondent adds that if the Claimant were to request to amend its claims and were to be granted the opportunity to do so, the Respondent reserves all rights, including the right to seek to amend the procedural calendar to provide an opportunity for the Respondent to fully brief the Tribunal on this issue.
41. **The Claimant's request that the Respondent submit unredacted versions of nine SUNAT documents into the record:** With respect to the Claimant's second request relating to Nexa's (formerly Milpo), Antapaccay's (formerly Tintaya), and Yanacocha's written statement consenting to the disclosure and use in this proceeding of nine SUNAT resolutions relating to them, the Respondent submits that Article 85 of the Peruvian Tax Code imposes an obligation on the Tax Administration to protect tax secrecy. According to the Respondent, there are limited exceptions under which SUNAT may be released from that obligation, one of which is upon issuance of a Supreme Decree and none of the other exceptions includes a scenario in which the taxpayer waives its tax secrecy rights, much less where it does so in a communication to a third party. The Respondent avers that the Claimant's reference to an Ombudsman Report is misleading because it relates to the power of family law judges to lift tax secrecy in a case related to child support issues. Specifically, it discusses a separate and different exception to SUNAT's obligations under Article 85 of the Tax Code, which provides that SUNAT may lift the tax secrecy obligation when ordered by the Judicial Power, the Fiscal de la Nación (Prosecutor General), or the Investigative Congress Commission with respect to a specific case. Accordingly, it remains the case that SUNAT cannot release the unredacted documents to the Claimant or the Tribunal in these proceedings without an express Supreme Decree, even if the companies whose information is protected by the law have told the Claimant's counsel that they are willing to waive tax secrecy protection for the documents' use in this arbitration. If anything, according to the Respondent, then the Claimant should be able to obtain the resolutions itself, as the Claimant is not burdened by Article 85 of the Peruvian Tax Code, which governs SUNAT, not the Claimant. The Respondent asserts that the Claimant could seek leave to submit those documents on the record.
42. Finally, the Respondent submits that the Claimant has cherry-picked only a handful of documents for which it apparently asked some and not all of the mining companies to waive their tax secrecy. According to the Respondent, other documents would show that mining stabilization agreements are limited to the mining investment project for which they were entered into. Thus, the Respondent requests that if the Claimant were allowed to submit these nine resolutions into the record, the Claimant be restricted from discussing them until

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after the Respondent has been able to obtain the Supreme Decree that allows disclosure of all of the 105 SUNAT documents, so that all of the other mining companies' SUNAT documents can be dealt with at the same time. Furthermore, if the Tribunal were to allow the Claimant to submit unredacted versions of the nine SUNAT documents on the record, then it should simultaneously review the unredacted versions of the other 96 documents that it has ordered the Respondent to submit as doing so would enable the Tribunal to appreciate, and the Respondent to argue, the full evidentiary picture created by those documents, and would create a level playing field for the Parties.

43. **The Claimant's request to submit an additional excerpt of Mr. Bravo's book to the record**: With respect to the Claimant's third request seeking to introduce an excerpt of one of Mr. Bravo's books, the Respondent submits that the Claimant's assertions lack merit and that its request is untimely and inappropriate. First, the Respondent submits that it did not discuss for the first time in its Rejoinder SMCV's obligations to maintain separate accounts nor SMCV's accounting options for doing so. Thus, the fact that Mr. Bravo and Mr. Picón discussed the "ring-fencing method" in their second report in response to arguments that the Claimant made in its Reply is not inappropriate. Second, the Respondent asserts that the Claimant's request is untimely as the Claimant has had the Respondent's Rejoinder and accompanying evidence for approximately four months. The Respondent submits that the Claimant did not attempt to rebut either of these points in its letter of 29 March 2023 and that the Tribunal should draw adverse inferences from this fact.

### III. SECTION C - THE TRIBUNAL'S CONSIDERATIONS

#### A. The Tribunal's general considerations

44. The Tribunal recalls its considerations in paras. 58 and 59 of PO3 that at this juncture, the Tribunal's principal concern is that the Parties are given a full opportunity to be heard at the Hearing and that, at this stage, the Tribunal is not in a position to decide on the ultimate relevance and probative value of any of the evidence discussed by the Parties.
45. The Tribunal further recalls that pursuant to Section 17.4 of PO1, ICSID Rule 34(2) and Article 43 of the ICSID Convention, tribunals enjoy *ex officio* discretion to call upon parties to produce documents at any stage of the proceeding. Specifically, Section 17.4 of PO1 provides:

*The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).*

46. ICSID Arbitration Rule 34(2) provides:

*The Tribunal may, if it deems it necessary at any stage of the proceeding:*

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*(a) call upon the parties to produce documents, witnesses and experts; [...]*

47. The Tribunal notes that both Parties agree as to the Tribunal's authority to summon supplementary evidence pursuant to Section 17.4 of PO1<sup>9</sup> and that the Tribunal has already ordered the submission to the record of documentary evidence on the basis of this provision in PO3.
48. As set out in PO3, the Tribunal's discretion to call upon the Parties to produce additional evidence is informed, among others, by concepts of specificity, relevance, and materiality taking guidance on the 2020 IBA Rules on the Taking of Evidence in International Arbitration. With respect to the notion of specificity, the Tribunal notes that the documents respectively sought by the Parties are clearly identified. With respect to relevance and materiality, the Tribunal, at this juncture, does not issue a view on the ultimate relevance and materiality of the documents respectively sought by the Parties. Rather, the Tribunal finds it appropriate to rely on one or the other Party's position that the document is relevant and material and to consider whether the Parties' requested documents hold the potential of further assisting the Tribunal's understanding of the factual matrix prior to the Hearing.
49. In light of these general considerations, the Tribunal turns to the Parties' respective requests.

**B. The Claimant's request for leave to submit nine Milpo resolutions into the record**

50. The Tribunal notes that the Claimant seeks leave to submit into evidence nine SUNAT and Tax Tribunal resolutions it has received from Milpo. In this regard, the Claimant submits that these documents show that the Respondent (i) understood that the Mining Law and Regulations applied stability guarantees to concessions or mining units; (ii) consistently applied each of Milpo's two stability agreements to the respective mining units covered by each stability agreement and not to specific investment projects, as the Respondent claims; (iii) consistently applied stability guarantees to new investments made within Milpo's mining units that could not have formed part of the investment program or feasibility study submitted to obtain the stability agreements; and (iv) treated SMCV differently and less favorably than Milpo.
51. With respect to items (i) to (iii), the Tribunal notes that such issues fall within the factual matrix before the Tribunal and that, in the eyes of at least one party, the documents are relevant and material for the Claimant's claims and hold the potential of assisting the Tribunal's understanding on the application of stability agreements. For these reasons alone, and without having to issue a view on item (iv), the Tribunal orders the Claimant to submit the nine Milpo resolutions into the record pursuant to Section 17.4 of PO1.

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<sup>9</sup> PO3, ¶ 65.

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52. The Tribunal notes that two of the nine Milpo resolutions have already been ordered to be produced to the record pursuant to PO3. The Tribunal further recalls that, with respect to the Milpo resolutions the Respondent has indicated that, it “*would agree not to impose restrictions beyond those provided by Milpo*” should the Tribunal admit them into the record.<sup>10</sup>
53. Additionally, with respect to item (iv) on alleged discrimination against SMCV, the Tribunal notes that, at this stage, the Claimant has not formulated any discrimination claim. The Claimant only announced *inter alia* during the Pre-Hearing Call to reserve the right to make such claim. The Respondent has stated its objection to the Claimant bringing a new claim on the basis of alleged discrimination. However, given that the Claimant has not made such claim, the Tribunal merely takes note of the Parties’ positions as expressed in their letters to the Tribunal without a need to decide on the admissibility of a discrimination claim.
54. The Parties will have the opportunity to brief the Tribunal on the relevance and materiality of such documents during the Hearing and in any post-Hearing briefs.

**C. The Claimant’s request that the Respondent submit unredacted versions of nine SUNAT documents into the record**

55. The Tribunal notes that the Claimant requests that the Respondent submit to the record unredacted versions of nine SUNAT documents ordered to be produced through PO3 concerning three mining companies, i.e. Nexa, Antapaccay, and Yanacocha. The Claimant has obtained waivers of tax secrecy and consent to the disclosure and use in this proceeding of the SUNAT documents by such companies but is itself not in the possession of the unredacted documents. The Respondent objects on the basis that it cannot release unredacted documents to the Claimant or the Tribunal in these proceedings without an express Supreme Decree by virtue of Article 85 of the Peruvian Tax Code. According to the Respondent, the Claimant should be able to obtain the resolutions itself, as the Claimant is not burdened by Article 85 of the Peruvian Tax Code, which governs SUNAT, not the Claimant.
56. The Tribunal notes that the nine documents at issue have already been ordered to be produced by the Tribunal by virtue of PO3 in both redacted and unredacted form. While the redacted documents were produced on 18 March 2023 by the Respondent, the unredacted documents are still outstanding. In this regard, the Tribunal takes note that the Respondent is “*making every possible effort to accelerate the process [...] to issue the*

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<sup>10</sup> Respondent’s communication to the Tribunal dated 24 March 2023.

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*Supreme Decree*” and that the Respondent expects to issue the Supreme Decree at the latest during the week of 24 April 2023.<sup>11</sup>

57. The Tribunal understands that, even in the case where a taxpayer has procured waivers of tax secrecy and consented to the disclosure and use of SUNAT documents, the exceptional authorization mechanism via Supreme Decree could still be necessary under Article 85 of the Peruvian Tax Code for the Respondent to produce unredacted documents. The Tribunal finds that the Claimant has not shown how the Respondent would be released from its obligations under Article 85 of the Peruvian Tax Code by virtue of the waivers, which were addressed to the Claimant and not to the Respondent.
58. At the same time, the Tribunal reiterates its request to obtain unredacted versions of the documents ordered to be produced by PO3 as soon as possible. The Tribunal understands that this will happen before the Hearing, at the latest during the week of 24 April 2023.<sup>12</sup>
59. Conversely, should the Claimant come into possession of the documents prior to the Respondent’s production, the Tribunal invites the Claimant to submit them to the record pursuant to Section 17.4 of PO1. The Respondent has indicated that if the “*Claimant were to submit the documents on the record, because [the] Claimant obtained them directly from the companies, then [the] Respondent would agree not to impose restrictions beyond those provided by the companies. As [the] Respondent has explained, [the] Claimant—unburdened by Article 85 of the Tax Code—can surely obtain the documents from the companies and seek leave to submit them on the record.*”<sup>13</sup>
60. The Parties will have the opportunity to brief the Tribunal on the relevance and materiality of the documents during the Hearing and in any post-Hearing briefs.

**D. The Claimant’s request for leave to submit an additional excerpt of Mr. Bravo’s book to the record**

61. The Tribunal notes that the Claimant seeks leave to submit into the record Chapter 1 of Tax Law Legal Bases by the Respondent’s tax expert, Mr. Bravo, which allegedly addresses issues relevant to SMCV’s ability to separate its accounts and determine its fiscal obligations.
62. Without expressing a view on the relevance and materiality of this document, the Tribunal finds that the additional excerpt of Mr. Bravo’s book holds the potential of assisting the Tribunal on an issue pleaded by the Parties, i.e. the alleged obligation to maintain separate accounting for mining titleholders with stabilized and non-stabilized projects.

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<sup>11</sup> Respondent’s letter to the Tribunal dated 5 April 2023, p. 12.

<sup>12</sup> Respondent’s letter to the Tribunal dated 5 April 2023, p. 12.

<sup>13</sup> Respondent’s communication to the Tribunal dated 24 March 2023.

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63. Accordingly, pursuant to Section 17.4 of PO1, the Tribunal orders the Claimant to submit to the record Chapter 1 of Tax Law Legal Bases by Mr. Bravo.
64. As Mr. Bravo will be available for examination at the Hearing, the Parties will have the opportunity to further brief the Tribunal on the relevance and materiality of this document.

**E. The Respondent's requests to add the non-disputing party submission in the *Koch* case and a procedural order from the *Legacy Vulcan* case to the record**

65. The Tribunal notes that, in the context of the Claimant's request relating to the nine Milpo resolutions, the Respondent has requested to add two legal exhibits to the record relating to the Claimant's potential discrimination claim. Specifically, the Respondent requests leave to submit the non-disputing party submission in the *Koch* case and procedural order no. 7 of the *Legacy Vulcan* case to the record. According to the Respondent, the *Koch* case non-disputing party submission shows that the customary international law minimum standard of treatment does not include a prohibition of discrimination while the *Legacy Vulcan* procedural order is relevant to ancillary claim issues. The Claimant has objected to the Respondent's request relating to the non-disputing party submission in the *Koch* case on the basis that the Tribunal can rule on neither the propriety nor the merit of hypothetical claims that Freeport has not made.
66. While the Tribunal does not take a position on whether a potential claim based on discrimination would be admissible at this stage in the proceedings, the Tribunal finds that the two legal exhibits sought to be added to the record by the Respondent may assist it.
67. Accordingly, the Tribunal orders the Respondent to submit the non-disputing party submission in the *Koch* case and procedural order no. 7 of the *Legacy Vulcan* case to the record pursuant to Section 17.4 of PO1.

**IV. SECTION D - THE TRIBUNAL'S ORDER**

68. In light of the foregoing considerations, the Tribunal:
- a. Orders the Claimant to submit to the record the nine Milpo resolutions identified in the Claimant's letter dated 16 March 2023 pursuant to Section 17.4 of PO1;
  - b. Requests the Respondent to expedite the submission of all unredacted SUNAT documents ordered to be produced to the record pursuant to PO3 and to submit such documents to the record as soon as possible prior to the Hearing, at the latest in the week of 24 April 2023;
  - c. Orders the Claimant to submit the nine SUNAT documents identified in its letter dated 16 March 2023 to the record pursuant to Section 17.4 of PO1, should the



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Claimant come into possession of them prior to the Respondent's production under item b.;

- d. Orders the Claimant to submit to the record Chapter 1 of Tax Law Legal Bases by Mr. Bravo pursuant to Section 17.4 of PO1;
- e. Orders the Respondent to submit the non-disputing party submission in the *Koch* case and procedural order no. 7 of the *Legacy Vulcan* case to the record pursuant to Section 17.4 of PO1.

For and on behalf of the Tribunal,

[signed]

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Dr. Inka Hanefeld  
President of the Tribunal  
Date: 13 April 2023