International Centre for Settlement of Investment Disputes
ICSID Case No. ARB/20/08

FREEPORT-MCMORAN INC.
on its Own Behalf and on Behalf of
SOCIEDAD MINERA CERRO VERDE S.A.A.

Claimant/Applicant

— *v.* —

REPUBLIC OF PERU

Respondent

APPLICANT'S REPLY ON ANNULMENT

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ABBREVIATED TERMS

Application	Application for Partial Annulment dated 16 September 2024
Arbitration Rules or ICSID Arbitration Rules	2006 ICSID Rules of Procedure for Arbitration Proceedings
Award or *Freeport* Award	Award dated 17 May 2024 in *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Counter-Memorial	Peru's Counter-Memorial dated 16 September 2025
Freeport or Applicant	Freeport-McMoRan Inc.
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial	Freeport's Memorial dated 23 May 2025
MINEM	Peru's Ministry of Energy and Mines
Mining Law	1992 Single Unified Text of the General Mining Law
Peru or Respondent	Republic of Peru
Regulations	1993 Regulations to Title Nine of the Mining Law
Royalty Assessments	Mining royalty assessments issued by SUNAT against SMCV in relation to its 2006–2013 operations at Cerro Verde based on a restrictive interpretation of SMCV's Stability Agreement
Royalty Law	Mining Royalty Law
SMCV	Sociedad Minera Cerro Verde S.A.A.
Stability Agreement	Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998)
SUNAT	National Superintendence of Customs and Tax Administration
Tax Assessments	Tax assessments issued by SUNAT against SMCV in relation to its 2006–2013 operations at Cerro Verde based on a restrictive interpretation of SMCV's Stability Agreement
TPA	United States-Peru Trade Promotion Agreement
Tribunal	Arbitral Tribunal constituted in *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08

1. Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention"), Rule 50 of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), and Procedural Order No. 1 of the *ad hoc* Committee dated 12 February 2025, applicant Freeport-McMoRan Inc. ("Freeport" or "Applicant"), on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A. ("SMCV"), hereby submits this Reply in response to Peru's Counter-Memorial dated 16 September 2025 (the "Counter-Memorial") in support of its Application for Partial Annulment of the award issued on 17 May 2024 in *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08 (the "Award").

I. INTRODUCTION

2. The Tribunal failed to decide Freeport's US$417 million claims for penalties and interest on the Royalty Assessments, after expressly confirming jurisdiction over them. This fundamental omission presents precisely the type of exceptional case in which partial annulment is warranted under Article 52 of the ICSID Convention. Annulment is justified on three independent grounds: (*i*) under Article 52(1)(b) because the Tribunal manifestly exceeded its powers by failing to decide Freeport's Royalty penalties and interest claims after affirming jurisdiction over them; (*ii*) under Article 52(1)(e) because the Tribunal's inexplicable omission constitutes a failure to state reasons; and (*iii*) under Article 52(1)(d) because the Tribunal's failure to decide claims submitted to it, despite Article 48's requirement that a tribunal address all questions before it, constitutes a serious departure from a fundamental rule of procedure.

3. Peru recognizes, as it must, that this type of glaring omission is precisely the kind of error prior committees have found justify annulment. To avoid that result, Peru attempts to recast the Award as denying jurisdiction over the Royalty penalties and interest claims under the TPA's tax exclusion. This is an impossible task. The Award's *dispositif* unambiguously denies jurisdiction only over the *Tax* penalties and interest claims and affirms jurisdiction over all other claims. The jurisdictional section reinforces this conclusion: it repeatedly and unequivocally confines the tax exclusion analysis to penalties and interest on the *Tax* Assessments alone. By contrast, there is not a single reference to—let alone exclusion of—the Royalty penalties and interest claims anywhere in that analysis, and nowhere does the Award state that those claims fall outside the Tribunal's jurisdiction.

4. To argue that the Tribunal intended the opposite of what it expressly and repeatedly held, Peru advances a series of contrived interpretations that find no support in the Award. Most strikingly, Peru attempts to sidestep the Tribunal's express jurisdictional ruling in the *dispositif* by labeling it as a mere "typographical or clerical error." This extraordinary contention itself exposes the untenability of Peru's position, which cannot even be reconciled with the Award's operative text. Peru then relies on the only

two paragraphs of the Award that mention "penalties and interest" without expressly referencing the *Tax* Assessments, arguing that they demonstrate the Tribunal excluded all penalties and interest from its jurisdiction "as a general matter." But that argument ignores that *every* reference to penalties and interest in the Tribunal's tax exclusion analysis is expressly and exclusively limited to the *Tax* Assessments. That limitation conclusively disproves Peru's theory that the Tribunal found all penalties and interest claims—including those on Royalty Assessments—fell outside its jurisdiction.

5. Peru then constructs an alternative version of the Award in which the Tribunal is said to have "conducted a thorough analysis . . . of the nature of penalties and interest, regardless of whether they result from tax or royalty assessments," and to have concluded that the Royalty penalties and interest claims fall outside its jurisdiction. Peru contends that this purported analysis allows the Award's reasoning to be followed from "Point A. to Point B." In fact, not a single step of Peru's reconstruction appears in the Award—explicitly or implicitly. Peru's theory is not only absent from the Award; it is directly contradicted by its plain terms.

6. Yet even if, as Peru contends, the Award had rejected jurisdiction over the Royalty penalties and interest claims—which it clearly did not—partial annulment would still be warranted. Any such decision would directly contradict the Award's own jurisdictional holdings, including the *dispositif* and the entirety of the Tribunal's jurisdictional analysis. Such contradiction in the Award would itself constitute a failure to state reasons and justify annulment under Article 52(1)(e). And Peru's counterfactual would mean that the Tribunal dismissed Freeport's Royalty penalties and interest claims on a jurisdictional ground that was never raised, argued, or briefed by the Parties, denying Freeport its fundamental right to be heard and constituting a serious departure from a fundamental rule of procedure under Article 52(1)(d).

7. Recognizing the fatal weaknesses in its attempt to recast the Award, Peru resorts to two last-ditch arguments, neither of which withstands scrutiny. *First*, Peru contends that Freeport's application is an "abuse of process" because Freeport did not seek a supplemental decision under Article 49. But Article 49 cannot save Peru's case: it is meant to address only minor, technical omissions, not a tribunal's wholesale failure to resolve core claims. And nothing in the Convention, the Arbitration Rules, or ICSID practice requires an applicant to invoke Article 49 before seeking annulment. *Second*, Peru urges the Committee to exercise "broad discretion" to uphold the Award *even if* Freeport establishes an annulment ground, asserting—without authority—that the Tribunal "would have" decided in Peru's favor had it addressed the Royalty penalties and interest claims. No committee has ever declined annulment on such a theory, and rightly so. The Committee cannot speculate about what the Tribunal "would have" decided, particularly when the Tribunal never addressed these claims at all.

8. Freeport's Reply is organized as follows: **Section II** addresses Peru's arguments on Article 52(1)(b); **Section III** addresses Peru's arguments on Article 52(1)(e); **Section IV** addresses Peru's arguments on Article 52(1)(d); **Section V** addresses Peru's two last-ditch attempts to avoid annulment—its "abuse of process" argument and its appeal to "broad discretion"; **Section VI** explains why Freeport is entitled to an award of costs, fees, and expenses. And finally, **Section VII** restates Freeport's request for relief.

9. In sum, the Tribunal's failure to decide Freeport's US$417 million Royalty penalties and interest claims—after expressly affirming jurisdiction over them and without offering any explanation—goes to the heart of the ICSID Convention's safeguards. Freeport does not dispute that annulment is a high bar, reserved for exceptional circumstances. This case meets that standard. A tribunal's failure to resolve a significant claim within its accepted jurisdiction, its failure to provide any reasons for that omission, and its disregard of the basic procedural guarantees embodied in Article 48 are precisely the types of defects the Convention's annulment mechanism was designed to correct. If these obvious failures are not grounds for annulment, it is hard to imagine what would be. To preserve the integrity of the ICSID system and remedy the injustice Freeport has suffered, Freeport respectfully requests that the Committee grant the requested partial annulment of the Award.

II. PERU HAS FAILED TO REBUT FREEPORT'S SHOWING THAT THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS UNDER ARTICLE 52(1)(B) OF THE ICSID CONVENTION.

10. As Freeport demonstrated in its Memorial, the Tribunal manifestly exceeded its powers under Article 52(1)(b) when it upheld jurisdiction over Freeport's penalties and interest claims on the Royalty Assessments but then failed to decide them.[1] Once the Tribunal confirmed jurisdiction, it was obligated to decide those claims on the merits, and its failure to do so constitutes an excess of powers. This error is manifest, because it is obvious on the face of the Award.

11. Peru does not contest that a tribunal's failure to consider claims within its jurisdiction can constitute a manifest excess of powers.[2] Nor does it contest that the Tribunal did not decide the merits of Freeport's claims based on penalties and interest on the Royalty Assessments. Peru instead asserts that the

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1 *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Applicant's Memorial on Annulment (23 May 2025) ("Freeport's Memorial"), § III.A.

2 *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Respondent's Counter-Memorial on Partial Annulment (16 September 2025) ("Peru's Counter-Memorial"), ¶ 159 (acknowledging that *ad hoc* committees have found a manifest excess of powers justifying annulment where they "found jurisdiction over certain claims, but then failed to decide those claims on the merits"). *See also* Freeport's Memorial, § III.A.

Tribunal affirmatively "decided" it lacked jurisdiction over those claims. This is simply wrong and unsupported by the Award: Peru identifies no paragraph in which the Tribunal reached such a conclusion, and the *dispositif* expressly affirms jurisdiction over all claims other than those based on the Tax Assessments' penalties and interest. Peru's desperate attempt to dismiss this operative sentence as a mere "typographical or clerical error" only underscores that its arguments lack any textual basis in the Award.[3]

12. Peru's only other argument, that the term "manifest" should be interpreted to mean "substantially serious,"[4] is equally flawed. Most annulment committees have rejected that position, and it is irrelevant here: the Tribunal's omission disposed of claims worth over US$417 million and is serious by any measure. More fundamentally, Peru cites no authority for converting the "manifest" inquiry into speculation about how the Tribunal "would have" decided claims it never addressed. As Peru itself recognizes elsewhere, annulment is not an appeal, and the Committee cannot reconstruct hypothetical findings the Tribunal never made.

A. PERU'S ASSERTION THAT THE TRIBUNAL DENIED JURISDICTION OVER THE ROYALTY PENALTIES AND INTEREST CLAIMS IS UNSUPPORTED BY THE AWARD.

13. Peru's assertion that the Tribunal "dismissed" Freeport's penalties and interest claims on the Royalty Assessments for lack of jurisdiction is both incorrect and unsupported by the Award.[5] As Freeport has explained, the Award's plain text confirms the opposite: the Tribunal *upheld* jurisdiction over those claims.[6] The *dispositif* states unequivocally that "[t]he Tribunal *has jurisdiction over the Claimant's claims*, except for the Claimant's claims based on the disputed *Tax* Assessments' penalties and interest."[7] That formulation cannot be squared with Peru's position and is fatal to its argument that the Tribunal supposedly denied jurisdiction over the Royalty penalties and interest claims.

14. By contrast, Peru does not—and cannot—identify a single paragraph in which the Tribunal found that the TPA's tax exclusion barred penalties and interest claims arising from the Royalty Assessments. Instead, Peru asks the Committee to assume that the Tribunal treated *all* penalties and interest as "taxation measures" "*regardless of whether they resulted from unpaid tax assessments or royalty assessments*" and dismissed all such claims for lack of jurisdiction.[8] That assumption flies in the face of

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3 Peru's Counter-Memorial, ¶ 202.

4 Peru's Counter-Memorial, ¶ 145.

5 *See e.g.*, Peru's Counter-Memorial, ¶ 150.

6 *See* Freeport's Memorial, ¶¶ 33–37.

7 **AA-1**, *Freeport* Award, ¶ 1047(a) (emphasis added).

8 *Cf.* Peru's Counter-Memorial, ¶ 152 (emphasis added).

the Award's text. The Tribunal's "taxation measures" analysis is expressly and exclusively directed at the penalties and interest on *Tax* Assessments; it contains no reference to the *Royalty* Assessments and cannot be extended to them. Because Peru's position depends on a jurisdictional ruling the Tribunal never made, it fails to engage with well-established authority confirming that a tribunal's failure to decide a claim within its accepted jurisdiction constitutes a manifest excess of powers.

15. *First*, Peru's contention that the Tribunal "dismiss[ed] Freeport's claims concerning penalties and interest on Royalty Assessments" for lack of jurisdiction has no basis in the Award.[9] The Award's plain text is clear and unambiguous that the Tribunal *upheld* jurisdiction over those claims and excluded *only* the Tax Assessments' penalties and interest claims. Peru's contrary position is unsupported and rests entirely on misreading the Award.[10]

16. The Award's *dispositif* is unequivocal: it states that "[t]he Tribunal *has jurisdiction over the Claimant's claims* except for the Claimant's claims based on the disputed *Tax* Assessments' penalties and interest."[11] This is dispositive and alone defeats Peru's theory that the Tribunal declined jurisdiction over the *Royalty* penalties and interest claims. Peru's sole response—that this operative sentence is a "typographical or clerical error"—is simply ludicrous.[12] The *dispositif* is the Award's core operative directive; it cannot be dismissed as a mistake, particularly since it determined the fate of claims worth US$417 million.

17. The *dispositif* is also entirely consistent with the Award's jurisdictional section:

(a) Paragraph 456 summarizes the Tribunal's findings and plainly states that "the Claimant's claims are *within the jurisdiction of the Tribunal*, save for the Claimant's claims based on penalties and interest assessed on *Tax* Assessments, which the majority finds to be outside the Tribunal's jurisdiction" per the TPA's "taxation measures" carve-out.[13]

(b) The Tribunal reaffirmed this limitation at the outset of its Article 22.3.1 analysis, identifying the sole issue as whether the TPA's tax carve-out barred claims arising from

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9 *Cf. id.*, ¶ 150.

10 *Cf. id.*, ¶ 151 (arguing that Freeport relies on an implicit finding upholding jurisdiction, and that "Claimant does not cite to any section of the Award in which the Tribunal states that it had jurisdiction over Claimant's penalties and interest claims on Royalty Assessments.").

11 **AA-1**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Award (17 May 2024) (Hanefeld, Tawil, Cremades) ("*Freeport* Award"), ¶ 1047 (emphasis added); *see* Freeport's Memorial, ¶ 8.

12 *Cf.* Peru's Counter-Memorial, ¶ 202.

13 **AA-1**, *Freeport* Award, ¶ 456 (emphasis added). *See also* Freeport's Memorial, ¶ 37.

Peru's failure to waive penalties and interest on the *Tax* Assessments, and concluding that those tax-related claims fell outside its jurisdiction:

> The issue for the Tribunal to determine is whether Article 22.3.1 of the TPA bars the Claimant's TPA Article 10.5 claims for the Respondent's alleged failure to waive penalties and interest *on the Tax Assessments*. In what follows, the Tribunal sets out its analysis of this issue and reaches by majority the conclusion that the disputed penalties and interest *on the Tax Assessments* fall outside of the Tribunal's jurisdiction.[14]

(c) The Tribunal reiterated this limitation at the end of its Article 22.3.1 analysis, expressly concluding that "the Claimant's claims based on Article 10.5 of the TPA for the *Tax Assessments'* penalties and interest assessed against SMCV are not within the jurisdiction of the Tribunal as they constitute 'taxation measures' excluded by Article 22.3.1 of the TPA."[15]

(d) Consistent with this, the Tribunal rejected all of Peru's other jurisdictional objections—namely its *ratione temporis* and statute of limitations arguments—that expressly applied to the penalties and interest claims on the Royalty Assessments, confirming those claims were properly before it.[16]

18. In contrast, Peru cannot identify a *single specific paragraph* in the jurisdictional section in which the Tribunal denied jurisdiction over the Royalty penalties and interest claims.[17] The only paragraph it cites is paragraph 986 in the *merits* section[18]—but that paragraph merely cross-references the jurisdictional section and depends entirely on findings that apply only to Tax Assessments:

> The Tribunal has found that penalties and interest constitute "*taxation measures*" within the meaning of Article 22.3.1 of the TPA (see above, paras. 540 *et seq.*). The Tribunal has therefore no jurisdiction to decide on the merits of the Claimant's claim based on the Respondent's alleged violation of Article 10.5 of the TPA in relation to the Respondent's assessment of penalties and interest. During the Hearing, evidence was taken with regard to Article 170 of the Peruvian Tax Code and the waiver

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14 **AA-1**, *Freeport* Award, ¶ 540 (emphasis added). *See also* Freeport's Memorial, ¶ 47.

15 **AA-1**, *Freeport* Award, ¶ 553 (emphasis added). *See also* Freeport's Memorial, ¶ 35.

16 **AA-1**, *Freeport* Award, § IV; Freeport's Memorial, §§ II.B(2); II.C(1).

17 Peru's Counter-Memorial, ¶ 92, n. 152 (citing to paragraph 986 of the merits section and "generally" to the jurisdictional section); *see generally* Peru's Counter-Memorial, § IV.B.

18 *Cf. id.*, ¶¶ 92, 153.

> requirements. However, this was done without prejudice to the Tribunal's decision on jurisdiction.[19]

19. Because paragraph 986 merely adopts the Tribunal's earlier tax-only reasoning, it cannot supply a jurisdictional dismissal of claims the Tribunal had already found to be within its jurisdiction. A jurisdictional ruling not made in the jurisdictional section cannot be accomplished through paragraph 986's derivative reference.

20. *Second*, Peru is wrong that the Tribunal concluded that penalties and interest constitute "taxation measures" under Article 22.3.1 "as a general concept."[20] The Tribunal made no such finding. Peru's argument—that the jurisdictional section, read together with paragraph 986, should be understood as a jurisdictional dismissal of *all* penalties and interest claims—has no basis in the Award's text. [21]

21. Peru identifies only two passages in the entire Award that mention "penalties and interest" without expressly linking them to the Tax Assessments.[22] The first is paragraph 986, which as noted merely cross-references the jurisdictional section.[23] The second is paragraph 455, an introductory sentence that lists one of the issues before the Tribunal as: "[a]re the Claimant's claims based on penalties and interest outside of the Tribunal's jurisdiction because they constitute '*taxation measures*' which are excluded from the scope of the TPA under Article 22.3.1 of the TPA?"[24] Peru now asserts that to answer that question, the Tribunal undertook a general analysis of penalties and interest "regardless of whether they resulted from unpaid tax assessments or royalty assessments."[25] That is simply incorrect. Paragraph 456 dispels any such reading. There, the Tribunal stated that "[t]he Parties have briefed the Tribunal on these issues," which alone confirms that the "issue" described in paragraph 455 did not include penalties and interest arising from Royalty Assessments—an issue the Parties agree was *never* briefed.[26] The Tribunal then leaves no doubt as to the scope of its analysis, explaining that:

> [i]n what follows, the Tribunal will set out its analysis of these five [jurisdictional] issues. The Tribunal reaches the conclusion that the Claimant's claims are within the jurisdiction of the Tribunal, save for the Claimant's claims based on penalties and interest assessed on *Tax*

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19 **AA-1**, *Freeport* Award, ¶ 986.

20 Peru's Counter-Memorial, ¶ 93.

21 *Id.*, ¶ 153

22 *Id.*, ¶¶ 152–153.

23 **AA-1**, *Freeport* Award, ¶ 986.

24 **AA-1**, *Freeport* Award, ¶ 455.

25 Peru's Counter-Memorial, ¶ 152.

26 **AA-1**, *Freeport* Award, ¶ 456; *see* Peru's Counter-Memorial, ¶ 89.

> *Assessments*, which the majority finds to be outside the Tribunal's jurisdiction.[27]

22. Paragraph 455 therefore cannot support Peru's attempt to recast the Tribunal's entire jurisdictional reasoning as applying "generally" to all penalties and interest, including those tied to the Royalty Assessments.

23. Moreover, the analysis itself leaves no doubt that it does not apply "generally" to all penalties and interest. The Tribunal majority's 14-paragraph analysis of Article 22.3.1 is expressly limited to penalties and interest on the *Tax Assessments*.[28] That limitation appears repeatedly and unequivocally:

(a) As noted above, the introductory and concluding paragraphs of the analysis (paragraphs 540 and 553) both confine the analysis to "penalties and interest *on the Tax Assessment*s."[29]

(b) Paragraph 543 likewise considers only whether penalties and interest "on the *Tax Assessments*" constitute "taxation measures" and concludes that "SUNAT's imposition of penalties and interest on the *Tax Assessments* cannot be treated differently than SUNAT's failure to waive such penalties."[30]

(c) Paragraphs 551 and 552 reiterate that penalties and interest on tax assessments fall within the "domestic tax regime" and that the Tribunal's exclusion applies solely to the "*Tax* Assessments."[31]

(d) The remaining references to "the domestic tax regime" or "enforcement of taxes" reinforce this narrow scope.[32] There is not a single reference to royalties in the entire Article 22.3.1 analysis—an omission that alone defeats Peru's attempt to generalize the reasoning.[33]

24. Further, the Tribunal's analysis cannot simply be transposed to the Royalty penalties and interest claims. The Tribunal's analysis rests on the premise that the penalties and interest enforce a *tax*—a premise that Peru's own experts acknowledged does not apply to royalties.[34]

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27 **AA-1** *Freeport* Award, ¶ 456 (emphasis added).

28 *Id.*, ¶¶ 540-553.

29 *Id.*, ¶ 540 (emphasis added); *id*, ¶ 553.

30 *Id*., ¶ 543 (emphasis added).

31 *Id*., ¶¶ 551, 552.

32 *Id*., ¶¶ 548–549, 552.

33 *See generally id.*, ¶¶ 540–553.

34 **AA-8**, Tr. 2664:22–2665:3 (Day 9) (Bravo and Picón) (noting that "Mining Royalties are not a tax"); *id.*, Tr. 2670:10–12 (Day 9) (Bravo and Picón) (asserting that "as we clarified a moment ago, Royalties are not a tax"); *id.*, Tr. 2687:1–21 (Day 9) (Bravo and Picón) (reiterating that "Royalties [] are not taxes. That's true. They're not taxes."); **AA-16**, First Expert Report of Prof. Bravo and Prof. Picon, ¶ 134 ("Article 33 of the Tax Code is

(a) The Tribunal explicitly stated that "'taxation measures' include measures that are part of the regime for the imposition and enforcement *of a tax*."[35]

(b) The Tribunal repeatedly emphasized that "the enforcement or *failure to enforce a tax* constitute 'practice(s)' related to 'taxation" and that penalties and interest on the Tax Assessments are "tax enforcement measures" or "enforcement of taxation measures."[36]

(c) The Tribunal further "agreed" with the *Murphy v. Ecuador* tribunal that the key question is whether the measure "*comes within the State's domestic tax regime*" and then concluded that "imposition of penalties and interest on *tax* assessments and the refusal to waive them *fall under the Peruvian tax regime*."[37]

(d) The Tribunal also cited approvingly to Peru's experts' testimony that "penalties and interest related to *tax assessments* are considered 'tax debt'" and thus "any measure related to the assessment [] of *tax*-related penalties and interest is a taxation measure."[38] On that basis, the Tribunal recognized that tax-related penalties and interest "are part of the government's administration of *taxes*."[39]

25. The Tribunal's reasoning on "taxation measures" is textually and conceptually limited to penalties and interest on the Tax Assessments and thus cannot be extended to the Royalty penalties and interest. It was and is undisputed that royalties are not taxes, but an economic consideration for the exploitation of State-owned mineral resources.[40] Peru's tax experts repeatedly affirmed that "[r]oyalties

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not applicable to mining royalties, given that royalties are not taxes"); **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, ¶ 186 (recognizing that "royalties are not taxes"). *See also* **AA-3**, Peru Counter-Memorial, ¶ 749 (noting that "as Drs. Bravo and Picón explain, a mining royalty is not treated as a tax" because "it represents consideration for the exploitation of mineral resources"); **AA-15**, First Expert Report of Prof. Luis Hernandez, ¶ 98 (stating that "royalties are not taxes"); **AA-7**, Tr. 1621:3–10 (Day 6) (Bedoya) (recognizing that royalties "are not considered taxes"). *See also* Freeport's Memorial ¶¶ 7, 31.

35 **AA-1**, *Freeport* Award, ¶ 548 (emphasis added).

36 *Id*., ¶¶ 548–549 (emphasis added).

37 *Id*., ¶¶ 550–551 (emphasis added).

38 *Id*., ¶ 530 (citing **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, ¶¶ 258–260) (emphasis added).

39 *Id*., *Freeport* Award, ¶ 530 (emphasis added).

40 **AA-3**, Peru's Counter-Memorial, ¶ 749 (noting that "as Drs. Bravo and Picón explain, a mining royalty is not treated as a tax" because "it represents consideration for the exploitation of mineral resources"); **AA-5**, Peru Rejoinder, ¶ 433 (arguing that "mining royalties are an administrative charge"); *id*., ¶ 612 ("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"); *id*., ¶ 1028 (noting 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"); **AA-16**, First Expert Report of Prof. Bravo and Prof. Picon, ¶ 51 (noting that "a mining royalty is a legally established economic compensation for titleholders of

are not a tax,"[41] and Peru's witness Ms. Bedoya, a former SUNAT auditor, similarly affirmed that royalties "are not considered taxes."[42] This agreement is unsurprising: the principle that royalties are not taxes is enshrined in Peru's legal system and was recognized by Peru's Constitutional Tribunal in an April 2005 ruling, which conclusively held that mining royalties are not taxes but rather an "'economic consideration' for the extraction of sovereign resources consistent with the right to property."[43] It was also undisputed by both Parties' experts that "neither delinquent interest nor penalties are taxes *per se*."[44] Because royalties are not taxes, penalties and interest on unpaid Royalty Assessments are not measures "to enforce a tax" and do not "fall under the Peruvian tax regime" under the Tribunal's own analysis.[45] Accordingly, nothing in the Tribunal's tax-specific analysis under Article 22.3.1 can be read to exclude penalties and interest arising from Royalty Assessments from its jurisdiction.

26. Moreover, Peru's attempt to recast the Tribunal's tax carve-out analysis as applying equally to royalties would upend the Award. Peru's position—that "taxation measures" includes any State "revenue-generating mechanism"—would require the Tribunal to have found that royalties themselves are "taxation measures" excluded from the TPA's protections.[46] The Tribunal did not do so, nor does Peru argue that it should have.[47] On the contrary, the Tribunal analyzed and resolved Freeport's royalty-based Article 10.5 claims on the merits.[48] Peru's expansive reinterpretation is therefore clearly unsupported by the Award and is foreclosed by the Tribunal's overall reasoning and findings.

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mining concessions for the exploitation of metal and non-metal ore resources."); *id*., ¶ 130 ("it is important to recall that a royalty is a legal economic consideration established for the exploitation of metal and non-metal ore resources."); *id*., ¶ 134 ("the Tax Code is not applicable to mining royalties, given that royalties are not taxes."); **AA-15**, First Expert Report of Prof. Luis Hernandez, ¶ 98 (explaining that "royalties are not taxes"); **AA-65 (CD-09)**, Expert Presentation of Prof. Hernandez, Slide 19 (noting that "it is undisputed that royalties . . . are not taxes"); *see also* Freeport's Memorial, ¶¶ 7, 31.

41 **AA-8**, Tr. 2664:22–2665:3 (Day 9) (Bravo and Picón) (noting that "that Mining Royalties are not a tax"); *id*., Tr. 2670:10–12 (Day 9) (Bravo and Picón) (asserting that "as we clarified a moment ago, Royalties are not a tax"); *id*., Tr. 2687:1–21 (Day 9) (Bravo and Picón) (reiterating that "Royalties [] are not taxes. That's true. They're not taxes."); **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, ¶ 186 (recognizing that "royalties are not taxes"); **AA-66 (RD-05)**, Expert Presentation of Prof. Bravo and Prof. Picon, Slide 11 (stating "ROYALTIES ARE NOT TAXES").

42 **AA-7**, Tr. 1621:3–10 (Day 6) (Bedoya) (recognizing that royalties "are not considered taxes").

43 **AA-1**, *Freeport* Award, ¶ 254. *See also* **AA-28 (CE-490)**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005), ¶¶ 48–56, 86–88.

44 **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, ¶ 255 ("In fact, neither delinquent interest nor penalties are taxes *per se*. In that, we are in full agreement with Claimant's tax law expert.").

45 **AA-1**, *Freeport* Award, ¶¶ 548, 551.

46 *Cf.* Peru's Counter-Memorial, ¶ 194.

47 **AA-1**, *Freeport* Award, ¶ 1047; Peru's Counter-Memorial, ¶¶ 90, 96. *See also generally* **AA-1**, *Freeport* Award, § V; Peru's Counter-Memorial, § II.C.2.

48 *See generally* **AA-1**, *Freeport* Award, § V.B.

27. *Finally*, Peru's efforts to distinguish Freeport's annulment authorities fare no better. Each attempted distinction rests on Peru's incorrect premise that the Tribunal denied jurisdiction over the Royalty penalties and interest claims. Peru cannot meaningfully engage with decisions such as *Vivendi I*, *Helnan*, *MHS*, and *Khudyan*—each of which annulled awards where tribunals failed to decide claims within their jurisdiction.[49] Peru's effort to confine these decisions to their specific facts, without offering any principled distinction, does nothing to rebut the settled rule they confirm: a tribunal's failure to decide a claim that lies within its jurisdiction constitutes a manifest excess of powers.

(a) *Vivendi I* and *Helnan* confirm the basic rule that a tribunal commits a manifest excess of powers when it fails to decide claims that it has accepted are within its jurisdiction.[50] Peru concedes this principle but attempts to distinguish these decisions on the incorrect premise that here "[t]he Tribunal did not find that it had jurisdiction over Claimant's penalties and interest claims regarding Royalty Assessments."[51] As shown above, the Award says the opposite. These authorities therefore remain squarely applicable and unrebutted.

(b) *MHS v. Malaysia* is no different. There, the committee annulled an award because the tribunal failed "even to consider, let alone apply" the treaty definition of "investment" before declining jurisdiction.[52] Peru's effort to confine *MHS* to its facts is unpersuasive.[53] The principle applied by the committee's majority was broader: a tribunal manifestly exceeds its powers when it fails to exercise jurisdiction entrusted to it.[54] Here, the defect is more pronounced—the Tribunal not only failed to exercise jurisdiction like in *MHS*, it did so after affirming that it had jurisdiction over the Royalty penalties and interest claims.

(c) The same reasoning applies to *Khudyan*. The committee annulled the award because the tribunal failed to resolve a "critical question" before it (the nationality of one of the

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49 *Cf.* Peru's Counter-Memorial, ¶¶ 158–159.

50 Freeport's Memorial, ¶ 54 (citing to **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) (Fortier, Crawford, Fernández Rozas) ("*Vivendi I* Decision on Annulment"), ¶ 86); **AALA-8**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee (14 June 2010) (Schwebel, Ajibola, McLachlan) ("*Helnan* Decision on Annulment"), ¶¶ 46–55.

51 Peru's Counter-Memorial, ¶ 159.

52 Freeport's Memorial, ¶ 54 (citing to **AALA-7**, *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) (Schwebel, Shahabuddeen, Tomka) ("*Malaysian Historical Salvors* Decision on Annulment"), ¶¶ 23–80).

53 Peru's Counter-Memorial, ¶ 159.

54 Freeport's Memorial, ¶ 54 (citing to **AALA-7**, *Malaysian Historical Salvors* Decision on Annulment, ¶¶ 23–80).

claimants).[55] Peru offers no principled reason why *Khudyan* should be limited to *ratione personae* issues.[56] As in *Khudyan*, the Tribunal here failed to answer a critical question—and, indeed, failed to decide an entire claim—despite having confirmed that the claim lay within its jurisdiction.

(d) Peru's reliance on *Duke Energy*, *Sodexo*, and *(DS)2* is misplaced.[57] Those decisions concern challenges to the correctness of jurisdictional determinations and emphasize that annulment is not an avenue for *de novo* review.[58] Freeport does not challenge the Tribunal's jurisdictional reasoning; it relies on it. Freeport's challenge is that the Tribunal, having affirmed jurisdiction, then failed to decide the claims. Properly read, these decisions reinforce Freeport's position: a tribunal's "failure to decide a question entrusted to it" constitutes an excess of powers.[59]

28. In short, Peru's attempt to re-write the Award cannot be reconciled with what the Award actually says. The plain text confirms that the Tribunal upheld jurisdiction over the Royalty penalties and interest claims and then failed to decide them on the merits. The *dispositif* is no "typographical or clerical error;" it mirrors the Tribunal's jurisdictional analysis and confirms its scope. The Tribunal's omission to decide claims within its jurisdiction strikes at the heart of its mandate. A tribunal that affirms jurisdiction over a claim must decide it. Here, the Tribunal did not. That is precisely the circumstance in which committees have found a manifest excess of powers, and this Committee should do the same.

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55 Freeport's Memorial, ¶ 54 (citing to **AALA-15**, *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment (21 July 2023) (Greenwood, Cichetti, Onwuamaegbu) ("*Khudyan* Decision on Annulment"), ¶ 218).

56 Peru's Counter-Memorial, ¶ 159.

57 Peru's Counter-Memorial, ¶ 161 (citing to **RALA-19**, *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment (7 May 2021) (Linetzky, Onwuamaegbu, van Haersolte-van Hof) ("*Sodexo* Decision on Annulment") (redacted and excerpted in original), ¶ 93); **RALA-50**, *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on the Annulment Application (14 October 2022) ("*(DS)2*, Decision on Annulment"), ¶ 130 ("the Tribunal's reasoning is in any case not obviously wrong, unreasonable or untenable; it is at best debatable."); Peru's Counter-Memorial, ¶ 143 (citing to **RALA-14**, *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the Ad Hoc Committee (1 March 2011) (McLachlan, Hascher, Tomka) ("*Duke Energy* Decision on Annulment"), ¶ 99).

58 **RALA-19**, *Sodexo* Decision on Annulment, ¶ 93 (holding that a tribunal's jurisdictional determinations are annullable only where they are either unreasonable or untenable); **RALA-50**, *(DS)2*, Decision on Annulment, ¶¶ 100, 130 (same); **RALA-14**, *Duke Energy* Decision on Annulment, ¶ 97 *et seq*. (same).

59 **RALA-50**, *(DS)2*, Decision on Annulment, ¶ 100 ("It has also been held that a failure to decide a question entrusted to a tribunal may, in some circumstances, constitute an excess of powers, since the tribunal has in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement."); **RALA-14**, *Duke Energy* Decision on Annulment, ¶ 97 ("a failure to decide a question entrusted to the tribunal and requiring its decision may also constitute an excess of powers"); **RALA-19**, *Sodexo* Decision on Annulment, ¶ 89 ("a manifest excess of power may occur both at the jurisdiction and at the merits stage").

B. PERU MISSTATES THE "MANIFEST" STANDARD, AND ITS POSITION FAILS EVEN ON ITS OWN TERMS.

29. Peru's remaining argument is that Freeport must show the Tribunal's error was "substantively serious" and that this requires the Committee to determine how the Tribunal "would have" ruled on the merits.[60] That argument, too, is wrong. The "manifest" standard under Article 52(1)(b) requires only that the excess of powers be *obvious*, not that it be "serious"—a gloss that appears nowhere in the Convention and has been rejected by multiple committees. The Tribunal's omission here easily meets the correct standard: it is apparent from a straightforward reading of the Award. And even under Peru's mistaken standard, its argument would still fail: the omission here is plainly serious, and no authority supports Peru's invitation for the Committee to speculate about a hypothetical merits outcome.

30. *First*, Peru's argument that Article 52(1)(b) requires the excess of powers to be "substantially serious" and to have "serious consequences for a party"[61] is contrary to the Convention's plain text and has been expressly rejected by multiple committees.[62] As Freeport has explained, the ordinary dictionary meaning of "manifest" is "obvious," "perceived without difficulty," or "[c]learly revealed to the eye, mind, or judgement."[63] Critically, Article 52(1)(b) nowhere uses the term "serious," unlike Article 52(1)(d), which requires that any departure from a fundamental rule of procedure be "serious."[64] As Professor Schreuer explains in his leading treatise on the ICSID Convention:

> In accordance with its dictionary meaning, "manifest" may mean "plain", "clear", "obvious", "evident" and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived. On this view, the word relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent.[65]

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60 Peru's Counter-Memorial, ¶¶ 145, 163–164.

61 Peru's Counter-Memorial, ¶ 145 (citing **RALA-11**, *Kiliç* Decision on Annulment, ¶ 53).

62 *Cf.* Peru's Counter-Memorial, ¶ 145. *See, e.g.*, **AALA-15**, *Khudyan* Decision on Annulment, ¶ 181; **RALA-30,** *Azurix Corp. v. The Argentine Republic (I),* ICSID Case No. ARB/01/12, Decision on Annulment (1 September 2009) (Griffith, Ajibola, Hwang) ("*Azurix* Decision on Annulment"), ¶ 68; **RALA-5**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 December 2015) (Tomka, Blair, Schreuer) ("*Tulip* Decision on Annulment"), ¶¶ 56–57.

63 *See* Freeport's Memorial, ¶ 55 (citing **AALA-11**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015) (Fernández-Armesto, Feliciano, Oreamuno), ¶ 57); *see also* **AALA-19**, Oxford English Dictionary, 3rd ed. (Oxford: Oxford University Press, 2000), "Manifest", available at: https://www.oed.com/view/Entry/113483?rskey=8W5GVP&result=2&isAdvanced=false#eid.

64 *See* **AALA-1,** ICSID Convention, Article 52(1)(d).

65 **RALA-18**, C. Schreuer (ed.), *The ICSID Convention: A Commentary* (2009) (excerpt) ("Schreuer"), Art. 52, ¶ 135.

31. The vast majority of committees that have considered the meaning of "manifest" have thus concluded that it means "clear," "self-evident," or "obvious."[66] Multiple committees—including several cited by Peru—have rejected the notion that Article 52(1)(b) requires the excess of powers to be "substantially serious."[67] The few decisions Peru invokes to suggest otherwise represent a clear minority view and cannot override the Convention's text.[68] Moreover, none of those decisions actually applied a "substantially serious" standard.[69]

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[66] *See* **AALA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 89 ("The 'manifest' nature of the excess of powers has been interpreted by most ad hoc Committees to mean an excess that is obvious, clear or self-evident"). *See*, *e.g.*, **RALA-8**, *Wena Hotels Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002) (Kerameus, Bucher, Vicuna) ("*Wena* Decision on Annulment"), ¶ 25 ("The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other."); **RALA-4**, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles (29 June 2005) (Brower, Hwang, Williams) ("*CDC* Decision on Annulment"), ¶ 41 ("As interpreted by various *ad hoc* Committees, the term 'manifest' means clear or 'self-evident.'"); **RALA-13**, *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador),* ICSID Case No. ARB/01/10, Decision on Annulment (8 January 2007) (Kessler, Bernardini, Biggs), ¶ 36 ("It is generally understood that exceeding one's powers is '*manifest'* when it is '*obvious by itself'* simply by reading the Award, that is, even prior to a detailed examination of its contents"); **RALA- 5**, *Tulip* Decision on Annulment, ¶¶ 56–57 ("The requirement that an excess of powers must be 'manifest' in order to constitute a ground for annulment means that the excess must be obvious, clear or easily recognizable… [i]t is unnecessary to interpret the term 'manifest' in Article 52(1)(b) as adding a requirement that the excess must be serious or material."); **AALA-12**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016) (Hanotiau, Oyekunle, Sachs) ("*TECO* Decision on Annulment"), ¶ 77 ("[A]n excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear.").

[67] **AALA-15**, *Khudyan* Decision on Annulment, 181 ("As for the requirement that the excess must be manifest, that term is generally held to refer not to the gravity of the excess but to how readily apparent it is."); *see also* **RALA-30,** *Azurix* Decision on Annulment, ¶ 68 ("The expression 'manifestly' in Article 52(1)(b) means 'obvious' rather than 'grave', and the relevant test is thus whether the excess of power *'can be discerned with little effort and without deeper analysis'")*; **RALA-5**, *Tulip* Decision on Annulment, ¶¶ 56–57 ("The requirement that an excess of powers must be 'manifest' in order to constitute a ground for annulment means that the excess must be obvious, clear or easily recognizable… [i]t is unnecessary to interpret the term 'manifest' in Article 52(1)(b) as adding a requirement that the excess must be serious or material."); **RALA-18**, Schreuer, Art. 52, ¶ 135 ("the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived.").

[68] *See* **AALA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 89 ("Some ad hoc Committees have interpreted 'manifest' to require that the excess be serious or material to the outcome of the case."). *Cf.* Peru's Counter-Memorial, ¶ 145 (citing to **RALA-10**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment (24 January 2014) (Oreamuno, Zuleta, Cheng) ("*Impregilo* Decision on Annulment"), ¶ 128; **RALA-6**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki (5 June 2007) (Feliciano, Nabulsi, Stern), ("*Soufraki* Decision on Annulment"), ¶ 40; **RALA-15**, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment (30 November 2022) (Knieper, Figueres, Nolan) ("*Cyprus Popular Bank* Decision on Annulment"), ¶ 203; **RALA-49**, *SGS* Decision on Annulment, ¶ 122; **RALA-27**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited (3 July 2013) (Sureda, Alexandrov, Romero) ("*Malicorp* Decision on Annulment"), ¶ 56.

[69] **RALA-10**, *Impregilo* Decision on Annulment, ¶¶ 125–162; **RALA-6**, *Soufraki* Decision on Annulment, ¶¶ 24–38, 40–56; **RALA-15**, *Cyprus Popular Bank* Decision on Annulment, ¶¶ 204–293; **RALA-49**, *SGS* Decision

32. Applying the correct legal standard, the Tribunal's excess of powers here is plainly "manifest." The Award's jurisdictional section—by limiting the Article 22.3.1 exclusion solely to penalties and interest on the *Tax* Assessments and by rejecting Peru's other jurisdictional objections—together with the *dispositif*, make clear that the Tribunal retained jurisdiction over the Royalty penalties and interest claims.[70] Paragraph 986 does not say otherwise; it simply cross-refers to the jurisdictional section, which addresses only tax-related penalties and interest.[71] The Award does not address Freeport's Royalty penalties and interest claims on the merits at all, as Peru concedes.[72] From the face of the Award, it is therefore obvious that the Tribunal accepted jurisdiction over the Royalty penalties and interest claims and then failed to decide them—the very definition of a manifest excess of powers.

33. *Second*, even under Peru's misguided standard, its position still fails, because the Tribunal's omission is unquestionably "substantially serious." Having affirmed jurisdiction over the Royalty penalties and interest claims, the Tribunal then failed to decide them at all.[73] That omission eliminated an entire set of claims worth US$417 million—precisely the kind of "serious consequence" Peru says its test requires.[74] On Peru's own formulation, the Tribunal's omission therefore easily satisfies the standard it tries to impose.

34. Peru also identifies no support for its contention that assessing "substantial seriousness" requires the Committee to speculate how the Tribunal would have ruled on the merits.[75] As far as Freeport is aware, no committee has ever held that a "manifest" excess turns on speculation about a hypothetical merits outcome, and none of Peru's authorities suggest otherwise.[76] *Khudyan* illustrates the point: the

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on Annulment, ¶¶ 107–136; **RALA-27**, *Malicorp* Decision on Annulment, ¶¶ 154–160; **RALA-11**, *Kiliç* Decision on Annulment, ¶¶ 95–128, 161–173.

70 **AA-1**, *Freeport* Award, ¶ 1047(a) ("For all of the foregoing reasons, the Tribunal decides as follows: a. The Tribunal has jurisdiction over the Claimant's claims except for the Claimant's claims based on the disputed Tax Assessments' penalties and interest"); *id.*, ¶ 553 ("Accordingly, the Tribunal concludes that the Claimant's claims based on Article 10.5 of the TPA for the Tax Assessments' penalties and interest assessed against SMCV are not within the jurisdiction of the Tribunal as they constitute '*taxation measures*' excluded by Article 22.3.1 of the TPA.").

71 *Id.*, ¶ 986 ("The Tribunal has found that penalties and interest constitute '*taxation measures*' within the meaning of Article 22.3.1 of the TPA (see above, paras. 540 *et seq.*).").

72 Peru's Counter-Memorial, ¶ 198.

73 *Supra.* ¶¶ 13–26.

74 Peru's Counter-Memorial, ¶ 145 (citing to **RALA-11**, *Kiliç*, Decision on Annulment, ¶ 53 for the proposition that "Article 52(1)(b) 'should not be resorted to unless the tribunal's excess had serious consequences for a party.'").

75 Peru's Counter-Memorial, ¶ 164.

76 **RALA-10**, *Impregilo* Decision on Annulment, ¶¶ 125–162; **RALA-15**, *Cyprus Popular Bank* Decision on Annulment, ¶¶ 204–293; **RALA-49**, *SGS* Decision on Annulment, ¶¶ 107–136; **RALA-27**, *Malicorp* Decision on Annulment, ¶¶ 154–160; **RALA-11,** *Kiliç* Decision on Annulment, ¶¶ 95–128, 161–173; **RALA-6**, *Soufraki* Decision on Annulment, ¶¶ 24–38, 40–56.

committee found a manifest excess of powers in a single paragraph, without addressing respondent's argument that the tribunal's other findings would have doomed the claim in any event.[77] More broadly, in every decision on the record in which an excess of powers was found to be "manifest," committees made that determination without speculating what the tribunal "would have" otherwise decided.[78] Clearly, Peru's formulation finds no basis in the Convention or the jurisprudence.

35. Moreover, Peru's position is also irreconcilable with its own acknowledgment that annulment is not an appeal. Peru concedes that "committees cannot serve as appellate bodies and are not permitted to substitute the committee's judgment for that of the arbitral tribunal on substantive issues."[79] Yet, Peru's argument—that the Tribunal's excess of powers was not "substantially serious" because the Tribunal "would have" ruled for Peru—asks the Committee to do exactly that.[80] The Convention does not permit such speculation. And in any event, as discussed in detail in Section V, there is no basis for the Committee to determine what the Tribunal "would have" decided on the Royalty penalties and interest claims, which were pleaded in the alternative and involved distinct factual and legal questions that the Parties disputed. In the absence of any findings on these issues, there is no basis from which the Committee could, consistent with its limited mandate, infer how the Tribunal might have resolved these claims.

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77 **AALA-15**, *Khudyan* Decision on Annulment, ¶ 232 (the committee instead rejected these allegations as part of its section on its residual discretion under Article 52, noting that "[t]he Committee cannot speculate on how the Tribunal would or should have answered those questions had it asked them.").

78 **AALA-3**, *Amco Asia Corporation and others v. Republic of Indonesia (I)*, ICSID Case No. ARB/81/1, *Ad Hoc* Committee Decision on the Application for Annulment (16 May 1986) (Seidl-Hohenveldern, Giardina, Feliciano) ("*Amco* Decision on Annulment"), ¶ 95; **RALA-34**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the ad hoc Committee on the Application for Annulment Submitted by Klöckner (3 May 1985) (Lalive, El-Kosheri, Seidl-Hohenveldern) ("*Klöckner* Decision on Annulment"), ¶ 79; **AALA-5**, *Vivendi I* Decision on Annulment, ¶ 115; **AALA-8**, *Helnan* Decision on Annulment, ¶ 80; **AALA-7**, *Malaysian Historical Salvors* Decision on Annulment, ¶ 80; **AALA-20**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 June 2010) ("*Sempra* Decision on Annulment"), ¶¶ 211–219; **RALA-31,** *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) (Griffith, Robinson, Tresselt) ("*Enron* Decision on Annulment"), ¶¶ 355–405; **AALA-11**, *Occidental* Decision on Annulment, ¶¶ 267–268; **AALA-23**, *Venezuela Holdings B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 March 2017) (Berman, Abraham, Knieper) ("*Venezuela Holdings* Decision on Annulment"), ¶ 189; **AALA-15**, *Khudyan* Decision on Annulment, ¶ 218; **RALA-40**, *Agility Public Warehousing Company K.S.C.P. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment (8 February 2024) (Ramírez, van Haersolte-van Hof, Shin), ¶ 117.

79 Peru's Counter-Memorial, ¶ 130.

80 *Id*., ¶ 164.

36. In sum, the Tribunal's failure to decide Freeport's penalties and interest claims on the Royalty Assessments constitutes a manifest excess of powers under Article 52(1)(b). The Award makes clear that the Tribunal retained jurisdiction over those claims, yet it never resolved them on the merits—a textbook excess of powers, as prior committees have consistently held. The Tribunal's omission is also "manifest" because it is immediately apparent from the face of the Award. And even under Peru's mistaken interpretation of "manifest" as requiring "substantial seriousness," that standard would plainly be met: the Tribunal's omission left an entire category of Freeport's claims—worth US$417 million—unaddressed.

III. PERU HAS FAILED TO REBUT FREEPORT'S SHOWING THAT THE TRIBUNAL FAILED TO STATE REASONS UNDER ARTICLE 52(1)(E) OF THE ICSID CONVENTION.

37. As Freeport demonstrated in its Memorial, annulment is independently warranted under Article 52(1)(e) because the Award gives no path to "follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion."[81] After affirming jurisdiction over the claims for penalties and interest on the Royalty Assessments, the Tribunal neither decided those claims on the merits nor provided any reasons for failing to do so.[82] This failure to state reasons is grounds for annulment.

38. Peru does not dispute this fundamental defect.[83] It concedes that the Award contains no reasoning for the Tribunal's failure to decide the Royalty penalties and interest claims on the merits and, instead, retreats to a counterfactual narrative: that the Tribunal dismissed those claims for lack of jurisdiction and that the jurisdiction section purportedly provides the missing reasons.[84] As shown above in Section II, neither contention withstands scrutiny. The Award nowhere states that the Royalty penalties and interest claims were "dismissed" for lack of jurisdiction, nor does it articulate any reasoning that could support such a conclusion. The Tribunal made only one jurisdictional exclusion—penalties and interest on the Tax Assessments under the TPA's tax carve-out—and its jurisdictional analysis is expressly confined to that category of claims. Peru cannot recast that analysis to manufacture a *post-hoc* reason for the Tribunal's failure to decide the Royalty-related penalties and interest claims on the merits. Peru's attempts to construct a "Point A. to Point B." rationale only underscores the core defect: the Award offers no reasoning for the Tribunal's grave omission.

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81 Freeport's Memorial, § III.B.

82 Freeport's Memorial, § III.B.

83 Peru's Counter-Memorial ¶ 198.

84 Peru's Counter-Memorial, ¶¶ 180–200.

39. Peru also contends that no contradiction would arise from recasting the Award as providing jurisdictional reasons to dismiss the penalties and interest claims on the Royalty Assessments.[85] That is incorrect. Such a reading cannot be reconciled with the *dispositif*, which affirms the Tribunal's jurisdiction over those very claims, nor with the jurisdictional section, which declines jurisdiction only for penalties and interest on the Tax Assessments. Interpreting the Award as dismissing the Royalty-related penalties and interest claims on jurisdiction therefore would create a direct and irreconcilable conflict within the Award—one that itself reflects a failure to state coherent reasons—and that would, even on Peru's own theory, still warrant annulment under Article 52(1)(e).

A. THE TRIBUNAL PROVIDED NO REASONS FOR ITS FAILURE TO DECIDE THE ROYALTY PENALTIES AND INTEREST CLAIMS ON THE MERITS.

40. The Parties agree that an award fails to state reasons when the reader cannot follow how the tribunal proceeded "from Point A. to Point B. and eventually to its conclusion."[86] That standard is plainly not met here. The Award offers no explanation for the Tribunal's failure to decide the Royalty penalties and interest claims on the merits after upholding jurisdiction over them—an omission that alone warrants annulment under Article 52(1)(e). Unable to contest this silence, Peru again attempts to recast the Award as also having dismissed jurisdiction over the Royalty penalties and interest claims. But the Award contains no reasoning to support that view; its jurisdictional analysis is expressly limited to the Tax Assessments and provides no basis for dismissing the Royalty-related penalties and interest claims.

41. *First*, Peru does not dispute that the Award contains no reasoning on the merits of Freeport's Royalty penalties and interest claims. That omission independently warrants annulment under Article 52(1)(e). Having affirmed jurisdiction over the Royalty penalties and interest claims, the Tribunal was required to decide them; yet the Award offers no explanation for its failure to do so.[87] Paragraph 986—the only paragraph in the merits section that might even arguably relate to those claims—merely refers back to the jurisdiction section, which expressly limits the Article 22.3.1 carve-out to the Tax Assessments and upholds jurisdiction over all other claims. The Award therefore provides no basis to understand why the Tribunal did not decide Freeport's claims on the merits, and this complete absence of reasons independently justifies annulment.

42. *Second*, unable to defend the Award's lack of reasoning on the merits, Peru again seeks to recast the Award as dismissing jurisdiction over Royalty penalties and interest claims. That effort fails, as

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85 *See generally* Peru's Counter-Memorial § V.B(2).

86 Freeport's Memorial, ¶ 57; Peru's Counter-Memorial, ¶¶ 172–173.

87 *See supra.* ¶¶ 15–19.

discussed in Section II above. And even if Peru's untenable characterization were accepted, the Award provides no reasoning to support it. The only "reasoning" Peru identifies is the Tribunal's discussion of "taxation measures" in the jurisdictional section—an analysis expressly confined to penalties and interest on the Tax Assessments and wholly silent on the Royalty Assessments.[88]

43. With no reasoning in the Award to sustain its theory, Peru offers a reconstructed chain of reasoning that appears nowhere in the Award's text. But that reconstructed chain of reasoning fares no better—and in fact underscores the absence of any reasoning in the Award. Peru's effort to extend the Tribunal's tax-based jurisdictional analysis to the Royalty penalties and interest claims is unsupported at every step. Peru's proposed "Point A." is that the Tribunal concluded that "'taxation measures' include any law, regulation, procedure, or practice related to taxation—including taxes, customs duties, and other revenue-generating mechanisms under the authority of the State."[89] The Tribunal never made that finding. The sentence Peru cites is the holding of another case that the Tribunal merely "note[d]"; it is dicta.[90]

44. Further, the foundational error in Peru's "Point A." is not only absent from the Award; it is incompatible with the Tribunal's reasoning. If the Tribunal defined "taxation measures" as any "revenue-generating mechanism under the authority of the State," the term would encompass not only penalties and interest on royalties but royalties themselves. Peru's four-point analysis acknowledges as much, since step two is that "Royalties constitute a revenue-generating mechanisms within the scope of the State's fiscal authority"—another statement found nowhere in the Award.[91] In other words, if Peru's "reasons" were accurate, the Tribunal would have dismissed the *entirety* of Freeport's royalty-related claims under Article 10.5 as barred by the TPA's tax carve-out. Clearly, the Tribunal did not do so.[92] The Tribunal addressed Freeport's royalty-related Article 10.5 claims on the merits.[93] Peru's so-called "reasons" are thus both speculative and demonstrably inconsistent with the Award.

45. Peru's remaining steps in its "Point A. to Point B." reconstruction collapse once its foundational error is removed. And tellingly, none of the remaining "reasons" it identifies, nor its conclusion, can actually be found in the Award:

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88 *See supra*. ¶¶ 20–24.

89 Peru's Counter-Memorial, ¶ 195.

90 **AA-1**, *Freeport* Award, ¶ 547 (citing *Link Trading v. Department for Customs Control of Republic of Moldova*, UNCITRAL, Award on Jurisdiction (16 February 2021) (Hertzfeld, Buruiana, Zykin), p. 9).

91 Peru's Counter-Memorial, ¶ 195.

92 **AA-1**, *Freeport* Award, § IV.B(4).

93 **AA-1**, *Freeport* Award, §V.B(1).

(a) Peru's third step—that "[b]ecause royalties constitute a revenue-generating mechanism, [] penalties and interest on Royalty Payments constitute 'taxation measures' under the TPA"[94]—is likewise unsupported by any paragraph of the Award. Peru identifies none because none exists.

(b) Finally, Peru's asserted conclusion that "[b]ecause Claimant's penalties and interest claims on Royalty Assessments pertain to 'taxation measures,' Claimant's claims regarding the same fall outside the Tribunal's jurisdiction"[95]—is likewise entirely absent. The Award does not reach that conclusion, but to the contrary, upholds jurisdiction over the claims.

46. Peru's entire chain of reasoning is thus invented; it does not appear, explicitly or implicitly, in the Award's text the Committee is tasked to evaluate. It also only attempts to provide reasons for *Peru's* conclusion—implicitly acknowledging that there can be no "Point A." to "Point B" for why the Tribunal failed to decide Freeport's claims on the merits if it upheld jurisdiction, as the *dispositif* reflects. And it fails even to provide reasons for that incorrect conclusion since it starts with a "Point A." found nowhere in the Award.

47. Even accepting that reasoning may, in some circumstances, be implied, that principle cannot rescue Peru's argument. Under Article 52(1)(e), the reasons must be found in the award itself; they cannot be supplied by counsel or reconstructed after the fact.[96] Implied reasons are acceptable only where "they can be *reasonably inferred from the terms used in the decision*."[97] Here, no such inference is remotely

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94 Peru's Counter-Memorial, ¶ 195.

95 *Id*., ¶ 195.

96 **AALA-12**, *TECO* Decision on Annulment, ¶ 124 ("A tribunal's reasoning need not be explicit in every respect, *as long as the reasons can be understood from the rest of the award*") (emphasis added); **AALA-13**, *Tidewater Investment Srl and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2016) (Yusuf, Abraham, Knieper) ("*Tidewater* Decision on Annulment"), ¶ 167 ("the Committee does not have the authority to reassess the merits of the dispute or to substitute the Tribunal's determination by its own convictions. Its authority is limited to the examination of the award with respect to the alleged failure to state the reasons on which the Tribunal has based its decision."); **RALA-9**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment (28 March 2022) (van Haersolte-van Hof, Howell, Feighery) ("*Cube* Decision on Annulment"), ¶ 337 ("It is not for this Committee to reassess the Tribunal's analysis or to seek to rewrite or enhance the Tribunal's reasoning, or, as Spain rightly submits 'reconstruct what the award should have said and did not say.'").

97 Peru's Counter-Memorial, ¶ 199 (quoting **RALA-8**, *Wena* Decision on Annulment, ¶ 81 (emphasis added)); *see also* **AALA-18**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (25 September 2007) (Guillaume, Elaraby, Crawford) ("*CMS* Decision on Annulment"), ¶¶ 94, 97 ("In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that answers to the question raised 'can be reasonably inferred from the terms used in the decision'; they cannot. Accordingly, the Tribunal's finding on Article II(2)(c) must be annulled for failure to state reasons."); **RALA-6**, *Soufraki* Decision on Annulment, ¶ 24 ("with regard to the reasoning of the award,

possible. No basis for the Tribunal's failure to decide Freeport's claims can be inferred from "terms used in the decision" because the Award is completely silent with respect to the merits of those claims.

48. *Finally*, as Freeport explained in its Memorial, annulment committees have repeatedly annulled awards in similar circumstances where a tribunal's reasoning is altogether absent.[98] Peru does nothing to rebut these cases.[99] For example, in *Perenco,* the committee annulled portions of the award because there was "no explanation whatsoever" for key findings and because it was "unable to find one single reason in [the Award] that support[ed] the Tribunal's conclusion" on tax deductibility.[100] Similarly, in *CMS v. Argentina*, the committee annulled the umbrella-clause finding because the tribunal "nowhere addressed . . . expressly" the issue and relied instead on repeated references back to its decision on jurisdiction—where the relevant question "was not dealt with at all."[101] The committee identified a "significant lacuna" that made it impossible to follow the tribunal's reasoning.[102] These decisions are directly on point—and the fact that Peru simply ignores them altogether is a telling admission.

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if the Committee can make clear - without adding new elements previously absent - that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award."); **RALA-44**, *Vivendi II* Decision on Annulment, ¶ 247 (finding that the Article 52(1)(e) standard concerns whether "the reasoning *used by the Tribunal* . . . [is] adequate to understand how the Tribunal reached its decisions.") (emphasis added); **RALA-32**, *Rumeli Telekom A.S. and Telsim Mobil Telekommunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee (25 March 2010) (Schwebel, McLachlan, Romero), ¶ 83 (finding that a Committee's ability to infer reasoning to "follow from Point A to Point B" is subject to the caveat that "*if* [*non-stated*] *reasons do not necessarily follow or flow from the award's reasoning*, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal."); **RALA-21**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Annulment Decision (15 April 2019) (Howell, Valenzuela, Tinman), ¶ 97 (finding that, while "it may be necessary for [the Committee] to undertake an interpretative or exegetical exercise *of the Tribunal's analysis*," such review should only be conducted "without going as far as supplementing it with arguments that cannot *reasonably be inferred*.") (emphasis added); **RALA-9**, *Cube* Decision on Annulment, ¶ 324 (citing to **AALA-9**, *Fraport* Decision on Annulment, ¶ 264 (quoting **RALA-8**, *Wena* Decision on Annulment, ¶ 81) and finding that reasons may be implied "provided they can be reasonably inferred from the terms used in the decision."); **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment (28 May 2021) (Zuleta, Knieper, Pinto) ("*Perenco* Decision on Annulment"), ¶¶ 466, 572–574 ("The Committee has been unable to find one single reason in the Decision on Jurisdiction and Liability, in the Award, or in any of the other decisions that form part of the Award, that supports the Tribunal's conclusion stated in paragraph 420 of the Award… The Committee therefore finds that the Tribunal failed to state the reasons for its decision that that the OCP ship-or-pay costs were fully tax-deductible.").

98 Freeport's Memorial, ¶ 59.

99 *See generally* Peru's Counter-Memorial, § V.B(1).

100 **AALA-14**, *Perenco* Decision on Annulment ¶¶ 572–575.

101 **AALA-18**, *CMS* Decision on Annulment, ¶ 94.

102 *Id.*, ¶ 97.

49. Peru's reliance on *Wena* for the proposition that reasoning can be "implicit" is also misplaced, and immaterial.[103] *Wena* allows implicit reasoning only where it can be "reasonably inferred from the terms used in the decision."[104] Here, no inference is possible; the Award's terms expressly limit the Article 22.3.1 analysis to Tax Assessments and contradict Peru's reconstruction.[105] Unlike in *Wena*, where the tribunal clearly articulated the premises from which its conclusion followed, nothing in the Award supports the jurisdictional dismissal Peru now proposes.

50. The Award contains no reasoning for the Tribunal's failure to decide the Royalty penalties and interest claims and should be partially annulled on that basis. There is no path to follow "from Point A. to Point B.," and indeed no clear conclusion. Explaining the Tribunal's omission would require the Committee not merely to fill gaps but to construct reasoning absent from the Award. Article 52(1)(e) does not permit such reconstruction.

B. EVEN ON PERU'S CASE, A JURISDICTIONAL DISMISSAL OF THE ROYALTY PENALTIES AND INTEREST CLAIMS WOULD RESULT IN CONTRADICTORY REASONS IN THE AWARD.

51. Even on Peru's theory, treating the Award as dismissing the Royalty penalties and interest claims on jurisdiction would still result in annulment. The Award contains no reasoning for any such dismissal, and the only paragraph Peru invokes—paragraph 986—merely cross-references the Tribunal's tax-specific jurisdictional analysis, which says nothing about the Royalty-related claims. And even if paragraph 986 were treated as the Tribunal's "reasoning," that reading would place the Award in direct conflict with its express jurisdictional findings and the *dispositif*, producing precisely the kind of contradictory reasons that warrant annulment under Article 52(1)(e).

52. *First*, treating paragraph 986 as "reasoning" would put the Award in direct conflict with its express jurisdictional findings and the *dispositif*. Both the *dispositif* and the jurisdictional section state that the Tribunal has jurisdiction over all claims except the Tax Assessment penalties and interest. Reading paragraph 986 as dismissing the Royalty penalties and interest claims on jurisdiction would therefore contradict the Award's operative text and its entire jurisdictional analysis. Peru offers no explanation for how such an inconsistency could be reconciled.

(a) Peru first argues that the *dispositif*—which states that the Tribunal "has jurisdiction over the Claimant's claims except for the Claimant's claims based on the disputed Tax Assessments' penalties and interest"—does not reflect any contradiction and is

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103 Peru's Counter-Memorial, ¶ 174.

104 **RALA-8**, *Wena* Decision on Annulment, ¶ 81.

105 **AA-1**, *Freeport* Award, § IV.B(4).

"consistent" with the Tribunal's reasoning.[106] That is correct, but it does not assist Peru. The *dispositif* and the jurisdiction section are entirely aligned: both exclude only the Tax Assessments' penalties and interest and uphold jurisdiction over all other claims.[107]

(b) Peru next asserts that the absence of an express reference in the *dispositif* to a purported lack of jurisdiction over the Royalty penalties and interest claims "does not negate or cancel out the conclusions reached in the jurisdictional and merits sections of the Award."[108] But the jurisdiction section contains no such conclusion, and the *dispositif* is not "silent": it affirmatively upholds jurisdiction over "all other claims," which necessarily includes the Royalty penalties and interest claims. [109]

(c) Peru is thus forced to make the extraordinary assertion that the *dispositif "*appears to be a typographical or clerical error, not an error of substance"—an assertion that only underscores the weakness of its position.[110] As discussed in detail above, rather than reflecting a "clerical" error, the *dispositif* flows directly from every paragraph of the jurisdiction section. [111] If paragraph 986 reflects "reasoning" to the contrary, there is no escaping the conclusion that it contradicts the rest of the Award.

53. *Second*, Peru invokes the principle that a committee should interpret an award "as a whole" and adopt a reading that preserves its internal consistency. [112] But even on Peru's own account, such a reading would be impossible here. The interpretation Peru proposes can be sustained only by disregarding the *dispositif*, the conclusions of the jurisdiction section, the express limits of the Tribunal's Article 22.3.1 analysis, and the fact that the Tribunal adjudicated Freeport's royalty-based claims on the merits. Far from preserving internal coherence, Peru's reading depends on ignoring the Award's central findings.

54. *Third*, as Freeport showed and Peru again failed entirely to address, committees have consistently confirmed that annulment is appropriate where the tribunal's reasoning is contradictory in circumstances similar to those that would arise from Peru's reading of the Award.[113]

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106 Peru's Counter-Memorial, ¶ 202 (citing to **AA-1**, *Freeport* Award, ¶ 1047.a).

107 *Supra.* ¶¶ 15–18.

108 Peru's Counter-Memorial, ¶ 202.

109 *Supra.* ¶¶ 15–18.

110 Peru's Counter-Memorial, ¶ 202.

111 *Supra.* ¶¶ 15–18.

112 *Id*., ¶ 203 (citing **RALA-23**, *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Decision on Annulment (7 March 2025) (van Haersolte-van Hof, Ohara, Pawlak) ("*Pawlowski* Decision on Annulment"), ¶ 76).

113 Freeport's Memorial, ¶ 60(c).

(a) In *Pey Casado I*, the committee held that the tribunal failed to state reasons when it used an expropriation-based damages calculation that the committee found to be "manifestly inconsistent with its decision a few paragraphs earlier that such an expropriation-based damage calculation is irrelevant and that all evidence and submissions relevant to such a calculation could not be considered."[114]

(b) Similarly, in *Tidewater*, the committee held that a tribunal failed to state its reasons for using a 1.5% country risk premium to calculate its damages valuation because it contradicted the tribunal's earlier conclusion that a 1.5% country risk premium was unreasonable.[115] In so doing, the committee noted that it found "[t]he two statements of the Tribunal cannot be reconciled. They are genuinely contradictory."[116]

(c) *MINE II* is to the same effect. The committee annulled the damages portion of the Award because the tribunal relied on assumptions it had elsewhere rejected, holding that a tribunal "could not, without contradicting itself," adopt reasoning it has already dismissed.[117] As the committee explained, "contradictory reasons" do not satisfy the requirement that an award state the reasons on which it is based.[118]

55. Accordingly, even to the extent that the bare reference to the jurisdictional findings regarding the Tax Assessments in paragraph 986 could constitute "reasoning" regarding the Royalty Assessments, the reasoning would be contradictory and still grounds for annulment.

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56. In sum, the Award provides no basis to understand why the Tribunal failed to decide the Royalty penalties and interest claims. The reasoning is not merely deficient; it is entirely absent. And even on Peru's own account, any purported "reasoning" would contradict the Tribunal's express findings elsewhere in the Award and therefore warrant annulment. This case illustrates precisely why Article 48 requires tribunals to provide a reasoned decision—and why failure to do so constitutes grounds for annulment.

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114 **AALA-10**, *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 December 2012) (Fortier, Bernardini, El-Kosheri) ("*Pey Casado I* Decision on Annulment"), ¶ 285.

115 **AALA-13**, *Tidewater* Decision on Annulment, ¶¶ 185–189.

116 *Id.*, ¶ 189.

117 **AALA-4**, *MINE II* Decision on Annulment, ¶ 6.107.

118 *Id.*

IV. PERU HAS FAILED TO REBUT FREEPORT'S SHOWING THAT THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE UNDER ARTICLE 52(1)(D) OF THE ICSID CONVENTION.

57. As Freeport explained in its Memorial, the Tribunal majority's failure to decide the merits of Freeport's claims based on penalties and interest on the Royalty Assessments—after expressly affirming jurisdiction over those claims—constituted a serious departure from a fundamental rule of procedure under Article 52(1)(d).[119] Further, even if the Tribunal had dismissed these claims for lack of jurisdiction, it would still have committed a serious departure from a fundamental rule of procedure because it did so without giving Freeport any opportunity to be heard.[120] The departures were unquestionably "serious," because they resulted in the dismissal of claims worth over US$417 million.[121]

58. Peru again contends that the Tribunal did not fail to decide Freeport's claims, but instead dismissed them for lack of jurisdiction.[122] As discussed above, this is simply wrong.[123] Peru further argues that even if the Tribunal dismissed the Royalty penalties and interest claims based on Article 22.3.1's tax exclusion, there was no violation of the right to be heard because the Tribunal's decision fit into the "legal framework established by the Parties," and the Parties had "ample opportunity" to present their positions.[124] The record squarely contradicts this: the issue was never presented to the Tribunal, never briefed or argued, and never raised by the Tribunal for comment.[125] Finally, Peru argues that any departures were not "serious" because the Tribunal "would have" ruled in Peru's favor regardless.[126] But, as in other contexts where Peru advances this point, the Committee cannot engage in such speculation. Moreover, the departures were clearly "serious" as that term is understood in the consistent jurisprudence, because there is a "chance" they could have affected the Tribunal's decision on a critical issue, as opposed to a tangential issue or one decided in Freeport's favor notwithstanding the procedural violation.

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119 Freeport's Memorial, ¶¶ 63–66; *see generally id*., § III.C.

120 *Id*., ¶ 65.

121 *Id*., ¶ 64.

122 Peru's Counter-Memorial, ¶ 221.

123 *Supra* ¶¶ 15–26.

124 Peru's Counter-Memorial, ¶¶ 227, 235.

125 Freeport's Memorial, ¶ 65. *See also* **AA-6**, Tr. (Day 1); **AA-60**, Tr. (Day 2); **AA-61**, Tr. (Day 3); **AA-62**, Tr. (Day 4); **AA-63**, Tr. (Day 5); **AA-7**, Tr. (Day 6); **AA-64**, Tr. (Day 7); **RA-1**, Tr. (Day 8); **AA-8**, Tr. (Day 9); **AA-9**, Tr. (Day 10).

126 Peru's Counter-Memorial, ¶¶ 247–255.

A. PERU'S ATTEMPT TO RECAST THE TRIBUNAL'S GLARING OMISSION AS AN IMPLICIT "DECISION" ON THE ROYALTY PENALTIES AND INTEREST CLAIMS IS UNSUPPORTED AND MISCONCEIVED.

59. As Freeport explained and as Peru does not deny, committees have consistently confirmed that the obligation under Article 48(3) of the Convention to "deal with every question submitted to the Tribunal" is a fundamental rule of procedure, and that a serious departure from this obligation is grounds for annulment under Article 52(1)(d).[127] Peru's main argument is thus once again to recast the Award as one in which the Tribunal "implicit[ly]" addressed Freeport's Royalty penalties and interest claims by purportedly denying jurisdiction.[128] As Freeport explained, it did not do so, and this is fatal to Peru's position. [129] Peru's remaining arguments—that a tribunal's failure to address particular evidence or arguments should not result in annulment, or that Article 48(3) is satisfied so long as the tribunal restates the parties' arguments and resolves the claim[130]—also fail because each presupposes that the Tribunal actually decided the claim, which it did not.

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127 *See* Freeport's Memorial, ¶ 64; Peru's Counter-Memorial, ¶¶ 215–218; **AALA-1**, ICSID Convention, Art. 48(3); **AALA-6**, C. Schreuer (ed.), *The ICSID Convention: A Commentary* (2009) ("Schreuer"), Art. 48, ¶¶ 44–47; *see also* **AALA-3**, *Amco* Decision on Annulment, ¶ 32 (noting that "[f]ailure to deal with one or more questions raised by the parties would entail annulment of the award where such omission amounts to 'failure to state reasons upon which [the award] is based' (Art. 52(1)(e), Convention). Such an omission could, moreover, amount in particular situations to 'a serious departure from a fundamental rule of procedure' (Art. 52(1)(d)) and to a manifest excess of power (Art. 52(1)(b))"); **AALA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 110 ("[I]f a Tribunal's failure to address a particular question submitted to it might have affected the Tribunal's ultimate decision, this could, in the view of some ad hoc Committees, amount to a failure to state reasons and could warrant annulment. Ad hoc Committees have also noted that such failure could amount to a serious departure from a fundamental rule of procedure."); **RALA-31,** *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 July 2010) (Griffith, Robinson, Tresselt) ("*Enron* Decision on Annulment"), ¶ 222 ("As has been noted, pursuant to these provisions, a tribunal has a duty to deal with each of the *questions ('pretensiones')* submitted to it"); **RALA-28,** *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic (16 September 2011) (Griffith, Söderlund, Ajibola) ("*Continental Casualty* Decision on Annulment"), ¶ 97 ("As observed above, a failure by a tribunal to consider one of the *questions* submitted to it for decision, such as a specific defence raised by the respondent, may in certain circumstances amount to a serious departure from a fundamental rule of procedure."); **RALA-32**, *Rumeli* Decision on Annulment, ¶ 84 ("If the arguments of the parties have been correctly summarized and *all the claims have been addressed*, there is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so.") (emphasis added); **AALA-14**, *Perenco* Decision on Annulment, ¶ 125 ("a failure to consider a question or a point raised by a Party that is critical to the Tribunal's decision may, in certain cases, amount to a serious departure from a fundamental rule of procedure."); **RALA-23,** *Pawlowski* Decision on Annulment, ¶¶ 54–55, 59, 201 ("The tribunal is required to deal with all claims and/or defenses specifically raised for the tribunal's determination.").

128 Peru's Counter-Memorial, § VI.B(1).

129 *Supra* ¶¶ 15–26, 47.

130 *Id*., ¶¶ 214, 217.

60. *First*, Peru acknowledges that, in its own words, "a tribunal's failure to decide a claim before it may, in principle, amount to a departure from a fundamental rule of procedure."[131] As Freeport explained, this is exactly what the Tribunal did.[132] By failing to decide Freeport's claims for penalties and interest on the Royalty Assessments—claims over which the Tribunal affirmed jurisdiction—the Tribunal majority failed to determine claims squarely before it.[133] If the Committee accepts Freeport's description of the Award, as it should, that should be the end of the matter.

61. *Second*, Peru's argument that a tribunal's failure to consider specific "arguments" or "evidence" does not constitute a serious departure from a fundamental rule of procedure is beside the point.[134] This is not a case in which the Tribunal merely failed to address a line of argument or a piece of evidence—though it did so in multiple respects.[135] Rather, the Tribunal failed altogether to decide claims that were properly before it. Freeport's claims for penalties and interest on the Royalty Assessments were expressly pleaded, quantified, and placed before the Tribunal for decision.[136] The Tribunal's own *dispositif* confirmed its jurisdiction over the claims.[137] Having accepted these questions for determination, the Tribunal was bound by Article 48(3) to decide them.[138]

62. *Third*, the decisions Peru cites for the irrelevant proposition that failing to address a particular argument does not warrant annulment in fact *confirm* that the Tribunal committed an annullable error here.[139] Each of those decisions distinguishes between (*i*) a failure to address *every* argument—which may not result in annulment, and (*ii*) a failure to address a *claim*—which does. For example:

(a) In *Pawlowski*, the committee affirmed that "[t]he tribunal is required to deal with all claims and/or defenses specifically raised for the tribunal's determination."[140] Applying this test, the committee found no basis for annulment because the tribunal expressly decided the individual claims, even if it did not address every argument related to those claims.[141]

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131 *Id*., ¶ 214.

132 Freeport's Memorial, ¶ 64.

133 *Id*., ¶ 63.

134 Peru's Counter-Memorial, ¶¶ 215–218.

135 Freeport's Memorial, ¶¶ 39, 60(b), 67.

136 *See* **AA-1**, *Freeport* Award, ¶¶ 967–973; **AA-2**, Freeport Memorial, §§ IV.B.3, V.B.2; **AA-4**, Freeport Reply, §§ II.C.4, IV.

137 **AA-1**, *Freeport* Award, ¶ 1047.

138 **AALA-1**, ICSID Convention, Art. 48(3).

139 *See generally* Peru's Counter-Memorial, ¶¶ 214–218, 220, 221, 226.

140 **RALA-23**, *Pawlowski* Decision on Annulment, ¶ 55.

141 *Id*., ¶¶ 328, 349.

Here, by contrast, the Tribunal did not address Freeport's claim *at all*—the very type of failure *Pawłowski* identified as ground for annulment.

(b) The *Rumeli*, *Tulip*, and *Perenco* committees also expressly held that, while a tribunal need not "explicitly . . . address each and every one of the arguments raised in support of the particular claims," "all the claims [must] have been addressed."[142] These decisions therefore likewise support annulment here since the Tribunal failed to address Freeport's Royalty penalties and interest claims entirely.

63. Peru's argument—relying on these decisions—that a tribunal satisfies Article 48(3) so long as the committee finds that that "the arguments of the parties have been correctly summarized and all the claims have been addressed" undermines its own position.[143] Contrary to Peru's framing, the Award fails this test. As Freeport explained, the claims at issue have *not* been addressed.[144] The single sentence in paragraph 986 that Peru cites does not constitute a decision on the claims.[145] Rather, as discussed above, it is a circular, and inexplicable reference back to the jurisdictional section.[146] The result is precisely what Article 48(3) forbids: a claim within the Tribunal's jurisdiction left undecided. The weight of authority confirms that such a failure should result in annulment under Article 52(1)(d).[147]

64. In short, if the Committee agrees that the Tribunal failed to decide Freeport's claims—as it should—Peru has not identified any reason why such failure would not constitute a serious departure from a fundamental rule of procedure.

B. EVEN ON PERU'S CASE, THE TRIBUNAL'S DECISION WOULD CONSTITUTE A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE.

65. Even if, as Peru argues, the Tribunal majority had dismissed Freeport's claims based on penalties and interest on the Royalty Assessments on jurisdictional grounds, this would still have constituted a serious departure from a fundamental rule of procedure warranting annulment. The Parties never raised this issue during the arbitration, and Freeport had no opportunity to respond. By extending its jurisdictional

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142 **RALA-32**, *Rumeli* Decision on Annulment, ¶ 84; *see also* **RALA- 5**, *Tulip* Decision on Annulment, ¶ 152 (confirming that a tribunal's "duty to afford the parties a fair hearing" means that tribunals have an obligation "to give reasons for their decisions."); **AALA-14**, *Perenco* Decision on Annulment, ¶ 125 ("a failure to consider a *question* or a point raised by a Party that is critical to the Tribunal's decision may [] amount to a serious departure from a fundamental rule of procedure.") (emphasis added).

143 Peru's Counter-Memorial, ¶ 218.

144 *See supra*. ¶¶ 13–26.

145 Peru's Counter-Memorial, ¶¶ 92, 235 (citing to **AA-1**, *Freeport* Award, ¶ 986).

146 *See supra*. ¶¶ 18–19.

147 *See supra*. ¶¶ 59, 62.

findings on the Tax Assessments' penalties and interest claims to a wholly distinct set of claims, the Tribunal would have decided the issue *sua sponte*—outside the legal framework submitted by the Parties—without giving them an opportunity to be heard.

66. Peru does not dispute that the right to be heard is a fundamental rule of procedure.[148] It argues instead that there was no departure here because (*i*) the majority's reasoning was "aligned with the legal framework established by the Parties," (*ii*) both Parties had "ample opportunity" to address whether penalties and interest on the Royalty Assessments were "taxation measures" under the TPA's carve-out, and (*iii*) the Tribunal was "obliged" to "independently assess its own jurisdiction."[149] Each of these arguments fails.

67. *First*, Peru concedes that a violation of the right to be heard may result in annulment under Article 52(1)(d).[150] It does not dispute that committees have annulled awards where a tribunal decided an issue that "did not form part of the legal framework established by the Parties and was never raised by the Tribunal."[151] Peru further accepts that the right to be heard guarantees each party an opportunity to state its claims or defenses and to submit all supporting arguments and evidence.[152] And Peru acknowledges that here, if the Tribunal dismissed the Royalty penalties and interest claims under Article 22.3.1's tax exclusion, it would have done so without the Parties ever raising, briefing, or arguing the issue during the arbitration.[153] These undisputed facts and legal standard alone suffice for the Committee to conclude that the Tribunal would have violated Freeport's fundamental right to be heard.

68. *Second*, there is no support for Peru's argument that the Tribunal "did not breach the claimant's right to be heard, since the tribunal's reasoning remained squarely within the legal framework of the dispute," even though the issue was never raised or briefed.[154] Peru relies on decisions it argues allow a tribunal to rely on reasoning or arguments not expressly developed by the parties so long as the Tribunal stays within the legal framework the parties actually established.[155] Yet the committees addressing

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148 Peru's Counter-Memorial, ¶ 225.

149 Peru's Counter-Memorial, § VI.B(2).

150 *Id*., ¶ 225.

151 **AALA-12**, *TECO* Decision on Annulment, ¶ 190. *See* Peru's Counter-Memorial, ¶ 227.

152 *Id*., ¶ 225.

153 *Id*., ¶ 235.

154 *Id*., ¶ 234.

155 *Id*., ¶¶ 225–230 (citing to **RALA-34**, *Klöckner* Decision on Annulment ¶ 91; **RALA-8**, *Wena* Decision on Annulment, ¶ 66–67; **AALA-5**, *Vivendi I* Decision on Annulment, ¶ 84; **RALA-44**, *Vivendi II* Decision on Annulment 254–57; **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014) (Fernández-Armesto, Abraham, Danelius) ("*Caratube* Decision on Annulment"), ¶ 90–94; **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No.

this issue, including those on which Peru relies, make clear that the relevant "legal framework" is established by the *arguments the parties actually presented* during the arbitration.[156] None of these decisions support the notion that a tribunal may decide issues entirely outside the parties' claims and submissions.[157] For example:

(a) Peru cites *Caratube* for the proposition that a tribunal may rely on its own interpretation of a treaty without violating the right to be heard.[158] But Peru ignores the fact that the

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ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (22 September 2014) (Oreamuno, Cheng, Knieper) ("*El Paso* Decision on Annulment"), ¶ 284; **RALA-5**, *Tulip* Decision on Annulment, ¶ 80; **RALA-25**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, Decision on the Request for Annulment (2 February 2018) (Howell, Bernardini, Rodríguez), ¶ 218; **RALA-26**, *Orascom* Decision on Annulment, ¶ 144–148; **AALA-14**, *Perenco* Decision on Annulment, ¶ 125; **RALA-16**, *Niko* Decision on Annulment, ¶ 77.

156 *See*, *e.g.*, **RALA-34**, *Klöckner* Decision on Annulment, ¶ 91 ("The real question is whether, by formulating its own theory and argument, the Tribunal goes beyond the 'legal framework' established by the Claimant and Respondent."); **AALA-5**, *Vivendi I* Decision on Annulment, ¶ 85 (finding that there was no serious departure from a fundamental rule of procedure only because the "Tribunal's analysis of issues was clearly based on the materials presented by the parties and was in no sense *ultra petita*."); **RALA-8**, *Wena* Decision on Annulment, ¶ 66 (accepting in principle that a serious departure from a fundamental rule of procedure would occur if the applicant "was not offered the opportunity to address the issue of the appropriate rule of interest."); **AALA-10**, *Pey Casado I* Decision on Annulment, ¶¶ 262, 266 (finding that the tribunal "should have allowed each party the right to present its arguments and to contradict those of the other party" regarding "the remedy for breach of Article 4 of the BIT."); *id.*, ¶ 192 ("This is not a situation where the Tribunal stepped out of the legal framework established by the Claimants. The Tribunal found liability of Chile on the basis of arguments that had been presented, albeit briefly, by one party."); **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic (22 September 2014) (Oreamuno, Cheng, Knieper) ("*El Paso* Decision on Annulment"), ¶ 284 (finding no serious departure from a fundamental rule of procedure where Argentina had "ample opportunity to defend itself and counter all the arguments brought by the Claimant and its experts."); **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014) (Fernández-Armesto, Abraham, Danelius) ("*Caratube* Decision on Annulment"), ¶ 94 ("[T]ribunals do not violate the parties' right to be heard if they ground their decision on the legal reasoning not specifically advanced by the parties, provided that the tribunal's arguments can be fitted within the legal framework argued during the procedure and therefore concern aspects on which the parties could reasonably be expected to comment, if they wished their views to be taken into account by the tribunal."); **RALA-5**, *Tulip* Decision on Annulment, ¶ 80 ("each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case"); **RALA-25**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, Decision on the Request for Annulment (2 February 2018) (Howell, Bernardini, Rodríguez), ¶ 270 (finding that a serious departure would occur if a tribunal decides an issue within briefing that "has not been extracted from what was proposed by the parties.") (free translation); **RALA-26**, *Orascom* Decision on Annulment, ¶ 146 (citing to **RALA-35**, *Caratube* Decision on Annulment, ¶ 94); **AALA-14**, *Perenco* Decision on Annulment, ¶ 127 ("a tribunal does not violate the parties' right to be heard if they ground their decision on legal reasoning not specifically argued by the parties, insofar as the tribunal's reasoning can be fitted within the legal framework argued during the procedure."); **RALA-16**, *Niko* Decision on Annulment, ¶ 183 (rejecting the applicants' argument that they were not afforded an "opportunity to 'present their clams or defenses . . .'" on the basis that there was no allegation that there were "new allegations or evidence that merited further submissions.").

157 *Cf.* Peru's Counter-Memorial, ¶¶ 233–234.

158 *Cf. id.*, ¶ 234.

committee in *Caratube* emphasized that the relevant question—the definition of "investment" in the relevant BIT—had been raised and argued by the parties.[159] The committee noted that, while much of the discussion had focused on Article 25 of the ICSID Convention, "it is equally accurate that both parties also referred to the BIT," making "both [instruments] part of the legal framework."[160] Moreover, the BIT definition of "investment" was "closely linked and in reality inseparable" from the Convention definition, which the parties extensively debated.[161] Far from supporting Peru, *Caratube* in fact contradicts Peru's argument.

(b) Peru similarly mischaracterizes the decision in *Vivendi II*, asserting that the tribunal "rejected both parties' valuation methods and applied its own."[162] In fact, the committee found no denial of the right to be heard because the valuation approach adopted by the tribunal "was originally the method proposed by Respondent."[163]

(c) Peru's reference to *Wena*, asserting that "the tribunal awarded compound interest despite Claimant not having specifically requested it,"[164] is likewise misleading. The committee declined annulment after finding that (*i*) the claimant had requested the "fixing of 'appropriate' interest," (*ii*) both parties had briefed that issue, and (*iii*) the "Parties admit[ed] that the allocation of compound interest is . . . one of the methods followed by international tribunals."[165]

69. Peru's argument that Freeport's reliance on *Pey Casado I* and *TECO* "overlooks the broader and more consistent body of jurisprudence" is irrelevant.[166] None of the decisions Peru cites contradict the main findings in those two decisions: that deciding issues never argued by the parties, without giving them an opportunity to be heard, violates their fundamental right to be heard.[167] Peru thus essentially leaves those decisions unrebutted, even though they demonstrate that annulment is warranted here. In particular:

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159 **RALA-35**, *Caratube* Decision on Annulment, ¶ 177.

160 *Id*., ¶¶ 177–178.

161 *Id*., ¶ 178.

162 Peru's Counter-Memorial, ¶ 233.

163 *Cf. id*., ¶ 233 *with* **RALA-44**, *Vivendi II* Decision on Annulment, ¶¶ 254–255.

164 Peru's Counter-Memorial, ¶ 233.

165 **RALA-8**, *Wena* Decision on Annulment, ¶¶ 66–70.

166 Peru's Counter-Memorial, ¶ 233.

167 Freeport's Memorial, ¶ 65.

(a) In *Pey Casado I,* the committee held that the tribunal had seriously departed from a fundamental rule of procedure by calculating damages for a denial of justice breach without giving the parties an opportunity to brief the issue.[168]

(b) In *TECO*, the committee found that the tribunal's decision awarding interest on the claimant's historical damages, based on an "unjust enrichment" theory, was a serious departure from a fundamental rule of procedure because neither party had raised that theory in their submissions.[169]

70. *Third*, Peru's argument that both parties had "ample opportunity" to brief whether penalties and interest on the Royalty Assessments were "taxation measures" is simply wrong.[170] The record shows that this issue was never briefed, argued, or presented to Freeport for a response. In particular:

(a) Peru never argued that penalties and interest on the Royalty Assessments were "taxation measures" under Article 22.3.1 of the TPA. From the outset, its tax-exclusion objection was explicitly limited to penalties and interest on the Tax Assessments.[171] Peru confirmed this position in each of its written submissions, at the hearing, and even in its post-hearing brief.[172] The Tribunal itself recorded this in the Award, noting that Peru argued only that

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168 **AALA-10**, *Pey Casado I* Decision on Annulment, ¶¶ 261–271.

169 **AALA-12**, *TECO* Decision on Annulment, ¶ 189.

170 *Cf.* Peru's Counter-Memorial, ¶ 235.

171 **AA-3**, Peru Counter-Memorial, ¶ 463 (arguing that both the claims based on the Royalty and Tax Assessments "are outside Article 10.18.1's limitations period, and the *claims based on the Tax Assessments are further barred by TPA Article 22.3.1's carve-out for taxation measures*.") (emphasis added); *id.*, ¶ 456 ("[A]ll of Claimant's claims based on SUNAT's decision not to waive penalties and interest arising from SUNAT's *Tax* Assessments against SMCV should be dismissed outright. Article 22.3.1 of the TPA expressly excludes taxation measures from the scope of protection under Chapter Ten of the TPA."); *id*., ¶ 459 ("Second, with respect to the penalties and interest that SUNAT maintained on its Royalty Assessments against SMCV, Claimant's claims under the TPA are time-barred in accordance with Article 10.18.1's limitations provision."); *id*., ¶ 468 ("Second, regarding Claimant's claims based on SUNAT's refusal to waive penalties and interest on Royalty and Tax Assessments: (a) its claims based on *Tax* Assessments are barred under Article 22.3.1 of the TPA; and (b) its claims based on Royalty Assessments are time barred.") (emphasis added).

172 **AA-3**, Peru Counter-Memorial, ¶ 446, n. 904 ("As the taxation-measure carve out under TPA Article 22.3.1 expressly bars claims of breach of the TPA based on taxation measures, and as noted at paragraphs 457-58 below that tax assessments are taxation measures within the meaning of the TPA, to the extent that Claimant's claims for breach of the TPA or related damages are based on *Tax* Assessments, they fall entirely outside of the Tribunal's jurisdiction.") (emphasis added); **AA-5**, Peru Rejoinder, ¶ 692 ("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.") (emphasis added); *id.*, ¶ 693 ("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.") (emphasis added); **AA-57**, Peru Comments on the Non-Disputing Party Submission of the United States of America ¶ 32

"penalties and interests [on] Tax Assessments constitute taxation measures, which are excluded from the scope of Article 10.5 of the TPA under Article 22.3.1 of the TPA."[173] Freeport, accordingly, never addressed this issue in its submissions.[174]

(b) Peru's suggestion that Freeport should have anticipated the Tribunal's rulings and independently raised the issue far exceeds what can be reasonably expected from a party.[175] Nothing in the pleadings, procedural orders, or at the hearing indicated that the Tribunal might, by Peru's request or on its own initiative, extend the tax exclusion objection to a distinct set of claims based on the Royalty Assessments.[176]

(c) Peru's argument that Freeport had "ample opportunity to brief and argue" the issue because the Tribunal questioned the Parties' experts during the hearing is equally meritless.[177] The exchanges Peru selectively cites arose in discussions responding to Peru's attempt to exclude tax-related penalties and interest as "taxation measures."[178] Neither the Tribunal's questions nor the experts' answers addressed whether penalties and interest on the Royalty Assessments qualify as "taxation measures."[179] Nothing in that discussion suggested that the Tribunal intended to treat royalties as taxes—or to extend the tax carve-out to non-tax

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("Under the correct interpretation of Article 22.3.1 that Perú and the United States share, it is clear that penalties and interest imposed because of a taxpayer's *failure to pay its taxes* are 'taxation measures,'") (emphasis added); **AA-59**, Peru Opening Presentation, slide 163 ("Claims *related to Tax Assessments*: These claims are barred under Article 22.3.1 of the TPA, which excludes TPA claims based on 'taxation measures'"); **AA-9**, Tr. 3042:18–3043:4 (Day 10) (Resp. Closing); **AA-11**, Peru Post-Hearing Brief, ¶¶ 285–287 (arguing that "the Tribunal should find that penalties and interest on the *Tax Assessments* are 'taxation measures,' and that it lacks jurisdiction over Claimant's related claims") (emphasis added). *See also* **AA-55**, Non-Disputing Party Submission of the United States of America, ¶ 32 (noting with respect to Article 22.3.1 that ""practice" in this context includes not only the application of, or failure to apply a *tax*, but also the enforcement or failure to enforce a *tax*") (emphasis added).

173 **AA-1**, *Freeport* Award, ¶ 526.

174 *See generally* **AA-50**, Freeport Notice of Arbitration; **AA-52**, Freeport Notice of Additional Claims; **AA-2**, Freeport Memorial; **AA-4**, Freeport Reply; **RA-2**, Freeport Rejoinder on Jurisdiction; **AA-56**, Freeport Comments on the Non-Disputing Party Submission of the United States of America; **AA-58 (CD-01)**, Freeport Opening Presentation; **AA-67 (CD-11)**, Freeport Closing Presentation; **AA-10**, Freeport Post-Hearing Brief.

175 Peru's Counter-Memorial, ¶¶ 235, 246.

176 *See e.g.*, *id*., ¶ 235 (recognizing that Article 22.3.1 of the TPA's taxation measures exclusion clause "had been pleaded by both parties in the context of penalties and interest of *Tax* Assessments") (emphasis added).

177 *Id*., ¶¶ 236–246.

178 *Id*., ¶¶ 236 *et seq*.; **AA-8**, Tr. 2689 6-13 (Day 8) ("*taxes* may not exist by themselves. They need, for example, procedural rules, a penalty regime. They need also other kinds of rules so that the *tax* may be complied with.")

179 *See* **AA-8**, Tr. 2568-2754 (Day 8).

measures—an approach Peru itself consistently rejected.[180] Moreover, even if the Tribunal had raised the issue with the experts, this would not satisfy *Freeport*'s right to be heard. In *Pey Casado,* the committee rejected a similar argument, holding that a question posed by the tribunal during a hearing did not fulfill the right to be heard.[181]

(d) Had the Tribunal intended to afford the Parties a real opportunity to address that issue, it should have invited focused submissions in closing arguments or in post-hearing briefs. It did not. Freeport expressly encouraged the Tribunal to raise questions to ensure all concerns were addressed.[182] When the Tribunal asked whether post-hearing briefs were necessary, both Parties stated they would be useful to address any Tribunal questions.[183] Freeport emphasized that "the primary focus" of its post-hearing submissions should be to "address specific questions or concerns of the Tribunal."[184] Despite Peru's closing submissions—which again expressly limited Peru's Article 22.3.1 objection to the *Tax* Assessments[185]—the Tribunal stated it had "no additional questions" and asked the Parties merely to "focus on the assessment of the evidence," in line with their "closing submissions," because "this is what we are interested in."[186] The Tribunal thus assured the Parties that no further legal issues required clarification and then, on Peru's case, decided the case on an issue never raised or briefed.

71. *Finally*, Peru's arguments that the Tribunal has "the authority and the duty to determine [its] jurisdiction" and that it is "immaterial whether Peru invoked the taxation-measures exclusion clause in connection with penalties and interest on Royalty Assessments" because "the Tribunal was entitled—indeed obliged—to independently assess its own jurisdiction" miss the point.[187] The Tribunal's competence

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180 *Cf.* Peru's Counter Memorial, ¶¶ 236–246; *see generally* **AA-8**, Tr. 2568-2754 (Day 8). *See also* **AA-59**, Peru Opening Presentation, slide 163 ("Claims *related to Tax Assessments*: These claims are barred under Article 22.3.1 of the TPA, which excludes TPA claims based on 'taxation measures'").

181 **AALA-10**, *Pey Casado I* Decision on Annulment, ¶¶ 262–263 (noting that the parties "had very little time at the hearing to answer the question posed by the President. The Committee agrees with Chile that a party cannot respond to such a question and present its arguments on the consequences of a potential breach of a substantive provision of a Bilateral Investment Treaty 'in one minute'").[182] **AA-9**, Tr. 3050 (Day 10) (Closing).

182 **AA-9**, Tr. 3050 (Day 10) (Closing).

183 **AA-9**, Tr. 3050-3056 (Day 10) (Closing).

184 **AA-9**, Tr. 3050 (Day 10) (Closing).

185 **RA-3,** Respondent's Closing Statement Presentation, Slide 83 ("The *enforcement of a tax* by applying penalties and interest is a 'practice' related to 'taxation.' . . . The Tribunal also has no jurisdiction over penalties and interest on **Royalty Assessments**, but *for a different reason*: because the claims fall outside the 3-year limitations period under the TPA.") (emphases in italics added).

186 **AA-9**, Tr. 3056:3-20 (Day 10) (Closing).

187 Peru's Counter-Memorial, ¶¶ 231-232.

to determine its own jurisdiction does not permit it to disregard Freeport's right to be heard. Freeport's challenge is not simply that the Tribunal would have decided the issue *sua sponte* but that it would have done so without ever raising it to the Parties and giving them the opportunity to be heard. The principle of competence-competence therefore provides no support for Peru's argument.[188]

72. In short, even if the Tribunal had decided Freeport's claims, it would have done so on its own initiative, based on arguments never raised by the Parties and on which they had no opportunity to comment. Such a decision would still constitute a serious departure from a fundamental rule of procedure.

C. THE TRIBUNAL'S DEPARTURES WERE "SERIOUS."

73. Peru's only other argument for why annulment under Article 52(1)(d) is not warranted is that there is no "serious" departure because the Tribunal "would have" dismissed Freeport's claims based on penalties and interest on the Royalty Assessments, had it considered them.[189] This is wrong as a matter of both law and facts.

74. *First,* Peru's contention that a "serious" departure requires Freeport to prove that it "would have prevailed" on its claims absent the procedural failure is unsupported and contrary to well-settled annulment jurisprudence. The consistent approach is that a departure is "serious" if "there is a distinct possibility (a 'chance') that it may have made a difference on a critical issue."[190] The key question is whether the error related to an issue that *could have* influenced the outcome rather than a tangential issue or one that was already resolved in the applicant's favor. Committees have repeatedly held that applicants are "not required to show that the result would have been different, that it would have won the case, if the rule had been respected"[191] or that "the violation of the rule of procedure was decisive for the outcome."[192]

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188 *Cf. id*., ¶ 231.

189 *Id*., ¶ 251.

190 **AALA-10**, *Pey Casado I* Decision on Annulment, ¶ 77; *see also* **RALA-2**, *Iberdrola Energía S.A. v. The Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment (13 January 2015) (Bourie, Bernardini, Shaw) ("*Iberdrola I* Decision on Annulment, ¶ 104 ("a serious breach potentially entails a different decision from the one that would have been handed down if the procedural rule that was breached had been observed."); **RALA-5**, *Tulip* Decision on Annulment,¶ 78 ("an applicant must demonstrate that the observance of the rule had the *potential* of causing the tribunal to render an award substantially different from what it actually decided."); **AALA-12**, *TECO* Decision on Annulment, ¶ 85 ("What a committee can determine however is whether the tribunal's compliance . . . could potentially have affected the award."); **AALA-14**, *Perenco* Decision on Annulment, ¶ 137 ("The Applicant, however, has the burden to demonstrate that there is a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal's decision.").

191 **AALA-10**, *Pey Casado I* Decision on Annulment, ¶ 78.

192 **AALA-11**, *Occidental* Decision on Annulment, ¶ 62.

75. By contrast, committees have emphasized that they cannot speculate on what the tribunal "would have" held absent the annullable error.[193] As the *TECO* committee explained:

> Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected *is a highly speculative exercise*. *An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which it is not within its powers to do*.[194]

76. The decisions Peru relies on for the proposition that an applicant must show an "actual material effect on the award"[195] do not support its position. In *Continental Casualty, OIEG,* and *CDC,* committees confirmed that they "cannot substitute [their] determination on the merits for that of the tribunal" or "'second guess' their substantive result."[196] *Wena, Azurix,* and *Fraport* similarly make clear that demonstrating a "material effect" is satisfied by showing the possibility of a different outcome, not by speculating what the tribunal "would have" decided.[197] None of these decisions thus support Peru's broader position. In any event, the majority of these decisions are over a decade old, and the recent jurisprudence consistently applies the "distinct possibility" standard discussed above.[198]

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193 *See, e.g.*, **AALA-10**, *Pey Casado I* Decision on Annulment, ¶ 78 ("The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected."); **RALA-5**, *Tulip* Decision on Annulment, ¶ 78 ("To require an applicant to prove that the award would actually have been different . . . may impose an unrealistically high burden of proof."); **AALA-12**, *TECO* Decision on Annulment, ¶ 85 ("An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which it is not within its powers to do."); **AALA-11**, *Occidental* Decision on Annulment, ¶ 62 ("the applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied."); **AALA-14**, *Perenco* Decision on Annulment, ¶ 137 (noting that a "serious" error " need not be outcome determinative in the sense that the Applicant has to demonstrate that the Tribunal's decision would have been different").

194 **AALA-12**, *TECO* Decision on Annulment, ¶ 85 (emphasis added).

195 *See* Peru's Couter-Memorial ¶ 249 (citing **RALA-8**, *Wena* Decision on Annulment, ¶ 58; **RALA-4**, *CDC* Decision on Annulment; **AALA-9**, *Fraport* Decision on Annulment, ¶ 246; **RALA-27**, *Malicorp* Decision on Annulment, ¶¶ 33–35, **RALA-28**, *Continental Casualty* Decision on Annulment, ¶ 248; **RALA-30**, *Azurix* Decision on Annulment, ¶ 234; **RALA-41**, *El Paso*, Decision on Annulment, ¶ 269).

196 **RALA- 28**, *Continental Casualty* Decision on Annulment, ¶ 82; **RALA-4,** *CDC* Decision on Annulment, ¶ 35; *see also* **RALA-29**, *OIEG* Decision on Annulment, ¶ 248 (noting that "second-guessing of decisions taken in the original arbitration . . . is improper for an annulment proceeding").

197 **RALA-8,** *Wena* Decision on Annulment, ¶ 61 (rejecting an application under Article 52(1)(d) because "[t]he Applicant does not show the impact that this issue *may have had* on the Award.") (emphasis added); **RALA-30**, *Azurix* Decision on Annulment, ¶ 238 (rejecting an Article 52(1)(d) application where there was no basis that a different outcome was "reasonably likely."); **AALA-9**, *Fraport* Decision on Annulment, ¶ 235 (finding a serious departure from a fundamental rule of procedure where the departure concerned an "issue which came to form the ratio of the Tribunal's Award."); *Cf.* Peru's Counter-Memorial, ¶ 249, n. 433.

198 *See supra*. ¶ 74.

77. *Second*, the Tribunal majority's departures are unquestionably *serious* under Article 52(1)(d). Regarding the first departure, the Tribunal's failure to address Freeport's claims based on penalties and interest on the Royalty Assessments clearly "may have made a difference on a critical issue," as it led to the dismissal of claims worth US $417 million—claims that Peru itself describes as "important" and significant in quantum—without explanation.[199]

78. The second departure, under Peru's case, is equally "serious." Allowing the Parties to brief the issue could have "made a difference" on the same critical issue.[200] Committees consistently treat violations of the right to be heard on dispositive issues as serious.[201] In *TECO*, for example, the committee explained:

> The Committee cannot of course comment on the effects the discussion of the unjust enrichment theory may have had on the Parties' respective rights. What is clear however is that the Parties, if given the right to comment on this issue by the Tribunal, could have made arguments that at least had the potential to affect the ultimate financial outcome of the case. That is sufficient for the Committee to hold that the departure from the Parties' right to be heard was serious and warrants annulment.[202]

79. The same reasoning applies here. Had Freeport been given the opportunity to comment on whether the Royalty penalties and interest claims fell under the tax exclusion, it would have presented strong arguments demonstrating that this approach was completely wrong—arguments that could clearly have had at least the potential to affect the decision.[203]

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80. In sum, the Tribunal majority's failure to decide Freeport's US$417 million claims based on penalties and interest on the Royalty Assessments constitutes a serious departure from a fundamental rule of procedure because the Tribunal failed to "deal with every question" submitted to it. Further, even if the Tribunal *had* declined jurisdiction over these claims based on Article 22.3.1's tax exclusion, it still would have committed a serious departure from a fundamental rule of procedure by violating Freeport's right to be heard on a dispositive jurisdictional issue. These are precisely the types of serious violations that Article 52(1)(d) is designed to correct in order to maintain the integrity of the ICSID process.

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199 Peru's Counter-Memorial, ¶ 244.

200 **AALA-10**, *Pey Casado I* Decision on Annulment, ¶ 77.

201 **AALA-9**, *Fraport* Decision on Annulment, ¶¶ 218–247; **AALA-10**, *Pey Casado I* Decision on Annulment, ¶¶ 261–271; **AALA-12**, *TECO* Decision on Annulment, ¶¶ 189–198.

202 **AALA-12**, *TECO* Decision on Annulment, ¶ 195.

203 Freeport's Memorial, ¶¶ 29–30, 65.

V. THERE IS NO BASIS TO REFUSE ANNULMENT IF THE TRIBUNAL COMMITTED AN ANNULLABLE ERROR.

81. Recognizing the weakness of its position, Peru makes two last-ditch attempts to shield the Award from annulment even if the Committee finds annullable errors under Article 52. *First*, Peru contends that Freeport's application amounts to an abuse of process because Freeport could have sought supplementation of the Award under Article 49(2) of the Convention and should be denied on that basis. *Second*, Peru argues that, even if the Committee finds an annullable error, it should exercise "broad discretion" to nevertheless uphold the Award.

82. Each of these desperate fallback arguments fails. *First*, Article 49(2), unlike Article 52, addresses only minor or clerical omissions, not a failure to address an entire set of claims. It therefore would not have been an appropriate remedy here, given the seriousness of the Tribunal's errors. In any event, nothing in the Convention, Arbitration Rules, or ICSID practice supports the proposition that a party must seek rectification or supplementation under Article 49(2) as a prerequisite to annulment under Article 52, much less that failure to do so constitutes an abuse of process. *Second*, Peru's argument that the Tribunal, if it finds an annullable error, should nevertheless refuse to annul based on residual "discretion" fares not better. No committee has ever exercised discretion to overlook an annullable error, and Peru offers no basis for why this Committee should be the first. Were the Committee to do so here—despite the fundamental and manifest errors in the Award *and* after finding those errors annullable—it would cast serious doubt on the integrity of the ICSID system.

A. PERU'S ABUSE OF PROCESS ALLEGATIONS ARE BASELESS AND CANNOT PREVENT FREEPORT FROM EXERCISING ITS RIGHT TO REQUEST ANNULMENT.

83. Peru argues that "[e]ven if the Committee were to determine that the Tribunal failed to address an issue that was subject to its jurisdiction," partial annulment would be "unwarranted" because Freeport "ought to have requested supplementation of the Award under Article 49(2) of the ICSID Convention."[204] This argument fails, because Article 49(2) addresses only minor omissions or clerical-type errors, and thus was plainly inapplicable here. In any event, Freeport clearly was not required to invoke Article 49(2) as a precondition to seeking annulment. Peru cites no authority for such a requirement, and, as far as Freeport is aware, none exists.

84. *First*, Peru's reliance on Article 49(2) is inapposite for the simple reason that the provision does not apply to fundamental, substantive errors like those present here. As Peru itself acknowledges,

[204] *Cf.* Peru's Counter-Memorial, ¶ 267.

Article 49(2) addresses only minor omissions or clerical, arithmetical, or similar errors.[205] A failure to decide an entire set of claims valued at US$417 million cannot possibly be characterized as a "minor omission" or a "clerical error," regardless of Peru's attempts. As the *Masdar* tribunal noted when addressing a supplementation request under Article 49(2), the remedy of supplementation is "limited" to "unintentional omissions of technical nature," so is "not a sufficient remedy for a failure to address major facts and arguments [that] go to the core of the tribunal's decision."[206] Consistent with this, committees have consistently held that annulment—not rectification or supplementation—is the appropriate remedy where a tribunal has failed to "deal with . . . all of the parties' heads of claim within its award"[207] or where the omission "may affect the reasoning supporting the Award."[208]

85. To the extent that Article 49(2) has any relevance in the context of annulment, it provides limited context only. Specifically, committees have interpreted Article 52(1)(e) in the context of Article 49(2) to hold that Article 52(1)(e) is not meant to address "unintentional omissions of relatively minor points" or to "rectify [a] clerical, arithmetical or similar error in the award."[209] This interpretation is

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[205] *See, e.g.*, **AALA-26**, C. Schreuer (ed.), *The ICSID Convention: A Commentary* (2022), Art. 49, ¶ 89 (explaining that Article 49(2) is intended to address "inadvertent omissions of a technical character" and not an "omission affecting a fundamental aspect of the tribunal's reasoning."); *see* Peru's Counter-Memorial, ¶ 171.

[206] *Compare* Peru's Counter-Memorial, ¶ 171 *with* **AALA-24**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Decision on the Respondent's Request for a Supplementary Decision (29 November 2018) (Beechey, Born, Stern), ¶ 49; *see also* **AALA-26**, C. Schreuer (ed.), *The ICSID Convention: A Commentary* (2022), Art. 49, ¶¶ 86, 95).

[207] **AALA-27**, *Daimler Financial Services AG v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2025) (Zuleta, Felicioano, Khan), ¶ 87; *see also* **AALA-3**, *Amco* Decision on Annulment, ¶¶ 34–35 ("[a]ny omissions of relatively minor points may be repaired pursuant to Article 49(2) . . . the main reasoning of the award remaining unaffected by such insertion."); **RALA-8**, *Wena* Decision on Annulment, ¶ 101 ("Article 49(2). . . is not a sufficient remedy when such a decision may affect the sequence of arguments contained in the Award and require that it be reconsidered in the light of the Tribunal's decision on the omitted question."); **AALA-11**, *Occidental* Decision on Annulment, ¶ 67 ("the failure to address a particular argument raised by the Parties does not warrant annulment, unless it is decisive to the tribunal's decision (not obiter dictum)"); **RALA-37**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment (29 May 2019) (Mourre, Salaverry, Hernández) ("Teinver Decision on Annulment"), ¶ 210 (finding that annulment may occur where "the argument in question was so important that it would clearly have been determinative of the outcome."); **RALA-9**, *Cube* Decision on Annulment ¶ 324 (quoting **RALA-37**, Teinver Decision on Annulment", ¶ 210).

[208] **RALA-8,** *Wena* Decision on Annulment, ¶ 101; *see also* **AALA-3**, *Amco* Decision on Annulment, ¶ 34 ("Any omissions of relatively minor points may be repaired pursuant to Article 49(2) by simply inserting the Tribunal's conclusions thereof in the award, the main reasoning of the award remaining unaffected by such insertion."); **AALA-4**, *MINE II* Decision on Annulment, ¶ 5.13 ("The defect complained of by Guinea could not have been cured by supplementing the Award, but would have required in effect that it be reconsidered in the light of the Tribunal's decision on the 'omitted' question.").

[209] *See, e.g.*, **AALA-3**, *Amco* Decision on Annulment, ¶¶ 34–35 ("[a]ny omissions of relatively minor points may be repaired pursuant to Article 49(2) by simply inserting the Tribunal's conclusions thereof in the award, the main reasoning of the award remaining unaffected by such insertion . . .. In the present case, however, Indonesia alleges that the Tribunal had disregarded facts and arguments which, had they been considered,

consistent with the drafting history of the ICSID Convention. As Peru notes, the drafters excluded a tribunal's failure to "rule on *every* issue submitted" as an annullable error and instead provided Article 49(2) as a remedy for such minor errors.[210]

86. Here, the shocking failure to decide an entire set of Freeport's claims is not a mere "unintentional omission[] of relatively minor points."[211] Rather it is a fundamental and substantive error squarely within Article 52—not Article 49(2).[212] In *MINE II*, the committee, for instance, explained that Article 49(2) was not the appropriate remedy for complaints that "would have required in effect that [the award] . . . be reconsidered in the light of the Tribunal's decision on the 'omitted' question."[213] Here, because the Tribunal never reached the merits of Freeport's penalties and interest claims, any purported "correction" of the Award would have required drafting new substantive sections of the Award, including a detailed assessment of evidence and arguments that the Tribunal completely failed to undertake. Such an exercise would necessarily impact the Award's "main reasoning" and require the Tribunal to "reconsider[]"

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could have obliged the Tribunal to abandon the very bases of its Award."); **AALA-4**, *MINE II* Decision on Annulment, ¶ 5.13 ("The defect complained of by Guinea could not have been cured by supplementing the Award, but would have required in effect that it be reconsidered in the light of the Tribunal's decision on the 'omitted' question."); **RALA-8**, *Wena* Decision on Annulment, ¶ 101 ("However, the remedy provided for in Article 49(2) is not always sufficient in such a case, as other *ad hoc* Committees have pointed out. . . . It is not a sufficient remedy when such a decision may affect the sequence of arguments contained in the Award and require that it be reconsidered in the light of the Tribunal's decision on the omitted question."); **AALA-11**, *Occidental* Decision on Annulment, ¶ 67 ("the failure to address a particular argument raised by the Parties does not warrant annulment, unless it is decisive to the tribunal's decision (not obiter dictum)"); **RALA-37**, *Teinver* Decision on Annulment ¶ 210 ("a tribunal has no duty to follow the parties in the detail of their arguments, and that the sole fact of failing to address one or more of the same does not in itself entail annulment, unless the argument in question was so important that it would clearly have been determinative of the outcome."); **RALA-9**, *Cube* Decision on Annulment ¶ 324 (same).

210 **RALA-7**, ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-2 (1968) (excerpt), at p. 849 ("Mr. BROCHES (Chairman) suggested that Article 51 be amended to provide for a duty by the Tribunal to rule on every issue submitted to it and that a consequent change be made in Article 55 which would state that the failure to comply with this duty could be a ground for annulment. . . . Whereupon a vote was taken on the question whether arbitrators should be required to rule on every issue presented, with 32 delegates voting in the affirmative and none against. The meeting then voted on the question whether a failure to comply with this duty would give the parties the right to seek annulment and the motion was defeated by 8 to 6. Thirty delegations, however, then voted in favor of there being some kind of remedy where the Tribunal has failed to discharge its duty. A majority of 32 to none then indicated that the remedy should be in the nature of a supplemental review which was not identical with the revision of the award, and the Chairman announced that the Secretariat would try and prepare a draft provision giving effect to the sense of the meeting."). *Cf.* Peru's Counter-Memorial, ¶ 269.

211 **RALA-8,** *Wena* Decision on Annulment, ¶ 101.

212 **AALA-3**, *Amco* Decision on Annulment, ¶ 34.

213 **AALA-4**, *MINE II* Decision on Annulment, ¶ 5.13.

its analysis, instead of making a clerical clarification.[214] This confirms that the omission is substantive and can only be remedied through annulment under Article 52.

87. *Second*, contrary to Peru's positions, the ICSID Convention imposes no requirement to invoke Article 49(2)—or any other post-award remedy—before seeking annulment under Article 52.[215] Rather, each post-award remedy operates independently.[216]

88. Peru cannot cite a single case in which a committee denied annulment because the applicant did not first seek rectification or supplementation under Article 49(2). To the contrary, multiple committees have confirmed that Article 49(2) is *not* a procedural prerequisite to an Article 52 application as the two remedies address different types of tribunal error.

(a) In *Amco*, the committee held that the claimant's failure to exhaust Article 49(2) remedies did not preclude the claimant from seeking annulment under Article 52.[217] It explained that "in line with the international law rule that *a claimant does not need to exhaust inadequate remedies before resorting to remedies believed to be more efficient*, . . . Indonesia can have recourse to Article 52(1) without having previously requested the Tribunal, under Article 49(2), to decide questions which, according to Indonesia, it had omitted to decide in the Award."[218]

(b) Likewise, in *Klöckner* and *MINE II*, committees annulled awards because the tribunals had failed to address a question posed to them, even though the applicants had made no Article 49(2) applications.[219]

(c) The other decisions that Peru cites—*Wena*, *CDC*, *Tulip*, *Teinver* and *Cube*—confirm that Article 49(2) does not bar annulment.[220] They refused annulment only because no annullable error was found, not because the applicant had skipped Article 49(2).[221]

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214 **AALA-3**, *Amco* Decision on Annulment, ¶ 34; **RALA-8**, *Wena* Decision on Annulment, ¶ 101.

215 *Cf.* Peru's Counter-Memorial, § VIII.A.

216 *See generally* ICSID Convention, Articles 49–52.

217 **AALA-3**, *Amco* Decision on Annulment, ¶ 36 ("Indonesia can have recourse to Article 52(1) without having previously requested the Tribunal, under Article 49(2), to decide the questions which, according to Indonesia, it had omitted to decide in the Award.").

218 *Id*., ¶ 36 (emphasis added).

219 **RALA-34**, *Klöckner* Decision on Annulment, ¶¶ 131–164; **AALA-4**, *MINE II* Decision on Annulment, ¶¶ 6.98–6.108.

220 Peru's Counter-Memorial, ¶ 271.

221 **RALA-8**, *Wena* Decision on Annulment, ¶ 101 ("However, the remedy provided for in Article 49(2) is not always sufficient in such a case, as other *ad hoc* Committees have pointed out. . . . It is not a sufficient remedy when such a decision may affect the sequence of arguments contained in the Award and require that it be

89. Accordingly, there is simply no basis for Peru to claim that Freeport committed an abuse of process. Freeport could not have sought relief under Article 49(2) because Article 49(2) does not address the types of errors present here. And even if Article 49(2) were theoretically available, there would be no requirement for Freeport to invoke it before pursuing annulment under Article 52. The idea that Freeport is abusing process by pursuing a targeted and legitimate annulment application has no support whatsoever and cannot possibly be a basis to avoid annulment.

B. PERU CANNOT RESORT TO COMMITTEE DISCRETION TO AVOID ANNULMENT.

90. In a final attempt to avoid annulment, Peru argues that, even if the Committee finds an annullable error, "the Committee should exercise its discretion to not partially annul the Award" because, according to Peru, the Tribunal's failure to address the US$417 million penalties and interest claims on the Royalty Assessments "has no impact on the Tribunal's decision."[222] Unsurprisingly, Peru cites no support for this extraordinary position. No Committee has ever ignored a finding of an annullable error on the basis of discretion, and this Committee should not be the first. None of Peru's hodgepodge of arguments to support this position are persuasive; if anything, they only underscore how far-fetched Peru's plea is.

91. *First*, Peru's reliance on the committee's purported "broad discretion" to avoid a result Peru does not like is misplaced. While several committees have noted in passing that committees retain discretion to determine if annulment is appropriate, Freeport is not aware of a single instance—and Peru cites none—in which a committee has declined to annul an award after finding that one or more Article 52 grounds were satisfied.[223] This reflects the seriousness of the Article 52 annulment grounds, which—as Schreuer explains—"leave little in the way of a margin of appreciation."[224] Applicants must meet a high threshold to establish annulment, and the kind of "trivial" error that might warrant the use of discretion—

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reconsidered in the light of the Tribunal's decision on the omitted question."); **RALA-37**, *Teinver* Decision on Annulment ¶ 210 ("a tribunal has no duty to follow the parties in the detail of their arguments, and that the sole fact of failing to address one or more of the same does not in itself entail annulment, unless the argument in question was so important that it would clearly have been determinative of the outcome."); **RALA-9**, *Cube* Decision on Annulment ¶ 324 (quoting RALA-37, *Teinver* Decision on Annulment, ¶ 210); *see also* **RALA- 5**, *Tulip* Decision on Annulment, ¶¶145–160, 171–202, 211–221 (showing that the annulment committee determined the application on the merits, notwithstanding no mention of an Article 49(2) application having been made); **RALA-4**, *CDC* Decision on Annulment, ¶¶ 44–47, 51–65, 73–87 (showing, similarly, that the annulment committee determined the application on the merits with no mention or application of Article 49(2)).

222 Peru's Counter-Memorial, ¶ 284.

223 *See generally id*., ¶¶ 278–284.

224 **RALA-18**, Schreuer, Art. 52, ¶ 479; *id.*, ¶ 481 (citing *Amco* and *MINE II* refusing annulment "by applying a material violation approach" in the standard itself and not as part of the "technical discrepancy standard"); *id.*, ¶ 484 (citing *CDC* refusing annulment by "reconstruct[ing] certain gaps in the reasoning.").

such as those described by the *Vivendi I* and *EURUS* committees[225]—would not satisfy that threshold for annulment in the first place.[226]

92. Moreover, even the authorities on which Peru relies confirm that any discretion is extremely limited in practice. Rather, its theoretical purpose would be to allow committees to refrain from annulment where an error technically satisfies an Article 52 ground but annulment would be inconsistent with the object and purpose of the remedy.[227] As Schreuer notes, discretion may be exercised for "technical violations without practical effect," for example:

(a) an arbitrator's "minor delay" in signing their declaration;

(b) a failure to apply the proper law that does not affect the outcome, as in *MINE II*, where the tribunal improperly referenced French rather than Guinean law, but the two provisions were substantively identical (though in that case, the committee found no ground for annulment met);

(c) an arbitrator's potential bias whose views were rejected by the remainder of the tribunal and not reflected in the award;

(d) the tribunal deciding a motion from one party without hearing the other party but then deciding the motion fully in favor of the party that was not heard; and

(e) shortcomings or gaps in reasoning that do not prevent the committee from being able to infer the basis for the tribunal's decision.[228]

93. There is no support for Peru's assertion that "discretion" constitutes a separate, free-standing standard that an applicant must meet beyond the Article 52 grounds. The above examples make

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225 *Cf.* Peru's Counter-Memorial ¶ 280 (quoting **RALA-3**, *EURUS Energy* Decision on Annulment ¶ 75 (quoting **AALA-5**, *Vivendi I* Decision on Annulment, ¶ 63)).

226 *See* **RALA-18**, Schreuer, Art. 52, ¶ 479 ("the requirement of manifestness attached to ground (b) . . . and the adjectives serious and fundamental in connection with ground (d) . . . would leave little in the way of a margin of appreciation.").

227 *See* **AALA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 80(4) ("*ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards"); **RALA-5**, *Tulip* Decision on Annulment, ¶ 46 (quoting **AALA-5**, *Vivendi I* Decision on Annulment, ¶ 63 (committees "must guard against the annulment of awards for trivial cause")); **RALA-3**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Annulment (31 July 2025) (Hanotiau, Arrocha, Ridings) ("*EURUS Energy* Decision on Annulment"), ¶ 75 (same); **AALA-4**, *MINE II* Decision on Annulment, ¶ 4.10 ("An *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment."); *see also* Peru's Counter-Memorial, ¶¶ 280–281.

228 **RALA-18**, Schreuer, Art. 52, ¶¶ 481–485.

clear that discretion is meant to prevent purely technical violations that could not possibly have impacted the outcome of the award—unlike here. The Tribunal's failure to address an entire set of Freeport's claims clearly is substantive and serious, and not a mere technical violation, and could have impacted the outcome of the case.[229]

94. *Second*, Peru's assertion that the error here does not warrant partial annulment because "it does not come close to constituting an egregious violation of any fundamental principle" underscores that, in arguing for "discretion," Peru essentially seeks to abandon the Article 52 annulment framework altogether.[230] The standard for annulment is solely defined by each of the five Article 52 grounds. There is no *additional* threshold of an "egregious violation of a fundamental principle."[231] Accordingly, Freeport does not need to prove an "egregious violation" to obtain annulment—even though, in any event, dismissing the US$417 million claims without any discussion after affirming jurisdiction is undoubtedly egregious.

95. *Third*, Peru's argument that "the alleged annullable error has no impact on the Tribunal's decision" merely repeats its substantive arguments on the individual Article 52 grounds and fails for the same reasons.[232] Like those arguments, it rests on what committees have consistently confirmed they cannot do: stand in the shoes of the tribunal and speculate on how the tribunal "would have" ruled. Whether framed in the context of a specific Article 52 ground or as a separate plea for "discretion"—Peru's argument cannot succeed.

96. Moreover, Peru's argument that the error "had no impact" because "the Tribunal has already ruled on the merits of the question whether there is reasonable doubt related to the correct application of the Mining Law and its Regulation" is simply wrong.[233] The Tribunal made no findings on the distinct legal and factual questions governing Freeport's Royalty penalties and interest claims,[234] which Freeport pleaded in the alternative based on the concept of reasonable doubt under Article 170 of Peru's Tax Code and international principles of fairness and equity—neither of which the Tribunal analyzed.[235]

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229 *See supra.* ¶¶ 73–79.

230 *Cf.* Peru's Counter-Memorial, ¶ 282.

231 *Cf. id*., ¶ 282.

232 *Cf. id*., ¶ 284.

233 *Id*., ¶ 284.

234 **AA-1**, *Freeport* Award, ¶¶ 967–986.

235 *See id*., ¶¶ 967–973. *See more generally* **AA-2**, Freeport Memorial, § IV.B.3; **AA-4**, Freeport Reply, § II.C.4.

97. As Freeport explained, Article 170 entitled Freeport to a waiver of penalties and interest on the Royalty Assessments because the underlying obligation was imprecise, obscure, or ambiguous.[236] In the arbitration, the Parties disputed multiple aspects of this argument, including the legal criteria for "reasonable doubt" under Peruvian law, the relevance of certain types of evidence to a determination of "reasonable doubt," and whether there was in fact "reasonable doubt" in this case.[237] It is undisputed that the Tribunal did not rule on any of these issues with respect to the penalties and interest claims.[238]

98. Peru's attempt to recast the Tribunal majority's acceptance of Peru's interpretation of the Mining Law as a "rul[ing] on the merits" as to whether reasonable doubt existed, and its claim that the "Tribunal found that the scope of stabilization agreements under the Mining Law and its Regulations was well-defined and not vague, obscure, or ambiguous" cannot be implied from the Award.[239] The Award contains no findings in relation to "reasonable doubt," including as to the relevant legal test that the Tribunal would have to apply or which categories of evidence could be relevant.[240] All of the paragraphs of the Award Peru cites for this proposition simply reflect that the Tribunal majority accepted Peru's interpretation of the Mining Law and Regulations and rejected Freeport's.[241] Even if the Tribunal majority stated as a general matter that provisions of the Mining Law and Regulations clearly supported Peru's position, this is entirely different from ruling, as a legal matter, on whether there was no reasonable doubt.

99. The Tribunal also failed to engage with the extensive evidentiary record establishing reasonable doubt, including:

(a) Conflicting judicial rulings, such as the First Instance Court's decision in the 2008 Royalty Case adopting SMCV's interpretation of the Stability Agreement.[242]

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236 *See* **AA-1**, *Freeport* Award, ¶¶ 967–973. *See also* **AA-2**, Freeport Memorial, § IV.B.3; **AA-4**, Freeport Reply, § II.C.4. *See also* **AA-41 (CA-14),** Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 170.

237 *See* **AA-1**, *Freeport* Award, ¶¶ 967–984.

238 Peru's Counter-Memorial, ¶¶ 157, 164–165, 198.

239 *Id*., ¶ 165.

240 *Cf. id*., ¶ 164.

241 *See id*., ¶¶ 164–165 (citing to **AA-1**, *Freeport* Award, ¶¶ 698, 704, 711, 716-717).

242 *See* **AA-44 (CE-122)**, Contentious Administrative Court, Decision, No. 07650-2013-CA, 2008 Royalty Assessment (17 December 2014), pp. 25–26, 28, ¶ 34, 38; **AA-46 (CE-274)**, Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017), pp. 33-36, ¶¶ 8.1–8.4; **AA-22 (CE-12)**, Stability Agreement (26 February 1998). *See also generally* **AA-2**, Freeport Memorial, ¶¶ 382, 407–408; **AA-4**, Freeport Reply, ¶ 184.

(b) A divided Supreme Court, where two of five justices supported SMCV's interpretation of the Stability Agreement in the 2006–2007 Royalty Case.[243]

(c) Government admissions of ambiguity, including contemporaneous statements by SUNAT and MINEM officials acknowledging uncertainty regarding the scope of stability guarantees under the Mining Law;[244] and

(d) Legislative "clarifications"; specifically, the 2014 and 2019 amendments to the Mining Law and Regulations, which expressly stated that their purpose was to "clarify" the scope of stability guarantees as the prior text had given rise to divergent interpretations.[245]

100. The Tribunal also never assessed whether, in addition to failing to comply with Peruvian law, Peru's failure to waive penalties and interest on the Royalty Assessments was arbitrary and inequitable. Additional evidence on this point included the fact that the main reason the penalties and

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243 *See* **AA-47 (CE-739)**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 46, ¶ 2.12. *See also generally* **AA-2**, Freeport Memorial, ¶ 405; **AA-4**, Freeport Reply, ¶ 184.

244 *See e.g.*, **AA-47 (CE-739)**, Supreme Court Decision, No. 18174-2017, 2006/07 Royalty Assessment (20 November 2018) **AA-29 (CE-494)**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005) (Isasi Report); **AA-51 (CE-884)**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021-JUS/TTAIP (16 April 2021); **AA-40 (CE-883)**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012), p. 3; **AA-30 (RE-377)**, SUNAT Intendency Resolution No. 0150140003988 (31 August 2005), p. 76; **AA-33 (RE-436)**, SUNAT Tax Assessment No. 012-003-0010598 (31 October 2006), p. [25]; **AA-27 (RE-380)**, SUNAT Tax Assessment No. 012-003-0005518 (9 December 2004), pp. [10-15]; **AA-32 (RE-415)**, SUNAT Tax Assessment No. 012-003-0010553 (31 October 2006) (Cl. Supplement), p. [14]; **AA-24 (CE-382)**, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002); **AA-43 (CE-1128)**, SUNAT Intendancy Resolution No. 0150140011382 (30 June 2014), p. 11, fn. 5; **AA-31 (CE-1124)**, SUNAT Tax Assessment No. 012-003-0008216 (28 November 2005), p. 2; **AA-38 (CE-1125)**, SUNAT Intendency Resolution No. 0150140008402 (30 June 2009), p. 22, fn. 24; **AA-42 (CE-1127)**, SUNAT Tax Assessment No. 012-003-0043061 (20 November 2013), p. 29; **AA-39 (CE-1126)**, SUNAT Tax Assessment No. 012-003-0025931 (16 September 2011), p. 3; **AA-45 (CE-1129)**, SUNAT Tax Assessment No. 012-003-0059181 (29 May 2015), p. 2; **AA-48 (CE-1130)**, SUNAT Tax Assessment No. 012-003-0109380 (24 December 2019), p. [4]; **AA-54 (CE-1132)**, Tax Tribunal, Resolution No. 06446-3-2022 (2 September 2022), pp. 9-10; **AA-53 (CE-1131)**, Tax Tribunal, Resolution No. 06111-3-2022 (19 August 2022), p. 7; **AA-36 (RE-370)**, SUNAT Tax Assessment No. 092-003-0001919 (28 December 2007), p. [4]; **AA-35 (RE-193)**, SUNAT Tax Assessments Nos. 092-003-0001931 to 092-003-0001942 (28 December 2006), p. [408]; **AA-37 (RE-382)**, SUNAT Intendency Resolution No. 0150140007925 (30 December 2008), pp. 57-58; **AA-34 (RE-374)**, SUNAT Tax Assessments Nos. 092-003-0001498 to 092-003-0001505 (27 December 2006), p. [27]; **AA-25 (CE-882)**, MINEM, Report No. 019-2003-DGM-DPDM/L (20 January 2003), p. 2; **AA-26 (CE-932)**, Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003), p. 4; **AA-23 (CE-377)**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p. 1. *See also generally* **AA-2**, Freeport Memorial, § IV.A.2(i)(d); **AA-4**, Freeport Reply, § II.A.2–4.

245 *See* **AA-68 (CE-823)**, Congress, Bill No. 30230, Statement of Legislative Intent, p. 11; **AA-49 (CA-246)**, Supreme Decree amending the Regulations of the Ninth Title of the General Mining Law, No. 021-2019-EM (28 December 2019), Statement of Legislative Intent, p. 9; **AA-21 (CA-2)**, Mining Regulations, Supreme Decree No. 024-93-EM (7 June 1993); **AA-20 (CA-1)**, General Mining Law, Supreme Decree No. 014-92-EM (3 June 1992). *See also generally* **AA-2**, Freeport Memorial, ¶ 407; **AA-4**, Freeport Reply, ¶ 183.

interest were so extensive was due to Peru's delays in hearing Freeport's administrative challenges, some of which took over *nine years*.[246]

101. The Tribunal thus never assessed any aspect of Freeport's Royalty penalties and interest claims, including the content of the standard of reasonable doubt, whether that standard was satisfied, and Freeport's significant evidence in support of that position. It is not possible to conclude that the Tribunal "ruled" on the merits of Freeport's claims, nor that it "would have" done so, without entering into pure speculation.

102. Nor can the Committee otherwise conclude that the errors had "no impact."[247] As a direct result of these errors, claims worth over US$417 million were dismissed without explanation. This is not a case where, for example, the Tribunal's decision on a different jurisdictional objection would equally have dismissed the claims in full, such that the Tribunal's error has no *actual* impact. Here, the Tribunal's flawed approach is the *only* basis in the Award for dismissal. Peru therefore cannot possibly contend that the errors had no "impact."

103. *Fourth*, none of Peru's remaining arguments support using "broad discretion" to avoid an otherwise annullable error. Peru's argument that a partial annulment would force Peru into a "futile but costly arbitration" that would "end in the same place it is now—total dismissal of Claimant's unsubstantiated claims" is both irrelevant and wrong.[248] To start with, any resubmitted new arbitration is the unfortunate result of the Tribunal's errors that constitute annullable grounds, not Freeport's application. There is no basis for the Committee to assess Freeport's prospects of success in such a subsequent arbitration when determining whether annulment is appropriate. In any event, as noted above, significant evidence supports Freeport's claims that Peru's refusal to waive penalties and interest on the Royalty Assessments was arbitrary and violated the TPA's minimum standard obligation.[249] Peru's argument is simply another version of its contention that the errors had "no impact" and fails for the same reason.

104. Similarly, Peru's argument that annulment would force Peru to bear the "unjustified" costs of defending against Freeport's claims again, and that annulment would prolong resolution of an already-lengthy dispute, is likewise irrelevant.[250] These are not factors that the committee can or should consider when deciding whether the Award should be annulled. These consequences arise from the Tribunal's failure to fulfill its mandate, not from Freeport's conduct. That Freeport has had to seek recourse at both the

246 *See* **AA-4**, Freeport Reply, § II.C.4(v).

247 *Cf.* Peru's Counter-Memorial, § VIII.B.

248 *Cf.* Peru's Counter-Memorial, ¶ 285.

249 *See supra.* ¶ 99; *see also* Freeport's Memorial ¶ 27.

250 *Cf.* Peru's Counter-Memorial, ¶¶ 285–286.

domestic and international levels and that this dispute has endured for years and at great cost is the result of Peru's unlawful conduct, not Freeport's actions. Freeport has been a responsible partner and operator in Peru for decades and made every effort to give Peru the opportunity to resolve its wrongful conduct through administrative proceedings. It was only Peru's utter failure to do so that compelled Freeport to commence arbitration to defend its rights. Peru cannot shift the blame for the length and procedural irregularities before its own domestic administrative bodies and courts to Freeport. And in any event, many other annulment committees have annulled awards even where the underlying dispute lasted for an extended period of time.[251]

105. Likewise, Peru's argument that the Committee should exercise discretion to preserve the "finality" of ICSID awards underscores the flaw in its position.[252] The Convention ensures "finality" of ICSID awards by providing the exclusive post-award remedies, limiting annulment to five narrowly defined grounds, and setting a high bar for each. But where, as here, those exceptional grounds are satisfied, "finality" does not justify ignoring them based on an undefined exercise of "discretion." To the contrary, partial annulment here upholds and strengthens the integrity and legitimacy of the ICSID system.

106. *Finally*, Peru misses the point when it argues that the additional errors in the Award that Freeport identified, but upon which it did not seek annulment, "fail to justify partial annulment of the Award" and thus are mere "distractions."[253] While these shocking errors would themselves constitute grounds for annulment, Freeport decided not to challenge them. Instead, Freeport challenged only the most egregious error: the failure to decide the claims based on penalties and interest on the Royalty Assessments. Freeport thus does not argue that the Committee find these additional errors to "justify annulment" of the Award.

107. However, these additional errors are relevant in that they highlight that the Tribunal's failure to decide Freeport's Royalty penalties and interest claims is symptomatic of a broader lack of rigor in exercising its mandate. As Freeport noted, the Tribunal majority completely ignored 15 SUNAT and two Tax Tribunal resolutions applying stability guarantees to entire mining units—documents the Tribunal had ordered produced because of their materiality.[254] It adopted Peru's incorrect position that Article 2 of the 1993 Mining Regulations was amended only in 2019, when in fact the original text confirmed that stability

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251 *See, e.g.*, **AALA-10**, *Pey Casado I* Decision on Annulment (partially annulling an award in proceedings commenced 15 years prior); **AALA-14**, *Perenco* Decision on Annulment (partially annulling an award in proceedings commenced 13 years prior); **AALA-4**, *Rockhopper* Decision on Annulment (annulling an award in proceedings that had been commenced eight years prior).

252 Peru's Counter-Memorial, ¶¶ 278–286.

253 *Cf. Id.*, §VII; *id.*, ¶ 261.

254 Freeport's Memorial, ¶ 67(a).

guarantees applied to "concessions or units."[255] It relied uncritically on Peru's 2014 "Statement of Reasons" to interpret the Mining Law—contrary to the record and to basic principles of non-retroactivity.[256] It ignored that stability agreements are adhesion contracts whose scope cannot be negotiated, even though both Parties' experts agreed upon this crucial point.[257] And it mischaracterized Freeport's due-process claims by failing to consider SUNAT's conduct at all and ignoring a significant portion of Freeport's evidence, including testimony at the hearing that a SUNAT auditor predetermined the outcome of SMCV's challenges.[258] These egregious defects—unreasoned findings, ignored evidence that supported Freeport's claims, and clear legal error—show that the Tribunal's failure to consider Freeport's Royalty penalties and interest claims is part of a wider pattern of errors and lack of reasoning in the Award.

108. Having failed to rebut Freeport's showing that multiple Article 52 grounds are satisfied here, Peru cannot rely on "broad discretion" to avoid annulment. There is no basis whatsoever for the Committee to decline annulment once an Article 52 ground is established—even more so here, where the Tribunal failed to decide claims valued over US$ 417 million after affirming jurisdiction over them. No committee has ever done so, and to uphold the integrity of the ICSID system, this Committee should not be the first.

VI. FREEPORT IS ENTITLED TO COSTS.

109. In its Counter-Memorial, Peru requests the Committee to order Freeport to bear all costs and legal fees of this proceeding, contending that Freeport's application "goes far beyond what the annulment remedy was designed to address."[259] This bears no resemblance to Freeport's targeted submission, which is limited to the most egregious of the Tribunal's errors and well-supported by prior annulment jurisprudence. Contrary to Peru's request, it is Freeport, not Peru, that is entitled to a full costs award, including reimbursement of its reasonable attorney and other fees, disbursements, and the Centre's charges. Annulment committees increasingly award costs to the prevailing party, and Freeport should prevail here. Peru has driven up the costs of this proceeding by raising extraneous issues and arguments that have no bearing on the task before the Committee. Finally, a costs award in favor of Freeport is particularly appropriate here given the gravity of the Tribunal's errors and the violation of Freeport's fundamental procedural rights.

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255 *Id*., ¶ 67(b).

256 *Id*., ¶ 67(c).

257 *Id*., ¶ 67(d).

258 *Id*., ¶ 67(e).

259 Peru's Counter-Memorial, ¶ 289.

110. *First*, if Freeport prevails, the Committee should apply the well-established "costs follow the event" principle. Freeport is entitled to partial annulment of the Award, and with that relief, it should also recover its costs. This principle is well established in international arbitration, and has also increasingly been applied by annulment committees in decisions where an applicant successfully obtains annulment relief.[260] For example, in *Eiser*, the committee found that where it granted the request for annulment in full, the applicant was entitled to its costs, legal fees, and expenses.[261] Similarly, in *Khudyan v. Armenia*, the committee held that "since the Applicant has been successful, the Republic of Armenia should bear the cost of counsel's fees and other costs incurred by the Applicant to the extent that these are reasonable."[262] The same reasoning applies here, as Freeport was "compelled" to seek annulment due to the Tribunal's shocking errors.[263]

111. *Second*, Peru's own conduct in this proceeding further supports an adverse costs award. In sharp contrast to Freeport's focused application, Peru has inflated costs by advancing irrelevant arguments and attempting to re-litigate the merits of the underlying arbitration. More than 120 paragraphs—over one-third of Peru's Counter-Memorial—were devoted to repeating undisputed facts or presenting arguments that have no bearing on the limited issues before this Committee, while only a small portion of its Counter-Memorial addressed the substance of Freeport's narrowly framed Application.[264] Peru also advanced arguments completely outside of the well-established legal framework for annulment, including its insistence that the Committee should address what the Tribunal "would have" done and its abuse of process claim.[265] Such conduct is squarely at odds with the efficiency objectives of annulment and, standing alone, justifies an adverse costs award. International arbitration tribunals and committees have recognized in the context of costs awards that a party's procedural conduct is a "material consideration, particularly where it has led to costs being unnecessarily incurred."[266]

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260 *See e.g.*, **AALA-25**, *Eiser Infrastructure Limited v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment (11 June 2020) (Hernández, Khan, Hascher) ("*Eiser* Decision on Annulment"), ¶¶ 272–273.

261 **AALA-25**, *Eiser* Decision on Annulment, ¶¶ 270–273.

262 **AALA-15**, *Khudyan* Decision on Annulment, ¶¶ 258–259. *See also, e.g.*, **AALA-7**, *Malaysian Historical Salvors* Decision on Annulment, ¶¶ 82–83 (ordering Malaysia to pay the full costs and expenses that ICSID had incurred in the annulment proceeding); **AALA-20**, *Sempra* Decision on Annulment, ¶¶ 227–228 (awarding the Centre's costs to the successful applicant for annulment, Argentina).

263 **AALA-25**, *Eiser* Decision on Annulment, ¶¶ 272–273.

264 *See e.g.* Peru's Counter-Memorial, ¶¶ 19–139.

265 *See e.g. id*., ¶¶ 164, 267–286.

266 **AALA-22**, *European American Investment Bank AG (EURAM) v. The Slovak Republic*, UNCITRAL, Award on Costs (20 August 2014) (Greenwood, Petsche, Stern), ¶ 43; **AALA-23**, *Venezuela Holdings* Decision on Annulment, ¶ 193 ("As regards the allocation of the costs of these annulment proceedings, the Committee intends to follow the same approach as that of the Tribunal, and take into account the conduct of the Parties as

112. *Third*, the nature and gravity of the issues raised by Freeport's application, including serious procedural violations, further support awarding costs to Freeport. In *Eiser*, one of the factors that the committee took into account when awarding the applicant its costs, legal fees, and expenses was that the applicant "was compelled to go through these annulment proceedings" due to, among others, serious procedural failures.[267] Similarly, in *Libananco*, even though the committee denied annulment, it considered the seriousness of the alleged procedural violations as a factor in allocating costs.[268] Similar considerations apply here, where Freeport challenges violations that go to the core of the ICSID Convention's procedural guarantees, including the right to be heard and the requirement that an award state the reasons on which it is based.

113. *Finally*, Peru's arguments that Freeport should bear the full costs and expenses of the proceedings, as well as Peru's legal fees, even if Freeport prevails, because Freeport allegedly should have brought an Article 49(2) proceeding instead, or because the Tribunal "did decide" on Freeport's claims or "would have" dismissed Freeport's claims, are irrelevant for costs.[269] Peru is simply rehashing its argument on the merits, which will necessarily already have been rejected by the Committee in the situation where Freeport is the prevailing party. Contrary to Peru's arguments, it is Peru, not Freeport, that should be responsible for all costs, fees, and expenses associated with the annulment proceeding.

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well as the principle that costs should normally follow the event."); **AALA-12**, *Standard Chartered (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (TANESCO)*, ICSID Case No. ARB/10/20, Decision on the Application for Annulment (22 August 2018) (Wobeser, Schreuer, Cooper-Rousseau), ¶ 756 ("the Committee has reviewed and considered similar cases, and notes that three main approaches may be identified … (iii) another criterion commonly adopted is the general conduct of a party and the more or less serious nature of the case it has defended").

267 **AALA-25**, *Eiser* Decision on Annulment, ¶¶ 270–273.

268 **AALA-21**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment (22 May 2013) (Sureda, Danelius, Romero) ("Libananco Decision on Annulment"), ¶ 226 (noting that the committee "pays special attention to the fact that annulment was sought on the basis of allegations which raised questions of observance of fundamental procedural rights, including the right to a fair hearing and equality of arms between the parties. Although the Committee, after analyzing the facts of the case, found that there was no ground for annulment, it nevertheless considers that the character and importance of the issues involved were such as to justify the conclusion that each party should bear its own costs for legal representation and expenses").

269 Peru's Counter-Memorial, ¶¶ 290-294.

VII. REQUEST FOR RELIEF

114. For the foregoing reasons, Freeport respectfully requests that:

(a) the Award's rejection of Freeport's Article 10.5 claims based on Peru's failure to waive the penalties and interest on the Royalty Assessments be annulled; and

(b) Freeport be reimbursed for all costs and expenses associated with the annulment proceedings, including professional fees and disbursements, with interest as of the date of the decision on annulment until full and final payment.

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