INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Republic of Peru

(ICSID Case No. ARB/20/08)

DISSENTING OPINION OF PROFESSOR DR. GUIDO SANTIAGO TAWIL

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1. The Tribunal proposes, by majority, (i) to affirm its jurisdiction over Claimant's claims except for those claims based on the disputed Tax Assessments' penalties and interest; and (ii) to reject Claimant's claims on the merits in their entirety;[1].

2. I respectfully dissent.

3. In order to decline the Tribunal's jurisdiction concerning the disputed Tax Assessments' penalties and interest, the majority concludes that penalties and interest imposed on SMCV for its failure to pay taxes assessed in SUNAT's Tax Assessments constitute "*taxation measures*", which are excluded from the scope of Article 10.5 of the TPA under Article 22.3.1 of the TPA.

4. In doing so, the majority finds that the word "taxation" refers to a broader notion than the term "tax", and that measures that are part of the regime for the imposition and enforcement of a tax, as those including penalties and interest shall be considered *"taxation measures"* and, therefore, excluded from the Tribunal's jurisdiction by Article 22.3.1. of the TPA.[2]

5. However, the TPA's Tax exclusion under Article 22.3.1 should not bar Claimant's Article 10.5 claims for Peru's failure to waive penalties and interest on the Tax Assessments as the challenged measures did not impose or enforce taxes, and penalties and interest are not taxes under Peruvian law.

6. One of the basic principles (and guarantees) of modern taxation is that taxes are not sanctions or penalties for unlawful actions, but a mandatory levy set out in law to be paid by the person that falls within the specific situation determined by the statute.[3]

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[1] Award, ¶ 1047.
[2] Award, ¶¶ 540-553.
[3] *See* Constitutional Court of Perú, Case No. 3303-2003-AA/TC, decision dated 28 June 2004, pp. 1-2 **(CA-378)** ("*Asi, el tributo es definido como: la obligación jurídicamente pecuniaria,* ex lege*, que no constituye sanción de acto ilícito, cuyo sujeto activo es, en principio, una persona pública y cuyo sujeto pasivo es alguien puesto en esa situación por voluntad de la ley… A partir de esta noción, podemos establecer los elementos esenciales de un tributo, los cuales son: a) su creación por ley; b) la obligación pecuniaria basada en el* ius imperium *del Estado; y c) su carácter coactivo, pero distinto a la sanción por acto ilícito*"). (emphasis added). As a logical consequence of such reasoning, if taxes are not sanctions or penalties, sanctions or penalties cannot be considered taxes.

7. The challenged measures did not impose taxes. The Peruvian Tax Code establishes only three types of levies (*tributos*): taxes (*impuestos*), contributions and fees (*tasas*). Penalties and interest are not included among them.[4]

8. The challenged measures did not enforce taxes. They failed to waive penalties and interest and, as such, although they constitute acts of Respondent, they were not taxation measures themselves.[5]

9. While most States view their power to impose taxes in their territory as a central element of their sovereignty, its exercise is subject to very strict limits.[6] Consistent with such idea, when treaties provide for tax exclusions from investment protection, their purpose is to preserve the States' sovereign power to impose taxes in their territory[7] and they should not be extended to other governmental decisions or measures at risk of affecting protected rights and diverting from the very same purpose that inspired the tax carve-out clauses.

10. On the merits of the dispute, the majority summarizes the discussion in two main questions:

    (a) Did the Respondent breach the 1998 Stability Agreement?; and

    (b) Did the Respondent breach Article 10.5 of the TPA?

    to further conclude that Perú has neither breached the 1998 Stability Agreement nor Article 10.5 of the TPA.[8]

11. In order to reach the conclusion that Respondent did not breach the 1998 Stability Agreement the majority is of the view that such agreement limited its scope to the

[4] Hernandez II (**CER-8)**, ¶¶ 129-144, citing Rule II of the Tax Code (**CA-14).**
[5] As explained by one of the tax experts (Hernandez II (**CER-8)**, ¶ 137), even if some penalties could be applied as a consequence of non-payment of taxes, they are, in themselves, independent and separate obligations.
[6] Constitutional Court of Perú, Case No. 3303-2003-AA/TC, decision dated 28 June 2004, p. 1 **(CA-378)** ("*…están sometidos a la observancia de los principios constitucionales consagrados por el artículo 74° de la Constitución, que regulan el régimen tributario, como son el de legalidad, de igualdad, de no confiscatoriedad, de capacidad contributiva y los derechos fundamentales. Estos principios de la tributación constituyen límites de observancia obligatoria para quienes ejercen el poder tributario de acuerdo a la Constitución*").
[7] *See Murphy Exploration & Production Company – International v The Republic of Ecuador,* PCA Case No. 2012-16, Partial Final Award dated 6 May 2016 **(CA-279)**, ¶ 165.
[8] Award, ¶¶ 646-647.

investment in the leaching facility[9] and that the extension of the Beneficiation Concession did not extend the scope of the 1998 Stability Agreement to the Concentrator.[10]

12. I disagree.

13. When interpreting the Mining Law and the Mining Regulations, the majority considers that nothing in the Mining Law and the Mining Regulations provide in favour of the view that stabilizations agreements should apply to entire "*concessions*" or "*mining units*". On the contrary, my co-arbitrators affirm that such regulations limit the scope of stabilization agreements to a specific investment project,[11] understanding by such –in the case of Cerro Verde– only the original investment in the leaching facility.

14. However, the Mining Law and the Mining Regulations provisions defining the stability guarantees' scope referred to the mining units or concessions, not to specific investment projects. In fact, the term "investment projects" did not exist in the Mining Law or the Mining Regulations until the July 2014 amendments to the Mining Law.

15. Article 82 of the Mining Law granted stability guarantees to "mining activity titleholders" to promote investment within an "Economic-Administrative Unit", defined as a "set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that constitute a single production unit due to sharing supply, administration and services".[12]

16. In interpreting Article 82 of the Mining Law and Article 22 of the Mining Regulations, the majority provides particular value to the term "*exclusively*" of Article 22 of the Mining Regulations in the understanding that such term limits the

[9] Award, ¶¶ 698-699.
[10] Award, ¶ 814.
[11] Award, ¶¶ 698-699, also referred to as a "specific mining project set out in the investment program of the feasibility study" (Award, ¶ 699) or as a "specific investment in a specific mining project" (Award, ¶ 703).
[12] Mining Law **(CA-1)**, Article 82. Article 44 of the Mining Law established that "*[t]o fulfill the work obligations established in the preceding chapter, the titleholder of more than one mining concession of the same class and nature, may group them into Economic Administrative Units, provided they are located within an area of a 5 kilometer radius, in the case of non-ferrous metallic minerals or primary gold metallic minerals; a 20 kilometer radius in the case of iron, coal and non-metallic mineral…*".

scope of stabilization agreements to a specific investment project and that the reference to concessions or Economic Administrative Units (or **EUAs**) in such provision only shows the location where the investments are made.[13]

17. I fail to find in those provisions the clarity that the majority affirms. On the contrary, when reading Article 22 of the Mining Regulations, the term "*exclusively*" appears to be referring to "*the investments that it makes **in the concessions or Economic-Administrative Units***" (emphasis added).[14]

18. As the activities and investments of the mining companies are carried out through the concession system,[15] the wording of Article 22 of the Mining Regulations seems consistent with the intention of preventing an investor from obtaining stability for non-mining activities and to exclude affiliates of the investor other than the mining company that made the investment,[16] a concern existing at the time of drafting the statute and that appears to have originated in the privatization of the State-owned conglomerate Centromín.[17]

19. The majority also finds that the only way to give effect to the term "*exclusively*" in Article 83 is to interpret the provision as meaning that not all activities of a mining company are subject to stability guarantees, rather only those in relation to the undertaken investment project set out in the feasibility study.[18] Concerning the fact that Article 83 of the Mining Law was amended in 2014 and that Article 83-B was

[13] Award, ¶¶ 702-703.
[14] Likewise, Article 2 of the Mining Regulations **(CA-432)** makes reference to concessions or Economic Administrative Units and not to "specific investment projects" establishing that when "*the titleholder*" has "*several concessions or Economic-Administrative Units*" stability qualification "*will only take effect for those **concessions** or **units** that are supported by… the [Stability] agreement*" (emphasis added). When implementing Article 83 of the Mining Law **(CA-1)**, Article 22 of the Mining Regulations **(CA-432)** established that in order to reflect the result of their operation, titleholders that have "*other **concessions or Economic-Administrative Units***" different from those already established, had to "*keep independent accounts and reflect them in separate earning statements*" (emphasis added).
[15] Article 7 of the Mining Law **(CA-1)** provides that "*[t]he exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons through the concession system*".
[16] In line with such reasoning, Article 83 of the Mining Law **(CA-1)** provides that "*[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made*".
[17] *See* Tr. 842:8-16; 843:8-844:14; 919:10-922:10 (Day 3) (Chappuis). Ms. Chappuis explained that Mr. Polo came from Centromín –a State-owned mining company with seven old underground mines, a lot of labor problems and without a tax stability agreement– and that their concern when drafting this provision of the Mining Law together with Mr. Polo was that Centromín not only had mines but also had factories.
[18] Award, ¶ 699.

therein introduced, the majority concludes that the amendment to Article 83 only clarified what legal framework was in force before the amendment.[19]

20. I cannot agree. The 2014 introduction of Article 83-B to the Mining Law meant a significant change in the existing regulatory scheme by relating the stability benefit to the investment plan contained in the feasibility study, forcing titleholders of concessions or EAUs to undergo a whole new procedure to stabilize expansions, and therefore restricting its applicability to future investments.[20]

21. Amendments to an existing legal regime are not made to clarify what is already clear. Much less amendments of the relevance of the one introduced through Article 83-B of the Mining Law by linking the stability benefit to the investment plan contained in the feasibility study, precisely the main area of disagreement between SMCV and the Peruvian authorities at the time.[21]

22. Under Article 86 of the Mining Law, stability agreements are adhesion contracts (*contratos de adhesión*) prepared by the Ministry of Energy and Mines and need to incorporate all the guarantees established in the Mining Law. Stability agreements cannot be interpreted against the Mining Law and the Mining Regulations nor be negotiated with a different scope than the one established by the Mining Law or the Mining Regulations.[22] All stability agreements were drafted in the same way, with few blanks to be filled in order to avoid the possibility of corruption.[23] The investor

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[19] Award, ¶¶ 707-708.

[20] Mining Law **(CA-1)**, Article 83-B, third paragraph ("*The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made,* ***provided that said investments are expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the Stability Agreement****; or, the additional activities that are performed after the execution of the investment program, provided that such activities are performed within the same concession where the Investment Project that is the subject matter of the agreement entered into it with the State is being developed; they are related to the purpose of the Investment Project; that the amount of the additional investment is no less that the equivalent in domestic currency to U$S 25,000,000; and they are previously approved by the Ministry of Energy and Mines, without prejudice to subsequent auditing from the aforementioned Sector*" (emphasis added).

[21] At the hearing, Prof. Otto confirmed that such was not the common understanding of the authorities and other participants in the industry of how the stability guarantees worked. Referring to his 2002 meetings with the Peruvian authorities -who he was advising at the time – he expressed: "*During my many meetings to prepare my comprehensive review of the Peruvian mining fiscal system for the MEF, a limitation of stabilization to only the initial Feasibility Study never came up. It was a nonissue. No one was thinking that way. It would have been a unique position, worldwide, harming Perú's ability to compete for investment*" Tr. 2110:19-2111:3 (Day 7) (Otto).

[22] Tr. 2333:13-22; 2356:6-11 (Day 8) (Bullard); Bullard Presentation (**CD-8**), slide 9.

[23] Tr. 914:13-15; 931:19-21; 936:14-22 (Day 3) (Chappuis).

was not free to choose whether to apply for an administrative unit, a whole specific concession or a specific investment. The stability agreements applied to all the concessions indicated in Annex I of the Model Stability Agreement [24] and there was no room for negotiation of a different scope.[25]

23. Stability agreements must be constructed in accordance with the Mining Law and the Mining Regulations.[26] Therefore, as the Mining Law and the Mining Regulations provided that stability covered concessions and EAUs, not "specific investment projects", stability agreements must be considered as providing the same scope of guarantees that the Mining Law and the Mining Regulations, that is in connection to the concessions part of the stabilized mining unit.[27]

24. SCMV's investments were made in its Mining Concessions Cerro Verde No. 1, No. 2 and No. 3 and its Beneficiation Concession Plant Cerro Verde, located in the district of Uchumayo, Department of Arequipa, over an extension of 7,455 has and 463 has, respectively.[28] Those Mining (Cerro Verde No. 1, No. 2 and No. 3) and Beneficiary Concessions were the ones covered by the Stability Agreements, irrespective of the different techniques or processes (*i.e.* leaching or flotation) used in developing their mineral reserves.[29] The introduction of the term "*The Leaching Project of Cerro Verde*" used in the Stability Agreement,[30] which has probably contributed to trigger this dispute, appears to have followed the language used in Clause 1.1. of the Model Contract, which required the parties to define a name for the EAU.[31]

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[24] Tr. 933:10-934:7 (Day 3) (Chappuis).
[25] Bullard II (**CER-7**), ¶¶ 12-16.
[26] Tr. 2333:10-22 (Day 8) (Bullard); Bullard Presentation (**CD-8**), slide 9.
[27] Tr. 2255:4-10 (Day 8) (Vega).
[28] Stability Agreement **(CE-12)**, Clause 3 and Exhibit 1.
[29] While the upper layers of minerals (oxide and secondary sulfides) are stripped and processed through a leaching facility, primary sulfides (also known as copper ore) need to be processed through a concentrator. At the end, the same minerals, in the same concessions (Cerro Verde No. 1, No. 2 and No. 3), are extracted and processed in a single production unit (EAU) through two different techniques (leaching and flotation). For a more detailed explanation, *see* Aquiño 1 (**CWS-1**), ¶¶ 12-18.
[30] Stability Agreement (**CE-12**), Clause 1.1. ("*...the guarantees of the benefits contained in articles 72, 80 and 84 of the same legal body be granted to it, in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3,* ***hereinafter 'The leaching project of Cerro Verde"***") (emphasis added).
[31] Model Contract, **(CE-778)** Clause 1.1. ("*...THE OWNER WILL BE GUARANTEED THE BENEFITS CONTAINED IN ARTICLES 72, 80 AND 84 OF SAID STATUTE, IN RELATION TO (OPERATIONAL STARTUP) (INVESTMENT IN) ITS CONCESSIONS, CONSISTING OF THE_____ ECONOMIC-*

25. The possibility of constructing a concentrator was not new to the Cerro Verde project. Such possibility was already contemplated as part of the project at the time of the privatization and included in its documents.[32] And so relevant was Perú's interest in the development of Cerro Verde's primary sulfide reserves that Minero Perú initiated an arbitration against Cyprus in 2001 for allegedly breaching the 1994 Share Purchase Agreement. The dispute was finally settled with SMCV's compromise to invest an additional U$D 50 million in the project and to explore additional ways of developing a concentrator.[33]

26. As already explained, Clauses 1.1. and 3 of the 1998 Stability Agreement identified as the subject of SMCV's stability guarantees the Mining Concession (Cerro Verde No. 1, No. 2 and No. 3) and the Beneficiation Concession (Cerro Verde Beneficiation Plant), which together comprise an EAU under Article 82 of the Mining Law.[34] A different interpretation would assume that SMCV claimed less than the scope established by the Mining Law, the Regulations, and the Model Contract, voluntarily reducing its rights. The title used in the 1998 Stability Agreement – the "*Leaching Project of Cerro Verde*" – was referential and could not have defined its scope.[35] A similar situation seem to have occurred in the case of SMCV's 1994 Stability Agreement[36] and those executed by other mining companies.[37]

ADMINISTRATIVE UNIT(S), ***HEREINAFTER '_____ PROJECT'***") (emphasis added). *See also* Tr. 2341:1-2342:1 (Day 8) (Bullard); Bullard Presentation (**CD-8**), slides 33-36.

[32] 1994 SMCV's Share Purchase Agreement **(CE-4)**, Annex G. The three initial phases referred to the leaching operation. The fourth and last one to the construction of a 28,000 tons per day expandable primary sulfide concentrator.

[33] 2001 Out-of-Court Settlement Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. **(CE-17)**, Clause 3.1(B) ("*CYPRUS undertakes to continue carrying out, within the aforementioned period, the research and technological development tasks intended to continue evaluating economically reasonable ways for the exploitation and processing of primary sulfides at Cerro Verde*").

[34] Tr. 2334:1-10; 2356:6-17 (Day 8) (Bullard).

[35] Claimant's Post-Hearing Brief, ¶¶ 26 (b) and 28, referring to the testimonies at the hearing of Mr. Polo, Ms. Chappuis and Ms. Torreblanca.

[36] *See* 1994 Stability Agreement (**CE-344)**, Clauses 1.1 and 5.1. While the referential name used was "Cerro Verde Project", it clearly did not match with the scope of the stability agreement as the project was limited to a minor improvement of the existing facility, valued in U$S 2.2 million.

[37] *See List of Guarantee Contracts and Investment Promotion Measures, Report No. 153-2005-MEM/OGAJ* (**RE-175**), April 14, 2005. When referring to projects No. 2 of Minera Toromocho S.A. and No. 3 of Minera Yauricocha S.A. the referential names used in both cases in the list for the project is "Centromín Perú"; project No. 10 of Minsur S.A. is denominated "Minsur"; project No. 14 of Minera Ares S.A. is called "Ares"; project No. 16 of Minera Sipan S.A. is denominated "Sipán", etc. None of those names appear to explain or define the scope of the individual stability agreement executed in each case. *See also* Bullard Presentation (**CD-8**), slides 42-43.

27. The 1996 Feasibility Study's investment program was a qualifying prerequisite to demonstrate SMCV's compliance with the minimum U$S 50 million investment requirement for 15-year stability agreements under the Mining Law.[38] Neither the Mining Law, the Mining Regulations in force in 1998 nor the 1998 Stability Agreement established that the feasibility study would define the scope of the guarantees provided by them.[39]

28. The majority is also of the view that, as the Concentrator did not benefit from the guarantees of the 1998 Stability Agreement, none of the disputed Royalty and Tax Assessments applying the "*non-stabilized regime*" to the Concentrator constituted violations of the 1998 Stability Agreement. Therefore, in my colleagues' view, Respondent did not breach Clauses 9.4, 9.5, 9.6, 10.1 and 10.2. of the Stability Agreement.[40]

29. As explained above, the majority misinterprets the stabilized regime. Under the 1998 Stability Agreement, the SMCV's Cerro Verde EAU (which included the Cerro Verde No. 1, No. 2 and No. 3 Mining Concessions and the Beneficiation Concession) was stabilized and, upon their approval, all new investments made in such EAU while the Stability Agreement was in force should be considered stabilized.

30. In the course of 2004, Ms. Chappuis –at the time, the Director General of Mining and the officer in charge of controlling compliance with the 1998 Stability Agreement[41]– confirmed to SMCV and Phelps Dodge that the 1998 Stability Agreement would apply to the planned concentrator as long as the investment was made in the existing mining unit or site as the 1998 Stability Agreement comprised

[38] Tr. 2343:21-22; 2349:10-14 (Day 8) (Bullard).
[39] Respondent's witnesses were not in agreement on how such a system would have worked. While Ms. Bedoya (Supervisor at SUNAT's National Intendency of Challenges) was of the view that every new investment exceeding the items and amounts mentioned in the investment program should be considered non stabilized (even if they related to the leaching project subject of the feasibility study), Mr. Polo (Vice-minister of the MINEM and one of the drafters of the Mining Law) was not able to reach such conclusive determination (Tr. 1643:8-1644:15, 1648:2-7, 1652:6-21, (Day 6) (Bedoya); Tr. 1349:2-5, 1377:4-1378:9 (Day 5) (Polo)).
[40] Award, ¶ 816.
[41] Mining Law **(CA-1)**, Article 101(e) provides that "*[t]he powers of the Directorate General of Mining are the following: …(e) To ensure compliance with tax stability agreements…*".

all the investments made in such concessions.[42] The expansion approval confirmed that the Concentrator fell within the Beneficiation Concession, already stabilized under the 1998 Stability Agreement. And, therefore, also confirmed that it benefitted from the stabilized regime.

31. The majority has also concluded that Respondent did not breach Clauses 9.4, 9.5, 9.6, 10.1 and 10.2 of the Stability Agreement when certain of its Tax Assessments applying the non-stabilized regime to the stabilized activities (the so-called leaching activities) became final and enforceable.[43] Although the majority accepts that "*[i]t is undisputed between the Parties that such assessments were imposed on the stabilized leaching activities of Cerro Verde*",[44] it concludes that as some of its activities were stabilized (leaching activities) and other not (the Concentrator activities), SMCV was required to keep separate accounts for each of them.[45] As SMCV did not keep such separate accounts, it concludes that SUNAT's tax assessments on SMCV's stabilized project were not inappropriate.[46]

32. As explained, under SMCV's stabilized regime, all the investments made in the Cerro Verde's EAU or Mining Unit while the Stability Agreement was in force should be considered stabilized. Therefore, no Tax Assessments applying the non-stabilized regime should have been issued concerning the Cerro Verde's EAU. In addition, SMCV was not required to keep separate accounts for the Leaching and

[42] Chappuis I (**CWS-3**), ¶¶ 28, 52-53 and Chappuis II (**CWS-14**), ¶¶ 37, 40. At the hearing, Ms. Chappuis ratified that she informed SMCV that the Concentrator was covered by the 1998 Stability Agreement, that no written confirmation was necessary and –when asked by the Tribunal– she assumed personal responsibility for doing so. *See* Tr. 1011:17-1013:3 (Day 4) (Chappuis).
[43] As explained in ¶ 817 of the Award, Claimant alleges that (i) in the 2010 and 2011 Income Tax Assessments, SUNAT applied non-stabilized depreciation rates to certain assets without attributing them to the Concentrator and – in the 2012 and 2013 Income Tax Assessments – to all the assets that SMCV started using as of 2007, including some of the same leaching facilities' assets it had treated as stabilized in previous fiscal years; (ii) in the 2007-2013 Income Tax Assessments, SUNAT denied SMCV's income tax deductions for PTU, expenses accrued in prior years, and recreational expenses, as well as deductions for payments that SMCV recorded using the classification system applicable under the Stability Agreement; and (iii) SUNAT assessed the following taxes from which SMCV was exempted by operation of the 1998 Stability Agreement against the entire Cerro Verde Mining Unit: 2009-2013 TTNA; 2007-2013 AIT and the 2013 CMPF. *See also* Claimant's Reply, ¶ 124.
[44] Award, ¶ 818.
[45] Award, ¶ 824.
[46] Award, ¶¶ 820-828.

Concentrator activities as both activities were performed in the same Mining Unit/EAU[47] and were equally stabilized under the 1998 Stability Agreement.

33. Respondent's repudiation of its obligations under the 1998 Stability Agreement also constitute arbitrary actions that violate Freeport and SMCV's rights to a fair and equitable treatment under Article 10.5 of the Treaty. The legal framework existing in 1998 made clear that the Mining Law's stability guarantees would apply to the entire mining unit or concession and, therefore, all investments made within a stabilized concession or mining unit should have benefitted of the stability guarantees.

34. Even if there was any doubt that the 1998 Stability Agreement covered new investments in the Cerro Verde's EAU while the Stability Agreement was in force –a doubt which in my view did not exist– Respondent's actions should still be framed as unfair and inequitable under Article 10.5 of the TPA.

35. SMVC's position that it was not required to pay royalties and taxes was reasonable and consistent under the legal regime existing at the time of execution of the 1998 Stability Agreement. Such view was reaffirmed by senior officials as Ms. Chappuis and by enacting the 2014 and 2019 amendments to the Mining Law and Mining Regulations, Respondent itself took the view that, at a minimum, the prior versions of those regulations were ambiguous and casted reasonable doubts as to their correct interpretation.

36. In such circumstances, Respondent's decisions not to waive penalties and interest when it had the possibility to do so[48] and to retain both the GEM overpayments and the Royalty Assessments –when both Parties agree that either royalties or GEM

[47] Article 22 of the Mining Regulations **(CA-432)** provides that "[*t]o determine the results of its operations,* ***a mining activity titleholder that has other concessions or Economic-Administrative Units*** *shall keep independent accounts and reflect them in separate earning statements*" (emphasis added).

[48] *See* Articles 92(g) ("*Subjects are entitled,* inter alia*, to: g) Request the non-application of interest and adjustment for inflation based on the Consumer Price Index, if applicable, and of penalties in case of reasonable doubt or conflicting criteria in accordance with the provisions of Article 170*") and 170 *(*"*The assessment of interest, restatement of inflation based on the Consumer Price index or the assessment of penalties is not applicable if: 1. As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation had been paid until the clarification thereof, provided the clarifying provision expressly states that this paragraph is applicable*") of the Peruvian Tax Code (**CA-14**). When referring to Article 170, Mr. Bravo confirmed at the hearing that the waiver of penalties and interest could also take place in other cases (Tr. 2692:21-2693:22 (Day 9) (Bravo)).

payments could be owed but never both[49]– constitute, in my view, additional arbitrary actions that violated Freeport and SMCV's rights to a fair and equitable treatment under Article 10.5 of the Treaty.

37. Given the terms in which the majority of the Tribunal has ruled, I will render no opinion regarding the damages claimed.

[49] Award, ¶ 1003. In order to deny the claim for GEM overpayments, the majority interprets that the five-year statute of limitations set out in Article 1274 of the Civil Code should be disregarded and that the four-year term established in the Tax Code should be applied. Award, ¶¶ 1006-1010. I disagree. GEM payments were of a contractual nature and not tax payments. The construction sustained by the majority through Clauses 3 and 8 of the GEM Agreement **(CE-64**) and Article 5 of Law 29790 **(CA-181**) in order to apply the most restrictive rule – the one applicable to taxes – in the enforcement of contractual obligations run contrary to the very same (contractual) nature of the GEM payments and denies Claimant any possibility of exercising its rights. In addition, GEM payments only applied to companies with stability agreements that were exempted from royalties and Special Mining Tax (SMT) payments. SMCV made voluntarily GEM payments during 2012-2014 based on the premise that its entire Mining Unit was stabilized. Between June 2011 and April 2016, SMCV did not receive any royalties' assessments. SUNAT resumed assessing royalties against SMCV for the activities of the Concentrator in April 2016 and only in late 2017 the tax authority started assessing royalties and SMT against SMCV for the periods corresponding to the GEM payments (Q4/2011-2013). Therefore, it was only when SUNAT started assessing royalties and SMT against SMCV for the activities of the Concentrator that GEM payments became overpayments and Claimant was allowed to seek their refund. *See* Bullard II **(CER-7)**, ¶¶ 90-97 (explaining the interplay between Articles 1274 and 1993 of the Peruvian Civil Code).

[Signed]

Prof. Dr. Guido S. Tawil
Arbitrator

Date: 6 May 2024