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

CLAIMANT'S APPLICATION FOR PARTIAL ANNULMENT

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ABBREVIATED TERMS

Arbitration Rules	2006 ICSID Rules of Procedure for Arbitration Proceedings
Application	Application for Partial Annulment dated 16 September 2024
Award or *Freeport* Award	Award dated 17 May 2024 in *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08
Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Freeport or Applicant	Freeport-McMoRan Inc.
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings, 2006
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
Phelps Dodge	Phelps Dodge Mining Corporation
Regulations	1993 Regulations to Title Nine of the Mining Law
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
TPA	United States-Peru Trade Promotion Agreement

1. In accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention") and Rule 50 of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), 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 to the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") this Application for Partial Annulment (the "Application") of the award dated 17 May 2024 in *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/08 (the "Award").

I. INTRODUCTION

2. Freeport brings this Application for partial annulment in light of the *Freeport* Tribunal majority's clear error in failing to decide—or even consider—a significant portion of Freeport's claims, valued at US$417 million. Despite having clearly and explicitly upheld jurisdiction over these claims, the majority failed to exercise that jurisdiction. Instead, in the merits section of its decision, the majority incorrectly conflated these claims with different claims that it *had* dismissed on jurisdictional grounds and declined to consider them further. This constitutes a basis for annulment of this aspect of the Award based on multiple grounds set out in Article 52 of the Convention, specifically as a manifest excess of powers, a failure to state reasons, and a serious departure from a fundamental rule of procedure.

3. The underlying arbitration arises from the Republic of Peru's ("Peru," the "Government," or "Respondent") assessment of nearly US$1.2 billion in royalties, taxes, and penalties and interest on both royalties and taxes against SMCV, a Peruvian mining company of which Freeport is the majority owner. Peru assessed these royalties and taxes against SMCV in relation to its 2006-2013 operations at Cerro Verde, an open-pit mine in the Arequipa region of Peru. During this entire period, SMCV had a stability agreement in force which stabilized its administrative and tax regimes (the "Stability Agreement"). The royalties and taxes were not part of the stabilized regimes, because they only came into force after the stabilization date—and so SMCV did not have to pay them during the Stability Agreement's term. Yet, Peru nevertheless assessed royalties and new taxes against SMCV, based on a novel and restrictive interpretation of SMCV's Stability Agreement, which Peru claimed limited its scope to only a portion of SMCV's operations. Peru assessed significant penalties and interest against SMCV for its nonpayment of the royalties and the new taxes. It did so despite the fact that under Peruvian law and basic principles of fairness and equity, SMCV was entitled to a waiver of those penalties and interest because, at the very minimum, there was reasonable doubt about the scope of stability guarantees under Peruvian law.

4. In the arbitration, Freeport brought, as its two principal claims: (*i*) claims based on Peru's breaches of the Stability Agreement, and (*ii*) claims relating to the Royalty Assessments for Peru's breaches of Article 10.5 of the US-Peru Trade Promotion Agreement ("TPA"), which requires Peru to afford the minimum standard of treatment to U.S. investors and their investments. Because Article 22.3.1 of the TPA precludes Article 10.5 claims based on "taxation measures," Freeport did not challenge the Tax Assessments under Article 10.5.

5. In addition to the two principal claims, Freeport also brought alternative claims, which included, among others, (*i*) claims under Article 10.5 of the TPA based on Peru's failure to waive the penalties and interest on the Royalty Assessments, and (*ii*) claims under Article 10.5 of the TPA based on Peru's failure to waive the penalties and interest on the Tax Assessments. With respect to the latter, Freeport took the position that, unlike the Tax Assessments themselves, the *penalties and interest* on Tax Assessments were not "taxation measures," and so were not precluded by Article 22.3.1's tax exclusion. Peru disagreed and objected to jurisdiction over the claims relating to the penalties and interest on the Tax Assessments based on the tax exclusion. However, throughout the entire arbitration, it was undisputed that Freeport's Article 10.5 claims based on both the Royalty Assessments themselves and the penalties and interest on the Royalty Assessments were not barred by Article 22.3.1's exclusion of "taxation measures," as under Peruvian law royalties are not taxes.

6. In the jurisdictional section of the Award, the majority upheld Peru's Article 22.3.1 tax exclusion objection to Freeport's claims for penalties and interest on the Tax Assessments but found that it had jurisdiction over all of Freeport's other claims—including the claims for penalties and interest on the Royalty Assessments. But in the merits section of the Award, the majority completely failed to decide Freeport's Article 10.5 claims based on penalties and interest on the *Royalty* Assessments. Instead, in a one paragraph "analysis," the majority simply cross-referenced to its earlier jurisdictional finding dismissing the Article 10.5 claims based on the penalties and interest on the *Tax* Assessments—different and separate claims—and stated that the Tribunal was without jurisdiction to decide the claims "in relation to the Respondent's assessment of penalties and interest," without distinguishing between those based on the Tax Assessments and those based on the Royalty Assessments. Although this explanation completely contradicted the Tribunal's conclusions on jurisdiction and the Award's *dispositif*, the majority provided no further explanation for its failure to decide the claims based on penalties and interest on the Royalty Assessments.

7. The majority's inexplicable failure to decide the claims for penalties and interest on the Royalty Assessments is thus grounds for annulment because the Tribunal (*i*) manifestly exceeded its powers in failing to decide claims within its jurisdiction, (*ii*) failed to provide any coherent reasoning for its decision

and completely contradicted its jurisdictional ruling with the "analysis" offered in the merits section, and (*iii*) violated its duty to decide the questions before it and deprived Freeport of the opportunity to be heard. Freeport thus respectfully requests that the *ad hoc* committee annul the Award with respect to the majority's decision to reject the Article 10.5 claims relating to the penalties and interest on the Royalty Assessments.

II. APPLICANT'S DETAILS AND PROCEDURAL REQUIREMENTS

8. Freeport is an entity incorporated in the State of Delaware in the United States.[1] Freeport indirectly owns 53.56% of the shares of SMCV, a company constituted under the laws of the Republic of Peru.[2] Correspondence with Freeport relating to this matter should be sent to the undersigned counsel of record at the address below.[3] Freeport attaches proof of payment of the requisite lodging fee for the Application (US$25,000) to the Centre.[4]

9. As noted above, Freeport's annulment application relates to the Award dated 17 May 2024, which was delivered to the parties on the same date.[5] Freeport's application is thus filed within the 120-day time limit set out in Article 52(2) of the Convention and Arbitration Rule 50(3)(b).[6] Section IV below sets out the grounds on which Freeport's annulment application is based, and the reasons in support of each ground.[7]

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1 **CEA-1**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Award (17 May 2024) (Hanefeld, Cremades, Tawil) ("*Freeport* Award"), ¶ 2.

2 *Id.* ¶ 2.

3 **CEA-13**, 16 September 2024, Power of Attorney granted by Freeport to Debevoise & Plimpton LLP; **CEA-14**, 16 September 2024, Power of Attorney granted by SMCV to Debevoise & Plimpton LLP.

4 *See* **CEA-12**, 13 September 2024, Payment Certificate of Lodging Fee; *see* **CAA-1**, International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings, 2006 ("ICSID Arbitration Rules"), Rule 50(1)(d).

5 **CEA-1**, *Freeport* Award; *see* **CAA-1**, ICSID Arbitration Rules, Rule 50(1)(a).

6 **CAA-1**, Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1966 ("Convention"), Art. 52(2); **CAA-1**, ICSID Arbitration Rules, Rule 50(3)(b); **CAA-1**, International Centre for Settlement of Investment Disputes Administrative and Financial Regulations, 2006, Regulation 29.

7 *Infra* Section IV; *see* **CAA-1**, ICSID Arbitration Rules, Rule 50(1)(c)(iii).

III. FACTUAL AND PROCEDURAL BACKGROUND

A. THE DISPUTE

10. The underlying dispute relates to Cerro Verde, an open-pit mine in the Arequipa region of Peru that is one of the largest copper mines in the world. Cerro Verde is operated by SMCV, a Peruvian mining company of which Freeport is the majority owner.

11. At the center of this dispute is a fifteen-year mining Stability Agreement that SMCV entered into with Peru's Ministry of Energy and Mines ("MINEM"), acting on behalf of Peru, in 1998.[8] The Stability Agreement implemented guarantees of tax and administrative stability set forth in the 1992 Single Unified Text of the General Mining Law (the "Mining Law") and the 1993 Regulations to Title Nine of the Mining Law (the "Regulations").[9] The Stability Agreement froze the tax and administrative regimes for SMCV as they existed on 6 May 1996 (the "Stabilization Date") until the expiration of the Stability Agreement's term on 31 December 2013.[10] This meant that, while in force, any changes Peru made to the tax or administrative regimes after the Stabilization Date—including lowering or revising existing tax rates, or imposing new taxes or new administrative charges like royalties—would not apply to SMCV's stabilized operations during the term of the Stability Agreement.[11] Freeport's and SMCV's understanding was that the guarantees set out in the Stability Agreement, Mining Law, and Regulations applied to the entire Cerro Verde mining unit, which was made up of a mining concession and a beneficiation concession.[12]

12. In 2004, after entering into the Stability Agreement and completing its qualifying investment project, Freeport's predecessor-in-interest, Phelps Dodge Mining Corporation ("Phelps Dodge"), and SMCV decided to invest an additional US$850 million in the Cerro Verde mining unit to build a concentrator (the "Concentrator") to process primary sulfide ore, which made up a great majority of Cerro Verde's ore body. This was one of the largest mining investments in Peru's history at the time.[13] The Government had long sought this investment, as it would prolong the life of the mine by more than thirty years, triple tax revenues, and create thousands of new jobs.[14] Phelps Dodge and SMCV approved

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8 **CEA-1**, *Freeport* Award ¶¶ 160, 171, 184.

9 *Id.* ¶¶ 157–159, 164–166.

10 *Id.* ¶ 184.

11 *Id.* ¶ 184.

12 **CEA-2**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Memorial (19 October 2021) ("Freeport Memorial"), § IV.A.2.i; **CEA-4**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Reply and Counter-Memorial on Jurisdiction (13 September 2022) ("Freeport Reply"), ¶¶ 89-96.

13 **CEA-1**, *Freeport* Award ¶¶ 229–231, 267.

14 **CEA-2**, Freeport Memorial § III.A.C; **CEA-4**, Freeport Reply ¶ 53.

the investment based on the assumption that the Stability Agreement would apply to the Concentrator because it would operate within the Cerro Verde mining unit.[15]

13. In 2004, facing domestic political pressure to increase the Government's share of mining revenues, Peru enacted a mining royalty law (the "Royalty Law") that imposed a surcharge on mining profits.[16] The Royalty Law post-dated the Stabilization Date in the Stability Agreement and thus did not form part of the stabilized administrative regime. Peru also enacted certain changes to its tax laws and regulations that likewise did not form part of SMCV's stabilized tax regime.

14. In 2009, Peru's tax authority, the National Superintendence of Customs and Tax Administration ("SUNAT"), began assessing royalties and taxes against SMCV based on its Concentrator operations—charges that SMCV was exempted from under the stabilized tax and administrative regimes.[17] SUNAT did so arguing that the Stability Agreement only covered the specific investment project set out in the feasibility study SMCV submitted to qualify for the Stability Agreement and hence did not cover the Concentrator. Based on this interpretation, SUNAT ultimately assessed over US$1.2 billion against SMCV for fiscal periods spanning 2006 to 2013. Specifically:

(a) SUNAT issued Royalty Assessments against SMCV for the Concentrator operations for fiscal periods between 2006-2013, based on the 2004 Royalty Law and its subsequent 2012 amendment (the "Royalty Assessments"). These assessments ultimately totaled US$258 million as of the dates issued.[18] SUNAT also assessed penalties against SMCV and interest at exorbitant rates ranging from 10.95% to 18.25% annually on the Royalty Assessments and the penalties. The penalties and interest on the Royalty Assessments totaled US$198 million as of the dates issued, and continued to accrue thereafter.[19]

(b) SUNAT also assessed certain taxes against SMCV that were not part of the stabilized regime (the "Tax Assessments").[20] The Tax Assessments ultimately totaled US$253 million as of the dates issued.[21] SUNAT also assessed penalties against SMCV and interest at exorbitant rates ranging from 6.08% to 18.25% annually on the Tax Assessments and the

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15 *Id.* ¶¶ 221-233, 267.

16 *Id.* ¶ 214.

17 *Id.* ¶ 343.

18 **CEA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

19 *Id.*

20 **CEA-1**, *Freeport* Award ¶¶ 419–444.

21 **CEA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

penalties. The penalties and interest on the Tax Assessments totaled US$257 million as of the dates issued, and continued to accrue thereafter.[22]

15. SMCV unsuccessfully challenged each of the Royalty Assessments and Tax Assessments before SUNAT's Claims Division. SMCV also unsuccessfully challenged several of the Royalty Assessments and Tax Assessments before the Tax Tribunal, which serves as the final administrative appeal for royalty and tax matters.[23] SMCV also challenged the royalty assessments for 2006–2007 (the "2006–2007 Royalty Assessments") and for 2008 (the "2008 Royalty Assessments") before Peru's Contentious Administrative Courts, which provide a forum for judicial review of administrative resolutions.[24] SMCV initially prevailed before the first instance court, which found that the Stability Agreement applied to the entire Cerro Verde mining unit and annulled the 2008 Royalty Assessments.[25] However, the Superior Court of Justice (the "Appellate Court") reversed the first instance court's decision.[26] The Supreme Court of Justice (the "Supreme Court") then upheld the Appellate Court's decision.[27] The Contentious Administrative Courts likewise rejected SMCV's challenge to the 2006-2007 Royalty Assessments at the first instance and the appellate levels.[28] Following SMCV's final appeal to the Supreme Court, two judges voted in SMCV's favor, depriving the five-judge panel of the four votes needed to render a decision under Peruvian law.[29] The case thus remained unresolved until SMCV withdrew it in connection with Freeport's filing for arbitration.

16. In its administrative challenges before SUNAT's Claims Division and the Tax Tribunal, SMCV also sought waivers of the exorbitant penalties and interest on both the Royalty and Tax Assessments. SMCV did so based on a provision in Peru's Tax Code, Article 170, which provides that penalties and interest should be waived where the interpretation of the applicable legal provisions is subject to "reasonable doubt" as a result of their objective imprecision, obscurity, or ambiguity.[30] SMCV argued that there was at a minimum a reasonable doubt about the correct interpretation of the Mining Law and Regulations, including because (*i*) the assessments were based on a completely novel interpretation of the Mining Law and Regulations, (*ii*) SMCV's interpretation of the Mining Law and Regulations was

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22 *Id.*

23 **CEA-1**, *Freeport* Award ¶ 352.

24 *Id.* ¶ 368.

25 *Id.* ¶ 369.

26 *Id.* ¶ 374.

27 *Id.* ¶ 376.

28 **CEA-1**, *Freeport* Award ¶¶ 372–373.

29 *Id.* ¶ 377.

30 *See e.g.*, *id.* ¶ 364.

objectively reasonable in light of the text, which was at a minimum ambiguous, (*iii*) the Government's conduct was consistent with SMCV's interpretation, and (*iv*) other mining companies had the same interpretation of the Mining Law and Regulations as SMCV.[31] But SUNAT's Claims Division and the Tax Tribunal refused to waive any of the penalties and interest, first on spurious procedural grounds and then, in later proceedings, based on other arbitrary and pretextual grounds.[32] SMCV also requested the waiver of penalties and interest on the 2006-2007 and 2008 Royalty Assessments in the Contentious Administrative Court proceedings.[33] In the proceedings relating to the 2008 Royalty Assessments, the Appellate Court rejected SMCV's request for the waiver of penalties and interest on the 2008 Royalty Assessments in a single sentence that simply accepted the Tax Tribunal's dismissal of the claims on spurious procedural grounds without any independent assessment, even though SMCV had pointed to the Court's obligation to consider the issue *de novo*.[34] The Supreme Court then upheld this decision.[35] The first instance and Appellate Courts likewise refused to waive penalties and interest with respect to the 2006-2007 Royalty Assessments, again simply accepting the Tax Tribunal's procedural dismissal of the claims without any *de novo* assessment.[36] When SMCV appealed to the Supreme Court, the two Justices that voted in SMCV's favor specifically called attention to this omission, noting that the Appellate Court had "not addressed claimant's request" to waive penalties and interest.[37]

B. THE ARBITRATION

17. On 28 February 2020, Freeport submitted a notice of arbitration against Peru on its own behalf and on behalf of SMCV pursuant to Articles 10.16.1(a), (b) and 10.16.3 of the TPA.[38] Freeport appointed Professor Guido Santiago Tawil as arbitrator in the Notice of Arbitration.[39] On 3 June 2020, Peru appointed Prof. Dr. Bernardo Cremades as arbitrator in the case. The Parties requested the assistance of the Centre in appointing the President of the Tribunal, which led to the appointment of Dr. Inka Hanefeld as President of the Tribunal on 29 March 2021.

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31 **CEA-2**, Freeport Memorial ¶ 213; **CEA-4**, Freeport Reply ¶¶ 138, 179–182.

32 **CEA-2**, Freeport Memorial ¶¶ 17, 251-262.

33 *Id.* ¶ 257.

34 *Id.* ¶ 224.

35 *Id.* ¶ 230.

36 *Id.* ¶¶ 232–233.

37 *Id.* ¶¶ 238–239.

38 **CEA-1**, *Freeport* Award ¶ 453. *See generally* **CAA-2**, United States–Peru Trade Promotion Agreement.

39 **CEA-1**, *Freeport* Award ¶ 19.

1. Freeport's Claims

18. Freeport had two principal claims:

(a) *First*, Freeport alleged that Peru breached the Stability Agreement—which qualified as an investment agreement under Article 10.28 of the TPA[40]—each time that SUNAT's Royalty Assessments and Tax Assessments became final and enforceable. Freeport argued, among others, that under the plain terms of the Mining Law and Regulations, stability guarantees apply not only to the qualifying investment project, as the Government argued, but to all investments that the mining company made which fell within the mining unit or concessions for which the Stability Agreement was concluded.[41] This was consistent with the Government's own statements and practice, including a 2005 MINEM report unequivocally confirming that "it is not the mining titleholder . . .who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the *mining concessions of which it is the titleholder*, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of [the Royalty] Law;" and a 2012 SUNAT Report, which confirmed that stability guarantees are "applicable solely to the *concession or economic-administrative unit* for which said agreement has been signed."[42] Freeport's position was likewise consistent with the Government's implementation of SMCV's Stability Agreement up to that point, where it had never questioned that other new investments or expansions within the existing concessions were also stabilized, and indeed had approved expanding the existing beneficiation concession covered by the Stability Agreement to include the Concentrator.[43] It was also consistent with SUNAT's and MINEM's past practice in relation to other mining companies, which was to always apply stability guarantees to entire mining units.[44] Thus, because the Stability Agreement covered Cerro Verde's entire mining unit, the royalties and non-stabilized taxes should not have applied to the Concentrator, and Peru's decisions upholding these royalties and non-stabilized taxes breached the Agreement.[45]

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40 *Id.* ¶¶ 623, 632–644.

41 **CEA-2**, Freeport Memorial ¶ 241; **CEA-4**, Freeport Reply ¶¶ 70, 83.

42 *Id.* § II.A.2(i).

43 **CEA-4**, Freeport Reply ¶ 93.

44 **CEA-2**, Freeport Memorial ¶ 241; **CEA-4**, Freeport Reply ¶¶ 78, 155.

45 **CEA-2**, Freeport Memorial ¶¶ 300–357; **CEA-4**, Freeport Reply ¶¶ 120–121.

(b) *Second*, Freeport argued that Peru breached Article 10.5 of the TPA by failing to accord the minimum standard of treatment to Freeport and its investments each time that SUNAT's Royalty Assessments became final and enforceable.[46] With respect to the 2009-2013 Royalty Assessments, Freeport argued that Peru frustrated Freeport's and SMCV's legitimate expectations by inducing the Concentrator investment based on the assumption of stability and then reversing course due to political pressure.[47] Freeport further argued that Peru's adoption and application of its novel and restrictive interpretation of stability guarantees against SMCV was arbitrary, inconsistent, and non-transparent, since it was based not on a legitimate interpretation of the Mining Law and Regulations but rather a change in position resulting from political pressure, and because the Government continued to assure SMCV that it would not have to pay royalties even as MINEM advanced the restrictive interpretation internally.[48] For the 2006-2011 Royalty Assessments, Freeport also argued that both SUNAT and the Tax Tribunal committed serious due process violations in resolving SMCV's challenges to those assessments, including failing to decide these challenges on their own merits, improper coordination between proceedings, and improper interference by the president of the Tax Tribunal.[49]

19. Freeport valued these principal claims at US$942.4 million as of 13 September 2022.[50]

20. In addition, and independently from the principal claims, Freeport also raised an alternative claim, which, in relevant part, included the following claims:

(a) Freeport claimed that Peru breached Article 10.5 of the TPA each time that it arbitrarily and grossly unfairly failed to waive the extraordinarily punitive penalties and interest on the Royalty Assessments.[51] Freeport valued the claims for penalties and interest on the Royalty Assessments at US$417 million as of 13 September 2022. Freeport argued that international principles of fairness and equity and Article 170 of the Tax Code, described above, required Peru to waive the extraordinarily punitive penalties and interest on the grounds that, at a minimum, there was objectively reasonable doubt about the correct interpretation of the Mining Law and Regulations. Freeport further argued that Peru's

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46 **CEA-1**, *Freeport* Award ¶¶ 831, 835–837.

47 **CEA-2**, Freeport Memorial ¶¶ 22, 358, 368–377; **CEA-4**, Freeport Reply ¶¶ 148–150.

48 **CEA-2**, Freeport Memorial ¶¶ 22, 358, 367, 378–383; **CEA-4**, Freeport Reply ¶¶ 231–234.

49 **CEA-2**, Freeport Memorial ¶¶ 22, 358, 384–399; **CEA-4**, Freeport Reply ¶¶ 163–174.

50 *Id.* ¶ 289.

51 **CEA-1**, *Freeport* Award ¶ 992.

refusal to waive penalties and interest was arbitrary, unreasonable, disproportionate, procedurally improper, and fundamentally inequitable in light of the circumstances. In support of these claims, Freeport argued, among others that:

i. The plain text of the Mining Law and Regulations demonstrated on its face that it was, at the very least, imprecise, obscure, or ambiguous as to the scope of stability guarantees. This alone should have entitled SMCV to a waiver of penalties and interest under Article 170, and meant that SMCV's position that it did not have to pay royalties was entirely reasonable.[52]

ii. Until the Government acted against SMCV, officials from SUNAT, MINEM, and other Government authorities had repeatedly taken the position that stability guarantees under the Mining Law and Regulations applied to entire mining units or concessions.[53] This was true both with respect to SMCV itself, and with respect to the Government's treatment of other mining companies.[54] The Government even continued to take this position years *after* it issued the Royalty Assessments against SMCV on the grounds that stability guarantees applied only to the qualifying investment project.[55]

iii. The conflicting decisions of the Contentious Administrative Courts when SMCV challenged the first set of Royalty Assessments, described above, further demonstrated that the relevant provisions of the Mining Law and Regulations were at the very least ambiguous.[56] So too did the divided vote of the Supreme Court Justices in the case concerning the 2006-2007 Royalty Assessments, where three Justices voted to uphold the ruling in the Government's favor and two voted in SMCV's favor, depriving the Court of the four votes needed to render a decision.[57]

iv. Freeport also pointed to the Government's official statements of legislative intent accompanying amendments to relevant provisions of the Mining Law and Regulations in 2014 and 2019, respectively. These amendments—adopted after SMCV had contested the assessments—explicitly stated that their purpose was to

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52 **CEA-2**, Freeport Memorial ¶¶ 212–213, 403; **CEA-4**, Freeport Reply ¶¶ 179–184, 196.

53 **CEA-2**, Freeport Memorial § IV.A.2(i)(d); **CEA-4**, Freeport Reply §§ II.A.2–4.

54 **CEA-2**, Freeport Memorial ¶ 313; **CEA-4**, Freeport Reply ¶ 181.

55 **CEA-2**, Freeport Memorial ¶¶ 382, 408; **CEA-4**, Freeport Reply ¶ 182.

56 **CEA-2**, Freeport Memorial ¶¶ 382, 407–408; **CEA-4**, Freeport Reply ¶ 184.

57 **CEA-2**, Freeport Memorial ¶ 405; **CEA-4**, Freeport Reply ¶ 184.

make the legal framework relating to the scope of stability guarantees "clearer" and acknowledged that the previous text could be interpreted to apply stability guarantees to entire mining units.[58] While Freeport noted that the true purpose of these statements was to disguise Peru's changes to the legal framework as a "clarification," they at the very least confirmed that—by the Government's own admission—the prior versions of the relevant provisions of the Mining Law and Regulations were unclear as to the scope of stability guarantees.[59]

v. Freeport also argued that the Government's refusal to waive penalties and interest in the first set of challenges to the 2006-2007 and 2008 Royalty Assessments was unfair and inequitable because after the Tax Tribunal arbitrarily dismissed SMCV's waiver requests on spurious procedural grounds, the Contentious Administrative Courts simply adopted the Tax Tribunal's ruling without reasoning and without considering the issue *de novo* as they were required to do.[60] Freeport further argued that SUNAT's and the Tax Tribunal's failure to waive the penalties and interest on the remaining assessments was likewise unfair and inequitable because they denied SMCV's requests on arbitrary and pretextual grounds.[61] Among others, SUNAT and the Tax Tribunal claimed that they could only issue a waiver if the Government itself issued a specific "clarification" to the law—an interpretation that would render the waiver effectively meaningless by allowing the Government to thwart any request by refusing to issue such clarification.

vi. Freeport also demonstrated that Peru's long delays in both issuing the assessments and in resolving SMCV's administrative challenges significantly increased the amounts due, as did Peru's arbitrary failure to adjust the interest rate, making Peru's refusal to waive the penalties and interest based on SMCV's good faith interpretation particularly unfair and inequitable.[62]

(b) Freeport also alleged that for the same reasons, Peru's arbitrary and grossly unfair failure to waive the extraordinarily punitive penalties and interest on the Tax Assessments

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58 **CEA-2**, Freeport Memorial ¶ 407; **CEA-4**, Freeport Reply ¶ 183.

59 **CEA-2**, Freeport Memorial ¶¶ 405–407; **CEA-4**, Freeport Reply ¶ 183.

60 *Id.* ¶¶ 189–192.

61 *Id.* ¶¶ 193–196.

62 **CEA-2**, Freeport Memorial ¶¶ 417–420; **CEA-4**, Freeport Reply ¶¶ 197–198.

breached Article 10.5 of the TPA.[63] Freeport valued its claims for penalties and interest on the Tax Assessments at US$245 million, as of 13 September 2022.

2. Peru's Jurisdictional Objections

21. Peru raised several jurisdictional objections to Freeport's claims; specifically that (*i*) most of Freeport's claims were time-barred under Article 10.18.1's statute of limitations provision, (*ii*) most of Freeport's claims were outside the Tribunal's temporal jurisdiction under Article 10.1.3 of the TPA, (*iii*) Freeport's claims on behalf of SMCV for breaches of the Stability Agreement were precluded by Article 10.18.4's fork-in-the-road provision, and (*iv*) the Stability Agreement did not qualify as an investment agreement under Article 10.16.1 of the TPA.

22. Peru also filed a jurisdictional objection arguing that Article 22.3.1 of the TPA, which precludes Article 10.5 claims challenging "taxation measures," barred Freeport's Article 10.5 claims based on the penalties and interest on the Tax Assessments. Peru argued that the penalties and interest on Tax Assessments qualified as "taxation measures" under the TPA because they were, among others, the "means by which a government enforces a tax obligation" [64] and "part of the Executive Branch's powers and duties in administering taxes."[65] In recognition that the Tax Assessments themselves were "taxation measures," Freeport had not made Article 10.5 claims challenging the Tax Assessments.[66] However, Freeport took the position that, unlike the Tax Assessments, Article 22.3.1 did not preclude its challenges relating to the *penalties and interest* on the Tax Assessments because, among other reasons, the penalties and interest were not taxes under Peruvian law, and thus not "taxation measures" under the TPA.[67]

23. Notably, Peru did *not* make an Article 22.3.1 objection to the Article 10.5 claims based on the Royalty Assessments nor the penalties and interest on the *Royalty* Assessments—Peru's objection was explicitly limited to the penalties and interest on the *Tax* Assessments. That Peru did not object on this basis is unsurprising: it is well established that royalties are not taxes under Peruvian law, as Peru's own tax experts repeatedly confirmed at the hearing.[68] Since royalties are not taxes, penalties and interest on

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63 **CEA-1**, Freeport Award ¶ 992; **CEA-2**, Freeport Memorial ¶¶ 413–416; **CEA-4**, Freeport Reply ¶ 201.

64 **CEA-5**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Respondent's Rejoinder on the Merits and Reply on Jurisdiction (8 November 2022) ("Peru Rejoinder"), ¶ 774.

65 **CEA-5**, Peru Rejoinder ¶ 773.

66 *See, e.g.*, **CEA-9**, Tr. 2901:4–2902:11 (Day 10) (Resp. Closing) (noting that "the [TPA's] tax exclusion is not applicable to Freeport claims based on the royalty assessments" because "Perú has not objected to the royalties and penalties and interest on royalties on the basis of the [TPA's] tax exclusion."); **CEA-8**, Tr. 2664:22–2665:3 (Day 9) (Bravo and Picón) (conceding that "that Mining Royalties are not a tax").

67 **CEA-4**, Freeport Reply ¶¶ 273–274.

68 *See, e.g.*, **CEA-8**, Tr. 2664:22–2665:3 (Day 9) (Bravo and Picón) (noting that "that Mining Royalties are not a tax"); **CEA-8**, Tr. 2670:10–12 (Day 9) (Bravo and Picón) (asserting that "as we clarified a moment ago,

royalties likewise clearly are neither taxes nor "taxation measures."[69] Peru thus repeatedly reaffirmed during the proceedings that it was not challenging the Article 10.5 claims based on the penalties and interest on the *Royalty* Assessments under the TPA's tax exclusion.[70] Instead, Peru only objected to the claims for penalties and interest on the Royalty Assessments based on the TPA's Article 10.18.1 statute of limitations provision and Article 10.1.3 non-retroactivity provision.

24. The two-week hearing on jurisdiction, merits, and damages took place from 1-12 May 2023. The parties subsequently submitted simultaneous post-hearing briefs on 14 July 2023, and the Tribunal declared the record closed on 14 March 2024.

C. THE AWARD

25. The Tribunal rendered its Award on 17 May 2024.

1. Jurisdiction

26. With respect to jurisdiction, a majority of the Tribunal rejected all but one of Peru's objections. The Tribunal found that all of Freeport's claims, including its claims based on the penalties and interest on the Royalty Assessments, fell within Article 10.18.1's statute of limitations. It further concluded that all of the measures underlying Freeport's claims for breaches were within the TPA's temporal scope,

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Royalties are not a tax"); **CEA-8**, Tr. 2687:1–21 (Day 9) (Bravo and Picón) (reiterating that "Royalties [] are not taxes. That's true. They're not taxes."); **CEA-8**, Tr. 2690:4–13 (Day 9) (Bravo and Picón) (agreeing that "If Royalties are not taxes, penalties neither could be taxes.").

69 *See, e.g.*, **CEA-8**, Tr. 2690:4–13 (Day 9) (Bravo and Picón) (agreeing that "If Royalties are not taxes, penalties neither could be taxes.").

70 *See e.g.*, **CEA-3**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (4 May 2022), ¶¶ 456–459 (arguing that "First . . . all 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" under Article 22.3.1 of the TPA (emphasis in original), but that "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 (reiterating that "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"); *id.* n. 939 (confirming that Article 22.3.1 tax exclusion objection is limited to "SUNAT's penalty and interest decisions for the Tax Assessments," whereas statute of limitations objection applies to penalty and interest claims on both Tax and Royalty Assessments); **CEA-5**, Peru Rejoinder ¶¶ 770–777 (arguing that "Claimant's claims of alleged breaches of the TPA based on the Peruvian government's decisions to impose and maintain penalties and interest on SMCV's non-payment of the taxes identified in SUNAT's *Tax Assessments* fall outside the Tribunal's jurisdiction, because they constitute "taxation measures" under Article 22.3.1 of the TPA.") (emphasis added); **CEA-11**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Respondent's Post-Hearing Brief (14 July 2023), ¶¶ 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).

and thus rejected Peru's non-retroactivity objection under Article 10.13.1. The Tribunal also rejected Peru's Article 10.18.4 fork-in-the-road objections to the Stability Agreement claims, finding that Freeport had not previously submitted claims for the "same alleged breach" for adjudication in Peru. Finally, the Tribunal rejected Peru's objection that the Stability Agreement did not qualify as an "investment agreement" under Article 10.16.1 of the TPA as required to advance the Stability Agreement claims, finding that Freeport had proven that SMCV relied on the Stability Agreement to invest in the Concentrator.[71]

27. However, a majority of the Tribunal upheld Peru's jurisdictional objection to Freeport's claims for penalties and interest on the Tax Assessments. While the majority acknowledged that the penalties and interest themselves were not "taxes" under Peruvian law, it interpreted the treaty term "taxation measures"—which the TPA does not define—as broader than "taxes." The majority stated that it "is of the view that '*taxation measures*' include measures that are part of the regime for the *imposition and enforcement of a tax*."[72]

28. Applying this analysis to the penalties and interest on the Tax Assessments, the majority stated that it was "of the view that the imposition of penalties and interest on tax assessments and the refusal to waive them fall under the Peruvian tax regime."[73] The majority accordingly concluded that "the penalties and interest on the Tax Assessments (and SUNAT's failure to waive them) constitute measures that fall within the State's domestic tax regime" and thus 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.[74]

29. Prof. Tawil dissented on this point, finding that "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."[75]

30. The majority summarized its jurisdictional findings as follows: "the Claimant's claims are within the jurisdiction of the Tribunal, save for the Claimant's claims based on penalties and interest

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71 **CEA-1**, *Freeport* Award ¶ 639.

72 *Id.* ¶ 548 (emphasis added).

73 *Id.* ¶ 551.

74 *Id.* ¶¶ 552–553.

75 **CEA-1**, *Freeport* Award, Tawil Dissent ¶ 5.

assessed on *Tax* Assessments, which the majority finds to be outside the Tribunal's jurisdiction."[76] It reiterated this conclusion in the Award's *dispositif*, which 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." [77]

2. Merits

31. The Tribunal majority then rejected the remainder of Freeport's claims.

i. Freeport's Principal Claims

32. The majority first rejected all of Freeport's Stability Agreement claims on behalf of SMCV. The majority determined that under the Mining Law and Regulations, stability guarantees applied to specific investment projects, not to entire mining units or concessions.[78] The majority based this conclusion on its interpretation of the Mining Law, which largely tracked Peru's arguments.[79] The majority also pointed to statements made by the Government when it amended the law in 2014 as evidence of the scope of stability guarantees prior to the amendment.[80] It found that testimony from Freeport's witnesses and experts was "inconclusive," while relying heavily on the testimony of one of Peru's Government fact witnesses with respect to interpretation.[81] The majority likewise found that Freeport "has not shown that there was a clear administrative past practice" that stability guarantees applied to all investments in a mining unit or concession, rejecting some of Freeport's evidence on this point as inconclusive while failing to address other relevant evidence.[82]

33. The majority then turned to Freeport's Article 10.5 claims that Peru violated the minimum standard of treatment with respect to the 2009-2013 Royalty Assessments because its conduct was arbitrary, inconsistent, lacking in transparency, and contrary to Freeport's and SMCV's legitimate expectations. First, the majority rejected Freeport's legitimate expectations claim, finding, among others, that Freeport had not proven that there was a legitimate expectation of stability for the Concentrator.[83] The majority then concluded that, based on its finding that stability guarantees are limited to specific investment projects

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76 **CEA-1**, *Freeport* Award ¶ 546 (emphasis added).

77 *Id.* ¶ 1047(a).

78 *Id.* ¶¶ 697–717.

79 *Id.* ¶¶ 698–706.

80 *Id.* ¶ 708.

81 *Id.* ¶ 713.

82 *Id.* ¶ 716.

83 *Id.* ¶ 870.

under the Mining Law, Peru's conduct in assessing royalties against the Concentrator operations could not have been arbitrary or done for political motivations, because it was "based on legal standards."[84] The majority likewise rejected Freeport's argument that Peru's conduct was inconsistent and non-transparent, based on its assessment that "it was clear both before and after the investment that the Concentrator was not covered by the 1998 Stability Agreement."[85]

34. The majority also rejected Freeport's due process claims related to the 2006-2011 Royalty Assessments. In particular, it found that Freeport's submissions with respect to serious interference before the Tax Tribunal were "inconclusive,"[86] and that Freeport "ha[d] not demonstrated to the Tribunal's satisfaction that [the Tax Tribunal President] acted improperly."[87] The majority did not rule on Freeport's arguments that SUNAT's conduct had also given rise to due process violations.

35. Prof. Tawil again dissented from the majority's decision on the merits with respect to the principal claims. He found that the provisions of the Mining Law and Regulations that dealt with the scope of stability guarantees make clear that these guarantees applied to entire mining units or concessions, not to "investment projects"—noting that the latter term appeared nowhere in the Mining Law as in force at the time.[88] He further noted that because stability agreements are adhesion contracts—which was uncontested between the parties and their experts—they "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."[89] He concluded that the Stability Agreement applied to SMCV's entire mining unit—as reflected by the agreement itself, which lists both concessions—and therefore Peru repeatedly violated the Stability Agreement when it upheld assessments for royalties and taxes that did not form part of the stabilized tax and administrative regimes.[90] Per Prof. Tawil, the Government's conduct was also arbitrary in violation of Article 10.5.[91]

ii. Freeport's Alternative Claims

36. The majority then turned to Freeport's alternative claims. To recall, in the jurisdictional section, the majority had upheld Peru's tax exclusion objection to Freeport's Article 10.5 claims based on

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84 *Id.* ¶ 898.

85 *Id.* ¶ 925.

86 *Id.* ¶ 957.

87 *Id.* ¶¶ 958–960.

88 **CEA-1**, *Freeport* Award, Tawil Dissent ¶¶ 13–21.

89 *Id.* Tawil Dissent ¶ 22.

90 *Id.* Tawil Dissent ¶¶ 26–32.

91 *Id.* Tawil Dissent ¶ 33.

penalties and interest on the *Tax* Assessments but held that it had jurisdiction over Freeport's Article 10.5 claims based on penalties and interest on the *Royalty* Assessments. Accordingly, the Tribunal now should have assessed the claims based on penalties and interest on Royalty Assessments on the merits. But it did not. Instead, the majority failed to even consider, let alone decide, these claims on the merits—claims valued at US$417 million as of 13 September 2022, the date of Freeport's Reply—before inexplicably rejecting them.

37. The entirety of the Tribunal majority's "analysis" of the claims based on penalties and interest on Royalty Assessments in the merits section amounts to one short paragraph, paragraph 986, replicated in full below, in which it states:

> 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 requirements. However, this was done without prejudice to the Tribunal's decision on jurisdiction. [92]

38. In other words, the majority rejected the *entirety* of the Article 10.5 penalties and interest claims: both the claims based on the failure to waive penalties and interest on the *Royalty* Assessments, valued at US$417 million, and those based on failure to waive penalties and interest on the *Tax* Assessments, valued at US$245 million. According to paragraph 986, it did so on the basis that it had no jurisdiction to decide *any* of the penalty and interest claims.

39. This conclusion makes no sense and is completely irreconcilable with the Tribunal's actual jurisdictional findings, which explicitly limited the Article 22.3.1. tax exclusion ruling to the Article 10.5 claims based on penalties and interest on the *Tax* Assessments and explicitly *upheld* jurisdiction over the Article 10.5 claims based on penalties and interest on the *Royalty* Assessments. That the Tribunal upheld jurisdiction over the claims based on penalties and interest on the Royalty Assessments cannot seriously be disputed:

(a) The Award's *dispositif* explicitly confirms that the Tribunal upheld jurisdiction over the claims based on penalties and interest on the *Royalty* Assessments, stating that "[t]he

[92] **CEA-1**, *Freeport* Award ¶ 986.

Tribunal *has jurisdiction over the Claimant's claims* except for the Claimant's claims based on the disputed *Tax* Assessments' penalties and interest."[93]

(b) In the jurisdictional section of the Award, the Tribunal explicitly rejected Peru's only jurisdictional objections relevant to Freeport's Article 10.5 claims based on penalties and interest on the *Royalty* Assessments —*i.e.*, that those claims were time-barred, and that *all* of Freeport's treaty claims other than its due process claims fell outside the Tribunal's temporal jurisdiction.[94]

(c) The Tribunal majority also again explicitly stated at the outset of the jurisdictional section 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."[95]

40. The cross-reference to the jurisdictional section included in paragraph 986 sheds no light on the majority's inexplicable refusal to consider the claims based on penalties and interest on the *Royalty* Assessments, because the referenced paragraphs—540 *et seq*., which address Peru's tax exclusion objection—have nothing to do with those claims. Rather, those paragraphs, and the majority's ruling in those paragraphs, explicitly concern only the Article 10.5 claims based on penalties and interest on the *Tax* Assessments.

(a) The opening paragraph of this section makes clear that it concerns only penalties and interest on the *Tax* Assessments, confirming that:

> 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.[96]

(b) The majority's substantive analysis in this section likewise focuses only on whether the TPA's tax exclusion precludes jurisdiction over the Article 10.5 claims based on penalties

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93 *Id.* ¶ 1047 (emphasis added).

94 *Id.* ¶¶ 457–525 (rejecting Peru's objection that Freeport's claims based on Penalties and interest on the Royalty Assessments fell outside the TPA's statute of limitations period); ¶¶ 554–584 (rejecting Peru's objection that the relevant acts or facts occurred before the entry into force of the TPA and thus that all claims fell outside the Tribunal's jurisdiction).

95 *Id.* ¶ 456.

96 *Id.* ¶ 540 (emphasis added).

and interest on the *Tax* Assessments. For example, the Award notes that "the Tribunal is of the view that 'taxation measures' include measures that are part of the regime for the imposition and enforcement *of a tax*."[97] It further cites approvingly to Peru's experts' testimony related to, among others, "*tax-related* penalties and interest," "the determination of *tax* debts" as including "corresponding interest," "penalties and interest related to *tax assessments*," and "interest on *tax debts*."[98]

(c) The majority's conclusion upholding Peru's objection is likewise explicitly limited to the penalties and interest on the *Tax* Assessments, stating "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."[99]

41. In other words, in paragraph 986 of the Award, the Tribunal majority inexplicably and inappropriately appeared to conflate or confuse the Article 10.5 claims based on penalties and interest on the *Royalty* Assessments—over which the Tribunal had upheld jurisdiction—with those based on penalties and interest on the *Tax* Assessments, which it had concluded were outside the Tribunal's jurisdiction due to the Article 22.3.1 tax exclusion. It did so even though (*i*) Peru had never once raised an Article 22.3.1 objection to the Article 10.5 claims based on penalties and interest on the Royalty Assessments, (*ii*) the Tribunal had in fact *upheld* jurisdiction over those claims, and (*iii*) the majority had clearly and explicitly rejected jurisdiction based on Article 22.3.1 *only* with respect to the Article 10.5 claims based on penalties and interest on the *Tax* Assessments. The result of this error is that the Tribunal majority failed to address Freeport's claims based on penalties and interest on the Royalty Assessments, valued at US$417 million, on the merits *at all*. But it nevertheless apparently rejected them in the second line of the *dispositif*, which simply states: "The Claimant's claims are rejected in their entirety."[100]

42. Prof. Tawil's dissent was thus the only opinion on the merits of the penalty and interest claims. He considered together the merits of the penalty and interest claims related to the Tax Assessments and those related to the Royalty Assessments, since he would have rejected the Article 22.3.1 objection to Freeport's claims based on penalties and interest on the Tax Assessments. Prof. Tawil concluded that Peru's "decisions not to waive penalties and interest" were "arbitrary actions that violated Freeport's and SMCV's

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97 *Id.* ¶ 548 (emphasis added).

98 *Id.* ¶ 551 (emphasis added).

99 *Id.* ¶ 553 (emphasis added).

100 *Id.* ¶ 1047.

rights to a fair and equitable treatment under Article 10.5 of the Treaty."[101] This was because SMCV's position that it did not have to pay royalties and taxes was "reasonable and consistent under the legal regime existing at the time," and reaffirmed by senior Peruvian officials.[102] Prof. Tawil further pointed to the 2014 and 2019 respective amendments to the Mining Law and Regulations, in which "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."[103] As Prof. Tawil noted earlier in his dissent, "Amendments to an existing legal regime are not made to clarify what is already clear."[104]

IV. GROUNDS FOR ANNULMENT

A. THE TRIBUNAL'S FAILURE TO CONSIDER FREEPORT'S CLAIMS BASED ON PENALTIES AND INTEREST ON THE ROYALTY ASSESSMENTS ON THE MERITS WAS A MANIFEST EXCESS OF POWERS THAT CONSTITUTES GROUNDS FOR ANNULMENT

43. Under Article 52(1)(b), there are grounds for annulment where a tribunal has "manifestly exceeded its powers." Prior *ad hoc* committees have explained that a tribunal exceeds its powers "not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, . . . but also if it fails to exercise a jurisdiction which it possesses under those instruments."[105]

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101 **CEA-1**, *Freeport* Award, Tawil Dissent ¶ 36.

102 *Id.* Tawil Dissent ¶ 35.

103 *Id.* Tawil Dissent ¶ 35.

104 *Id.* Tawil Dissent ¶ 21.

105 **CAA-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. *See also* **CAA-7**, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment (16 April 2009) (Schwebel, Shahabuddeen (dissenting), Tomka), ¶ 80 ("the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed"); **CAA-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"), ¶ 41 ("a failure to decide a question entrusted to the tribunal also constitutes an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement"); **CAA-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, Cicchetti, Onwumaegbu) ("*Khudyan* Decision on Annulment"), ¶ 178 ("It is now well established that a tribunal may exceed its powers not only by asserting jurisdiction where none exists but also by declining to exercise a jurisdiction which it does possess.").

Further, the excess of powers is "manifest" when it is "obvious or clear,"[106] or "perceived without difficulty."[107]

44. Here, the Tribunal majority manifestly exceeded its powers when it failed to consider or decide on the merits claims within its jurisdiction—namely, Freeport's claims based on penalties and interest on the Royalty Assessments.

45. *First*, the claims based on penalties and interest on the Royalty Assessments clearly fell within the Tribunal's jurisdiction:

(a) As noted above, the Award's *dispositif* explicitly confirms that "[t]he Tribunal has jurisdiction over the Claimant's claims," which includes the claims based on penalties and interest on the Royalty Assessments, "except for the Claimant's claims based on the disputed *Tax* Assessments' penalties and interest."[108] The jurisdictional section of the Award likewise confirmed this point—finding 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"—and explicitly rejected Peru's only jurisdictional objections relevant to the claims based on penalties and interest on the Royalty Assessments, as explained above.[109]

(b) Peru also never raised a jurisdictional objection to the claims based on penalties and interest on the *Royalty* Assessments based on the TPA's Article 22.3.1 tax exclusion. As discussed above, Peru's jurisdictional objection was limited to the claims based on penalties and interest on the *Tax* Assessments, as the majority's summary of this objection acknowledges.[110] Peru's closing statements on this point at the hearing could not have been clearer: after setting out Peru's arguments in favor of tax exclusion objection to the claims

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106 **CAA-8**, *Helnan* Decision on Annulment, ¶ 55. *See also, e.g.*, **CAA-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 ("an excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear.").

107 **CAA-11**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015) (Fernández-Armesto, Feliciano, Oreamuno), ¶ 57.

108 **CEA-1**, *Freeport* Award ¶ 1047 (emphasis added). *See Supra* ¶ 30.

109 **CEA-1**, *Freeport* Award ¶ 456 (emphasis added); *id.* ¶¶ 457–525 (rejecting Peru's objection that Freeport's claims based on Penalties and interest on the Royalty Assessments fell outside the TPA's statute of limitations period); ¶¶ 554–584 (rejecting Peru's objection that the relevant acts or facts occurred before the entry into force of the TPA and thus that all claims fell outside the Tribunal's jurisdiction). *Supra* ¶¶ 26, 30.

110 **CEA-1**, *Freeport* Award ¶¶ 526–531 ("The Respondent argues that penalties and interest imposed on SMCV for its failure to pay taxes assessed in SUNAT's *Tax Assessments* constitute taxation measures . . . excluded from the scope of Article 10.5 of the TPA.") (emphasis added).

based on penalties and interest on the *Tax* Assessments, Peru's lead arbitration counsel explained:

> Now, there's been a discussion about tax assessment versus royalty assessment. So, to be clear, everything I said so far relates to the *tax assessments* and the penalties and interest *relating to those tax assessments*. Perú submits that the Tribunal has no jurisdiction either over penalties and interest on the royalty assessment, but *that's for a different reason*, because those claims fall outside of the statutory limitations.[111]

(c) The Tribunal majority's ruling upholding Peru's jurisdictional objection based on the TPA's tax exclusion likewise leaves absolutely no doubt that this ruling, like Peru's objection, is limited to the claims based on penalties and interest on the *Tax* Assessments, as discussed above.[112]

46. *Second*, because the Tribunal had jurisdiction to decide Freeport's claims based on penalties and interest on the Royalty Assessments, the majority's failure to exercise that jurisdiction—without any basis whatsoever—constitutes an excess of powers, as multiple *ad hoc* committees have confirmed[113]:

(a) In *Vivendi I*, for example, an *ad hoc* committee held that the tribunal committed a manifest excess of powers when it failed to decide certain treaty claims despite finding that those claims were within its jurisdiction. The treaty claims in that case related to performance of a concession contract that contained an exclusive jurisdiction clause in favor of local administrative courts. The tribunal found that notwithstanding this clause, it had jurisdiction to consider the treaty claims as separate and distinct from any contract claims, but then dismissed the treaty claims on the merits because resolving them would require the tribunal to interpret and apply the contract, which was exclusively a question for the

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111 **CEA-9**, Tr. 3042:18–3043:4 (Day 10) (Resp. Closing) (emphasis added).

112 *Supra* ¶¶ 27-28.; **CEA-1**, *Freeport* Award ¶ 540 ("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.") (emphasis added); *id.* ¶ 553 (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") (emphasis added). *See also generally id.* ¶¶ 540–553.

113 *See, e.g.*, **CAA-16,** ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 93 (summarizing prior decisions and noting that "a Tribunal's rejection of jurisdiction when jurisdiction exists also amounts to an excess of powers.").

administrative courts.[114] The committee found this to be grounds for annulment because the tribunal had held that it had jurisdiction over the treaty claims, yet "failed to decide whether or not the conduct in question amounted to a breach of the BIT."[115]

(b) In *Helnan v. Egypt*, an *ad hoc* committee held that the tribunal manifestly exceeded its powers when, despite finding that neither the treaty nor the Convention required the exhaustion of local remedies, the tribunal dismissed a treaty claim on the basis that Helnan had failed to pursue certain local remedies.[116] In so doing, the *ad hoc* committee noted that "a failure to decide a question entrusted to the tribunal also constitutes an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement,"[117] and noted that by requiring exhaustion of local remedies, the tribunal had clearly failed to fulfill its jurisdictional mandate.

(c) As recently as in 2023, in *Khudyan v. Armenia*, an *ad hoc* committee held that the tribunal committed a manifest excess of powers when it failed to answer a "critical question" before it.[118] In particular, the tribunal had held that there was no jurisdiction *ratione personae* over one of the claimants, yet had failed to decide a key question relating to the nationality of that claimant, instead relying on an alleged "common ground" between the parties that did not, in fact, exist.[119]

47. *Third*, the Tribunal majority's excess of powers is "manifest" because it is "obvious," "clear," and "perceived without difficulty." The fact that the Tribunal majority failed to decide claims within its jurisdiction is clear and obvious from the face of the Award. Indeed, one need only look at a handful of paragraphs—paragraphs 540–553 and 986—to realize that the Tribunal majority's failure to rule on the merits of the claims based on penalties and interest on the Royalty Assessments is entirely baseless. Paragraph 986 cites to paragraphs 540 *et seq* as the sole basis for declining to decide these claims. But these paragraphs have nothing to do with the claims based on penalties and interest on the Royalty Assessments —they only relate to the claims based on penalties and interest on the *Tax* Assessments. In other words, even in the Tribunal majority's own words, there is no support whatsoever for its failure to decide the claims based on penalties and interest on the Royalty Assessments.

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114 **CAA-5**, *Vivendi I* Decision on Annulment, ¶¶ 93–115.

115 *Id.* ¶ 111.

116 **CAA-8**, *Helnan* Decision on Annulment, ¶¶ 46–55.

117 *Id.* ¶ 41.

118 **CAA-15**, *Khudyan* Decision on Annulment, ¶ 218.

119 *Id*. ¶¶ 185–221.

48. The Tribunal majority's manifest excess of powers in failing to decide the claims based on penalties and interest on the Royalty Assessments thus constitutes grounds for annulment of its rejection of those claims.

B. THE TRIBUNAL'S FAILURE TO STATE REASONS WHEN IT REJECTED FREEPORT'S CLAIMS BASED ON PENALTIES AND INTEREST ON THE ROYALTY ASSESSMENTS CONSTITUTES GROUNDS FOR ANNULMENT

49. Article 52(1)(e) of the Convention provides for annulment where an "award has failed to state the reasons on which it is based." A tribunal fails to state reasons when a reader cannot "follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or law."[120] Past *ad hoc* committees have found that "an annulment must follow" where there is "no express rationale for the [tribunal's] conclusions," including where there is "a complete absence of reasons or . . . frivolous or contradictory explanations."[121] With respect to the latter, *ad hoc* committees have found that reasoning is contradictory where "two (or more) contradictory premises supporting a conclusion cannot stand together and cannot both be true."[122] Annulment will also follow where a tribunal "fail[s] to deal with a question" and, as a result, "render[s] the award unintelligible."[123]

50. Here, the Tribunal majority failed to provide *any* coherent reasoning for dismissing Freeport's claims based on penalties and interest on the Royalty Assessments.

51. *First*, the Tribunal majority's reasoning in its one-paragraph dismissal of the claims based on penalties and interest on the Royalty Assessments is not only "insufficient," it is entirely absent. The Tribunal majority offered no independent analysis of these claims. Instead, as discussed above, it simply cross-referenced to an earlier paragraph of the decision that has nothing to do with the claims based on

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120 **CAA-4**, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment (22 December 1989) (Sucharitkul, Broches, Mbaye) ("*MINE* Decision on Annulment"), ¶ 5.09. *See also, e.g.*, **CAA-12**, *TECO* Decision on Annulment, ¶ 87 (quoting **CAA-4**, *MINE* Decision on Annulment, ¶ 5.09).

121 **CAA-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"), ¶ 86. *See also, e.g.*, **CAA-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"), ¶¶ 167–168 ("Irrelevant or absurd arguments apparently supporting a conclusion do not amount to reasons. . . . [A]d hoc committees have considered that contradictory reasons might result in annulment under Article 52(1)(e).").

122 *Id.* ¶ 169. *See also* **CAA-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"), ¶ 170 (quoting **CAA-5**, *Vivendi I* Decision on Annulment, ¶ 65 and noting that "genuine contradictions which 'cancel each other out' may amount to a failure to state reasons").

123 **CAA-4**, *MINE* Decision on Annulment, ¶ 5.13.

penalties and interest on the Royalty Assessments.[124] This barest of references cannot equate to "reasoning," nor does it allow the reader to discern the Tribunal majority's motivations.

52. *Second*, even to the extent that the reference to the jurisdictional findings could constitute "reasoning" in the abstract sense, the reasoning provided is completely contradictory and thus insufficient.

(a) As discussed above, the Tribunal majority's jurisdictional ruling on the TPA's tax exclusion is unquestionably limited to the claims based on penalties and interest on the *Tax* Assessments.[125] Yet in paragraph 986, the Tribunal majority states instead that "[t]he Tribunal has found that *penalties and interest* constitute 'taxation measures' within the meaning of Article 22.3.1 of the TPA" and that it "has therefore no jurisdiction to decide on the merits of the Claimant's [Article 10.5] claim . . . in relation to the Respondent's assessment of penalties and interest."[126] In other words, in paragraph 986, the Tribunal majority made no distinction between the claims based on penalties and interest on the Tax Assessments and the claims based on penalties and interest on the Royalty Assessments, even though its jurisdictional decision completely contradicts this in that it only applies to the former.

(b) The *dispositif* further highlights this contradiction. It first 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*"—making clear that the Tribunal *did* have jurisdiction over the claims based on penalties and interest on the Royalty Assessments.[127] It then states that "the Claimant's claims are rejected in their entirety," *i.e.*, on the merits.[128] But the Tribunal majority did not reject Freeport's claims based on penalties and interest on the Royalty Assessments on the merits. It simply did not consider them at all.

53. *Third*, given this total lack of reasoning and internal contradiction, it is simply not possible to follow "how the tribunal proceeded from Point A to Point B."

(a) *Ad hoc* committees have repeatedly confirmed that annulment is appropriate where the tribunal provides a complete lack of reasoning. For example, in *Perenco*, the *ad hoc* committee held that the tribunal had failed to state reasons when it provided "[n]o

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124 *See supra* ¶¶ 37-38.

125 *See supra* ¶¶ 27-30.

126 **CEA-1**, *Freeport* Award ¶ 986.

127 *Id.* ¶ 1047.

128 *Id.* ¶ 1047.

explanation whatsoever" for its valuation of the claimant's loss of opportunity.[129] The *ad hoc* committee similarly stated that it was "unable to find one single reason in [the Award] that supports the Tribunal's conclusion" that certain shipping costs were tax deductible, and thus annulled this aspect of the tribunal's award based on a failure to state reasons.[130]

(b) *Ad hoc* committees have also consistently confirmed that annulment is appropriate where the tribunal's reasoning is contradictory. For instance, in *Pey Casado I*, an *ad hoc* committee found that the tribunal had failed to state reasons when it used an expropriation-based damage 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."[131] Similarly, in *Tidewater*, the *ad hoc* committee held that a tribunal had failed to state its reasons for using a 1.5% country risk premium to calculate its damages valuation (as evidenced by the amount the tribunal awarded in damages) because it contradicted the tribunal's earlier conclusion that a 1.5% country risk premium was unreasonable.[132] In so doing, the *ad hoc* committee noted that it found that "[t]he two statements of the Tribunal cannot be reconciled. They are genuinely contradictory."[133]

54. The Tribunal majority's total failure to provide any coherent reasoning for its failure to decide the claims based on penalties and interest on the Royalty Assessments—and the clear contradiction between its statements in the merits section and the actual jurisdictional findings—are thus equally grounds for annulment of its decision to reject these claims.

C. THE TRIBUNAL'S FAILURE TO CONSIDER FREEPORT'S CLAIMS BASED ON PENALTIES AND INTEREST ON THE ROYALTY ASSESSMENTS ON THE MERITS VIOLATED A FUNDAMENTAL RULE OF PROCEDURE AND CONSTITUTES GROUNDS FOR ANNULMENT

55. Under Article 52(1)(d) of the Convention, a serious departure from a fundamental rule of procedure is also grounds for annulment. Rules of procedure are "fundamental" when they enshrine "principles of natural justice, including the principles that both parties must be heard and that there must be

129 **CAA-14**, *Perenco* Decision on Annulment, ¶ 466.

130 *Id.* ¶¶ 572–575.

131 **CAA-10**, *Pey Casado I* Decision on Annulment, ¶ 285.

132 **CAA-13**, *Tidewater* Decision on Annulment, ¶¶ 185–189.

133 *Id.* ¶ 189.

adequate opportunity for rebuttal."[134] A tribunal will depart from a fundamental rule of procedure when it fails to consider a question submitted to it that could have affected its ultimate decision.[135] The right to be heard is also "undoubtedly accepted as a fundamental rule of procedure, a serious failure of which could merit annulment,"[136] such as when a party has been denied the right to "present its arguments" on an issue decided by the tribunal.[137] A departure is "serious" if the tribunal's failure to comply "with a rule of procedure could potentially have affected the award."[138]

56. Here, the Tribunal majority's failure to consider Freeport's claims based on penalties and interest on the Royalty Assessments on the merits constituted a serious violation of a fundamental rule of procedure, namely, of the Tribunal's duty to consider the questions before it and of Freeport's right to be heard.

57. *First*, by declining to consider or decide Freeport's claims based on penalties and interest on the Royalty Assessments on the merits, the Tribunal majority failed entirely to consider a question submitted to it for decision. The obligation to "deal with every question submitted to the Tribunal," found in Article 48(3) of the Convention, is "one of the general principles underlying arbitration" and, as a result, has been recognized by *ad hoc* committees as a fundamental rule of procedure, a serious departure from which is grounds for annulment.[139] As discussed above, there is no question that the Article 10.5 claims

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134 **CAA-9**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010) (Tomka, Hascher, McLachlan) ("*Fraport* Decision on Annulment"), ¶ 186.

135 *See e.g.*, **CAA-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, Feliciano, Giardina) ("*Amco I* Decision on Annulment"), ¶ 32 ("The *ad hoc* Committee believes that the obligation set out in Article 48(3) of the Convention to 'deal with every question submitted to the Tribunal and [to] state the reasons upon which [the award] is based', can find its sanction in Article 52(1)(e) of the Convention. Failure 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'."). *See also* **CAA-9**, *Fraport* Decision on Annulment, ¶ 271 ("There are instances where the absence of reasons may impact upon other issues, for example, if the motivation of an award is so aberrant that it would violate a fundamental rule of procedure.").

136 *Id.* ¶ 197; *see also* **CAA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 104 (discussing drafting history of Convention and noting that "one such fundamental principle mentioned during the negotiations was the parties' right to be heard").

137 *See e.g.*, **CAA-9**, *Fraport* Decision on Annulment, ¶ 197.

138 **CAA-12**, *TECO* Decision on Annulment, ¶ 85; *see also, e.g.*., **CAA-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.").

139 **CAA-1**, Convention, Art. 48(3); **CAA-6**, C. Schreuer (ed.), *The ICSID Convention: A Commentary* (2009), Art. 48, p. 816; *see also* **CAA-3**, *Amco I* Decision on Annulment, ¶ 32; **CAA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 110 ("if 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

based on penalties and interest on the Royalty Assessments were before the Tribunal for decision—or that the Tribunal majority failed to decide them. The Tribunal majority's error was also unquestionably "serious" as it resulted in the dismissal of claims worth over US$417 million without even so much as considering them.

58. *Second*, even if the majority had actually dismissed the claims based on penalties and interest on the Royalty Assessments on jurisdiction—though as discussed above, it clearly did not—this would equally constitute grounds for annulment, because the parties never argued this point during the proceedings, meaning that Freeport never had the opportunity to respond to it. *Ad hoc* committees have repeatedly confirmed that a denial of the right to be heard of this kind constitutes a serious departure from a fundamental rule of procedure. For example:

(a) The *Pey Casado I* committee held that the tribunal had seriously departed from a fundamental rule of procedure where the tribunal had calculated damages for a denial of justice breach without providing the parties with an opportunity to brief this issue.[140] The *ad hoc* committee noted that "the parties never pleaded the damages claims arising from the breaches of Article 4 of the BIT," and that the issue had not been raised before the parties other than in a question briefly posed by the president of the tribunal at a hearing, which the *ad hoc* committee found insufficient to fulfill the right to be heard.[141]

(b) Likewise, the *ad hoc* committee in *TECO* found the tribunal's decision that awarding interest on the claimant's historical damages would constitute "unjust enrichment" was a serious departure from a fundamental rule of procedure because neither of the parties had raised an unjust enrichment theory in their submissions.[142]

59. The Tribunal majority's failure to decide the claims based on penalties and interest on the Royalty Assessments was thus a serious departure from a fundamental rule of procedure that constitutes grounds for annulment of this aspect of the Award, and would equally constitute grounds for annulment if it had actually dismissed those claims for lack of jurisdiction.

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.").

140 **CAA-10**, *Pey Casado I* Decision on Annulment, ¶¶ 261–271.

141 *Id.* ¶¶ 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'").

142 **CAA-12**, *TECO* Decision on Annulment, ¶ 189.

V. THE *FREEPORT* TRIBUNAL'S OTHER ERRORS

60. While the Tribunal majority's failure to decide Freeport's claims for penalties and interest on the Royalty Assessments was its most egregious error, it is by no means the only serious flaw apparent in the Award. Rather, it is symptomatic of an unpersuasive Award that contains numerous clear errors and superficial or absent reasoning, fails to consider key evidence, and frequently adopts the Respondent's position on key issues without any real explanation for why it found Respondent's arguments more persuasive than Freeport's. To give just a few salient examples:

(a) The majority completely ignored all fifteen SUNAT resolutions and two Tax Tribunal resolutions issued to mining companies other than SMCV in which SUNAT or the Tax Tribunal had applied stability guarantees to entire mining units—a position that was in complete contradiction with Peru's position on the scope of stability guarantees in the arbitration. This evidence exposed a critical gap in Peru's main defense: while Peru insisted in the Freeport arbitration that the interpretation it adopted against SMCV was "longstanding," Peru had been unable to demonstrate *any* examples in which it had applied that interpretation to other mining companies, and the resolutions showed that Peru had actually applied Freeport's understanding of the scope of the stability guarantees to other mining companies.[143] Given the obvious relevance of these resolutions to the key issue in this arbitration—the scope of the stability guarantees—the Tribunal first granted Freeport's document requests for the relevant resolutions, and then ordered their production when Peru failed to comply with the requests.[144] Peru ultimately produced all of the SUNAT resolutions shortly before the hearing and they featured prominently in the Parties' oral submissions and the expert and witness testimony at the hearing, as well as in the Parties' post-hearing briefs.[145] Given the key relevance of these resolutions, as further demonstrated by this procedural history, the absence of any mention of these documents at all in the Award, let alone any reasoning regarding the relevance, is striking.

(b) In adopting Peru's interpretation of the Mining Law and Regulations, the majority ignored a provision that is totally irreconcilable with the Tribunal majority's interpretation—namely, the final paragraph of Article 2 of the Regulations, which makes clear that stability guarantees apply to the "concessions or units" covered by the agreement, and thus directly contradicted Peru's argument—and the majority's finding that they applied to "investment

143 **CEA-4**, Freeport Reply ¶¶ 153–154.

144 *See* **CEA-6**, Tr. 20:5–20:13 (Day 1) (Cl. Opening).

145 *See, e.g.*, **CEA-6**, Tr. 20:5–22:3 (Day 1) (Cl. Opening).

projects."[146] The majority did not engage with this key provision in substance, but stated that it was not relevant because it was "wording that was introduced in a reform in 2019," replicating—without any reasoning or verification—an argument Peru raised in its Rejoinder. [147] But this was clearly wrong—the relevant language appeared in the original text of Article 2 of the Mining Regulations in 1993, as Freeport demonstrated by exhibiting the original 1993 version of the Regulations, and as Peru conceded at the hearing. [148]

(c) Even though Freeport based its due process claims on serious procedural deficiencies in *both* the Tax Tribunal and SUNAT proceedings, the majority mischaracterized Freeport's due process claims as relating only to the question of whether "the Tax Tribunal committed serious due process violations"—and accordingly, failed to consider SUNAT's conduct *at all*.[149] This meant that the majority evaluated Freeport's due process claims without considering a significant portion of the relevant evidence—including testimony at the hearing that a SUNAT auditor prepared a secret report predetermining the outcome of SMCV's administrative challenges long before SUNAT audited SMCV, and that the very same SUNAT auditor who had prepared that report then sat as the sole decision-maker resolving SMCV's challenges.[150] Moreover, the SUNAT and Tax Tribunal proceedings both formed part of the same administrative challenge procedure, such that ignoring SUNAT's unlawful conduct—particularly conduct that influenced the outcome of these proceedings—also necessarily rendered the Tribunal's conclusions with respect to the Tax Tribunal proceedings both flawed and incomplete.

146 **CEA-1**, *Freeport* Award ¶ 704; *but see id.* Tawil Dissent ¶¶ 17–18, n.14; **CEA-4**, Freeport Reply § II.A.1(i).

147 **CEA-1**, *Freeport* Award ¶ 704.

148 **CEA-6**, Tr. 244:19–20 (Day 1) (Resp. Opening); *Id.* Tr. 43:6–44:1 (Day 1) (Cl. Opening).

149 *See* **CEA-1**, *Freeport* Award ¶¶ 930 *et seq*.

150 *See* **CEA-7**, Tr. 1618, 1640:22–1642:1, 1643:8–1644:15, 1725–1726, 1735:5–1738:17 (Day 6) (Bedoya); *see also* **CEA-10**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Post-Hearing Brief (14 July 2023), ¶¶ 81–82.

VI. REQUEST FOR RELIEF

61. For the foregoing reasons, which will be developed in subsequent submissions, 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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