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

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

Claimant/Applicant

— *v.* —

REPUBLIC OF PERU

Respondent

APPLICANT'S MEMORIAL ON ANNULMENT

Dietmar W. Prager
Laura Sinisterra
Nawi Ukabiala
Julianne J. Marley
Federico Fragachán
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001
United States of America
+1 (212) 909-6000
dwprager@debevoise.com
lsinisterra@debevoise.com
nukabiala@debevoise.com
jjmarley@debevoise.com
ffragachan@debevoise.com

Luis Carlos Rodrigo Prado
Francisco Cardenas Pantoja
RODRIGO, ELIAS & MEDRANO
Av. Pardo y Aliaga 652 piso 8
San Isidro
Lima 15073
Republic of Peru
+511 619-1900
lcrodrigo@estudiorodrigo.com
fcardenas@estudiorodrigo.com

23 May 2025

TABLE OF CONTENTS

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 or ICSID 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"), Rule 50 of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), and Procedural Order Number 1 of the *ad hoc* Committee dated 12 February 2025, applicant Freeport-McMoRan Inc. ("Freeport" or "Applicant"), on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A. ("SMCV"), hereby submits this Memorial in support of its Application for Partial Annulment 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. The annulment procedure set out in Article 52 of the Convention plays a critical role in upholding the legitimacy and fairness of the ICSID Convention system of dispute resolution. An annulment proceeding is not an appeal: its purpose is not to review all aspects of a tribunal's decision for their substantive correctness. Rather, annulment proceedings are designed to safeguard the integrity of the ICSID system by providing the sole remedy to address egregious flaws in a tribunal's process or decision that must be corrected, both for the sake of the parties involved and for the overall legitimacy of the system. The circumstances facing the *ad hoc* Committee in this case present exactly the type of glaring and inexplicable defect that the annulment process is designed to address—and that if left to stand would make it impossible for the system to deliver the justice it promises. If the circumstances here do not constitute annullable error, it is difficult to imagine what would.

3. Here, Freeport seeks partial annulment of the Award in light of the *Freeport* Tribunal majority's inexplicable failure to decide—or even consider—a significant portion of Freeport's claims, valued at US$417 million. Freeport had two sets of claims in the proceedings: its main claims relating to certain royalty and tax assessments, valued at US$569.5 million and US$372.9 million, respectively, and then its alternative claims based on penalties and interest on both the royalty and tax assessments, valued at US$417 million and US$245 million, respectively. The Tribunal explicitly upheld jurisdiction over all these claims, except the penalties and interest on *tax* assessments. Yet then on the merits, the Tribunal inexplicably ignored the other part of Freeport's alternative claims: the penalties and interest on the *royalty* assessments. Instead of deciding these claims, the majority incorrectly conflated them with the claims it had dismissed on jurisdictional grounds—the penalties and interest on the *tax* assessments. As a result, the Tribunal rejected these claims in their entirety, without ever considering them on the merits or even offering a coherent explanation of the basis for dismissal. This constitutes a basis for annulment of this part 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.

4. 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. During the entire period relevant to the dispute, SMCV had a stability agreement in force which stabilized its administrative and tax regimes (the "Stability Agreement"). Freeport claimed the Stability Agreement applied to the entirety of SMCV's operations at Cerro Verde, an open-pit mine in the Arequipa region of Peru. After the Stability Agreement entered into force, Peru passed a new royalty law and certain new taxes relevant to mining operations. It was undisputed that these royalties and taxes did not form part of the stabilized regime under the Stability Agreement. Yet, Peru nevertheless assessed royalties and new taxes against SMCV in relation to its 2006–2013 operations at Cerro Verde 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 (the "Royalty and Tax Assessments"). Peru also assessed significant penalties and interest against SMCV for its nonpayment of the Royalty and Tax Assessments. Peru 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.

5. Freeport's principal claims in the arbitration were based on the Royalty and Tax Assessments themselves. In particular, Freeport advanced (*i*) claims that Peru breached the Stability Agreement each time its Royalty and Tax Assessments became final and enforceable, and (*ii*) claims that Peru breached the minimum standard of treatment ("MST") provision under Article 10.5 of the US-Peru Trade Promotion Agreement ("TPA") each time its Royalty Assessments became final and enforceable. Because Article 22.3.1 of the TPA precludes Article 10.5 claims based on "taxation measures," Freeport did not submit any claims for breach of Article 10.5's MST provision based on the Tax Assessments.

6. In addition to these principal claims, Freeport also brought alternative claims. These included, among others, (*i*) claims that Peru's failure to waive the penalties and interest on the Royalty Assessments breached the MST provision in Article 10.5 of the TPA, and (*ii*) claims that Peru's failure to waive the penalties and interest on the Tax Assessments breached the MST provision of Article 10.5 of the TPA. 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 the TPA'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. Peru also argued that both the principal and alternative claims were jurisdictionally barred by the TPA's statute of limitations provisions.

7. Throughout the entire arbitration, it was undisputed that the TPA's tax exclusion did not bar Freeport's principal Article 10.5 claims based on the Royalty Assessments nor its alternative Article 10.5 claims based on the failure to waive penalty and interest on the Royalty Assessments, since under Peruvian law royalties are not taxes. Peru's jurisdictional objection based on Article 22.3.1's tax exclusion was limited only to Freeport's claim based on penalties and interest on the *Tax* Assessments, as Peru repeatedly and explicitly confirmed throughout the proceedings.

8. In the jurisdictional section of the Award, the majority ultimately upheld this objection and dismissed Freeport's Article 10.5 claims for penalties and interest on the *Tax* Assessments. However, the majority explicitly upheld jurisdiction over all of Freeport's other claims—including the claims based on penalties and interest on the *Royalty* Assessments. The Award's *dispositif* reflects this conclusion, unequivocally stating 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."

9. Yet despite explicitly confirming its jurisdiction, the majority then completely failed to decide Freeport's Article 10.5 claims based on penalties and interest on the *Royalty* Assessments in the merits section of the Award. 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 generally that the Tribunal was without jurisdiction to decide the claims "in relation to the Respondent's assessment of penalties and interest." 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. This obvious error on a key issue in dispute had a material effect on the Award and caused significant prejudice to Freeport, with claims worth US$417 million wiped out as a result.

10. 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 Freeport's Article 10.5 claims based on Peru's failure to waive penalties and interest on the Royalty Assessments, (*ii*) failed to state reasons for its decision to reject those claims, and (*iii*) seriously departed from a fundamental rule of procedure by violating its duty to decide the questions before it and depriving 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. FACTUAL AND PROCEDURAL BACKGROUND

A. THE DISPUTE

11. 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.

12. At the center of this dispute is the 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.[1] As a general matter, stability agreements are critically important to mining investors because they provide a guarantee of legal security for long-term mining projects that typically require years of development and investment before they begin generating revenues. Stability guarantees thus provide mining companies like Freeport with the security they need to make multi-million dollar investments like those it made in Cerro Verde. These investments benefited not only the investor and the mine, but Arequipa and Peru more broadly, by allowing for the sustained development of a critical natural resource.

13. In SMCV's case, 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").[2] 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.[3] This meant that, while in force, any changes Peru made to the administrative regime after the Stabilization Date, including the imposition of new administrative charges like royalties, would not apply to SMCV's stabilized operations during the Stability Agreement's term.[4] Similarly, any changes Peru made to the tax regime after the Stabilization Date—including lowering or revising existing tax rates, or imposing new taxes—would likewise not apply to SMCV's stabilized operations during the Agreement's term.[5]

14. Freeport's and SMCV's position 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.[6] The mining concession covered SMCV's activities related to

---

1 **AA-1**, *Freeport* Award, ¶¶ 160, 171, 184.

2 *Id.* ¶¶ 157–159, 164–166.

3 *Id.* ¶ 184.

4 *Id.*

5 *Id.*

6 **AA-1**, *Freeport* Award, § V.A.1.a.

exploration and extraction, whereas the beneficiation concession covered SMCV's activities related to processing the ore extracted at Cerro Verde.[7]

15. In 2004, after entering into the Stability Agreement and completing its qualifying investment to access the stability guarantees, 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.[8] This was one of the largest mining investments in Peru's history at the time.[9] 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.[10] Phelps Dodge and SMCV approved the investment based on the understanding that the Stability Agreement would apply to the Concentrator because it would operate within the Cerro Verde mining unit, and specifically, under the beneficiation concession explicitly designated in the Stability Agreement itself.[11]

16. 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.[12] The Royalty Law post-dated the Stabilization Date in the Stability Agreement and thus did not form part of SMCV's stabilized administrative regime.[13]

17. Peru also enacted certain changes to its tax laws and regulations that likewise did not form part of SMCV's stabilized tax regime. For example, in June 2002, it introduced a 4.1% Additional Income Tax on expenses deemed indirect profit distributions.[14] In August 2003, the General Sales Tax rate increased from 18% to 19%.[15] In December 2004, Peru created the Temporary Tax on Net Assets, applying a 0.4% rate on any net assets exceeding one million soles as of 31 December of the previous year.[16] Peru also introduced a new Special Mining Tax based on operating profit, and a Complementary Mining Pension

---

7 *Id.* ¶¶ 146, 179.

8 *Id.* ¶ 231.

9 *Id.* ¶¶ 229–231, 267.

10 **AA-2**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Memorial (19 October 2021) ("Freeport Memorial") § III.A.C; **AA-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"), ¶ 53.

11 **AA-1**, *Freeport* Award, ¶¶ 221-233, 267.

12 *Id.* ¶ 214.

13 *Id.* ¶¶ 184, 214.

14 **AA-2**, Freeport Memorial, ¶ 280.

15 *Id.* ¶ 267.

16 *Id.* ¶ 282.

Fund funded by 0.5% of employees' gross monthly compensation and mining companies' annual pre-tax income.[17]

18. In 2009, almost three years after the Concentrator started production, Peru's tax authority, the National Superintendence of Customs and Tax Administration ("SUNAT"), began assessing both royalties and taxes against SMCV based on its Concentrator operations—charges that were not applicable under the stabilized tax and administrative regimes.[18] SMCV claimed that the stability guarantees applied to the entire Cerro Verde mining unit, and thus that SMCV was exempt from these charges under the Stability Agreement.[19] However, SUNAT took the position that the Stability Agreement did not cover the Cerro Verde Mining Unit, or SMCV's operations in Cerro Verde as a whole, but rather that it only covered the specific investment project set out in the feasibility study that SMCV had submitted to qualify for the Stability Agreement, *i.e.* the qualifying investment project, and hence did not cover the Concentrator.[20] Based on this novel interpretation, SUNAT ultimately assessed over US$1.2 billion against SMCV for fiscal periods spanning 2006 to 2013. Specifically:

(a) SUNAT issued the Royalty Assessments against SMCV for the Concentrator operations for fiscal periods between 2006–2013, based on the 2004 Royalty Law and its subsequent 2011 amendment.[21] These Royalty Assessments ultimately totaled US$258 million as of the dates issued.[22] 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.[23] The penalties and interest on the Royalty Assessments totaled US$198 million as of the dates issued, and continued to accrue thereafter.[24]

(b) SUNAT also assessed certain taxes against SMCV that were not part of the stabilized regime. Specifically, SUNAT issued the Tax Assessments in relation to the following: General Sales Tax, Income Tax, Additional Income Tax, Temporary Tax on Net Assets, Special Mining Tax, and Complementary Mining Pension Fund.[25] The Tax Assessments

---

17 *Id.* ¶¶ 284-285.

18 *See* **AA-1**, *Freeport* Award, § III.J; **AA-2**, Freeport Memorial, ¶¶ 170, 267–270.

19 *See, e.g.*, **AA-1**, *Freeport* Award, § III.J.1; **AA-2**, Freeport Memorial, ¶¶ 172–173.

20 *See, e.g.*, **AA-1**, *Freeport* Award, ¶ 345; **AA-2**, Freeport Memorial, ¶ 175.

21 **AA-1**, *Freeport* Award, § III.J.1; **AA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

22 **AA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

23 **AA-2**, Freeport Memorial, ¶ 441; *see* **AA-1**, *Freeport* Award, § III.J.1.

24 **AA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

25 **AA-1**, *Freeport* Award ¶¶ 419–444.

ultimately totaled US$253 million as of the dates issued.[26] 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 penalties.[27] The penalties and interest on the Tax Assessments totaled US$257 million as of the dates issued, and continued to accrue thereafter.[28]

19. SUNAT's novel interpretation was contrary to SMCV's position that the Mining Law and Regulations conferred stability guarantees to entire concessions or mining units, and thus the Stability Agreement covered all of its activities carried out within the mining and beneficiation concession, including the Concentrator.[29] SMCV's position was based on, among others, the language of the Mining Law and Regulations, its interactions with the government at the time, and the government's practice in relation to both SMCV and other mining companies.[30] Accordingly, SMCV challenged each of the Royalty and Tax Assessments before SUNAT's Claims Division, and also challenged several Assessments before the Tax Tribunal, the final administrative appeal for royalty and tax matters.[31] However, both SUNAT and the Tax Tribunal upheld SUNAT's restrictive interpretation despite SMCV's arguments demonstrating the basis for its position on the correct interpretation of the Mining Law and Regulations.[32]

20. 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.[33] The first instance court agreed with SMCV's position with respect to the 2008 Royalty Assessments, and found that the Stability Agreement applied to the entire Cerro Verde mining unit and annulled the Assessments.[34] However, the Superior Court of Justice (the "Appellate Court") reversed the first instance court's decision, and the Supreme Court of Justice (the "Supreme Court") upheld the Appellate Court's decision.[35] For the 2006–2007 Royalty Assessments, after the first instance and appellate level courts upheld the Tax Tribunal's decision, SMCV again appealed to the Supreme Court.[36] After hearing the appeal, the Supreme Court was

---

26 **AA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

27 **AA-2**, Freeport Memorial, ¶ 441; *see* **AA-1**, *Freeport* Award, § III.J.2–6.

28 **AA-2**, Freeport Memorial, **Annex A**: Administrative Proceedings.

29 **AA-1**, *Freeport* Award, § V.A.1.a.

30 *Id.* ¶¶ 652–657.

31 *Id.* ¶¶ 352–353.

32 *Id.* ¶¶ 358, 362.

33 *Id.* ¶ 368.

34 **AA-1**, *Freeport* Award, ¶ 369.

35 *Id.* ¶¶ 374, 376.

36 *Id.* ¶¶ 372–373, 377.

divided: two judges voted in SMCV's favor, depriving the five-judge panel of the four votes needed to render a decision under Peruvian law.[37] The case thus remained unresolved until SMCV withdrew it in connection with Freeport's filing for arbitration.[38]

21. In its administrative challenges before SUNAT's Claims Division and the Tax Tribunal, SMCV also sought waivers of the exorbitant penalties and interest on the Royalty Assessments and on the Tax Assessments.[39] 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 legal provisions that led to the penalties and interest charge—here, the provisions of the Mining Law and Regulations—is subject to "reasonable doubt" as a result of their objective imprecision, obscurity, or ambiguity.[40] SMCV argued that there was at a minimum reasonable doubt about the correct interpretation of the Mining Law and Regulations, including because (*i*) both the Royalty and the Tax 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 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 shared SMCV's interpretation of the Mining Law and Regulations.[41]

22. But SUNAT's Claims Division and the Tax Tribunal arbitrarily and incorrectly refused to waive any of the penalties and interest on either the Royalty Assessments or the Tax Assessments.[42] First, with respect to the 2006–2007 and 2008 Royalty Assessments, the Tax Tribunal refused to consider SMCV's waiver requests based on spurious procedural grounds, claiming without basis that SMCV had abandoned the issue.[43] Then for the remaining Royalty Assessments, as well as the Tax Assessments, SUNAT and the Tax Tribunal arbitrarily claimed among others that there was no grounds for waiver because the dispute concerned SMCV's Stability Agreement and not the interpretation of an ambiguous provision in the Mining Law[44]—a conclusion squarely at odds with the assessments themselves, which clearly relied

---

37 *Id.* ¶ 377.

38 *Id.* ¶¶ 377–379.

39 **AA-1**, *Freeport* Award, ¶ 364.

40 *See, e.g., id*.

41 *See, e.g.*, **AA-1**, *Freeport* Award, ¶¶ 364, 383, 967–973; **AA-2**, Freeport Memorial, ¶ 213; **AA-4**, Freeport Reply, ¶¶ 179–182.

42 **AA-2**, Freeport Memorial, ¶¶ 17, 251–262; *see, e.g.*, **AA-1**, *Freeport* Award, ¶¶ 365, 384.

43 **AA-2**, Freeport Memorial, ¶ 409; *see* **AA-1**, *Freeport* Award, ¶ 365.

44 **AA-2**, Freeport Memorial, ¶ 414. *See also* **AA-1**, *Freeport* Award, ¶¶ 384, 397, 398, 402, 411.

on the disputed interpretation of the Mining Law as the legal basis for issuing the Royalty and Tax Assessments against SMCV.[45]

23. SMCV's requests for the waiver of penalties and interest were also largely ignored by the Contentious Administrative Courts in its challenges to the 2006–2007 and 2008 Royalty Assessments.[46] The Appellate Court in the 2008 Royalty Assessments challenge rejected SMCV's request for the waiver of penalties and interest on the 2008 Royalty Assessments in a single sentence, simply accepting the Tax Tribunal's arbitrary dismissal of the claims on procedural grounds without any independent assessment, despite the Court's obligation to consider the issue *de novo*.[47] The Supreme Court then upheld this decision.[48] The first instance and Appellate Courts in the 2006-2007 Royalty Assessment challenges likewise simply accepted the Tax Tribunal's procedural dismissal of the claims without any *de novo* assessment.[49] 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.[50]

B. THE ARBITRATION

24. On 28 February 2020, Freeport submitted a notice of arbitration against Peru on its own behalf and on behalf of SMCV pursuant to the TPA.[51] Freeport appointed Professor Guido Santiago Tawil as arbitrator in the Notice of Arbitration.[52] On 3 June 2020, Peru appointed Prof. Dr. Bernardo Cremades as arbitrator in the case.[53] 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.[54]

---

45 **AA-2**, Freeport Memorial, ¶ 414.

46 **AA-1**, *Freeport* Award, § III.J.1(e); **AA-2**, Freeport Memorial, ¶ 257.

47 **AA-2**, Freeport Memorial, ¶ 224.

48 *Id.* ¶ 230.

49 *Id.* ¶¶ 232–233.

50 *Id.* ¶¶ 238–239.

51 **AA-1**, *Freeport* Award, ¶ 453; *see* **AALA-2**, United States–Peru Trade Promotion Agreement, Arts. 10.16.1(a)-(b), 10.16.3. *See generally id.*

52 **AA-1**, *Freeport* Award, ¶ 30.

53 *Id.* ¶ 32.

54 *Id.* ¶¶ 37, 40.

1. Freeport's Claims

25. Freeport submitted 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[55]—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 that fell within the mining unit or concessions for which the Stability Agreement was concluded.[56] 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;"[57] 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."[58] 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.[59] 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 concessions or mining units.[60] 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 during

---

55 *Id.* ¶¶ 623, 632–644.

56 **AA-2**, Freeport Memorial, ¶ 214; **AA-4**, Freeport Reply, ¶¶ 70, 83.

57 **AA-4**, Freeport Reply, ¶ 74(a) (emphasis added).

58 *Id.* ¶ 69 (emphasis added).

59 *Id.* ¶ 93.

60 **AA-2**, Freeport Memorial, ¶ 241; **AA-4**, Freeport Reply, ¶ 78.

the life of the Stability Agreement, and Peru's decisions upholding these royalties and non-stabilized taxes breached the Agreement.[61]

(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.[62] With respect to the royalty assessments for fiscal years 2009–2013 (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.[63] 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.[64] 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.[65] Because Article 22.3.1 of the TPA precludes Article 10.5 claims based on "taxation measures," Freeport's principal claim for violation of Article 10.5 did not include the Tax Assessments—it was limited to the Royalty Assessments.

26. Freeport valued these principal claims at US$942.4 million as of 13 September 2022.[66]

27. 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 it arbitrarily and grossly unfairly failed to waive the extraordinarily punitive penalties and interest on the

---

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

62 **AA-1**, *Freeport* Award, ¶¶ 831, 835–837.

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

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

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

66 **AA-4**, Freeport Reply, ¶ 289.

Royalty Assessments.[67] 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 the reasonable doubt doctrine under 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 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.[68] This alone should have entitled SMCV to a waiver of penalties and interest under the reasonable doubt doctrine of Article 170, and meant that SMCV's position that it did not have to pay royalties was entirely reasonable.[69]

ii. Until the Government acted against SMCV, officials from SUNAT, MINEM, and other Government authorities, including SUNAT's National Superintendent and various ministers, had repeatedly taken the position that stability guarantees under the Mining Law and Regulations applied to entire mining units or concessions.[70] This was true both with respect to SMCV itself, and with respect to the Government's treatment of other mining companies.[71] The Government even continued to take this position years *after* it issued the Royalty Assessments against SMCV.[72]

iii. The conflicting decisions of the Contentious Administrative Courts in SMCV's challenge to the 2008 Royalty Assessments, described above, further demonstrated that the relevant provisions of the Mining Law and Regulations were at the very least ambiguous.[73] So too did the divided vote of the Supreme Court Justices in

---

67 **AA-1**, *Freeport* Award, ¶ 967–973.

68 **AA-2**, Freeport Memorial, ¶¶ 212–213; **AA-4**, Freeport Reply, ¶¶ 179–184.

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

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

71 **AA-2**, Freeport Memorial, ¶ 313-319; **AA-4**, Freeport Reply, ¶ 181.

72 **AA-2**, Freeport Memorial, ¶¶ 382, 408(l)–(m); **AA-4**, Freeport Reply, ¶ 182.

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

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.[74]

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 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.[75] While Freeport noted that the true purpose of these statements was to disguise Peru's substantive 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 and subject to "reasonable doubt."[76]

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.[77] Freeport further argued that SUNAT's and the Tax Tribunal's failures to waive the penalties and interest on the remaining Assessments were likewise unfair and inequitable because they denied SMCV's requests on arbitrary and pretextual grounds.[78] Among others, SUNAT and the Tax Tribunal claimed that they could only issue a waiver if the Government issued a formal "clarification" to the law explicitly referencing the application of Article 170—an interpretation that would render the

74 **AA-2**, Freeport Memorial, ¶ 405; **AA-4**, Freeport Reply, ¶ 184.

75 **AA-2**, Freeport Memorial, ¶ 407; **AA-4**, Freeport Reply, ¶ 183.

76 **AA-2**, Freeport Memorial, ¶ 407; **AA-4**, Freeport Reply, ¶ 183.

77 **AA-4**, Freeport Reply, ¶¶ 189–192.

78 *Id.* ¶¶ 193–196.

waiver effectively meaningless by allowing the Government to thwart any request by refusing to issue such clarification.[79]

vi. Freeport also demonstrated that Peru's years-long delays in both issuing the Royalty 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.[80]

(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 breached Article 10.5 of the TPA.[81] In so doing, Freeport took the position that unlike the Tax Assessments themselves, the *penalties and interest* on the Tax Assessments were not "taxation measures" within the meaning of Article 22.3.1's tax exclusion, and thus the TPA did not preclude Article 10.5 claims based on those measures.[82] 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

28. 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.[83]

29. Peru also filed a jurisdictional objection specifically in relation to Freeport's alternative claims based on penalties and interest on the Tax Assessments. In particular, Peru argued that Article 22.3.1 of the TPA, which as noted above 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.[84] Peru argued

---

79 *Id.* ¶¶ 185–188.

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

81 **AA-1**, Freeport Award, ¶¶ 967–973; **AA-2**, Freeport Memorial, ¶¶ 413–416; **AA-4**, Freeport Reply, ¶ 201.

82 **AA-1**, Freeport Award, ¶¶ 532–537; **AA-4**, Freeport Reply, § III.D.

83 **AA-1**, Freeport Award, § IV.

84 **AA-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) ("Peru Counter-Memorial"), ¶¶ 456–458.

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"[85] and "part of the Executive Branch's powers and duties in administering taxes."[86] As noted, in recognition that the Tax Assessments themselves were "taxation measures," Freeport had not made Article 10.5 claims challenging the Tax Assessments, as Peru repeatedly acknowledged.[87] 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 barred by the TPA's tax exclusion.[88]

30. Notably, Peru did not argue that the TPA's tax exclusion precluded Freeport's claims based on either the *Royalty* Assessments or the penalties and interest on the *Royalty* Assessments. Instead, Peru explicitly limited its jurisdictional objection based on the TPA's tax exclusion to the penalties and interest on the *Tax* Assessments. Throughout the proceedings, Peru repeatedly reaffirmed that it was not challenging the Article 10.5 MST claims based on the penalties and interest on the *Royalty* Assessments under the TPA's tax exclusion. Rather, Peru only objected to those claims based on two of its other jurisdictional objections: the TPA's Article 10.18.1 statute of limitations provision and Article 10.1.3 non-retroactivity provision. For example:

(a) In its Counter-Memorial on the Merits and Memorial on Jurisdiction, Peru argued that the Tribunal lacked jurisdiction over Freeport's Article 10.5 claims based on penalties and interest on both the Royalty Assessments and the Tax Assessments, but for different reasons. In particular, Peru argued that both the claims based on the Royalty and Tax Assessments "are outside Article 10.18.1's limitations period, and the *claims based on the Tax Assessments are further barred by TPA Article 22.3.1's carve-out for taxation measures*."[89] Peru repeatedly emphasized that its jurisdictional objection based on TPA

---

85 **AA-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.

86 *Id.* ¶ 773.

87 *See, e.g.*, **AA-3**, Peru Counter-Memorial, ¶ 484 ("Claimant alleges that Perú has breached Article 10.5 of the TPA based on (1) SUNAT's Royalty (but not Tax) Assessments; (2) SUNAT's imposition of penalties and interest on its Royalty and Tax Assessments …"); **AA-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.").

88 **AA-4**, Freeport Reply, ¶¶ 273–274.

89 **AA-3**, Peru Counter-Memorial, ¶ 463 (emphasis added).

Article 22.3.1 applied solely to Freeport's penalties and interest claims on *Tax* Assessments, and not with respect to *Royalty* Assessments.[90]

(b) In its Rejoinder on the Merits and Reply on Jurisdiction, Peru reiterated the limited scope of its Article 22.3 objection. Peru repeatedly argued that the Tribunal lacked jurisdiction over Freeport's claims based on its refusal to waive penalties and interest on *Tax* Assessments, as they constituted "taxation measures" excluded from the TPA's scope under Article 22.3.1.[91] Peru also emphasized it was challenging Freeport's claims of penalties and interests on *Royalty* Assessments on a different ground—as being barred by the statute of limitations.[92]

(c) At the hearing on jurisdiction, merits, and damages, which took place from 1–12 May 2023, Peru repeatedly asserted that its Article 22.3.1 tax exclusion objection was limited to "Claimant's claims based on penalties and interest related to SUNAT's *tax* assessments."[93]

---

90 **AA-3**, Peru Counter-Memorial, ¶ 456 ("[A]ll of Claimant's claims based on SUNAT's decision not to waive penalties and interest arising from SUNAT's *Tax* Assessments against SMCV should be dismissed outright. Article 22.3.1 of the TPA expressly excludes taxation measures from the scope of protection under Chapter Ten of the TPA.") (emphasis in original); *id*. ¶ 459 ("Second, with respect to the penalties and interest that SUNAT maintained on its Royalty Assessments against SMCV, Claimant's claims under the TPA are time-barred in accordance with Article 10.18.1's limitations provision."); *id.* ¶ 468 ("Second, regarding Claimant's claims based on SUNAT's refusal to waive penalties and interest on Royalty and Tax Assessments: (a) its claims based on *Tax* Assessments are barred under Article 22.3.1 of the TPA; and (b) its claims based on Royalty Assessments are time barred.") (emphasis added); *id*. p. 217, fn 904 ("As the taxation-measure carve out under TPA Article 22.3.1 expressly bars claims of breach of the TPA based on taxation measures, and as noted at paragraphs 457-58 below that tax assessments are taxation measures within the meaning of the TPA, to the extent that Claimant's claims for breach of the TPA or related damages are based on *Tax* Assessments, they fall entirely outside of the Tribunal's jurisdiction.") (emphasis added).

91 **AA-5**, Peru Rejoinder, ¶ 692 ("Second, Claimant's claims of alleged breaches of the TPA based on the Peruvian government's decisions not to waive penalties and interest on SUNAT's *Tax Assessments* are outside the Tribunal's jurisdiction, because the imposition of penalties and interest for non-payment of taxes constitutes 'taxation measures' which are carved out from the scope of the TPA pursuant to Article 22.3.1.") (emphasis added); *id.* ¶ 693 ("Claimant's allegations of breaches of the TPA based on the Peruvian government's imposition and maintenance of penalties and interest on SUNAT's *Tax Assessments* are outside the Tribunal's jurisdiction, because those penalties and interest on unpaid taxes constitute 'taxation measures' which are excluded from the scope of the TPA under Article 22.3.1.") (emphasis added).

92 **AA-5**, Peru Rejoinder, ¶ 751 ("Third, regarding Claimant's Article 10.5 claims based on SUNAT's refusal to waive penalties and interest on the Royalty and Tax Assessments: (a) its claims related to *Tax* Assessments are barred under Article 22.3.1 of the TPA, which excludes TPA claims based on 'taxation measures'; and (b) its claims related to *Royalty* Assessments are time-barred.") (emphases in original); *id*., ¶¶ 763–764 ("In its Counter-Memorial, Perú explained that Claimant's penalties-and-interest claims related to Tax Assessments are barred by Article 22.3.1 . . . With regard to Claimant's penalties-and-interest claims related to Royalty Assessments, . . . Claimant first knew or should have known of the alleged breaches and loss as of that date, which is many years before the cut-off date of February 28, 2017.") (emphases in original).

93 **AA-6**, Tr. 345:16–19 (Day 1) (Resp. Opening) ("Claims related to tax assessments, those claims are barred under Article 22.3.1 of the TPA, which excludes from the TPA claims based on taxation measures."); *id*., Tr. 346:9–13 (Day 1) (Resp. Opening) ("The second ground. Claimant's claims of alleged breaches of a TPA based

For example, in its opening presentation, Peru argued that "SUNAT's imposition and maintenance of penalties and interest on *taxes* assessed [] constitute taxation measures under Article 22.3.1 [] because those measures are *taxation* 'practices' aimed at enforcing *tax* obligations."[94] And in closing arguments, Peru's lead counsel explicitly clarified that its tax exclusion jurisdictional objection did not cover Freeport's claims based on penalties and interest on *Royalty* Assessments, stating that

> 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.[95]

(d) In its post-hearing brief, Peru once again made clear that its Article 22.3.1 objection was limited to Freeport's Article 10.5 claims based on penalties and interest on *Tax* Assessments.[96] In so doing, Peru noted that Freeport had deliberately refrained from asserting Article 10.5 claims on the Tax Assessments themselves due to Article 22.3.1.[97] Peru argued that Freeport's decision to advance Article 10.5 claims based on *penalties and interest* on those same Tax Assessments was thus fundamentally flawed, because in Peru's view, the penalties and interest on the Tax Assessments were "inherently tied" to "taxation measures" and could not be divorced from the broader context of tax enforcement under the TPA.[98] Once again, Peru only objected to Freeport's Article 10.5 claims based on

---

on penalties and interest related to tax assessments fall outside the scope of the TPA pursuant to Article 22.3.1 because those measures constitute taxation measures.").

94 *Id*., Tr. 347:13–22 (Day 1) (Resp. Opening) (emphases added).

95 **AA-9**, Tr. 3042:18–3043:4 (Day 10) (Resp. Closing) (emphases added).

96 **AA-11**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Respondent's Post-Hearing Brief (14 July 2023) (Peru Post-Hearing Brief), ¶¶ 285–287 (arguing that "the Tribunal should find that penalties and interest on the *Tax Assessments* are 'taxation measures,' and that it lacks jurisdiction over Claimant's related claims") (emphasis added).

97 *Id.*, ¶¶ 285–287.

98 *Id.*, ¶ 286 ("However, 'taxation measures' in the TPA are broader than 'taxes.' The United States agrees, explaining in its Non-Disputing Party Submission that "[a]ny 'practice' related to '*taxation*' is therefore addressed by Art. 22.3.1. A 'practice' in this context includes not only the application of … a tax, *but also the enforcement [of] a tax*." Enforcing taxes by applying and maintaining penalties and interest on the taxes owed is, surely, a 'practice related to taxation.'") (emphasis in original).

penalties and interest on *Royalty* Assessments based on the TPA's Article 10.18.1 statute of limitations, not on the TPA's tax exclusion.[99]

31. That Peru did not rely on the TPA's tax exclusion to challenge the Article 10.5 claims based on the Royalty Assessments or the penalties and interest on the *Royalty* Assessments is unsurprising. It is well established and undisputed that royalties are not taxes under Peruvian law—as Peru's own experts and witnesses repeatedly confirmed in their written testimony and when cross-examined at the hearing. For example, Peru's tax experts Jorge Bravo and Jorge Picón unequivocally and repeatedly stated that "Mining Royalties are not a tax."[100] Peru's witness Ms. Claudia Bedoya, a government official and auditor for SUNAT's claims division, likewise confirmed at the hearing that royalties "are not considered taxes."[101] Peru's tax experts further confirmed that, since royalties are not taxes, penalties and interest on royalties likewise clearly are neither taxes nor "taxation measures."[102]

C. THE AWARD

32. The Tribunal declared the record closed on 14 March 2024, and then rendered its Award on 17 May 2024.

1. Jurisdiction

33. 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

---

99 *Id.*, ¶ 284.

100 **AA-8**, Tr. 2664:22–2665:3 (Day 9) (Bravo and Picón) (noting that "that Mining Royalties are not a tax"); *id*, Tr. 2670:10–12 (Day 9) (Bravo and Picón) (asserting that "as we clarified a moment ago, Royalties are not a tax"); *id*, Tr. 2687:1–21 (Day 9) (Bravo and Picón) (reiterating that "Royalties [] are not taxes. That's true. They're not taxes."); **AA-16**, First Expert Report of Prof. Bravo and Prof. Picon, ¶ 134 ("Article 33 of the Tax Code is not applicable to mining royalties, given that royalties are not taxes"); **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, ¶ 186 (recognizing that "royalties are not taxes"). *See also* **AA-3**, Peru Counter-Memorial, ¶ 749 (noting that "as Drs. Bravo and Picón explain, a mining royalty is not treated as a tax" because "it represents consideration for the exploitation of mineral resources"); **AA-15**, First Expert Report of Prof. Luis Hernandez, ¶ 98 (stating that "royalties are not taxes").

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

102 *See, e.g.*, **AA-8**, Tr. 2690:4–13 (Day 9) (Bravo and Picón) (agreeing that "If Royalties are not taxes, penalties neither could be taxes."); **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, ¶¶ 255–257 (noting they "are in full agreement with Claimant's tax law expert" that "neither delinquent interest nor penalties are taxes *per se*" and recognizing that "tax measures" only "alludes to State decisions that may be handed down through established legal or regulatory provisions, procedures or requirements in tax matters."). *See also* **AA-17**, Second Expert Report of Prof. Luis Hernandez, ¶¶ 129-144 (noting that under Peruvian law penalties and interest are not taxes).

interest on the Royalty Assessments,[103] fell within Article 10.18.1's statute of limitations.[104] It further concluded that all of the measures underlying Freeport's claims for breaches were within the TPA's temporal scope, and thus rejected Peru's non-retroactivity objection under Article 10.13.1.[105] 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.[106] 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.[107]

34. However, a majority of the Tribunal upheld Peru's Article 22.3.1 tax exclusion jurisdictional objection to Freeport's claims for penalties and interest on the *Tax* Assessments. In considering the objection, the Tribunal first reiterated Peru's arguments, which it acknowledged advanced an Article 22.3.1 tax exclusion objection only with respect to Freeport's claims for penalties and interest on the *Tax* Assessments.[108] Then, 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."[109] 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*."[110]

35. 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."[111] The majority accordingly concluded that "the

---

103 **AA-1**, *Freeport* Award, ¶¶ 521–524.

104 *Id.* ¶¶ 501 *et seq*.

105 *Id.* ¶ 578.

106 *Id.* ¶¶ 606–609.

107 *Id.* ¶ 639.

108 **AA-1**, *Freeport* Award, ¶ 474 ("[T]he Respondent submits that all of the Claimant's claims concerning SUNAT's refusal to waive penalties and interest on its Royalty and Tax Assessments issued against SMCV fall outside of the Tribunal's jurisdiction. First, all of the Claimant's claims based on SUNAT's decision not to waive penalties and interest *arising from SUNAT's Tax Assessments* against SMCV should be rejected, since Article 22.3.1 of the TPA expressly excludes taxation measures from the scope of protection under Chapter Ten of the TPA. Second, with respect to the penalties and interest that SUNAT maintained on its Royalty Assessments against SMCV, the Respondent submits that the Claimant's claims under the TPA are time-barred") (emphasis added); *id.* ¶ 526 ("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, which are excluded from the scope of Article 10.5 of the TPA under Article 22.3.1 of the TPA. Thus, the Tribunal may not exercise jurisdiction over the Claimant's claims related to those penalties and interest.") (emphasis added).

109 *Id.* ¶¶ 544–547.

110 *Id.* ¶ 548 (emphasis added).

111 *Id.* ¶ 551 (emphasis added).

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.[112]

36. 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."[113]

37. 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 assessed on *Tax* Assessments, which the majority finds to be outside the Tribunal's jurisdiction."[114] 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."[115] Accordingly, at the conclusion of its jurisdictional analysis, the Tribunal upheld jurisdiction over all of Freeport's other claims, including Freeport's Article 10.5 MST claims based on Peru's failures to waive penalties and interest on the *Royalty* Assessments.

2. Merits

38. The Tribunal majority then rejected the remainder of Freeport's claims on the merits.

i. Freeport's Principal Claims

39. The majority first rejected all of Freeport's Stability Agreement claims. The majority determined that under the Mining Law and Regulations, stability guarantees applied to specific investment projects, not to entire mining units or concessions.[116] The majority based this conclusion on its interpretation of the Mining Law, which largely tracked Peru's arguments.[117] The majority also pointed to statements made by the Government when it amended the Mining Law in 2014 as evidence of the scope of

---

112 *Id.* ¶¶ 552–553 (emphases added).

113 **AA-1**, *Freeport* Award, Tawil Dissent, ¶ 5.

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

115 *Id.* ¶ 1047(a) (emphasis added).

116 *Id.* ¶¶ 697–717.

117 *Id.* ¶¶ 698–706.

stability guarantees prior to the amendment.[118] 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.[119] 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 even address other relevant evidence.[120]

40. The majority likewise rejected Freeport's Article 10.5 claims that Peru violated the minimum standard of treatment with respect to the 2009–2013 Royalty Assessments. In particular, it found that Freeport had not proven that Peru's conduct violated Freeport's and SMCV's legitimate expectations, nor that it was arbitrary, inconsistent, and non-transparent.[121] The majority further found that Freeport had not proven due process failures falling below the MST with respect to the Tax Tribunal's conduct, in particular that Freeport's submissions with respect to serious interference before the Tax Tribunal were "inconclusive,"[122] and that Freeport "ha[d] not demonstrated to the Tribunal's satisfaction that [the Tax Tribunal President] acted improperly."[123] The majority did not rule on Freeport's arguments that SUNAT's conduct had also given rise to due process violations.

41. 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.[124] 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."[125] 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

118 *Id.* ¶ 708.

119 **AA-1**, *Freeport* Award, ¶ 713.

120 *Id.* ¶ 716.

121 *Id.* ¶¶ 870, 898, 923-924.

122 *Id.* ¶ 958.

123 *Id.* ¶¶ 958–960.

124 **AA-1**, *Freeport* Award, Tawil Dissent, ¶¶ 13–21.

125 *Id.* Tawil Dissent, ¶ 22.

of the stabilized tax and administrative regimes.[126] Per Prof. Tawil, the Government's conduct was also arbitrary in violation of Article 10.5.[127]

ii. Freeport's Alternative Claims

42. The majority then turned to Freeport's alternative claims. To recall, in the jurisdictional section, the majority upheld Peru's tax exclusion objection to Freeport's Article 10.5 claims based on penalties and interest on the *Tax* Assessments but, after rejecting all of Peru's other jurisdictional objections, held that it had jurisdiction over Freeport's Article 10.5 claims based on penalties and interest on the *Royalty* Assessments.[128] Accordingly, the Tribunal now should have assessed the claims based on penalties and interest on the 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.

43. The majority began with an 18-paragraph summary of the parties' positions on Freeport's claims "that the Respondent violated Article 10.5 of the TPA each time it failed to waive the penalties and interest assessments against SMCV for the Royalty and Tax Assessments."[129] It noted Freeport's position that the penalties and interest charges were unfair and inequitable, given that SMCV's position that it did not have to pay the Royalty and Tax Assessments was reasonable in light of, among others, the relevant provisions of the Mining Law and Regulations, the Government's previous position regarding the scope of stability guarantees, and its prior practice toward SMCV and other mining companies.[130] The Tribunal further acknowledged Freeport's argument that SMCV was entitled to a waiver under Peruvian law because there was, at a minimum, reasonable doubt as to the correct interpretation of the Mining Law and Regulations, and that the penalties and interest were also excessive and disproportionate, amounting to 112% of the principal charged.[131] The Tribunal likewise noted Peru's position that its conduct did not rise to the level of arbitrary conduct in violation of the minimum standard of treatment, and further Peru's arguments that SMCV was not entitled to a waiver for "reasonable doubt" under Article 170 of the Tax Code, including because this doctrine applies only when there has been a formal correction of a prior interpretation invoking Article 170.[132] The parties had briefed these positions extensively during the

---

126 *Id.* Tawil Dissent, ¶¶ 26–32.

127 *Id.* Tawil Dissent, ¶ 33.

128 *See supra*, ¶¶ 33–34, 37.

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

130 *Id.* ¶¶ 967–973.

131 *Id.* ¶¶ 967–973.

132 *Id.* ¶¶ 974–984.

proceedings, with nearly 100 pages of the briefs, over 100 pages of expert reports, and 10 minutes of the parties' opening and closing statements at hearing devoted to the merits of the Article 10.5 MST claims based on Peru's failure to waive penalty and interest on the Assessments.[133]

44. Yet despite walking through the parties' arguments on the merits, the Tribunal then completely abdicated its responsibility to actually decide Freeport's claims based on penalties and interest on the Royalty Assessments on the merits. Instead, following its summary of the parties' positions, the Tribunal included a single short paragraph under the header "[t]he Tribunal's analysis," paragraph 986, which reads in full as follows:

> 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.[134]

45. In other words, in this paragraph, the majority conflated 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, and rejected both in their entirety. According to paragraph 986, it did so on the basis that it had no jurisdiction to decide *any* of the penalty and interest claims, and thus failed to address these claims at all on the merits.[135] 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.[136]

---

133 *See, e.g.*, **AA-2**, Freeport Memorial, § IV.B.3; **AA-3**, Peru Counter-Memorial, ¶¶ 721-751; **AA-4**, Freeport Reply § II.C.4; **AA-5**, Peru Rejoinder, ¶¶ 604-661, 1008–1026; **AA-11**, Peru Post-Hearing Brief, ¶¶ 108–110; **AA-16**, First Expert Report of Prof. Bravo and Prof. Picon, § V; **AA-18**, Second Expert Report of Prof. Bravo and Prof. Picon, § VI; **AA-6**, Tr. 20:5–22:3, 127:8–14 (Day 1) (Cl. Opening); **AA-9**, Tr. 2966:5–2970:11 (Day 10) (Cl. Closing); *id.* Tr. 3038:11–3039:21 (Day 10) (Resp. Closing).

134 **AA-1**, *Freeport* Award, ¶ 986.

135 *Id.* ¶ 986.

136 *See supra*, ¶¶ 33–37.

46. 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 Tribunal *has jurisdiction over the Claimant's claims* except for the Claimant's claims based on the disputed *Tax* Assessments' penalties and interest."[137]

(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.[138] In particular, the Tribunal found that the contentious administrative courts notified SMCV of their decisions "refusing to consider de novo SMCV's alleged entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments" and on the "2006-2007 Royalty Assessments" after the statute of limitations cut-off date, and that Freeport's claims based on those actions "are accordingly not time barred."[139] Further, the Tribunal found that the Tax Tribunal's failures to waive penalties and interest on the remainder of the Royalty Assessments, as well as on the Tax Assessments, did not accrue until the end of the administrative process, and accordingly were not time barred.[140] The Tribunal also rejected Peru's objection that all of Freeport's treaty claims other than its due process claims fell outside the Tribunal's temporal jurisdiction, finding that Freeport's claims were not based on acts or facts that occurred before the entry into force of the TPA.[141]

(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 the *Tax Assessments*, which the majority finds to be outside the Tribunal's jurisdiction."[142]

---

137 **AA-1**, *Freeport* Award, ¶ 1047 (emphasis added); *see supra*, ¶ 37.

138 **AA-1**, *Freeport* Award, ¶¶ 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); *id*., ¶¶ 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); *see supra*, ¶ 33.

139 **AA-1**, *Freeport* Award, ¶ 523.

140 *Id.* ¶ 524.

141 *Id.* ¶ 578.

142 *Id.* ¶ 456 (emphasis added).

47. The Tribunal's cross-reference to the jurisdictional section of the Award in paragraph 986 of the merits section—where it states that "[t]he 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.)"—thus sheds no light on the majority's inexplicable refusal to consider the claims based on penalties and interest on the *Royalty* Assessments on the merits. The referenced paragraphs, "540 *et seq*.," address Peru's tax exclusion objection—which as discussed above, have nothing to do with Freeport's Article 10.5 MST claims based on penalties and interest on the *Royalty* Assessments.[143] 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.[144]

(a) The opening paragraph of the section referenced as "540 *et seq*.," in which the Tribunal provides its analysis on Peru's tax exclusion objection, 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.[145]

(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 and interest on the *Tax* Assessments. For example, the Award notes that "[t]he Tribunal is of the view that 'taxation measures' include measures that are part of the regime for the imposition and enforcement *of a tax*."[146] 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*."[147]

(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

---

143 *See supra*, ¶¶ 30–31.

144 *See supra*, ¶¶ 34–35.

145 **AA-1**, *Freeport* Award, ¶ 540 (emphases added).

146 *Id.* ¶ 548 (emphasis added).

147 *Id.* ¶ 551 (emphases added).

> 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."[148]

48. 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. As a result, 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."[149]

49. 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 and SMCV's rights to a fair and equitable treatment under Article 10.5 of the Treaty."[150] 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."[151] 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."[152] As Prof. Tawil noted earlier in his dissent, "[a]mendments to an existing legal regime are not made to clarify what is already clear."[153]

---

148 *Id.* ¶ 553 (emphasis added).

149 *Id.* ¶ 1047.

150 **AA-1**, *Freeport* Award, Tawil Dissent, ¶ 36.

151 *Id.* Tawil Dissent, ¶ 35.

152 *Id.* Tawil Dissent, ¶ 35.

153 *Id.* Tawil Dissent, ¶ 21.

III. 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

50. Under Article 52(1)(b), there are grounds for annulment where a tribunal has "manifestly exceeded its powers."[154] 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."[155] Further, the excess of powers is "manifest" when it is "obvious or clear,"[156] or "perceived without difficulty."[157]

51. 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.

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

---

154 **AALA-1**, ICSID Convention, Art. 52(1)(b).

155 **AALA-5**, *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment (3 July 2002) (Fortier, Crawford, Fernández Rozas) ("*Vivendi I* Decision on Annulment"), ¶ 86. *See also* **AALA-7**, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment (16 April 2009) (Schwebel, Shahabuddeen (dissenting), Tomka) ("*Malaysian Historical Salvors* Decision on Annulment"), ¶ 80 ("It is [the *ad hoc* committee's] considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it 'manifestly' did so[.]"); **AALA-8**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee (14 June 2010) (Schwebel, Ajibola, McLachlan) ("*Helnan* Decision on Annulment"), ¶ 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"); **AALA-15**, *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment (21 July 2023) (Greenwood, 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.").

156 **AALA-8**, *Helnan* Decision on Annulment, ¶ 55. *See also, e.g.*, **AALA-12**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 April 2016) (Hanotiau, Oyekunle, Sachs) ("*TECO* Decision on Annulment"), ¶ 77 ("[A]n excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear.").

157 **AALA-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.

(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."[158] 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.[159]

(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. Peru's tax exclusion 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.[160] Peru's closing statements on this point at the hearing could not have been clearer: after setting out Peru's arguments in favor of the tax exclusion objection to the claims 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.[161]

(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.[162] In particular, it unequivocally states that "the Claimant's claims based on Article

---

158 **AA-1**, *Freeport* Award, ¶ 1047 (emphasis added); *see supra* ¶¶ 37, 46.

159 **AA-1**, *Freeport* Award, ¶ 456 (emphasis added); *id.* ¶¶ 457–524 (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); *id.* ¶¶ 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* ¶¶ 37, 46.

160 **AA-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); *see supra* ¶ 34.

161 **AA-9**, Tr. 3042:18–3043:4 (Day 10) (Resp. Closing) (emphases added).

162 *Supra* ¶¶ 34–35.

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."[163]

(d) There is no alternative basis on which the Tribunal could have denied jurisdiction over the claims based on penalties and interest on the Royalty Assessments. Rather, the Tribunal explicitly *rejected* each of Peru's other jurisdictional objections, including its objections based on *ratione temporis* and the TPA's statute of limitations, and confirmed 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."[164]

53. *Second*, the Tribunal majority clearly failed to exercise its jurisdiction to decide Freeport's claims based on penalties and interest on the Royalty Assessments.

(a) As discussed above, despite explicitly upholding jurisdiction over Freeport's claim based on penalties and interest on the Royalty Assessments, the Tribunal majority completely failed to decide these claims on the merits.[165] Instead, after summarizing the parties' positions on the merits of Freeport's claims, the Tribunal majority provided a one paragraph "analysis" that simply referred back to its jurisdictional finding that Freeport's claims based on penalties and interest on the *Tax* Assessments were barred by the tax exclusion, despite this paragraph being completely irrelevant to the claims based on penalty and interest on the *Royalty* Assessments.[166] It provided no analysis on the merits of the penalty and interest claims whatsoever.

(b) Further, the Tribunal majority's one paragraph "analysis," found in paragraph 986, explicitly confirms that the majority failed to address Freeport's claims on the merits. In particular, the Tribunal majority stated that, because it upheld Peru's jurisdictional objection based on the TPA's tax exclusion, the Tribunal "has therefore no jurisdiction to decide on the merits of the Claimant's [Article 10.5] claim . . . in relation to the

---

163 **AA-1**, *Freeport* Award, ¶ 553 (emphasis added); *see supra* ¶ 47. *See also* **AA-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). *See also generally id.* ¶¶ 540–553.

164 **AA-1**, *Freeport* Award, ¶ 456; *see id.* ¶¶ 501 *et seq*., 578. *See also supra* ¶¶ 33–35, 37.

165 *See supra* ¶ 47–48.

166 *See supra* ¶ 47.

Respondent's assessment of penalties and interest."[167] The Tribunal majority thus explicitly acknowledged that it failed to consider Freeport's claims based on penalties and interest on the merits for both Tax *and* Royalty Assessments—even though the jurisdictional objection dismissed only those based on the Tax Assessments.

54. *Third*, 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:[168]

(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.[169] 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.[170] 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 administrative courts.[171] 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."[172]

(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.[173] In so doing, the *ad hoc* committee observed 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

---

167 **AA-1**, *Freeport* Award ¶ 986; *supra* ¶¶ 44–45.

168 *See, e.g.*, **AALA-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.").

169 **AALA-5**, *Vivendi I* Decision on Annulment, ¶ 86.

170 *Id.*, ¶ 11.

171 *Id.*, ¶¶ 93–115.

172 *Id.* ¶ 111.

173 **AALA-8**, *Helnan* Decision on Annulment, ¶¶ 46–55.

by virtue of the parties' agreement."[174] It noted that by requiring exhaustion of local remedies, the tribunal had clearly failed to fulfill its jurisdictional mandate.[175]

(c) In *MHS v. Malaysia*, the majority of the *ad hoc* committee held that the sole arbitrator had manifestly exceeded his powers when he dismissed the investor's claims for lack of jurisdiction based on his conclusion that the investor failed to satisfy Article 25 of the ICSID Convention's definition of "investment," without any consideration of the broad definition of "investment" under the BIT.[176] The majority found that among others, the sole arbitrator had improperly "elevated" criteria relating to the interpretation of the term investment to "jurisdictional conditions" and failed entirely to consider the BIT definition, which the majority found plainly covered the investment in question (a contract).[177] The majority thus concluded that the sole arbitrator's failure "even to consider, let alone apply, the definition of investment as it is contained in the [Bilateral Investment] Agreement" was a "gross error that gave rise to a manifest failure to exercise jurisdiction."[178]

(d) In the 2023 decision 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.[179] 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.[180]

55. *Fourth*, the Tribunal majority's excess of powers is "manifest" because it is "obvious," "clear,"[181] and "perceived without difficulty."[182] That the Tribunal majority exceeded its powers by failing to decide claims within its jurisdiction is clear and obvious from the face of the Award. One need only look at a handful of paragraphs—paragraphs 540–553 and 986—to confirm that there is simply no basis for the

---

174 *Id.* ¶ 41.

175 *Id*.

176 **AALA-7**, *Malaysian Historical Salvors* Decision on Annulment, ¶¶ 23–80.

177 *Id.*, ¶¶ 62–80.

178 *Id.*, ¶ 74.

179 **AALA-15**, *Khudyan* Decision on Annulment, ¶ 218.

180 *Id*. ¶¶ 185–221.

181 **AALA-8**, *Helnan* Decision on Annulment, ¶ 55. *See also, e.g.*, **AALA-12**, *TECO* Decision on Annulment, ¶ 77 ("[A]n excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear.").

182 **AALA-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.

Tribunal's rejection of the claims based on penalties and interest on the Royalty Assessments.[183] Paragraph 986 confirms that the Tribunal majority did not consider these claims on the merits. Instead, it cites to paragraphs 540 *et seq* as the sole basis for the Tribunal majority's failure to decide these claims.[184] But paragraphs 540 *et seq* have nothing to do with the claims based on penalties and interest on the Royalty Assessments —they confirm that the Tribunal majority denied jurisdiction over the claims based on penalties and interest on the *Tax* Assessments.[185] And if that were not clear enough, the *dispositif*, and the Tribunal's own summary of its jurisdictional findings, likewise leave no doubt that the Tribunal upheld jurisdiction over the claims based on penalty and interest on the Royalty Assessments—despite then failing entirely to consider them on the merits.[186]

56. 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

57. Article 52(1)(e) of the Convention provides for annulment where an "award has failed to state the reasons on which it is based."[187] 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."[188] 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."[189] With respect to the latter, *ad hoc* committees

---

183 *See supra* ¶ 47.

184 *See supra* ¶ 47; **AA-1**, *Freeport* Award ¶ 986.

185 *See supra* ¶ 47; **AA-1**, *Freeport* Award ¶¶ 540–553.

186 *See supra* ¶ 37, 46; **AA-1**, *Freeport* Award ¶¶ 456, 1047.

187 **AALA-1**, ICSID Convention, Art. 52(1)(e).

188 **AALA-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.*, **AALA-12**, *TECO* Decision on Annulment, ¶ 87 (quoting **AALA-4**, *MINE* Decision on Annulment, ¶ 5.09).

189 **AALA-10**, *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile I*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 December 2012) (Fortier, Bernardini, El-Kosheri) ("*Pey Casado I* Decision on Annulment"), ¶ 86. *See also, e.g.*, **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment (28 May 2021) (Zuleta, Knieper, Pinto) ("*Perenco* Decision on Annulment"), ¶¶ 167–168 ("[I]rrelevant 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).").

have found that reasoning is contradictory where "two (or more) contradictory premises supporting a conclusion cannot stand together and cannot both be true."[190] Annulment will also follow where a tribunal "fail[s] to deal with a question" and, as a result, "render[s] the award unintelligible."[191]

58. Here, the Tribunal majority failed to provide *any* coherent reasoning for dismissing Freeport's claims based on penalties and interest on the Royalty Assessments—a point that was essential to the outcome of the case, given that it erased claims worth US$417 million in one fell swoop.

59. *First*, the Tribunal majority's one-paragraph dismissal of the claims based on penalties and interest on the Royalty Assessments is entirely absent of reasoning, and thus grounds for annulment.

(a) The Tribunal majority offered no independent analysis of these claims on the merits. Instead, as discussed above, the majority's one-paragraph explanation simply cross-referenced to a section of its jurisdictional decision that has nothing to do with the claims based on penalties and interest on the Royalty Assessments, because it related solely to the penalties and interest on the *Tax* Assessments.[192] This barest of references cannot equate to "reasoning," nor does it allow the reader to discern the Tribunal majority's motivations.

(b) *Ad hoc* committees have repeatedly confirmed that annulment is warranted where the award or decision reflects 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 explanation whatsoever" for its valuation of the claimant's loss of opportunity.[193] The *ad hoc* committee also found 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.[194] Here too, there is not "one single reason" for the Tribunal majority's rejection of the claims based on the penalties and interest on the Royalty Assessments.

(c) Similarly, the *ad hoc* committee in *CMS v. Argentina* found that the tribunal had failed to state reasons for its finding that Argentina had breached the umbrella clause when it

---

190 *Id.* ¶ 169. *See also* **AALA-13**, *Tidewater Investment Srl and Tidewater Caribe, C.A. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2016) (Yusuf, Abraham, Knieper) ("*Tidewater* Decision on Annulment"), ¶ 170 (quoting **AALA-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").

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

192 *See supra* ¶¶ 47–48.

193 **AALA-14**, *Perenco* Decision on Annulment, ¶ 466.

194 *Id.* ¶¶ 572–575.

neglected to "expressly" "address[]" the issue anywhere in the award.[195] Rather, the tribunal merely "repeatedly referred back to the Decision on Jurisdiction," where "this specific matter was not dealt with at all."[196] In these circumstances, the *ad hoc* committee found there to be a "significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point."[197] This is precisely what happened here, where the Tribunal majority's failure to provide any basis for dismissal of the claims based on penalties and interest on the Royalty Assessments—other than a reference back to the jurisdictional decision that makes no sense and where these claims are "not dealt with at all"—leaves a "significant lacuna" in the decision.

60. *Second*, even to the extent that the reference to the jurisdictional findings regarding the *Tax* Assessments could constitute "reasoning" regarding the *Royalty* Assessments (which it cannot) 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.[198] 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."[199] 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

---

195 **AALA-18**, *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision of the Ad hoc Committee on Argentina's Application for Annulment (25 September 2007) (Guillaume, Crawford, Elaraby) ("*CMS* Decision on Annulment"), ¶ 94.

196 *Id*.

197 *Id.* ¶ 97.

198 *See supra* ¶¶ 33–37.

199 **AA-1**, *Freeport* Award ¶ 986 (emphasis added); *see supra* ¶¶ 44–45.

jurisdiction over the claims based on penalties and interest on the Royalty Assessments.[200] It then states that "the Claimant's claims are rejected in their entirety," *i.e.*, on the merits.[201] 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.[202] It thus did not consider Freeport's arguments that Peru's failure to waive penalties and interest on the Royalty Assessments was unfair and inequitable under the circumstances, given that SMCV's failure to pay the Royalties was based on a reasonable and good-faith interpretation of the Mining Law and Regulations. It did not consider that under Peruvian law, SMCV was entitled to a waiver of penalties and interest given that there was, at a minimum, reasonable doubt in the interpretation of the Mining Law and Regulations. It further did not consider the myriad evidence in support of these arguments. Instead, there is not a single sentence in the Tribunal's analysis addressing these arguments and evidence, despite the fact that they were a central point in dispute between the parties—as evidenced by the nearly 100 pages of briefing, over 100 pages of written expert testimony, and significant time spent at the hearing on this issue—and that the Royalty penalties and interest claims alone were worth over $417 million, nearly half the value of Freeport's claims.

(c) *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."[203] 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.[204] In so doing, the *ad hoc* committee noted that it found that "[t]he two statements of the Tribunal

---

200 **AA-1**, *Freeport* Award ¶ 1047; *see supra* ¶ 46.

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

202 *See supra* ¶¶ 46–48.

203 **AALA-10**, *Pey Casado I* Decision on Annulment, ¶ 285.

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

cannot be reconciled. They are genuinely contradictory."[205] Likewise, the *ad hoc* committee in *MINE v. Guinea* found that the tribunal failed to state reasons for its damages award where it relied on assumptions that were rejected elsewhere in its decision. In particular, the committee found that "[h]aving concluded that [the claimant's damages] theories were unusable because of their speculative character, the Tribunal could not, without contradicting itself, adopt a 'damages theory' which disregarded the real situation and relied on hypotheses which the Tribunal itself had rejected as a basis for the calculation of damages."[206] Because "the requirement that the Award must state the reasons on which it is based is in particular not satisfied by contradictory reasons," the *ad hoc* committee annulled the damages portion of the award.[207]

(d) The kinds of contradictions that warranted annulment in these cases are exactly those at issue here. There is a clear contradiction between (*i*) the jurisdictional section of the Award—where the Tribunal explicitly upheld jurisdiction over the claims based on penalties and interest on the Royalty Assessments, and found only that penalties and interest on the *Tax* Assessments constituted "taxation measures" and were thus barred—and (*ii*) the cursory "analysis" paragraph claiming that the Tribunal found it did not have jurisdiction over *any* of the penalty and interest claims.[208]

61. 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." The Tribunal majority's total failure to provide any 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

62. Under Article 52(1)(d) of the Convention, a serious departure from a fundamental rule of procedure is also grounds for annulment.[209] 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

---

205 *Id.* ¶ 189.

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

207 *Id.*

208 *See supra* ¶¶ 46–48.

209 **AALA-1**, ICSID Convention, Art. 52(1)(d).

adequate opportunity for rebuttal."[210] 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.[211] The right to be heard is also "undoubtedly accepted as a fundamental rule of procedure, a serious failure of which could merit annulment,"[212] such as when a party has been denied the right to "present its arguments" on an issue decided by the tribunal.[213] A departure is "serious" if the tribunal's failure to comply "with a rule of procedure could potentially have affected the award,"[214] or if it was "such as to deprive a party of the benefit or protection which the rule was intended to provide."[215]

63. 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.

64. *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

---

210 **AALA-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.

211 *See e.g.*, **AALA-3**, *Amco Asia Corporation and others v. Republic of Indonesia (I)*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment (16 May 1986) (Seidl-Hohenveldern, 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* **AALA-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.").

212 **AALA-9**, *Fraport* Decision on Annulment, ¶ 197; *see also* **AALA-17**, *Amco v. Indonesia*, Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award, ICSID Case No. ARB/81/1 (17 December 1992) (Sucharitkul, Fatouros, Schindler) ("*Amco II* Decision on Annulment"), ¶ 9.08 (finding that the right to be heard, as described in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration ("the parties shall be treated equally and each party shall be given full opportunity of presenting his case"), is a "clear example of a fundamental rule"); **AALA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 104 (discussing drafting history of Convention and noting that "o[]ne such fundamental principle mentioned during the negotiations was the parties' right to be heard").

213 *See e.g.*, **AALA-9**, *Fraport* Decision on Annulment, ¶ 197.

214 **AALA-12**, *TECO* Decision on Annulment, ¶ 85; *see also, e.g.*., **AALA-10**, *Pey Casado I* Decision on Annulment, ¶ 78 ("The applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected.").

215 **AALA-17**, *Amco v. Indonesia II* Decision on Annulment, ¶ 9.09; **AALA-4**, *MINE* Decision on Annulment, ¶ 5.05.

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.[216] As discussed above, there is no question that the Article 10.5 claims based on penalties and interest on the Royalty Assessments were before the Tribunal for decision—or that the Tribunal majority failed to decide them, thus departing from this fundamental rule.[217] The Tribunal majority's departure was also unquestionably "serious": it had a clear material effect on Freeport's claims, as it resulted in the dismissal of claims worth over US$417 million without even so much as considering them.

65. *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.

(a) For example, 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.[218] 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.[219]

---

216 **AALA-1**, ICSID Convention, Art. 48(3); **AALA-6**, C. Schreuer (ed.), *The ICSID Convention: A Commentary* (2009), Art. 48, p. 816; *see also* **AALA-3**, *Amco I* Decision on Annulment, ¶ 32 (noting that "[f]ailure to deal with one or more questions raised by the parties would entail annulment of the award where such omission amounts to 'failure to state reasons upon which [the award] is based' (Art. 52(1)(e), Convention). Such an omission could, moreover, amount in particular situations to 'a serious departure from a fundamental rule of procedure' (Art. 52(1)(d)) and to a manifest excess of power (Art. 52(1)(b))"; **AALA-16**, ICSID Secretariat, Updated Background Paper on Annulment (March 2024), ¶ 110 ("[I]f a Tribunal's failure to address a particular question submitted to it might have affected the Tribunal's ultimate decision, this could, in the view of some ad hoc Committees, amount to a failure to state reasons and could warrant annulment. Ad hoc Committees have also noted that such failure could amount to a serious departure from a fundamental rule of procedure.").

217 *See supra* ¶¶ 46–48.

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

219 *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'").

(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.[220]

(c) Similarly here, Freeport never had the opportunity to brief or respond to this issue—because Peru never raised it. To the contrary, as explained above, Peru repeatedly confirmed that it was *not* raising an Article 22.3.1 tax exclusion objection to the penalty and interest claims based on the Royalty Assessments.[221] Rather, Peru only challenged jurisdiction over those claims "for a different reason, because those claims fall outside of the statutory limitations."[222]

66. 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.

IV. THE *FREEPORT* TRIBUNAL'S OTHER ERRORS

67. While the Tribunal majority's complete 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

---

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

221 *See supra* ¶¶ 30–31.

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

that interpretation to other mining companies. Instead, the resolutions showed that Peru had actually applied Freeport's understanding of the scope of the stability guarantees to other mining companies.[223] 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.[224] After making a concerted effort to withhold clearly relevant and material documents, 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.[225] 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 stability agreement. This provision directly contradicted Peru's argument—and the majority's finding that they applied to "investment projects."[226] 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.[227] But this was clearly wrong—the relevant language appeared in the original text of Article 2 of the Mining Regulations in 1993, and thus applies to the Stability Agreement, as Freeport demonstrated by exhibiting the original 1993 version of the Regulations, and as Peru conceded at the hearing.[228]

(c) The *Freeport* majority wrongly relied on Peru's "Statement of Reasons" for the 2014 amendment to interpret the Mining Law, finding "that the statement of reasons for the 2014 amendment to Article 83 *clarifies* what legal framework was in force before the

---

223 **AA-4**, Freeport Reply ¶¶ 153–154.

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

225 *See, e.g.*, *id.*, Tr. 20:5–22:3 (Day 1) (Cl. Opening).

226 **AA-1**, *Freeport* Award ¶ 703; *but see id.* Tawil Dissent ¶¶ 17–18, n.14; **AA-4**, Freeport Reply § II.A.1(i).

227 **AA-1**, *Freeport* Award ¶ 704.

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

amendment."[229] Thus, the *Freeport* majority accepted a self-serving statement that was drafted by the MEF at a time when SMCV and Peru were already disputing the meaning of the original text of the Mining Law. As Peru's own counsel acknowledged at the earlier hearing in the related *SMM Cerro Verde v. Peru* case, the transcript of which is part of the *Freeport* record and was before the *Freeport* tribunal, this amendment "doesn't say anything about how the Government interpreted [the Mining Law] in 1992."[230] And in the words of Arbitrator Tawil, "Amendments to an existing legal regime are not made to clarify what is already clear."[231]

(d) The *Freeport* majority completely ignored the fact that stability agreements are adhesion contracts under Peruvian law and thus cannot be negotiated to alter the scope of guarantees under the Mining Law and Regulations.[232] While the Parties' experts extensively discussed and ultimately agreed on this key point,[233] the *Freeport* majority made no mention of it. Instead, it wrongly found "the lack of express references to the Concentrator Project and the exclusive references to the Leaching Project in the 1998 Stability Agreement to be *decisive*."[234] As Arbitrator Tawil noted in his dissent, "[t]he stability agreements applied to all the concessions indicated in Annex I of the Model Stability Agreement and there was *no room for negotiation of a different scope*."[235]

(e) 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*.[236] 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

---

229 *Cf.* **AA-1**, *Freeport* Award, ¶¶ 707-708 (emphasis added).

230 **AA-19**, **(CE-1133)** *SMM Cerro Verde*, Tr. Day 1 at 237:6-10.

231 **AA-1**, *Freeport* Award, Tawil Dissent, ¶¶ 20-21.

232 *Id.*, Tawil Dissent, ¶¶ 22-23.

233 *Id.*, Tawil Dissent, ¶ 22.

234 **AA-1**, *Freeport* Award, ¶ 728.

235 **AA-1**, *Freeport* Award, Tawil Dissent, ¶ 22 (emphasis added).

236 *See* **AA-1**, *Freeport* Award ¶¶ 930 *et seq*.

resolving SMCV's challenges.[237] 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.

[237] *See* **AA-7**, Tr. 1618:9-18, 1640:22–1642:1, 1643:8–1644:15, 1725:8–1726:22, 1735:5–1738:17 (Day 6) (Bedoya); *see also* **AA-10**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Post-Hearing Brief (14 July 2023), ¶¶ 81–82.

V. REQUEST FOR RELIEF

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

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

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

Dietmar W. Prager
Laura Sinisterra
Nawi Ukabiala
Julianne J. Marley
Federico Fragachán
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, NY 10001
United States of America
+1 (212) 909-6000
dwprager@debevoise.com
lsinisterra@debevoise.com
nukabiala@debevoise.com
jjmarley@debevoise.com
ffragachan@debevoise.com

Luis Carlos Rodrigo Prado
Francisco Cardenas Pantoja
RODRIGO, ELIAS & MEDRANO
Av. Pardo y Aliaga 652 piso 8
San Isidro
Lima 15073
Republic of Peru
+511 619-1900
lcrodrigo@estudiorodrigo.com
fcardenas@estudiorodrigo.com

New York, 23 May 2025