BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport McMoRan Inc. on its Own Behalf and on Behalf of
Sociedad Minera Cerro Verde S.A.A.,
Applicant (Claimant),

v.

Republic of Perú,
Respondent.

ICSID Case No. ARB/20/8
Annulment Proceeding

Respondent's Counter-Memorial on Partial Annulment

September 16, 2025

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LIST OF DEFINED TERMS

"1996 Feasibility Study"	Revised version of the 1995 Fluor Canada Ltd. feasibility study for improvements, upgrades, and further development of the existing leaching facility and infrastructure
"2004 Feasibility Study"	Feasibility study conducted by Fluor Canada Ltd., for the Cerro Verde Primary Sulfide Project dated May 2004
"2006-2007 Royalty Assessments"	Assessments issued by SUNAT on August 17, 2009 against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007
"2008 Royalty Assessments"	Additional royalty assessments issued by SUNAT on June 1, 2010 against SMCV for minerals processed in the Concentrator from January 2008 to December 2008
"2009 Royalty Assessments"	Royalty assessments issued by SUNAT on June 27, 2011 against SMCV for the minerals processed in the Concentrator from January 2009 to December 2009
"2010-2011 Royalty Assessments"	Royalty assessments issued by SUNAT on April 13, 2016 against SMCV for the minerals processed in the Concentrator in 2010 and the first three quarters of 2011
"2012 Royalty Assessment"	Royalty assessments issued by SUNAT on March 28, 2018 against SMCV for the minerals processed in the Concentrator in 2012
"2013 Royalty Assessment"	Royalty assessments issued by SUNAT on September 28, 2018 against SMCV for the minerals processed in the Concentrator in 2013
"Application or Application for Partial Annulment"	Claimant's Application for Partial Annulment dated September 16, 2024
"Award"	Award issued in Freeport-McMoRan Inc. v. Republic of Perú, ICSID Case No. ARB/20/8 dated May 17, 2024
"Applicant," "Claimant," or "Freeport"	Freeport-McMoRan Inc.
"Beneficiation Concession"	The beneficiation concession for processing the minerals extracted from the Cerro Verde mine
"Claimant's Memorial"	Claimant's Memorial on the Merits dated October 19, 2021

"Claimant's Reply"	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated September 13, 2022
"Claimant's Rejoinder"	Claimant's Rejoinder on Jurisdiction dated December 16, 2022
"Committee"	*Ad hoc* Committee in this partial annulment proceeding
"Concentrator," "Concentrator Project," "Concentrator Plant"	The mining project set out in the 2004 Feasibility Study and its update destined to treat primary sulfide ore at Cerro Verde
"DGM"	Directorate General of Mining of Perú's Ministry of Energy and Mines
"GEM"	*Gravamen Especial a la Minería* – Special Mining Contribution
"EAU"	Economic Administrative Unit
"ICSID"	International Centre for Settlement of Investment Disputes
"ICSID Convention"	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
"ICSID Arbitration Rules"	ICSID Arbitration Rules, entered in force as of April 10, 2006
"Leaching Project"	The mining project set out in the 1996 Feasibility Study destined to produce 105 million pounds of cathode copper from the heap leaching of copper ore at Cerro Verde
"Memorial on Partial Annulment"	Memorial on Partial Annulment submitted by Freeport-McMoRan Inc. on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A on May 23, 2025
"MINEM"	Perú's Ministry of Energy and Mines
"Mining Law"	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) dated June 3, 1992
"Mining Concession"	The mining concession for the exploration and extraction of mineral resources in the areas known as Cerro Verde No. 1, No. 2, and No. 3
"Perú" or "Respondent"	Republic of Perú
"Phelps Dodge"	Phelps Dodge Mining Corporation
"Regulations"	Mining Regulations, Supreme Decree No. 024-93-EM dated June 7, 1993
"Q4 2011 Royalty	Royalty assessment issued by SUNAT on December 29, 2017

Assessment"	against SMCV for the minerals processed in the Concentrator for the fourth quarter of 2011
"Royalty Law"	Mining Royalty Law No. 28258 dated June 24, 2004
"SMCV"	Sociedad Minera Cerro Verde S.A.A., a company constituted under the laws of Perú
"Stabilization Agreement"	Stabilization Agreement signed between SMCV and the Republic of Perú on February 26, 1998
"SUNAT"	National Superintendence of Customs and Tax Administration
"Treaty" or "TPA"	United States-Peru Trade Promotion Agreement
"VCLT"	Vienna Convention on the Law of Treaties

1. The Republic of Perú, Respondent in the arbitration and in this annulment proceeding, submits this Counter-Memorial on Partial Annulment pursuant to the procedural timetable established by the *ad hoc* Committee in Procedural Order No. 1, in response to the Memorial on Partial Annulment submitted by Freeport-McMoRan Inc. on its own behalf and on behalf of Sociedad Minera Cerro Verde S.A.A.

I. INTRODUCTION

2. Claimant's annulment application is an attempt to relitigate before this Committee a 20-year dispute that has been resolved in litigation (all the way up to Perú's Supreme Court) and in international investment arbitration. Claimant did not get the result it wanted and is now trying to reopen many-times-resolved issues before this *ad hoc* Committee. As Respondent elaborates in this submission, partial annulment of the award rendered on May 17, 2024 ("Award") is not warranted, and Claimant's application should be dismissed in its entirety ("Freeport" or "Claimant").

3. Claimant's claims arose out of the legal stabilization agreement signed between Peruvian company Sociedad Minera Cerro Verde S.A.A. ("SMCV") and Perú's Ministry of Energy and Mines ("MINEM") on February 13, 1998 ("Stabilization Agreement" or "1998 Stabilization Agreement") and relevant provisions of Title Nine of the Single Unified Text of the General Mining Law (Texto Único Ordenado de la Ley General de Minería – "Mining Law") and its Regulations. The dispute turns on the scope of that Agreement under the Mining Law.

4. Claimant alleged that legal stabilization agreements signed under the Mining Law ("mining stabilization agreements"), such as the 1998 Stabilization Agreement, grant unlimited and open-ended stability guarantees in advance to any and all activities and investment projects, present or future, conducted within a concession or "mining unit." Under that interpretation, Claimant argued that its Stabilization Agreement covered not only its Leaching Project (the project

for which the Agreement was entered into), but also its Concentrator Project built six years after the Agreement was signed.

5. Starting in 2009, Perú's tax authority (SUNAT) issued Tax and Royalty Assessments to SMCV on the basis that the 1998 Stabilization Agreement did not cover the Concentrator Project. SUNAT also charged penalties and interest for overdue taxes and royalties related to those assessments, which SMCV refused to pay. SMCV (majority owned indirectly by Claimant Freeport) challenged those assessments. SMCV also requested, in the alternative, that SUNAT waive penalties and interest issued on those assessments based on alleged "reasonable doubt" regarding the interpretation of the Mining Law pursuant to Article 170 of the Peruvian Tax Code.

6. Claimant has now litigated these issues at the administrative and judicial levels in Perú (all the way up to the Supreme Court) and before the ICISD Tribunal. Claimant lost. Perú's SUNAT, Tax Tribunal, and courts (including the Supreme Court), and the ICSID Tribunal confirmed that Claimant's interpretation of the Stabilization Agreement and the Mining Law was incorrect—mining stabilization agreements only cover the investment project for which the agreement is entered into and, thus, the Stabilization Agreement only covered the Leaching Project. In addition, Perú's SUNAT, Tax Tribunal, and courts dismissed SMCV's request to waive penalties and interest, and the ICSID Tribunal found it did not have jurisdiction to hear Claimant's penalties and interest waiver claim.

7. In this annulment proceeding, Claimant now seeks an additional chance (in fact, a seventh chance) to prove its case on the alternative claim related to the waiver of penalties and interest. Claimant seeks partial annulment of the Award on the basis that the Tribunal allegedly failed to decide Claimant's alternative claim concerning penalties and interest on Royalty

Assessments, despite having purportedly upheld jurisdiction over that claim. Tellingly, Claimant does not (and cannot) challenge the Tribunal's decision on the interpretation of the Agreement and the Mining Law (*i.e.,* that both instruments were unequivocal in limiting the scope of mining stabilization agreements to the project for which they were entered into) and that decision is now *res judicata*.

8. Claimant now invites the Committee to stretch the exceptional and limited remedy of annulment far beyond its narrow mandate. Claimant raises arguments that it previously submitted before the Tribunal, seeking to re-litigate issues that have been exhaustively argued, meticulously weighed, and conclusively resolved by the Tribunal. In doing so, Claimant mischaracterizes the Award, disregards the high threshold for annulment set by Article 52 of the ICSID Convention, and portrays ordinary disagreements with the Tribunal's analysis as though they were procedural defects that amount to annullable errors. None of Claimant's allegations withstand scrutiny. During the arbitration, the parties were fully heard on the issues that Claimant now seeks to revisit, and the Tribunal ruled on all of Claimant's claims (included its alternative claims), providing clear and thorough reasoning on those matters. As Perú establishes in this Counter-Memorial on Partial Annulment, none of Claimant's arguments come close to satisfying its burden of demonstrating an annullable error.

9. *First*, the Tribunal did not manifestly exceed its powers. The Tribunal determined that it lacked jurisdiction to decide Claimant's claims regarding penalties and interest on Tax and Royalty Assessments on the basis that they constitute "taxation measures" excluded under Article 22.3.1 of the TPA. Thus, the Tribunal's decision lies well within the legal framework applicable to this dispute and is, in any event, a determination immune from annulment review under the applicable standard.

10. *Second*, far from "failing to state reasons," the Tribunal articulated a clear and coherent chain of reasoning that enables any reader to trace its analytical path from the interpretation of "taxation measures" under the TPA to its final determination that penalties and interest—including those related to Royalty Assessments—fell within that definition, thereby excluding jurisdiction over the associated claims.

11. *Third*, the Tribunal respected all fundamental rules of procedure. It addressed the issue of penalties and interest related to Royalty Assessments, concluded that it lacked jurisdiction over those claims, and resolved all matters within its jurisdiction. Both parties were given a fair and meaningful opportunity to present their case and express their views on the relevant issues. Even assuming a procedural flaw occurred (it did not), any such shortcoming would not meet the threshold of being a "serious departure from a fundamental rule of procedure" under Article 52(1)(d)) of the ICSID Convention as the Tribunal's reasoning indicates that the outcome—that is, dismissal of Claimant's claims on penalties and interest on Royalty Assessments—would have remained unchanged.

12. Claimant's attempt to recast its dissatisfaction with the Award as an omission from the Tribunal is particularly misplaced. If Claimant believed the Tribunal had failed to decide one of its alternative claims on the merits, Article 49(2) of the ICSID Convention provides a specific mechanism for requesting a supplementary decision where a tribunal has inadvertently failed to decide a question. Claimant chose not to avail itself of that remedy. It did so, because it knew the Tribunal's decision would not go its way. Instead, Claimant opted for annulment before this *ad hoc* Committee—an avenue reserved for rare and egregious procedural defects—forcing Perú to incur additional expenses to defend itself in the process. Claimant's tactical choice cannot transform an alleged interpretative disagreement of the Award into an annullable error. Claimant's

strategy to seek annulment with a new *ad hoc* Committee rather than ask the original Tribunal to address an alleged omission is an abuse of the annulment process and should be rejected.

13. Nor can Claimant meet the exacting "manifest" or "serious" thresholds that Articles 52(1)(b) and (d) impose. The Tribunal's findings are not merely defensible; they are firmly grounded in the evidentiary record, the plain text of the TPA, and well-established principles of international law. Alleged mistakes of fact, misappreciations of evidence, or purported misapplications of law—even if proven—do not constitute a basis for annulment.

14. But, even if the Committee were to find that the Award contains annullable errors (it does not), the Committee should exercise its discretion to not partially annul the Award. For example, even if the Committee were to conclude that the Tribunal found it had jurisdiction over Claimant's claims related to penalties and interest attached to Royalty Assessments (it did not), but failed to decide the issue on the merits, it is evident that Claimant's claims would have failed on the merits. The Tribunal found that the Mining Law and the Stabilization Agreement were clear and nothing in their text could be interpreted to expand the scope of the stability guarantees to include the Concentrator. That decision has not been challenged by Claimant in these proceedings and constitutes *res judicata*. Thus, the Tribunal's findings on the scope of the Stabilization Agreement and its resolution of Claimant's principal claims mean that, if considered on the merits, Claimant's waiver of penalties and interest on Royalty Assessments claim would have failed (*e.g.*, because there was no "reasonable doubt" regarding the interpretation of the Stabilization Agreement under the Mining Law), thus negating the need to partially annul the Award.

15. Moreover, any partial annulment would force Perú into a futile but costly re-litigation of the same issues that have already been litigated (and decided in Peru's favor) multiple

times. Any tribunal subsequently constituted to decide on Claimant's claim related to Perú's alleged obligation to waive penalties and interest on Royalty Assessments—allegedly stemming from a misinterpretation of the Stabilization Agreement due to an asserted ambiguity in the Mining Law and its Regulations—would be bound by the Tribunal's determination that the language in the Mining Law, its Regulations, and the Stabilization Agreement was clear. That determination defeats any claim that penalties and interest on Royalty Assessments should be waived under the "reasonable doubt" doctrine provided under Article 170 of the Peruvian Tax Code. Thus, if the Committee were to decide to partially annul the Award as Claimant requests (it should not), it would only create a situation where Perú could face a new and lengthy arbitration only to end up in the same place it is now—with a total dismissal of Claimant's unsubstantiated claims. There is no compelling basis for the Committee to partially annul the Award.

16. The type of award at issue here is not one the drafters of Article 52 of the ICSID Convention had in mind when carving out the exceptional and limited recourse of annulment. The Award was rendered by a Tribunal composed of three renowned arbitrators, who granted Claimant multiple opportunities to present its case, including multiple rounds of briefs and a nine-day evidentiary hearing. To grant Claimant's application would not only disregard settled jurisprudence on the exceptional and narrowly circumscribed nature of annulment proceedings but would also undermine the finality of awards—an essential feature of the ICSID system that the drafters of the Convention deliberately created.

17. Respondent respectfully requests that, for the reasons outlined in this Counter-Memorial on Partial Annulment, the *ad hoc* Committee reject Claimant's Application in its entirety. In so doing, the Committee will honor both the integrity of the arbitral process and the principle of finality that underpins investor-State dispute settlement under the ICSID Convention.

18. In the sections that follow, Perú addresses the arguments made by Claimant in its Memorial on Partial Annulment. **Section II** summarizes the factual background of the dispute, outlines the procedural history of the arbitration, and describes the Tribunal's findings, contrasting them with Claimant's mischaracterization of the facts. **Section III** explains the extraordinary and limited nature of the remedy of annulment under Article 52(1) of the ICSID Convention. **Sections IV, V, and VI** rebut Claimant's three annulment arguments under Articles 52(1)(b) (manifest excess of powers), 52(1)(e) (failure to state reasons), and 52(1)(d) (serious departure from a fundamental rule of procedure) of the ICSID Convention, respectively, and demonstrate why partial annulment should not be granted in this case. **Section VII** addresses Claimant's miscellaneous grievances, all of which fall outside the ambit of Article 52. **Section VIII** shows that even assuming, *arguendo*, that there is an annullable error (there is none), the Committee should nevertheless exercise its discretion not to annul. **Section IX** demonstrates that Claimant should bear all the costs for this annulment proceeding. Finally, **Section X** contains Perú's request for relief.

II. CLAIMANT'S ACCOUNT OF THE DISPUTE AND THE AWARD IS FACTUALLY INCORRECT AND MISLEADING

19. In its Memorial on Partial Annulment, Freeport misrepresents the facts of the underlying dispute. Rather than presenting the facts as determined by the Tribunal, Freeport is resubmitting its own factual assertions, referencing its own submissions in the arbitration. Freeport's arguments, however, have been conclusively dismissed by the Tribunal. Indeed, as Respondent will show throughout this submission, the Tribunal found Claimant's witnesses to not be credible and its evidence and arguments to be "unconvincing."[1]

[1] **AA-1**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Award, May 17, 2024 ("*Freeport* Award"), at paras. 767, 770.

20. By taking this approach, Claimant seeks to avoid the Tribunal's clear determination regarding the scope of stabilization agreements under Perú's Mining Law, despite not seeking to annul that portion of the Award. Claimant's approach is entirely inappropriate for an annulment proceeding. The responsibility for assessing the factual allegations advanced by the parties rests solely with the tribunal in the original proceeding.[2]

21. Conversely, the role of an *ad hoc* committee is strictly confined to determining whether the arbitral proceedings or the award are tainted by any of the procedural defects enumerated in Article 52(1) of the ICSID Convention. This is a legal inquiry, not a factual one. As discussed in Section III *infra*, the Committee is not empowered to reassess the evidentiary record or to re-evaluate the factual determinations made by the Tribunal. Accordingly, annulment submissions must limit the factual background to the findings expressly made by the Tribunal and material to the Award. This is not an opportunity for Claimant to re-tell its story.

22. In this section, Perú sets the record straight. First, it provides an accurate description of the factual background of the case and the underlying dispute (**Section II.A**). Second, it briefly describes the arbitral proceeding (**Section II.B**). Third, it outlines the parties' positions in the underlying arbitration and the Tribunal's findings (**Section II.C**).

23. In the interest of procedural economy and efficiency, Respondent will confine its observations to the facts and issues that are material to these proceedings, while addressing the erroneous and misleading assertions advanced by Claimant in its Memorial on Partial Annulment. Respondent's silence on certain factual descriptions should not be taken as acceptance of Claimant's assertions.

[2] *See* **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), at Rule. 34(1), p. 115 ("The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.").

A. FACTUAL BACKGROUND

24. In the Award, the Tribunal reached clear factual determinations regarding the scope of the Stabilization Agreement and the Mining Law and its Regulations.

25. In its Memorial on Partial Annulment, however, Claimant mischaracterizes both the scope of the Stabilization Agreement and the State's interpretation and implementation of its provisions, portraying a distorted account of the facts. Throughout its description of the dispute, Claimant suggests that SMCV enjoyed a stabilized administrative and tax regime that applied to all of its investments in Cerro Verde, including the Concentrator Project.[3] It did not. The Tribunal unequivocally concluded that the Stabilization Agreement applied only to the Leaching Project—not the entire mining unit or concession—and that SUNAT's Royalty and Tax Assessments on the Concentrator were lawful under the non-stabilized regime.[4]

26. Strikingly, in these proceedings, Claimant relies on its own pleadings from the arbitration to advance its own version of the facts, digging its head in the sand and wishing the Tribunal's factual findings did not exist. Claimant's reliance on its own pleadings from the arbitration to support its assertions in this proceeding is wholly inappropriate and misleading. Moreover, Claimant's account of the facts is in stark contrast with the Tribunal's clear findings.

1. SMCV Applied for and Entered into a Stabilization Agreement with Perú for Its Leaching Project

27. SMCV, a company incorporated under the laws of Perú and indirectly owned and controlled by Freeport since 2007,[5] conducts mining operations at Cerro Verde—an open-pit

[3] *See, e.g.*, Applicant's Memorial on Annulment, May 23, 2025 ("Memorial on Partial Annulment"), at para. 16 ("The Royalty Law post-dated the Stabilization Date in the Stability Agreement and thus did not form part of SMCV's stabilized administrative regime."); *id.* at para. 17 ("Peru also enacted certain changes to its tax laws and regulations that likewise did not form part of SMCV's stabilized tax regime."); *see also id*. at paras. 4, 18.

[4] *See, e.g.*, **AA-1**, *Freeport* Award, at paras. 717, 722-814, 816, 828-29.

[5] *See* **AA-1**, *Freeport* Award, at para. 2.

copper and molybdenum mining complex located in Arequipa, Perú.[6] At the time SMCV applied for and signed the Stabilization Agreement, SMCV had two concessions within the Cerro Verde site: (i) a mining concession for the exploration and extraction of mineral resources in specific locations ("Mining Concession");[7] and (ii) a beneficiation concession for processing the minerals extracted from the mine ("Beneficiation Concession").[8]

28. Cerro Verde's mineral deposits consist of three distinct categories of copper ore—oxides, secondary sulfides, and primary sulfides—each requiring a tailored processing method.[9] Oxides and secondary sulfides are processed through leaching and solvent extraction/electrowinning (SX/EW) in a leaching plant to obtain cathodes of 99.9% copper (refined copper), whereas primary sulfides are typically treated via flotation in a concentrator plant to obtain copper concentrate.[10] Copper cathodes and copper concentrate are different products.[11]

29. In 1996, SMCV (then owned by Cyprus Mineral Company) submitted an application to MINEM seeking to enter into a 15-year mining stabilization agreement. Mining stabilization agreements grant tax, currency exchange, and administrative stability.[12] The agreements are governed by the Mining Law (published in 1992) and its Regulations (published in 1993).[13]

[6] *See* **AA-1**, *Freeport* Award, at para. 136.

[7] *See* **AA-1**, *Freeport* Award, at para. 146.

[8] *See* **AA-1**, *Freeport* Award, at para. 179.

[9] *See* **AA-1**, *Freeport* Award, at para. 136.

[10] *See* **AA-1**, *Freeport* Award, at para. 136.

[11] *See, e.g.*, **AA-1**, *Freeport* Award, at paras. 148, 340; *see also id*. at para. 685.

[12] *See* **AA-1**, *Freeport* Award, at para. 159.

[13] *See* **AA-1**, *Freeport* Award, at paras. 159, 164.

30. Pursuant to the Mining Law and its Regulations, mining stabilization agreements provide stability guarantees to the specific investment project for which each agreement is entered into.[14] In particular, the Mining Law and Regulations provide that the stability guarantees granted through mining stabilization agreements are limited to the investment project described in the feasibility study submitted by the company seeking to enter into such an agreement.[15] For example, Article 82 of the Mining Law clarifies that stability guarantees apply only to specific mining projects—not to concessions or mining units (as Claimant alleges),[16] while Article 83 confirms that those guarantees are exclusively applicable to activities related to the project defined in the investment program described in the feasibility study submitted by the mining titleholder.[17] Articles 18, 19, 22, 24, and 25 of the Regulations also confirm that mining stabilization agreements apply only to the specific project outlined in the feasibility study.[18]

31. SMCV's application for a mining stabilization agreement referred to a USD 237 million dollar project to expand SMCV's leaching plant's annual production capacity from 72 million to 105 million pounds of copper cathodes (the "Leaching Project").[19] That project was specifically described and analyzed in a feasibility study that was attached to SMCV's request for a stabilization agreement (the "1996 Feasibility Study").[20] The language of the 1996 Feasibility Study made clear that the study "cover[ed] the Cerro Verde leaching project" and aimed to

[14] *See* **AA-1**, *Freeport* Award, at para. 717.

[15] *See* **AA-1**, *Freeport* Award, at para. 717.

[16] *See* **AA-1**, *Freeport* Award, at para. 701.

[17] *See* **AA-1**, *Freeport* Award, at para. 706.

[18] *See* **AA-1**, *Freeport* Award, at paras. 702-03, 710-11.

[19] *See* **AA-1**, *Freeport* Award, at para. 184.

[20] *See* **AA-1**, *Freeport* Award, at para. 175.

determine whether the Leaching Project was viable.[21] Notably, the study did not mention or refer to any investment in a concentrator plant or the development of a concentrator project.[22]

32. On May 6, 1996, MINEM's Directorate General of Mining ("DGM") approved the 1996 Feasibility Study for the Leaching Project.[23] This date marks the commencement of the stabilized legal regime under the mining stabilization agreement, meaning that the laws and regulations in force on that date remain applicable to the stabilized investment project (*i.e.*, the Leaching Project) throughout the duration of the agreement.[24]

33. In 1998, the Republic of Perú and SMCV entered into a Stabilization Agreement, pursuant to Article 82 of the Mining Law.[25] By virtue of the Stabilization Agreement, Perú granted SMCV's Leaching Project administrative and fiscal (tax) stability for a period of fifteen years (from January 1, 1999 through December 31, 2013) with respect to the legal and regulatory regimes in force in Perú as of May 6, 1996.[26]

34. The dispute addressed and resolved in the underlying arbitration arose from the State's issuance of assessments against SMCV for unpaid royalties and taxes related to the Concentrator Plant—an investment project which, as confirmed by the Tribunal, fell outside the scope of the Stabilization Agreement—as well as penalties and interest imposed on SMCV due to SMCV's refusal to comply with its tax and royalty obligations.

35. In its Memorial on Partial Annulment, Claimant blatantly ignores the Tribunal's factual findings with respect to the scope of mining stabilization agreements (in general) and

[21] **AA-1**, *Freeport* Award, at para. 175; *see also id.* at para. 753 (*quoting* 1996 Feasibility Study, Art. 1.1).

[22] *See* **AA-1**, *Freeport* Award, at para. 175; *see also* at para. 756.

[23] *See* **AA-1**, *Freeport* Award, at para. 177.

[24] *See* **AA-1**, *Freeport* Award, at para. 184.

[25] *See* **AA-1**, *Freeport* Award, at para. 184.

[26] *See* **AA-1**, *Freeport* Award, at para. 184; *see also id*. at paras. 723-37.

SMCV's Stabilization Agreement (in particular). Throughout its description of the dispute, Claimant suggests that SMCV enjoyed a stabilized administrative and tax regime that applied to all its investments in Cerro Verde, beyond SMCV's Leaching Project (*i.e.*, to include the Concentrator).[27] Claimant's assertions are baseless and stand in stark contrast to the Tribunal's findings.

36. As Respondent explains in further detail in Section II.C.2 below, the Tribunal unequivocally concluded (i) that mining stabilization agreements only cover the specific investment projects for which the agreements are entered into, as outlined and described in the feasibility study that forms part of the agreements; and, (ii) applying the same law, that the Stabilization Agreement covered exclusively SMCV's Leaching Project—it did not cover the Concentrator Project that was built six years after the Stabilization Agreement was entered into.

2. Six Years After Signing the Stabilization Agreement, SMCV Chose to Invest in a New Project: The Concentrator

a. In 2004, six years after signing the Stabilization Agreement for the Leaching Project, SMCV concluded that the construction of the Concentrator Plant was economically viable

37. Through 2004, SMCV had been treating the oxide ore extracted from the mine through its leaching plant.[28] The Cerro Verde site did not have a concentrator plant to process the sulfide ore, as SMCV had discarded any plans to build a concentrator plant, because it was not economically viable.

[27] *See*, *e.g.*, Memorial on Partial Annulment at para. 16 ("The Royalty Law post-dated the Stabilization Date in the Stability Agreement and thus did not form part of SMCV's stabilized administrative regime."); *see id.* at para. 17 ("Peru also enacted certain changes to its tax laws and regulations that likewise did not form part of SMCV's stabilized tax regime."); *see also id*. at paras. 4, 18.

[28] *See* **AA-1**, *Freeport* Award, at paras. 136, 145, 184.

38. Indeed, three studies assessing the feasibility of constructing a concentrator plant on the Cerro Verde site were carried out between 1995 and 1998.[29] However, all three feasibility studies concluded that the construction of a concentrator plant on the Cerro Verde site was not economically feasible.[30]

39. In December 2002, following a rise in copper prices, SMCV started to re-assess the feasibility of constructing a concentrator plant on the Cerro Verde site to process primary sulfide ore.[31] Indeed, in 2003, Phelps Dodge (SMCV's new majority shareholder and Freeport's predecessor in interest), engaged Fluor Canada Ltd. to conduct a full feasibility study to assess the possibility of developing a concentrator plant.[32]

40. In May 2004, six years after SMCV entered into the Stabilization Agreement with MINEM for the Leaching Project, Fluor Canada Ltd. delivered a feasibility study (the "2004 Feasibility Study").[33] The Study determined that the mine's previous constraints related to energy and water had been resolved, thereby making the construction of a concentrator plant economically viable.[34] In October 2004, SMCV's board of directors gave conditional approval for a USD 850 million investment for the construction of a concentrator, noting that the decision was contingent upon securing the necessary permits and financing for the project.[35]

[29] *See* **AA-1**, *Freeport* Award, at paras. 173-74, 178, 180.

[30] *See* **AA-1**, *Freeport* Award, at paras. 178, 180.

[31] *See* **AA-1**, *Freeport* Award, at para. 196.

[32] *See* **AA-1**, *Freeport* Award, at paras. 190, 200.

[33] *See* **AA-1**, *Freeport* Award, at para. 213.

[34] *See* **AA-1**, *Freeport* Award, at para. 213.

[35] *See* **AA-1**, *Freeport* Award, at para. 231.

b. MINEM did not confirm that the Stabilization Agreement applied to the Concentrator Project

41. In its Memorial on Partial Annulment, Claimant asserts that Phelps Dodge and SMCV approved the investment in the Concentrator "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."[36] Claimant cannot credibly continue trying to advance this argument when its own witness, Mr. Davenport (former President and Manager of SMCV),[37] testified during the hearing that the reference in the Stabilization Agreement to the Leaching Project and not the Concentrator Project was the "the elephant in the room" for Phelps Dodge.[38]

42. As Respondent shows in Section II.C.1., Claimant made this same argument before the Tribunal, and the Tribunal dismissed it. Indeed, the Tribunal found that there was "considerable amount of documentary evidence confirming the Parties' joint understanding that the 1998 [Stabilization] Agreement did not cover the Concentrator."[39] Respondent describes the relevant facts below.

(i) MINEM's approval of SMCV's reinvestment of profits for the construction of the Concentrator, free of tax, did not confirm that the Stabilization Agreement covered the Concentrator

43. While Fluor was in the process of preparing the feasibility study for the Concentrator Plant, SMCV sought confirmation from the DGM (MINEM) that SMCV would be

[36] Memorial on Partial Annulment at para. 15.

[37] *See* **AA-1**, *Freeport* Award, at para. 768.

[38] **AA-1**, *Freeport* Award, at para. 869.

[39] **AA-1**, *Freeport* Award, at para. 778 (emphasis added).

entitled to apply the profit reinvestment benefit for the construction of the Concentrator Plant.[40] The profit reinvestment benefit allowed SMCV to reinvest, free of tax, its profits from the Leaching Project into new investments.[41] This benefit had been repealed in September 2000 by the Peruvian Congress,[42] but was available to SMCV for the profits from the Leaching Project as it was a tax benefit that existed under the legal regime in force on May 6, 1996 (*i.e.*, the stabilized regime under the Stabilization Agreement).[43]

44. Correspondence between SMCV and the DGM related to the profit reinvestment benefit confirms that SMCV understood that the Stabilization Agreement covered only the Leaching Project, not the Cerro Verde unit.[44] For example, in its correspondence to the DGM in 2003, SMCV recognized that the Stabilization Agreement only referred to the "'*Leaching Project rather than to the Cerro Verde Project*.'"[45] The DGM replied to SMCV in a report which stated that the stabilized regime was granted to "*the Cerro Verde Leaching Project and not to the company*."[46]

45. After these exchanges with the DGM, SMCV submitted a request to MINEM seeking authorization to reinvest profits generated by the Leaching Project for the construction of the Concentrator to process primary sulfides at Cerro Verde.[47]

[40] *See* **AA-1**, *Freeport* Award, at para. 785.

[41] *See* **AA-1**, *Freeport* Award, at Section III.G.

[42] *See* **AA-1**, *Freeport* Award, at para. 193.

[43] *See* **AA-1**, *Freeport* Award, at paras. 201-04.

[44] *See* **AA-1**, *Freeport* Award, at paras. 785-89.

[45] **AA-1**, *Freeport* Award, at para. 785 (emphasis in the original).

[46] **AA-1**, *Freeport* Award, at para. 787 (emphasis in the original).

[47] *See* **AA-1**, *Freeport* Award, at para. 207.

46. In December 2004, the Minister of Energy and Mines granted final approval to SMCV's request to apply the profit reinvestment benefit toward the construction of the Concentrator, specifying that the eligible profits must be exclusively generated by the Leaching Project.[48] This approval did not constitute confirmation that the Stabilization Agreement covered the Concentrator, as Claimants allege.[49] Indeed, contrary to Claimant's assertions, the Tribunal found that the language in the 2003 correspondence, in SMCV's request, and in the DGM's approval demonstrated that the Concentrator was not covered by the Agreement.[50]

(ii) MINEM's approval of the expansion of SMCV's Beneficiation Concession did not confirm that the Stabilization Agreement covered the Concentrator

47. In August 2004, SMCV submitted an application to the DGM seeking to expand the Beneficiation Concession to include the Concentrator within its scope.[51] The Beneficiation Concession in effect at the time granted SMCV only the right to process the copper oxides and secondary sulfides extracted from the upper layers of the mine through the Leaching Plant. It did not authorize SMCV to process copper primary sulfides through the Concentrator. Later that month, MINEM approved SMCV's application to build the Concentrator and to expand the Beneficiation Concession to include the new Concentrator Plant.[52]

48. The application and procedure to expand the Beneficiation Concession was an independent procedure, entirely unrelated to the scope of the Stabilization Agreement.[53] This approval did not amend the Stabilization Agreement nor did it confirm that the Concentrator would

[48] *See* **AA-1**, *Freeport* Award, at para. 238; *see also id*. at para. 792.

[49] *See* **AA-1**, *Freeport* Award, at para. 761; *see also id*. at para. 786.

[50] *See* **AA-1**, *Freeport* Award, at paras. 786, 789, 792.

[51] *See* **AA-1**, *Freeport* Award, at para. 224.

[52] *See* **AA-1**, *Freeport* Award, at para. 233.

[53] *See* **AA-1**, *Freeport* Award, at paras. 775, 788.

benefit from the stabilized regime applicable to the Leaching Project, as Claimant wishes it had.[54] The approval simply allowed the Concentrator Project to operate under the existing Beneficiation Concession in Cerro Verde. Indeed, as Perú elaborates in Section II.C.2 below, the Tribunal concluded that Claimant's allegation that the expansion of the Beneficiation Concession to cover the Concentrator confirmed that the scope of the Agreement also expanded to cover the Concentrator was unsubstantiated and based on conflicting testimony from Claimant's witnesses.

49. Notwithstanding that SMCV received no confirmation from the State that the Concentrator would be included in the Stabilization Agreement, in December 2004, SMCV initiated construction of the Concentrator, which was completed in 2006.[55]

50. Notably, in addition to these particular approvals, the record of the arbitration was replete with instances in which MINEM had consistently stated in meetings, memoranda, letters, and public statements that mining stabilization agreements were limited to the project outlined in the underlying feasibility study (in this case, the Leaching Project).[56]

51. In light of the above, it is inaccurate and inappropriate for Claimant to assert, without qualification, that Phelps Dodge and SMCV approved the investment in the Concentrator based on an alleged understanding that the Stabilization Agreement would extend to that investment.[57] The evidence submitted by Claimant in the arbitral proceeding does not support that assertion.

52. Claimant's characterization of these facts represents an obvious attempt by Claimant to reargue a position that was already presented to, and expressly rejected by, the

[54] *See* **AA-1**, *Freeport* Award, at paras. 775-77.

[55] *See* **AA-1**, *Freeport* Award, at para. 239.

[56] *See*, *e.g.*, **AA-1**, *Freeport* Award, at paras. 798-808, 925.

[57] *See* Memorial on Partial Annulment at para. 15.

Tribunal. Such a maneuver not only undermines the finality and authority of the Tribunal's findings—it must also be dismissed as an improper attempt to relitigate matters that have already been conclusively resolved. This is particularly untenable given that Claimant is not seeking to annul the portions of the Award that specifically address and dispose of those very issues.

3. Perú Issued and Upheld Tax and Royalty Assessments Against SMCV Related to the Concentrator Project

53. On June 3, 2004, the Peruvian Congress enacted the Royalty Law, introducing an *ad valorem* royalty applicable to holders of mining concessions for ore extraction.[58] The Royalty Law was signed on June 23, 2004 and published the following day.[59] Given that the Stabilization Agreement applied exclusively to the Leaching Project, SMCV was obliged to declare and pay royalties derived from the Concentrator's operations.

54. Accordingly, in 2009, SUNAT began issuing assessments for unpaid royalties and taxes on SMCV's Concentrator operations for the fiscal years 2006 through 2013,[60] assessing also penalties and interest on Royalty and Tax Assessments.[61]

55. SMCV challenged SUNAT's Assessments on multiple occasions and lost:

- SMCV challenged the Assessments before SUNAT's Claims Division.[62] SUNAT rejected SMCV's challenges and upheld the Assessments and the applicable interest and penalties.[63]
- SMCV appealed SUNAT's decisions to the Tax Tribunal. The Tax Tribunal rejected SMCV's appeals and upheld SUNAT's decisions.[64]

[58] *See* **AA-1**, *Freeport* Award, at para. 214.

[59] *See* **AA-1**, *Freeport* Award, at para. 217.

[60] *See* **AA-1**, *Freeport* Award, at paras. 342-51.

[61] *See* **AA-1**, *Freeport* Award, at paras. 342-51.

[62] *See* **AA-1**, *Freeport* Award, at paras. 342-450.

[63] *See* **AA-1**, *Freeport* Award, at paras. 342-450.

[64] *See* **AA-1**, *Freeport* Award, at paras. 342-450.

- SMCV also challenged the 2006–2007 and 2008 Royalty Assessments before Peruvian courts.[65] Those courts rejected SMCV's arguments.

- SMCV even appealed to the Supreme Court of Justice in Perú; the Supreme Court of Justice rejected SMCV's arguments, found that the Concentrator was not covered by the Stabilization Agreement, and found that SUNAT's Assessments had been issued in accordance with Peruvian Law.[66]

56. As part of SMCV's challenges before SUNAT, the Tax Tribunal, and the Peruvian courts, SMCV also requested that the penalties and interest associated with the Royalty and Tax Assessments be waived, invoking Article 170 of the Peruvian Tax Code.[67]

57. According to the Peruvian Tax Code, taxpayers could request the non-application of interest and penalties in cases of "reasonable doubt" or conflicting criteria in accordance with the provisions of Article 170.[68] Article 170 of the Peruvian Tax Code limits the possibility of a waiver of penalties and interest to two specific situations.[69] First, a taxpayer may be able to obtain a waiver based on "reasonable doubt" if certain specific conditions are met: (i) there is a misinterpretation of a law or regulation as a result of which the underlying assessment would not have been issued; (ii) which leads to the government issuing a clarification correcting the misinterpretation; and (iii) the clarification explicitly states it is issued under Article 170 of the

[65] *See* **AA-1**, *Freeport* Award, at paras. 368-80. SMCV has only obtained one favorable decision in this 20-year period, the first instance court reviewing the case related to the 2008 Royalties. That decision was quickly overturned by the appellate court and the Supreme Court. For the sake of clarity, SMCV withdrew its claims related to the 2006-2007 Royalty Assessments before the Supreme Court could issue a final decision on the case in order to initiate the ICSID arbitration. Moreover, Claimant did not challenge the 2009-2013 Royalty Assessments before the courts for the same reason. *See also* **AA-1**, *Freeport* Award, Annex A to Respondent's Rejoinder on the Merits and Reply on Jurisdiction, at p. 339 (PDF).

[66] *See* **AA-1**, *Freeport* Award, at paras. 376-77.

[67] *See* **AA-1**, *Freeport* Award, at paras. 364, 383.

[68] **AA-1**, *Freeport* Award, at para. 976.

[69] *See* **AA-1**, *Freeport* Award, at para. 976.

Tax Code and is published in *El Peruano* (the official gazette) (Article 170.1).[70] Second, when SUNAT has interpreted a rule inconsistently over the course of time (Article 170.2).[71]

58. SMCV claimed that it had failed to make the payments for the corresponding Tax and Royalty Assessments because of the lack of clarity of the Mining Law and its Regulations.[72] SUNAT, however, rejected SMCV's applications to waive penalties and interest on the Tax and Royalty Assessments,[73] and its decision was ultimately confirmed by the Tax Tribunal and the local courts, including Perú's Supreme Court.[74]

59. In its description of the facts in this proceeding, Claimant alleges that SUNAT and the Tax Tribunal issued and confirmed those Royalty and Tax Assessments were based on a "novel" and "restrictive" interpretation of the Mining Law and its Regulations, "despite SMCV's arguments demonstrating the basis for its position on the correct interpretation of the Mining Law and Regulations."[75] Claimant also argues that SUNAT should have waived the penalties and interest associated with the Tax and Royalty Assessments under Article 170 of the Tax Code, asserting that SUNAT's decision was incorrect.[76]

60. Claimant's assertions are, once again, completely at odds with the Award. As explained in further detail below in Section II.C.2, the Tribunal found that Perú's interpretation and application of the Stabilization Agreement was consistent with the language of the Mining

[70] *See* **AA-1**, *Freeport* Award, at para. 976.

[71] *See* **AA-1**, *Freeport* Award, at para. 976.

[72] *See* **AA-1**, *Freeport* Award, at para. 364.

[73] To clarify, there were instances where SMCV did not request the waiver of penalties and interest before SUNAT in the Royalty Assessment cases. For example, it failed to do so in its challenges against the 2006-2007 and 2008 Royalty Assessments. *See* **AA-1**, *Freeport* Award, at paras. 364-365.

[74] *See* **AA-1**, *Freeport* Award, at paras. 384, 397, 398, 402, 411, 523.

[75] Memorial on Partial Annulment at paras. 18-19.

[76] *See* Memorial on Partial Annulment at paras. 21-23.

Law and Regulations, as well as the text of the Agreement itself, and that it had not altered its interpretation of the Stabilization Agreement over time.[77] Rather, the Tribunal found that Perú's interpretation remained consistent and publicly known.[78] Therefore, Claimant's claim that SUNAT's interpretation was novel and restrictive is inaccurate and simply untenable at this point.

61. In addition, SUNAT, the Tax Tribunal, and the Peruvian courts—including the Supreme Court—also held that the scope of the Stabilization Agreement was limited to the Leaching Project and, thus, confirmed the Tax and Royalty Assessments issued against SMCV. In doing so, these administrative and judicial bodies confirmed that both the Mining Law and its Regulations clearly and unambiguously limit the scope of mining stabilization agreements to specific investment projects. Therefore, Claimant's contention that SMCV acted reasonably in electing not to pay the Tax and Royalty Assessments is simply not credible. More critically, its claim that SMCV was entitled to a waiver of interest and penalties under the "reasonable doubt" doctrine in Article 170 of the Tax Code has no merit.

B. ARBITRAL PROCEEDING

62. The arbitration lasted almost four years. In March 2020, ICSID registered Claimant's Request for Arbitration, and the Tribunal issued its Award in May 2024.[79]

63. In the arbitral proceeding, the parties filed 2,071 pages of written submissions; offered the testimony of 20 witnesses and the opinions of 18 experts (on jurisdictional provisions in the TPA, International Mining Tax, Peruvian law, and quantum); submitted 1,600 factual

[77] *See infra* at paras. 97-123.

[78] *See* **AA-1**, *Freeport* Award, at para. 897.

[79] *See* **AA-1**, *Freeport* Award, at para. 31 and cover page, p. 1 (PDF).

exhibits and 639 legal authorities; and participated in a ten-day hearing.[80] The Tribunal granted the parties due process throughout the arbitration.

64. The Tribunal issued a complete, coherent, and reasoned Award dismissing Claimant's USD 942.4 million claim.[81] The arbitral proceeding was Claimant's sixth attempt to overturn SUNAT's Tax and Royalty assessments on the basis that that the Stabilization Agreement covered the Concentrator. Claimant sought to overturn SUNAT's assessments before (i) SUNAT; (ii) the Tax Tribunal; (iii) first instance administrative courts; (iv) administrative appellate courts; and, ultimately, (v) Perú's Supreme Court.[82] With this annulment proceeding, Claimant is attempting to drag Perú through yet another costly process that, ultimately, negatively impacts Peruvian taxpayers. For the reasons discussed in this submission, Claimant's latest attempt to seek recovery should also be denied.

C. THE AWARD

65. In its Memorial on Partial Annulment, Claimant offers a portrayal of the Award that is both incomplete and misleading. Rather than furnishing the *ad hoc* Committee with a faithful and comprehensive account of the Award, Freeport misuses the annulment process as a platform to reargue claims that were already submitted to and dismissed by the Tribunal. To ensure the Committee is equipped with a clear and accurate understanding of the Award, Perú sets out below a summary of the parties' arguments as reflected in the Award (**Subsection 1**), along with

[80] *See* **AA-1**, *Freeport* Award, at paras. 49-130.

[81] *See* **AA-1**, *Freeport* Award, at paras. 7, 13.

[82] *See* **AA-1**, *Freeport* Award, at Annex A Respondents Rejoinder on the Merits and Reply on Jurisdiction, at pp. 339-48 (PDF) (listing all of the individual instances in which Claimant sought to set aside SUNAT's assessments). The first instance court's ruling in the 2008 Royalty Assessment Case stands as the sole instance in which SMCV's legal challenges prevailed.

the Tribunal's findings and conclusions on Freeport's claims, particularly those relevant to these annulment proceedings (**Subsection 2**).

1. Summary of the Parties' Arguments

66. In its Memorial on Partial Annulment, Claimant fails to present a concise and objective summary of the claims advanced by Freeport and the defenses raised by Perú during the arbitration. Instead, it reargues its case on both the facts and the law, relying extensively on citations to its own written submissions in the arbitration, rather than referencing the Award.[83] Claimant's approach is misleading and inappropriate.

67. In the arbitration, Freeport advanced both principal and alternative claims. To assist the Committee in gaining a more accurate and balanced understanding of the parties' positions during the arbitration, Perú offers below a succinct overview of the key arguments raised by the parties during the arbitration.

a. Freeport's main claims

(i) Perú allegedly breached the Stabilization Agreement (it did not)

68. Under its first principal claim, Freeport alleged that Perú breached the Stabilization Agreement—an instrument which, according to Claimant, qualified as an investment agreement under Article 10.28 of the TPA—each time it denied stability guarantees to SMCV for products produced by the Concentrator.[84]

69. Specifically, Freeport argued that a breach occurred whenever SUNAT's Tax and Royalty Assessments concerning products produced by the Concentrator became final and

[83] *See* Memorial on Partial Annulment at paras. 25-31.

[84] *See* **AA-1**, *Freeport* Award, at paras. 648-49.

enforceable.[85] Claimant alleged that under the plain language of the Mining Law and Regulations in force at the time the Agreement was executed and in effect until 2014, stability guarantees extended to the entire mining unit or concession where the investor had made the qualifying minimum investment.[86] For Claimant, it was irrelevant whether the investments were part of the 1996 Feasibility Study's investment program, concerned processing methods identified in the 1996 Feasibility Study, or concerned production of product that was distinguishable from that envisioned in the 1996 Feasibility Study.[87]

70. Freeport asserted that its interpretation of the Mining Law and Regulations was confirmed by: (i) the Mining Law's drafters; (ii) the government's historical practice and past representations; (iii) the manner in which the government implemented the Stabilization Agreement (including its approval of SMCV's request to expand the Beneficiation Concession to include the Concentrator); and (iv) the language of the Stabilization Agreement itself.[88] Relying on its interpretation of the law and the Stabilization Agreement—namely, that the Agreement extended to the entire mining unit—Freeport argued that SUNAT should not have issued Tax and Royalty Assessments against SMCV for activities related to the Concentrator.[89]

71. Perú disputed these claims on two independent grounds. *First*, Perú demonstrated that the Mining Law and its Regulations provided that mining stabilization agreements granted stability guarantees exclusively to the investment project for which they were entered into.[90] Moreover, the Stabilization Agreement SMCV entered into referred only to the Leaching Project

[85] *See* **AA-1**, *Freeport* Award, at paras. 661-62.

[86] *See* **AA-1**, *Freeport* Award, at para. 650.

[87] *See* **AA-1**, *Freeport* Award, at para. 650.

[88] *See* **AA-1**, *Freeport* Award, at paras. 652-57.

[89] *See* **AA-1**, *Freeport* Award, at paras. 661-69.

[90] *See* **AA-1**, *Freeport* Award, at para. 681. *See also id.*, at para. 689.

identified in the 1996 Feasibility Study. The Stabilization Agreement did not refer to all investment projects in SMCV's mining concessions; it did not refer to SMCV's so-called mining unit; and it certainly did not refer to the Concentrator Project (a project that was deemed not feasible at the time the Stabilization Agreement was signed). In other words, the language of the Stabilization Agreement clearly confined the stability guarantees to the specific investment project identified therein (*i.e.*, the Leaching Project).[91]

72. Respondent demonstrated that said interpretation had been consistently affirmed by various official reports, statements, and presentations delivered in the Peruvian Congress.[92]

73. Thus, Perú did not breach the Stabilization Agreement when it assessed taxes and royalties on SMCV's Concentrator Project.[93]

74. *Second*, Perú contended that, in any case, Freeport was precluded by the doctrine of collateral estoppel from re-litigating an issue that had already been resolved under Peruvian law and was bound by multiple adverse rulings from Peruvian courts.[94] In particular, Perú showed that Peruvian courts (including the Supreme Court) had addressed the same legal issues raised by Claimant in the arbitration and concluded that mining stabilization agreements grant stability guarantees exclusively to the investment project for which they were entered into, and, accordingly, the Stabilization Agreement did not extend to the Concentrator Project.[95] Consequently, Tax and Royalty Assessments issued against SMCV did not breach the Stabilization Agreement.[96] Perú further submitted that even assuming, *arguendo*, collateral estoppel did not

[91] *See* **AA-1**, *Freeport* Award, at para. 685.

[92] *See* **AA-1**, *Freeport* Award, at paras. 680, 683, 686.

[93] *See* **AA-1**, *Freeport* Award, at paras. 670, 680.

[94] *See* **AA-1**, *Freeport* Award, at para. 670.

[95] *See* **AA-1**, *Freeport* Award, at para. 671.

[96] *See* **AA-1**, *Freeport* Award, at paras. 671-74.

apply, the scope of the Stabilization Agreement is governed by Peruvian law (including the Supreme Court's decision), which the Tribunal was bound to apply.[97]

(ii) Perú allegedly breached Article 10.5 of the TPA (it did not)

75. For its second principal claim, Claimant alleged that Perú violated Article 10.5 of the TPA by failing to provide the minimum standard of treatment to Claimant and its investments each time SUNAT's Royalty Assessments became final and enforceable against SMCV.[98] In particular, Claimant asserted that Perú: (i) frustrated Claimant's legitimate expectations;[99] (ii) acted arbitrarily and based on political calculations;[100] and (iii) was inconsistent and non-transparent[101] in issuing Royalty Assessments against SMCV, based on an allegedly novel and restrictive interpretation of the Stabilization Agreement. Claimant also asserted that the Tax Tribunal committed serious due process violations in the proceedings concerning SMCV's challenges to the 2006-2011 Royalty Assessments.[102]

76. According to Claimant, the then-existing legal framework (Mining Law and Regulations) along with alleged assurances given to SMCV by Peruvian officials, gave SMCV and Phelps Dodge an objectively reasonable expectation that the Concentrator would fall within the scope of the Stabilization Agreement.[103] Freeport argued that Perú allegedly undermined this expectation by purportedly reversing its position and adopting a novel and restrictive interpretation

[97] *See* **AA-1**, *Freeport* Award, at paras. 671, 675-77.

[98] *See* **AA-1**, *Freeport* Award, at para. 831.

[99] *See* **AA-1**, *Freeport* Award, at paras. 833, 834-39.

[100] *See* **AA-1**, *Freeport* Award, at paras. 833, 875-84.

[101] *See* **AA-1**, *Freeport* Award, at paras. 833, 901-08.

[102] *See* **AA-1**, *Freeport* Award, at paras. 833, 930-39.

[103] *See* **AA-1**, *Freeport* Award, at para. 840.

of the Stabilization Agreement when it issued the Royalty Assessments.[104] Freeport also contended that Perú's actions were arbitrary, politically motivated, and lacked consistency and transparency, asserting that Perú's interpretation of the Stabilization Agreement was driven by political pressure rather than grounded in the applicable Mining Law and Regulations.[105] Specifically, with respect to the 2006-2011 Royalty Assessments,[106] Claimant asserted that the Tax Tribunal violated Claimant's due process rights by allegedly failing to decide SMCV's challenges to those assessments on the merits, allegedly coordinating improperly among various proceedings, and allegedly allowing undue interference by its President.[107]

77. Perú contested all of Claimant's claims. *First*, Perú contended that Article 10.5 of the TPA does not include the protections afforded by the autonomous FET standard on which Claimant relied. Perú also showed that that Claimant failed to demonstrate that those protections—particularly the obligation not to frustrate investors' legitimate expectations—have crystallized into customary international law as required under the TPA.[108]

78. Perú also submitted that even if the Tribunal interpreted Article 10.5 of the TPA as encompassing such protection with respect to Claimant's alleged legitimate expectations,

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[104] *See* **AA-1**, *Freeport* Award, at paras. 831, 833, 840.

[105] *See* **AA-1**, *Freeport* Award, at paras. 875-84, 901-08.

[106] The 2006-2007, 2008, 2009, 2010-2011, and Q4 2011 Royalty Assessment cases before the Tax Tribunal.

[107] *See* **AA-1**, *Freeport* Award, at paras. 930-39. In its Memorial on Partial Annulment, Claimant asserts that for the 2006-2011 Royalty Assessments, Claimant also argued in the arbitration that SUNAT committed serious due process violations in resolving SMCV's challenges to those assessments (*see* Memorial on Partial Annulment, at para. 25 (b)). Claimant cites to its own pleadings in the arbitration in support of that assertion; however, their pleadings do not reflect this alleged claim. Notably, Claimant is referring to an argument that Claimant tried to belatedly raise at the hearing—for the first time—based on a document it had received during document production (*i.e.*, before submitting its Reply). At the hearing, Respondent demonstrated that Claimant's belated argument was without merit and that there was nothing inappropriate in SUNAT's actions (*see*, *e.g.*, **RA-3**, Respondent's Closing Statement Presentation Slides, May 12, 2023, at slide 72). Moreover, Claimant was aware its due process claims had no merit, because Claimant never actually raised a denial of justice claim in the arbitration.

[108] *See* **AA-1**, *Freeport* Award, paras. 843-50. *See also id*., at paras. 885-86, 910.

Claimant's alleged expectations were not objectively reasonable.[109] Particularly, Phelps Dodge and SMCV could not have reasonably relied upon the Mining Law and Regulations, given that said legal framework unequivocally provided that stability guarantees are limited to the investment project(s) outlined in the feasibility study on which the stabilization agreement was based.[110] Perú further demonstrated that SMCV and Phelps Dodge should have been aware of MINEM's position regarding the scope of stabilization agreements before constructing the Concentrator, based on public reports and presentations.[111] Perú also showed that the expansion of the Beneficiation Concession to include the Concentrator had no bearing on the scope of the guarantees under the Stabilization Agreement. In addition, Respondent showed that its interpretation of stabilization agreements remained consistent and had been publicly communicated from the outset, with full transparency.[112] Finally, Perú showed that Claimant failed to prove that Perú changed its interpretation regarding the scope of these agreements or that the Peruvian mining and tax authorities were influenced by political pressure with respect to their interpretation of the Stabilization Agreement.[113]

79. Perú disputed that the Tax Tribunal had committed any due process violations in the 2006-2011 Royalty Assessments cases.[114] Perú demonstrated that the Tax Tribunal acted within its mandate and maintained procedural integrity in handling the Royalty Assessment cases.[115] Specifically, it showed that the President of the Tax Tribunal appropriately allocated

[109] *See* **AA-1**, *Freeport* Award, paras. 850-53.

[110] *See* **AA-1**, *Freeport* Award, paras. 850-53.

[111] *See* **AA-1**, *Freeport* Award, paras. 854-58.

[112] *See* **AA-1**, *Freeport* Award, paras. 888, 911-13.

[113] *See* **AA-1**, *Freeport* Award, paras. 890-92.

[114] *See* **AA-1**, *Freeport* Award, paras. 940-42.

[115] *See* **AA-1**, *Freeport* Award, para. 942.

resources to the Chamber overseeing the 2008 Royalty Case and that the chambers reviewing SUNAT's 2006–2007, 2009, and 2010 Royalty Assessments conducted independent deliberations before issuing their decisions.[116] Perú also showed that the Tax Tribunal upheld due process in the 2010–2011 and the Q4 2011 Royalty Cases (by permitting Mr. Ninacondor to serve as a *vocal* in the 2010–2011 Royalty case and reasonably appointing Ms. Villanueva as *vocal ponente* in the Q4 2011 Royalty Case).[117]

b. Freeport's alternative claims

80. In addition to the main claims mentioned above, Claimant submitted alternative claims under Article 10.5 of the TPA. Claimant requested, in the alternative, that the Tribunal order Perú to pay monetary damages of more than USD 700 million for Perú's : (i) alleged breach of Article 10.5 of the TPA for its purported arbitrary failure to waive penalties and interest on Tax and Royalty Assessments issued against SMCV; (ii) alleged breach of Article 10.5 of the TPA for its purported refusal to reimburse *Gravamen Especial a la Minería* ("GEM") payments made by SMCV between Q4 2011 and Q3 2012; and (iii) alleged arbitrary application of the non-stabilized regime to certain assets and activities that, according to Claimant, should have been covered by stability protections.[118] For the sake of efficiency, Respondent addresses below only the alternative claim relevant to the annulment proceedings—namely, Perú's alleged breach of the TPA due to its failure to waive interest and penalties on the Royalty and Tax Assessments issued against SMCV.[119]

[116] *See* **AA-1**, *Freeport* Award, paras. 942, 947.

[117] *See* **AA-1**, *Freeport* Award, paras. 942, 948.

[118] *See* **AA-1**, *Freeport* Award, paras. 11, 13.

[119] *See* **AA-1**, *Freeport* Award, para. 967.

81. In the arbitration, Claimant argued that Perú was obligated under international principles of fairness and equity as well as the reasonable doubt doctrine under Article 170 of the Peruvian Tax Code to waive penalties and interest on the Royalty and Tax Assessments imposed on SMCV.[120] According to Claimant, under Article 170 of the Tax Code, it was unfair and inequitable to charge penalties and interest when non-payment of taxes and royalties resulted from an alleged lack of clarity concerning the rules requiring said payment. Claimant argued that when there is reasonable doubt, the government: (i) must clarify the scope of the rule; (ii) must automatically waive penalties and interest associated with application of said rule; and (iii) cannot refuse to issue a clarification of said rule.[121]

82. According to Claimant, there was objective "reasonable doubt" regarding the correct interpretation of the Mining Law and Regulations.[122] In Claimant's view, this was evidenced by a first instance court decision and some dissenting opinions that favored SMCV's position in the challenges against the Royalty Assessments, as well as by the 2014 and 2019 amendments to the Mining Law and Regulations. Claimant alleged that those amendments reflected the government's acknowledgment that the earlier versions of those provisions were ambiguous and imprecise.[123] Claimant also claimed that SMCV's interpretation of the relevant legal framework was aligned with the conduct of Peruvian government officials, both in general and in their specific dealings with SMCV.[124] Claimant further asserted that the Peruvian tax

[120] *See* **AA-1**, *Freeport* Award, paras. 968-69.

[121] *See* **AA-1**, *Freeport* Award, para. 969.

[122] *See* **AA-1**, *Freeport* Award, para. 970. *See also id*., at paras. 971-73.

[123] *See* **AA-1**, *Freeport* Award, para. 970. *See also id*., at paras. 971-73.

[124] *See* **AA-1**, *Freeport* Award, para. 970. *See also id*., at paras. 971-73.

authorities—namely SUNAT and the Tax Tribunal—as well as the courts, acted arbitrarily and on pretextual grounds when they denied SMCV's request to waive penalties and interest.[125]

83. Perú rejected Freeport's allegations.[126] Perú asserted that Claimant's reliance on "reasonable doubt" under Article 170 of the Tax Code was fundamentally flawed. Perú demonstrated that Article 170 of the Tax Code requires that specific requirements be met in order for there to be a finding of "reasonable doubt" and trigger a waiver of penalties and interest. In other words, the concept of reasonable doubt under the Peruvian Tax Code does not refer to a circumstance where a taxpayer alleges that the law or regulation can be read differently for its own self-serving purpose—under that scenario taxpayers would always allege "reasonable doubt" to avoid paying penalties and interest. To the contrary, for a waiver to apply, either an official clarification had to be published in *El Peruano* (the official gazette) expressly providing that it is issued for purposes of Article 170 of the Tax Code[127] or there had to be a proven history of inconsistent application by SUNAT of the rule in question on which the taxpayer relied.[128] Those two options are the only options under which "reasonable doubt" could exist for purposes of Article 170 of the Tax Code. Claimant failed to demonstrate either existed.

84. Perú showed that Claimant could not establish "reasonable doubt" based on a single favorable first instance ruling or the presence of dissenting judicial opinions, especially because the decisions on which Claimant relied were issued after SMCV had already filed its tax returns for the fiscal years at issue.[129] In any case, neither the favorable first instance ruling (which was

[125] *See* **AA-1**, *Freeport* Award, para. 970. *See also id*., at para. 972.

[126] *See* **AA-1**, *Freeport* Award, para. 975.

[127] The clarification could be issued, for example, through a legal provision in a Supreme Decree endorsed by the MEF, a Superintendency Resolution (SUNAT), a resolution from a similar authority, or a Tax Tribunal resolution.

[128] *See* **AA-1**, *Freeport* Award, paras. 976-77. *See also id*., at para. 982.

[129] *See* **AA-1**, *Freeport* Award, para. 979.

later overturned at the appellate level, which itself was confirmed by the Supreme Court), nor dissenting opinions constitute an official clarification published in *El Peruano.*[130] In addition, they do not show an inconsistent application of the rule by SUNAT over the course of time.[131]

85. Likewise, Perú showed that the 2014 and 2019 amendments to the Mining Law and Regulations did not retroactively create or validate the existence of reasonable doubt. Indeed, Perú showed that Peruvian authorities consistently maintained that the Stabilization Agreement had a limited scope.[132]

86. Respondent also argued that Claimant's claim should be dismissed because SUNAT, the Tax Tribunal, and the Peruvian courts acted properly under Peruvian law.[133] It showed that SMCV failed to timely raise the issue of the waiver of penalties and interest in certain Royalty Assessment cases and that the appellate courts rightly rejected SMCV's attempt to expand the scope of the appeal to include SMCV's belated arguments.[134]

c. Perú's jurisdictional objections

87. Perú also advanced the following jurisdictional objections in addition to its defenses against Claimant's main and alternative claims on the merits:

(i) Most of Claimant's claims based on the Royalty and Tax Assessments were time-barred under the TPA's limitations period (Article 10.18.1).[135]

(ii) Most of Claimant's claims were based on acts or facts that occurred before the TPA entered into force (Article 10.1.3 of the TPA).[136]

[130] *See, e.g.,* **AA-1**, *Freeport* Award, para. 977.

[131] *See, e.g.,* **AA-1**, *Freeport* Award, para. 977.

[132] *See* **AA-1**, *Freeport* Award, para. 979.

[133] *See* **AA-1**, *Freeport* Award, para. 975.

[134] *See* **AA-1**, *Freeport* Award, paras. 976, 980.

[135] *See* **AA-1**, *Freeport* Award, paras. 457-77.

[136] *See* **AA-1**, *Freeport* Award, paras. 554-63.

(iii) Claimant's claims (on behalf of SMCV) of alleged breaches of the Stabilization Agreement had already been submitted for resolution before administrative tribunals and binding dispute settlement procedures in Perú (Article 10.18.4 of the TPA).[137]

(iv) Claimant failed to prove that it relied on the Stabilization Agreement when it acquired or established its covered investments and thus was not entitled to submit claims for breach of an investment agreement (Article 10.16.1 of the TPA).[138]

(v) Claimant's claims based on Perú's decision to impose and maintain penalties and interest on Tax Assessments constitute tax measures which are excluded from the Tribunal's jurisdiction in accordance with the TPA (Article 22.3.1 of the TPA).[139]

88. The relevant jurisdictional objection for this annulment proceeding is the jurisdictional objection under Article 22.3.1 of the TPA (*i.e.,* that penalties and interest on Tax Assessments constitute tax measures and are excluded from the Tribunal's jurisdiction). Under that objection, Perú argued that the term "taxation measures" in the TPA should be interpreted broadly,[140] rejecting Claimant's attempt to narrow the definition of taxation measures by equating them to "taxes."[141] Respondent also submitted that Claimant agreed that the Tribunal should rely on Peruvian law to assess whether a government measure constitutes a taxation measure.[142] To support this, Perú pointed to Peruvian laws which explicitly recognize penalties and interest as taxation measures, given that they fall within the scope of the government's tax administration responsibilities.[143] Relying on its tax experts, Perú also argued that penalties and interest associated with tax assessments are considered as "tax debt" under Peruvian law.[144] Consequently,

[137] *See* **AA-1**, *Freeport* Award, paras. 585-92.

[138] *See* **AA-1**, *Freeport* Award, paras. 610-21.

[139] *See* **AA-1**, *Freeport* Award, paras. 526-31.

[140] *See* **AA-1**, *Freeport* Award, para. 526.

[141] **AA-1**, *Freeport* Award, paras. 527-28.

[142] *See* **AA-1**, *Freeport* Award, para. 530.

[143] *See* **AA-1**, *Freeport* Award, para. 530.

[144] *See* **AA-1**, *Freeport* Award, para. 530.

any government action involving the calculation, cancellation, or rescheduling of those penalties and interest qualifies as a taxation measure.[145]

89. While Perú did not insist that the Treaty's taxation measures carve-out applied to the claims concerning penalties and interest on Royalty Assessments, the Tribunal nonetheless reached a well-founded conclusion—based on the evidentiary record—that such penalties and interest also fall within the scope of taxation measures under the TPA. As discussed in Sections II.C.2.a. and V.B.1 below, the Tribunal's conclusion was firmly grounded in its interpretation of the TPA's language under international law and was further supported by Peruvian legal provisions and expert testimony.[146]

2. The Tribunal Rejected Claimant's Claims in Their Entirety

90. Following its review of the parties' submissions and the evidence, the Tribunal dismissed Claimant's claims in full.[147] Perú describes below the Tribunal's findings and conclusions regarding (i) Perú's jurisdictional objections (**Section II.C.2.a**); and (ii) Claimant's claims on the merits (**Section II.C.2.b**).

a. The Tribunal's findings and conclusions regarding Perú's jurisdictional objections

91. As mentioned above, Perú raised five jurisdictional objections to Claimant's claims.[148] The Tribunal rejected all but one of Perú's jurisdictional objections—specifically, Perú's objection based on Article 22.3.1 of the TPA.[149] As detailed in Section II.C.1 above, Respondent argued that Claimant's claims based on Perú's decision to impose and maintain

[145] *See* **AA-1**, *Freeport* Award, para. 530 (*citing* Respondent's Rejoinder at para. 774; Bravo-Picón II (**RER-8**) at paras. 258-60).

[146] *See* infra at paras. 91-95, 180-200.

[147] *See* **AA-1**, *Freeport* Award, at para. 1047.b.

[148] *See supra* at para. 87.

[149] *See* **AA-1**, *Freeport* Award, at Section IV. *See also id*. at para. 1047.a.

penalties and interest on Tax Assessments constituted taxation measures and were therefore excluded from the Tribunal's jurisdiction pursuant to Article 22.3.1 of the TPA.[150] In response to Perú's jurisdictional objection, the Tribunal identified the issue it needed to resolve as follows:

> Are Claimant's claims based on penalties and interest outside of the Tribunal's jurisdiction because they constitute "*taxation measures*" which are excluded from the scope of the TPA under Article 22.3.1 of the TPA?[151]

92. The Tribunal answered that question by finding that "penalties and interest constitute '*taxation measures'* within the meaning of Article 22.3.1 of the TPA," and therefore concluded that it lacked jurisdiction to hear Claimant's claims regarding penalties and interest.[152]

93. In particular, the Tribunal undertook a treaty interpretation analysis under the VCLT to determine the meaning of the term "taxation measures" under the TPA. In its analysis, the Tribunal concluded that "*taxation*" is a broader concept than "*tax*."[153] To support its interpretation, the Tribunal referred to the *Link Trading v. Moldova* case, where the tribunal found that the term "taxation" could include, in addition to taxes, customs duties and "*other forms of raising revenue* within *the State's power*."[154] Thus, the Tribunal concluded that penalties and interest, as a general concept, constituted "taxation measures."

94. Even though Perú's jurisdictional objection to Claimant's penalties and interest claim was directed at Claimant's claims stemming from penalties and interest on Tax Assessments, the Tribunal—exercising its authority under the principles of competence-competence and *iura*

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[150] *See supra* at para. 88.

[151] **AA-1**, *Freeport* Award, at para. 455.b.

[152] **AA-1**, *Freeport* Award, at para. 986 (emphasis in the original); *see also generally id*. at paras. 544-51.

[153] **AA-1**, *Freeport* Award, at para. 547 (emphasis in the original).

[154] **AA-1**, *Freeport* Award, at para. 547 (emphasis in the original) (internal quotation marks omitted).

novit arbiter—determined that it lacked jurisdiction over claims concerning penalties and interest more broadly, on the basis that such measures constitute "*taxation measures*."[155]

95. Thus, contrary to what Claimant asserts in its Memorial on Partial Annulment,[156] the Tribunal concluded that it lacked jurisdiction over Freeport's claims arising from penalties and interest on both Tax Assessments and Royalty Assessments. Thus, the Tribunal found that it lacked jurisdiction over Claimant's alternative claims under Article 10.5 of the TPA concerning Perú's alleged failure to waive penalties and interest on Tax and Royalty Assessments. The Tribunal's conclusion is supported by its reasoning, set out across several paragraphs of the Award, as Respondent shows in detail in Sections II.C.2.a. and V.B.1 below.

b. The Tribunal's findings and conclusions regarding Claimant's remaining claims on the merits

96. Following its ruling on jurisdiction, the Tribunal addressed Claimant's remaining claims on the merits, rejecting them in full. In particular, the Tribunal: (i) found that the Stabilization Agreement was limited to the specific mining project for which it was entered into (*i.e.*, the Leaching Project) and, thus, did not cover SMCV's Concentrator Plant; (ii) concluded that Perú did not breach the Stabilization Agreement; and (iii) concluded that Perú acted in a reasonable, consistent, and transparent manner regarding the measures allegedly taken against SMCV. Perú briefly discusses below the Tribunal's findings and conclusions on each of these points.

(i) The Scope of the Stabilization Agreement

97. The Tribunal found that the Stabilization Agreement was limited to the specific mining project for which it was entered into (*i.e.*, the Leaching Project) and, thus, did not cover

[155] **AA-1**, *Freeport* Award, at paras. 544-53, 986.

[156] *See, e.g.*, Memorial on Partial Annulment at paras. 8-9, 33-37, 46-48.

the Concentrator Project as alleged by Claimant. The tribunal reached this conclusion based on its interpretation of the Mining Law and Regulations and the Stabilization Agreement.[157]

(a) The Tribunal's interpretation of the Stabilization Agreement in light of the applicable legal framework (Mining Law and Regulations)

98. The Tribunal concluded that pursuant to the appliable legal framework, mining stabilization agreements confer benefits solely on the specific mining projects for which they are executed and, accordingly, the Stabilization Agreement applied exclusively to SCMV's Leaching Project and did not extend to the Concentrator.[158]

99. The Tribunal concluded that the Mining Law and Regulations clearly limit the scope of stability guarantees (granted by the State via stabilization agreements) to specific mining projects. In the Tribunal's own words, "the benefits granted through mining stabilization agreements are limited to a specific mining project set out in the investment program in the feasibility study, as evidenced by the Mining Law and Regulations."[159]

100. The Tribunal also determined that "it does not follow from the plain text of the Mining Law and Regulations that stabilization agreements should apply to entire 'concessions' or 'mining units' as the Claimant argues."[160] The Tribunal was unequivocal in its conclusion that "nothing in the Mining Law and its Regulations provide[s] for such a reading."[161]

[157] *See* **AA-1**, *Freeport* Award, at paras. 694, 697-814.

[158] *See* **AA-1**, *Freeport* Award, at paras. 813-14.

[159] **AA-1**, *Freeport* Award, at para. 699.

[160] **AA-1**, *Freeport* Award, at para. 698; *see also id*. at paras. 694, 697-814.

[161] **AA-1**, *Freeport* Award, at para. 698 (emphasis added).

101. To reach these conclusions, the Tribunal conducted a thorough analysis of the Mining Law and its Regulations. As part of its analysis of the Mining Law and its Regulations, the Tribunal reached several key conclusions.

102. *First*, Article 82 of the Mining Law "makes clear that stability guarantees are granted to specific '*mining projects*,' . . . and not to '*concessions*', '*EAU*s,' or '*mining units.*'"[162] The Tribunal found that reference in the law to an "Economic-Administrative Unit" and "concessions" merely indicates that a specific mining project may be located in one or more concessions, conditioned on the fact that the target project produces at least 5,000 MT/day.[163] In the Tribunal's view, "[i]n the absence of any clear wording[,]" references to EAUs or concessions cannot be interpreted to mean that substantive guarantees extend to an entire unit or concession.[164]

103. *Second,* the Tribunal's interpretation of Article 82 of the Mining Law (described above) aligns with its reading of Article 22 of the Law's Regulations.[165] Article 22 provides, in relevant part, that "contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units."[166] According to the Tribunal, the word "exclusively" in Article 22 "clearly limits the scope of stabilization agreements to a specific investment in a specific mining project, which has to be made within the concession or EAU."[167]

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[162] **AA-1**, *Freeport* Award, at para. 701 (underlined emphasis added; italicized emphasis in the original).

[163] **AA-1**, *Freeport* Award, at para. 701.

[164] **AA-1**, *Freeport* Award, at para. 701.

[165] *See* **AA-1**, *Freeport* Award, at para. 702 (*quoting* Art. 22 of the Regulations "*[t]he contractual guarantees shall benefit the mining activity titleholder* ***exclusively*** *for the investments that it makes in the concessions or Economic-Administrative Units*") (emphasis in the original).

[166] **AA-1**, *Freeport* Award, at para. 703 (emphasis added).

[167] **AA-1**, *Freeport* Award, at para. 703 (emphasis added).

104. Indeed, the Tribunal highlighted the testimony of Mr. César Polo, Perú's witness and one of the drafters of the relevant provisions in the Mining Law, who stated that this "provision could not be clearer: stability guarantees apply to the investment that the mining company makes in a specific project."[168] Notably, the Tribunal found that the testimonies submitted by Claimant regarding the interpretation of the Mining Law and its Regulations were "inconclusive and contradicted by both the testimony of Mr. Polo, who was undisputedly one of the key drafters of L.D. 708 and the Mining Law, as well as the plain text of the law."[169]

105. *Third,* the Tribunal found that the language in Article 83 of the Mining Law is dispositive. Article 83 of the Mining Law states, in relevant part, that "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made."[170] According to the Tribunal, "[T]he only way to give effect to the term 'exclusively' in Article 83 is to interpret the provision as meaning that not all activities of a mining company are subject to stability guarantees, rather only those in relation to the undertaken mining project set out in the investment program."[171] The Tribunal again highlighted Mr. Polo's testimony, in which he explained that Article 83 "limit[s] the scope of stabilization agreements to the investment project contained in the investment program submitted by the mining titleholder and approved by MINEM."[172]

106. In light of Claimant's argument in the arbitration that the 2014 amendment to the Mining Law creating Article 83-B showed that the scope of mining stabilization agreements was

[168] **AA-1**, *Freeport* Award, at para. 703.

[169] **AA-1**, *Freeport* Award, at para. 713.

[170] **AA-1**, *Freeport* Award, at para. 705 (emphasis added).

[171] **AA-1**, *Freeport* Award, at para. 706.

[172] **AA-1**, *Freeport* Award, at para. 706.

not limited to the investment project for which the agreement was entered into, the Tribunal also reviewed the 2014 amendment. The Tribunal held that the amendment was irrelevant to interpreting the language in Article 83 of the Mining Law that was in force at the time the Agreement was signed, which was the provision that had to be interpreted.[173] Importantly, the Tribunal found that the law in force at the time the Stabilization Agreement was signed "already provided that the scope of stabilization agreements was limited to what was foreseen in the feasibility study."[174] In the Tribunal's view, the 2014 amendment simply confirmed that the scope of mining stabilization agreements had always been limited to specific mining projects.

107. *Fourth*, the Tribunal also examined Articles 18, 19, 24, and 25 of the Regulations and concluded that these provisions confirm unequivocally that mining stabilization agreements confer stability guarantees solely for the specific mining project for which they were executed, as defined in the investment program outlined in the corresponding feasibility study.[175] In the Tribunal's words: "Mining Regulations further make clear that a stabilization agreement benefits the activities related to the investment project that is described in that feasibility study or investment plan."[176]

- With respect to Articles 18 and 19, the Tribunal found that if it were the case that stabilization agreements applied automatically to any investment made within a concession or mining unit, as Claimant alleged, the State would not request the detailed information required under Articles 18 and 19 to apply for the stability benefits.[177]

- With respect to Article 24, the Tribunal found that that provision "makes clear not any investments made within a '*concession*' or '*mining unit*' may benefit

[173] *See* **AA-1**, *Freeport* Award, at para. 707.

[174] **AA-1**, *Freeport* Award, at para. 707.

[175] *See* **AA-1**, *Freeport* Award, at paras. 710-11.

[176] **AA-1**, *Freeport* Award, at para. 711.

[177] *See* **AA-1**, *Freeport* Award, at para. 711.

from stabilization. Rather, the feasibility study defines the investments that may benefit from stabilization."[178]

- With respect to Article 25, the Tribunal found that it reinforced the Tribunal's interpretation of the scope of stabilization agreements, emphasizing that it "only foresees that while expansions or new investments may in given circumstances benefit from stabilization guarantees, such guarantees are not automatically granted to a mining company by virtue of its location within a '*mining unit*' or '*concession*' as the Claimant argu[ed]."[179]

108. The Tribunal also opined that the interpretation of the scope of stability guarantees in Article 2 of the Regulation, in particular, the one introduced by an amendment in 2019, "cannot form the basis for the interpretation of the version in force at the time when the [Stabilization] Agreement was signed."[180] Therefore, the Tribunal considered that the limited scope of mining stabilization agreements was already clearly defined under the original Mining Law and its Regulations.[181]

109. In assessing the meaning and scope of the Mining Law and its Regulations, the Tribunal also addressed Claimant's assertion that the State had engaged in an alleged administrative practice of applying stability guarantees to entire mining units or concessions.[182] The Tribunal found that no such administrative practice existed.[183] Instead, it found that "there has been a practice of having mining concessions with both stabilized and non-stabilized projects, which contradicts Claimant's position that stability guarantees should apply to entire mining concessions."[184]

[178] **AA-1**, *Freeport* Award, at para. 711.

[179] **AA-1**, *Freeport* Award, at para. 710.

[180] **AA-1**, *Freeport* Award, at para. 704.

[181] *See also* **AA-1**, *Freeport* Award, at para. 707.

[182] *See* **AA-1**, *Freeport* Award, at para. 716.

[183] *See* **AA-1**, *Freeport* Award, at para. 716.

[184] **AA-1**, *Freeport* Award, at para. 716.

110. In light of the foregoing, the Tribunal ultimately concluded that it was "convinced that the Mining Law and Regulations limit the scope of stability guarantees to specific mining projects set out in the investment program in the feasibility study."[185] For the Tribunal, the language of the Law and its Regulations was clear and left no room for an understanding that investment projects not included in underlying feasibility study would be covered by the mining stabilization agreement.

(b) The Tribunal's interpretation of the Stabilization Agreement in light of the agreed methods of contract interpretation under Peruvian law

111. The Tribunal then addressed the scope of the Stabilization Agreement under Peruvian contract interpretation rules. It determined that "under the applicable rules of contract interpretation," "the 1998 Stabili[zation] Agreement did not extend to the entire Mining and Beneficiation Concessions."[186] In accordance with Peruvian law, the Tribunal reached its conclusion by applying a literal, systemic, contextual, and functional approach to interpreting the Agreement. Each method led to the same outcome: the Stabilization Agreement applied solely to the Leaching Project and excluded the Concentrator Project.[187] The Tribunal reached the following determinations under each interpretative method.

112. Literal interpretation: The Tribunal concluded that the Stabilization Agreement did not extend stability guarantees to all investments within the Mining and Beneficiation Concessions, as it made no express reference to a future investment in a concentrator; instead, it exclusively referred to SMCV's "*leaching project*."[188] The Tribunal also noted that Clauses 1, 3,

[185] **AA-1**, *Freeport* Award, at para. 717.

[186] **AA-1**, *Freeport* Award, at para. 813.

[187] *See* **AA-1**, *Freeport* Award, at paras. 718-814.

[188] **AA-1**, *Freeport* Award, at para. 723 (emphasis in the original).

and 4 of the Stabilization Agreement consistently focused on the Leaching Project, lacking any indication of a shared intent to cover broader investments.[189]

113. The Tribunal found this exclusive reference "decisive," noting that the Leaching Project was clearly defined in Clause 1.3 of the Stabilization Agreement and the Feasibility Study, while the Concentrator Plant involved materials, processes, and outputs not described therein.[190] As the Tribunal pointed out, even Claimant's witness, Mr. Davenport, acknowledged that the reference to the "*leaching project*" in Clause 1.1 of the Stabilization Agreement was "*the elephant in the room*" for Phelps Dodge.[191]

114. Systematic interpretation: Based on a systematic interpretation of the Stabilization Agreement, the Tribunal concluded that its scope did not include the Concentrator. In particular, the Tribunal found that Clauses 9 and 10 of the Stabilization Agreement did not support Claimant's interpretation.[192] In the Tribunal's view, Clause 9 limited guarantees to the Leaching Project as defined in the feasibility study, while Clause 10 addressed legal changes coming into effect after the date of approval of the Feasibility Study, without expanding the Agreement's scope.[193] According to the Tribunal, a systematic reading of the Stabilization Agreement, including of Clauses 2, 4, 5, and 7, confirmed that only the Leaching Project was covered.[194]

115. Contextual Interpretation: The Tribunal concluded that even under Claimant's preferred contextual interpretation, which considers the parties' conduct before and after the

[189] *See* **AA-1**, *Freeport* Award, at para. 723.

[190] *See* **AA-1**, *Freeport* Award, at paras. 726-28.

[191] **AA-1**, *Freeport* Award, at paras. 726-28 (emphasis in the original).

[192] *See* **AA-1**, *Freeport* Award, at para. 742.

[193] *See* **AA-1**, *Freeport* Award, at para. 742.

[194] *See* **AA-1**, *Freeport* Award, at paras. 745-46.

Stabilization Agreement, it had "no doubt that the Concentrator was not covered by the 1998 Stability Agreement."[195]

116. The Tribunal first analyzed the events prior to the execution of the Agreement. According to the Tribunal, "[N]othing in the course of events allowed SMCV to consider that the future Concentrator would fall within the scope of the Agreement."[196] In other words, SMCV could not reasonably have expected that the future Concentrator would benefit from the stability benefits under the 1998 Stabilization Agreement. In particular, the Tribunal found that the 1996 Feasibility Study, which formed the foundation for the 1998 Stabilization Agreement, described the characteristics of SMCV's investment and was explicitly confined to the Leaching Project.[197] The Tribunal then pointed out that the 1996 Feasibility Study, the report by the DGM analyzing the study, and the MINEM resolution approving the study all confirm that the investment project aimed to expand SMCV's leaching facilities to boost copper cathode production.[198] Additionally, the Tribunal noted that none of those documents mentioned the Concentrator, which had already been evaluated and deemed not economically viable by the time the Stabilization Agreement was signed.[199]

117. The Tribunal also analyzed the parties' actions following the execution of the Stabilization Agreement. In particular, the Tribunal addressed Claimant's allegations that MINEM officials confirmed that the expansion of the Beneficiation Concession would ensure that the Concentrator would be entitled to stability guarantees. The Tribunal, however, "only [found]

[195] **AA-1**, *Freeport* Award, at para. 747; *see also id.* at paras. 748-58.

[196] **AA-1**, *Freeport* Award, at para. 759 (emphasis added).

[197] *See* **AA-1**, *Freeport* Award, at para. 753.

[198] *See* **AA-1**, *Freeport* Award, at para. 757.

[199] *See* **AA-1**, *Freeport* Award, at para. 757.

evidence that contradicts Claimant's position."[200] The Tribunal also observed that "there are only circumstances that clearly refute a common intent that the Concentrator would be covered by the 1998 Stability Agreement."[201]

118. On this point, the Tribunal carefully reviewed the witness testimony submitted by the parties. Ultimately, the Tribunal found that the alleged confirmation that the expansion of the Beneficiation Concession would ensure that the Concentrator was covered was "unproven and based on inconsistent testimony."[202]

- With respect to Claimant's witnesses, the Tribunal highlighted that their testimonies were inconsistent and unreliable. For example, with respect to Ms. Torreblanca's (SMCV's in-house counsel) testimony that MINEM allegedly confirmed in 2003 and 2004 that the Concentrator would be stabilized, the Tribunal found that (i) it was inconsistent with Ms. Chappuis's (former official of MINEM and Claimant's own witness) testimony;[203] (ii) Claimant "ha[d] not submitted any written evidence in relation to the alleged confirmations in 2003 and 2004";[204] (iii) Mr. Davenport's testimony contradicted Claimant's argument that an explicit confirmation was given;[205] and (iv) it was "unconvincing that after months of alleged meetings with MINEM officials seeking confirmation that the Concentrator would be covered by the 1998 Stability Agreement, neither Mr. Davenport nor Ms. Torreblanca would have kept internal records capturing MINEM's alleged assurances that the Concentrator would be covered by the 1998 Stability Agreement."[206]

- With respect to Perú's witnesses, the Tribunal observed that the three former MINEM officials who testified on behalf of Perú, all confirmed that (i) the application and procedure to expand a beneficiation concession was an independent procedure, unrelated to the scope of the Agreement; and (ii) the

[200] **AA-1**, *Freeport* Award, at para. 761 (emphasis added).

[201] **AA-1**, *Freeport* Award, at para. 761 (emphasis added).

[202] **AA-1**, *Freeport* Award, at para. 761.

[203] *See* **AA-1**, *Freeport* Award, at para. 767.

[204] **AA-1**, *Freeport* Award, at para. 767.

[205] *See* **AA-1**, *Freeport* Award, at para. 768.

[206] **AA-1**, *Freeport* Award, at para. 770.

approval to expand the beneficiation concession did not amend the Stabilization Agreement.[207]

119. The Tribunal also concluded that contemporaneous documents confirmed that the Concentrator was not covered by the Stabilization Agreement. The Tribunal highlighted that "while it found no evidence in writing" that would prove any of the alleged confirmations that the Concentrator would be covered, it did find "considerable amount of documentary evidence confirming the Parties' joint understanding that the 1998 Stability Agreement did not cover the Concentrator."[208] For instance, the Tribunal found that the communications between SMCV and the DGM pertaining to the application of the profit reinvestment benefit for the construction of the Concentrator reflected that both SMCV and the DGM understood that the stabilized regime only applied to the Leaching Project, not the Concentrator.[209] Similarly, the Tribunal concluded that DGM's approval of SMCV's request to apply the profit reinvestment benefit did not amount to confirmation that the Stabilization Agreement covered the Concentrator; rather, it affirmed that the Concentrator was outside the scope of the Agreement.[210]

120. Additionally, based on the evidence on the record, the Tribunal concluded that: (i) the risk of the stabilized regime not applying to Cerro Verde's primary sulfides was considered by SMCV and Phelps Dodge when deciding to invest in the construction of the Concentrator;[211] and (ii) that SMCV and Phelps Dodge were doubtful as to the scope of the 1998 Stability

[207] *See* **AA-1**, *Freeport* Award, at paras. 775-77.

[208] **AA-1**, *Freeport* Award, at para. 778 (emphasis added); *see also id.* at paras. 779-809.

[209] *See* **AA-1**, *Freeport* Award, at paras. 785-89.

[210] *See* **AA-1**, *Freeport* Award, at paras. 789, 792.

[211] *See* **AA-1**, *Freeport* Award, at para. 784.

Agreement.[212] In the Tribunal's view, the coverage of the Concentrator under the scope of the Stabilization Agreement "was an assumption made by SMCV and Phelps Dodge."[213]

121. Functional Interpretation: The Tribunal explained that, under Peruvian law, a functional interpretation favors the meaning that is most appropriate for the nature and purpose of the contract, where there is language that has various meanings. The Tribunal clarified that it was "not convinced that the terms of the 1998 Stability Agreement have '*various meanings*' and that the functional interpretation is thus even relevant."[214] The Tribunal concluded, however, that even a functional interpretation of the Stabilization Agreement supported the view that the Agreement applied solely to the Leaching Project.[215]

122. In sum, the Tribunal concluded that the terms of the Agreement were clear and unambiguous and that SMCV (and, thus, Phelps Dodge and Freeport) knew that the Concentrator would not be covered by the Stabilization Agreement.

(ii) The alleged breach of the Stabilization Agreement

123. Given the Tribunal's unequivocal interpretation of the Mining Law, Regulations, and Stabilization Agreement—namely, that mining stabilization agreements apply solely to the specific project for which they were executed, and, therefore, the Stabilization Agreement covered only the Leaching Project and not the Concentrator—the Tribunal rejected Freeport's (and SMCV's) claims.[216] It concluded that "none of the disputed Royalty and Tax Assessments applying the non-stabilized regime to the Concentrator constituted violations of the 1998 Stability

[212] *See* **AA-1**, *Freeport* Award, at para. 794.

[213] **AA-1**, *Freeport* Award, at para. 872.

[214] **AA-1**, *Freeport* Award, at para. 810 (emphasis in original).

[215] *See* **AA-1**, *Freeport* Award, at para. 810.

[216] *See* **AA-1**, *Freeport* Award, at para. 816.

Agreement."[217] Interpreting Peruvian law and the Agreement, the Tribunal also determined that Perú did not breach the Agreement when it applied the non-stabilized regime to the Leaching Project.[218] In the Tribunal's view, such applications were valid in part due to SMCV's failure to maintain separate accounts for stabilized and non-stabilized activities as required under the Mining Regulations.[219]

(iii) The alleged breach of the Minimum Standard of Treatment under Article 10.5 of the TPA

124. The Tribunal also concluded that Perú did not breach the Minimum Standard of Treatment under Article 10.5 of the TPA.[220] At the outset, the Tribunal determined that it was unnecessary to resolve the debate over the precise content of the customary international law minimum standard of treatment, as Claimant's claims failed even under its own proposed standard under the TPA (an autonomous FET standard).[221] Subsequently, the Tribunal found that Perú did not breach Article 10. 5 of the TPA when the Royalty Assessments became final and enforceable against SMCV.[222] In particular, the Tribunal found that: (i) Perú did not frustrate Claimant's legitimate expectations;[223] (ii) Perú's actions with respect to SMCV were not arbitrary;[224] (iii) Perú's actions with respect to SMCV were consistent and transparent;[225] and (iv) the Tax Tribunal did not commit serious violations of due process.[226]

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[217] **AA-1**, *Freeport* Award, at para. 816.

[218] *See* **AA-1**, *Freeport* Award, at paras. 817, 819.

[219] *See* **AA-1**, *Freeport* Award, at paras. 820-29.

[220] *See* **AA-1**, *Freeport* Award, at paras. 876, 902, 921, 931, 955.

[221] *See* **AA-1**, *Freeport* Award, at paras. 894; *see also id.* at paras. 921, 955.

[222] *See* **AA-1**, *Freeport* Award, at paras. 894-900; 921-29; 954-66.

[223] *See* **AA-1**, *Freeport* Award, at paras. 863-74.

[224] *See* **AA-1**, *Freeport* Award, at paras. 894-900.

[225] *See* **AA-1**, *Freeport* Award, at paras. 921-29.

[226] *See* **AA-1**, *Freeport* Award, at paras. 954-66.

- Legitimate Expectations: With respect to Freeport's legitimate expectations claim, the Tribunal found no basis for Claimant to expect that the Concentrator would be covered by the Stabilization Agreement, as the Mining Law clearly limited coverage to the project described in the feasibility study—the Leaching Project.[227] It also determined that the State never confirmed the Concentrator's inclusion, and thus Freeport failed to prove that its legitimate expectations were frustrated.[228]

- Arbitrariness: The Tribunal concluded that Perú's actions with respect to SMCV were not arbitrary nor a result of political calculations, based on the Tribunal's findings that Perú: (i) did not breach the 1998 Stabilization Agreement; (ii) maintained a consistent and public interpretation of that Agreement; and (iii) never assured SMCV that the Concentrator was covered.[229]

- Transparency: The Tribunal concluded that Perú's actions with respect to SMCV were consistent and transparent, because the State did not conceal its interpretation of the Stabilization Agreement from Freeport or SMCV and emphasized that SMCV could have requested written clarification from MINEM or SUNAT, but failed to do so.[230]

- Due Process: The Tribunal concluded that the Tax Tribunal did not commit serious due process violations based on its findings that: (i) the misconduct allegations against the President of the Tax Tribunal in the 2006–2007 and 2008 Royalty Cases were inconclusive and unfounded; and (ii) the allegations against the Tax Tribunal's President regarding the 2009 and 2010–2011 Royalty Cases, lacked merit.[231]

125. Additionally, the Tribunal concluded that Perú did not act arbitrarily each time it failed to reimburse SMCV for its GEM payments.[232] The Tribunal held that Perú acted in accordance with applicable Peruvian law, emphasizing that SMCV entered into an agreement with

[227] *See* **AA-1**, *Freeport* Award, at paras. 869-74.

[228] *See* **AA-1**, *Freeport* Award, at para. 870.

[229] *See* **AA-1**, *Freeport* Award, at paras. 897-98.

[230] *See* **AA-1**, *Freeport* Award, at paras. 922-25.

[231] *See* **AA-1**, *Freeport* Award, at paras. 958-65.

[232] *See* **AA-1**, *Freeport* Award, at paras. 1000-12.

the State to make those payments, with full awareness of the State's position regarding the scope of the Stabilization Agreement and its obligation to pay royalties related to the Concentrator.[233]

* * *

126. In sum, the Tribunal conclusively determined that the language in the Stabilization Agreement, the Mining Law, and its Regulations was unequivocal: mining stabilization agreements apply solely to the specific project outlined in the feasibility study, and, in this case, the Stabilization Agreement covered only the Leaching Project. The Tribunal carefully considered the parties' submissions and supporting evidence regarding Claimant's claims related to Perú's decision not to waive penalties and interest on both the Tax and Royalty Assessments. Ultimately, however, it concluded that it lacked jurisdiction to adjudicate those claims.

127. Even assuming the Committee were to find that the Tribunal did have jurisdiction to decide on those claims (it should not), as explained above, the Tribunal—as well as SUNAT, the Tax Tribunal, the Peruvian administrative courts, and Supreme Court—already decided that the Mining Law and its Regulations clearly defined the scope of mining stabilization agreements.[234] This leaves no room for any ambiguity or "reasonable doubt" regarding the interpretation of the Mining Law and Regulations that could justify a waiver of penalties and interest. The Tribunal thoroughly reviewed and rejected each of Claimant's arguments suggesting that SMCV could have reasonably understood the Concentrator to be covered by the Stabilization Agreement.

128. Claimant's argument for the waiver of penalties and interest could only have prevailed if the Tribunal had found that the State's interpretation—underpinning the issuance of

[233] *See* **AA-1**, *Freeport* Award, at paras. 1000-12.

[234] *See supra* at paras. 53-61.

the Tax and Royalty Assessments against SMCV—was inconsistent with the applicable law and the Stabilization Agreement. Given that the Tribunal definitively concluded that the Mining Law and Regulations excluded the Concentrator from the Stabilization Agreement, there is no question that, had it found it had jurisdiction over Freeport's claims and ruled on the merits, the Tribunal would have rejected Claimant's position. Therefore, Claimant's assertion that the Tribunal failed to decide its claims arising from penalties and interest on Royalty Assessments on the merits is completely misguided.[235]

III. ANNULMENT IS AN EXCEPTIONAL AND LIMITED REMEDY AND SHOULD NOT BE GRANTED IN THIS CASE

129. Perú demonstrates in Sections IV, V, and VI that the Tribunal committed no error in the issuance of its Award, much less any error that could justify annulment under the ICSID Convention. The Award is sound and must stand. But before responding to the specific grounds for annulment on which Claimant bases its application, Perú first offers preliminary observations on the exceptional and limited nature of annulment as a remedy under the ICSID Convention, as it is a principle central to these proceedings.

130. Pursuant to Article 53 of the ICSID Convention, "[t]he award shall be binding on the parties and shall not be subject to appeal or to any other remedy except those provided for in this Convention."[236] Thus, it is well established that ICSID awards are final and that annulment committees cannot serve as appellate bodies and are not permitted to substitute the committee's judgment for that of the arbitral tribunal's on substantive issues.

[235] *See* Memorial on Partial Annulment at paras. 42, 44.

[236] **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), at Art. 53.

131. Scholars and *ad hoc* committees have consistently recognized the limited nature of annulment proceedings.[237] For example, in its Updated Background Paper on Annulment, the ICSID Secretariat notes that the drafting history of the ICSID Convention reveals that (i) "assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system;"[238] (ii) "annulment 'is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment];'" and (iii) annulment "does not provide a mechanism to appeal alleged misapplications of law or mistakes in findings on fact."[239]

132. Moreover, ICSID highlights in its Updated Background Paper on Annulment that these principles have been consistently recognized by *ad hoc* committees, including that: annulment is an "exceptional and narrowly circumscribed remedy" and "*ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards."[240] This purpose means that the narrow and precise grounds for annulment in the ICSID Convention are the only ones that permit annulment of an award.

133. For example, on the limited scope of the remedy, the *ad hoc* committee in *Amco Asia Corporation v. Republic of Indonesia* (*II*) concluded that:

> [t]he remedy of annulment requested by either or by both Parties under Article 52 of the CONVENTION is essentially limited by the grounds expressly enumerated in paragraph 1, on which an application for annulment may be made. This limitation is further confirmed by Article 53 (1) by the exclusion of review of the merits

[237] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at paras. 78-80.

[238] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 77.

[239] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 78.

[240] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 80.

> of the Awards. Annulment is not a remedy against an incorrect decision.[241]

134. The *ad hoc* committee in *MINE* similarly stated that "Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review of the merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52."[242]

135. The *ad hoc* committees in *Alapli v. Turkey* and *Iberdrola v. Guatemala* also reaffirmed that annulment committees lack the authority to review the substantive determinations of arbitral tribunals. In *Alapli v. Turkey*, the committee clarified that its role was not to assess the correctness of the award on factual or legal grounds, but solely to verify whether the underlying proceedings met the required standards of procedural integrity.[243] In *Iberdrola v. Guatemala*, the committee similarly emphasized that annulment proceedings do not entail a review of the merits of the award; instead, they are confined to assessing the legitimacy of the decision-making process.[244] The committee further noted that as long as the award is defensible, annulment is unwarranted—even in cases where the committee may strongly disagree with the tribunal's conclusions.[245] More recently, the *ad hoc* committee in *EURUS Energy Holdings Corporation v.*

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[241] **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, December 17, 1992 ("*AMCO II*, Decision on Annulment"), at para. 1.17 (emphasis added).

[242] **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 , December 22, 1989 ("*MINE v. Guinea*, Decision on Annulment"), at para. 4.04.

[243] *See* **RALA-1**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014, at para. 33.

[244] *See* **RALA-2**, *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment, January 13, 2015 ("*Iberdrola I*, Decision on Annulment"), at para. 74.

[245] *See* **RALA-2**, *Iberdrola I*, Decision on Annulment, at para. 76.

Spain confirmed these principles, emphasizing that "*ad hoc* committees may not, under the guise of annulment, review the correctness of awards or provide their own views on the merits of a dispute."[246]

136. Doctrine has also confirmed the extraordinary character of annulment. As Professor Schreuer has observed, "Commentators concur that Art. 52(1) does not provide for annulment on the basis of 'error of fact or law no matter how egregious.'"[247]

137. This annulment proceeding is not an exception. The *ad hoc* Committee does not have the ability to revise the Tribunal's decision nor to correct any alleged mistakes incurred by the Tribunal (there were none, as explained below). Even if the Committee did not agree with the Tribunal's decision, partial annulment cannot be granted. In other words, even if the Committee disagrees with the Tribunal's decision to decline jurisdiction on penalties and interest for Royalty Assessments, the Committee must recall its limited authority under Article 52 of the ICSID Convention.

138. In its Memorial on Partial Annulment, Claimant appears to acknowledge this.[248] According to Claimant, the "purpose [of an annulment proceeding] is not to review all aspects of a tribunal's decision for their substantive correctness."[249] While it is thus undisputed that annulment is a limited and exceptional remedy, Claimant's actions reveal a different understanding.

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[246] **RALA-3**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Annulment, July 31, 2025, at para. 69.

[247] **RALA-18**, Christoph H. Schreuer, *et al.*, *The ICSID Convention: A Commentary*, Cambridge University Press (2nd ed. 2009) (excerpt), Article 52, para. 13, p. 902.

[248] *See* Memorial on Partial Annulment at para. 2.

[249] Memorial on Partial Annulment at para. 2.

139. As Perú demonstrates in the following sections, Claimant is effectively asking the *ad hoc* Committee to reassess the Tribunal's decision on Claimant's claims regarding penalties and interest issued on SMCV's Royalty Assessments and, essentially, to revoke that decision under the pretext of an alleged omission by the Tribunal that purportedly justifies partial annulment. Such a request is incompatible with the limited scope and exceptional nature of annulment proceedings and, thus, the Committee should reject it.

IV. CLAIMANT HAS FAILED TO SHOW THAT THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS UNDER ARTICLE 52(1)(B) OF THE ICSID CONVENTION

140. In its Memorial on Partial Annulment, Claimant asserts that (i) the Tribunal allegedly "failed to consider or decide on . . . Freeport's claims based on penalties and interest on the Royalty Assessments,"[250] and (ii) this alleged omission purportedly constitutes a manifest excess of powers under Article 52(1)(b) that warrants partial annulment of the Award.[251] Specifically, Claimant asserts that because its claims based on penalties and interest on Royalty Assessments allegedly fall within the Tribunal's jurisdiction[252] and the Tribunal failed to exercise its jurisdiction over those claims,[253] the Tribunal's alleged failure constitutes a manifest excess of powers.[254] Claimant's arguments must be rejected. First, in the following section, Perú demonstrates that Claimant's articulation of the applicable standard for "manifest excess of powers" under Article 52(1)(b) is incorrect (**Section IV.A**). Second, Respondent shows that Claimant has failed to demonstrate that the Tribunal exceeded its powers, much less manifestly,

[250] Memorial on Partial Annulment at para. 51; *see also id.* at para. 9.

[251] *See generally* Memorial on Partial Annulment, Section III.A.

[252] *See* Memorial on Partial Annulment at para. 52.

[253] *See* Memorial on Partial Annulment at para. 53.

[254] *See* Memorial on Partial Annulment at para. 54.

with respect to its treatment of Claimant's claims on penalties and interest for Royalty Assessments (**Section IV.B**).

A. CLAIMANT'S DESCRIPTION OF THE APPLICABLE STANDARD FOR ESTABLISHING A MANIFEST EXCESS OF POWERS UNDER ARTICLE 52(1)(B) IS DEFICIENT

141. Claimant acknowledges that, in order to establish whether there has been a manifest excess of powers under Article 52(1)(b) of the ICSID Convention, an *ad hoc* committee must conduct a two-step analysis: (i) determine whether the tribunal exceeded its powers; and (ii) assess whether any such excess was "manifest."[255]

142. Perú generally agrees with this description of the standard. But Claimant addresses the standard only in passing and overlooks important elements.[256] Perú therefore sets out below more precisely the contours of Article 52(1)(b) and how it has been applied by other committees in similar cases.

143. *First*, the drafters of the ICSID Convention inserted the adjective "manifest" into Article 52(1)(b) to preserve the finality of ICSID awards.[257] *Ad hoc* committees have consistently held that the "manifest" threshold requires that any excess of powers be obvious from a straightforward reading of the award.[258] An excess of powers cannot be "manifest" if the alleged

[255] Memorial on Partial Annulment at para. 50. *See also* Claimant's Application for Partial Annulment, September 16, 2024 ("Application for Partial Annulment"), at para. 43.

[256] Claimant only devotes two sentences to describe the standard under Article 52(1)(b) of the ICSID Convention. *See* Memorial on Partial Annulment at para. 50. *See also* Application for Partial Annulment at para. 43.

[257] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at paras. 15, 20-21.

[258] **RALA-12**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited (Tanesco)*, ICSID Case No. ARB/10/20, Decision on the Application for Annulment , August 22, 2018, at para. 181 ("discernible without the need for elaborate analysis of the award"). *See also* **RALA-13**, *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, January 8, 2007, at para. 36 ("It is generally understood that exceeding one's powers is 'manifest' when it is 'obvious by itself' simply by reading the Award, that is, even prior to a detailed examination of its contents.").

excess is discernible only through elaborate argument or interpretation.[259] As the committee in *Duke Energy* explained, the test is whether "the opinion of the tribunal [is] so untenable that it cannot be supported by reasonable arguments."[260] Put plainly, where the underlying issue admits more than one reasonable reading, there can, by definition, be no manifest excess of powers. In such circumstances, a tribunal's determinations are final, and the award must stand.

144. Specifically with respect to jurisdiction, the *Fraport ad hoc* committee confirmed that in "cases where the jurisdiction of the Tribunal is reasonably open to more than one interpretation, the *ad hoc* Committee will give special weight to the Arbitral Tribunal's interpretation of the jurisdictional instrument."[261]

145. *Second,* Claimant argues that "manifest" simply means ""obvious or clear' or 'perceived without difficulty.'"[262] *Ad hoc* committees have observed that to achieve the objective of finality, excess of powers in Article 52(1)(b) must not only be "obvious or clear" but also—in the words of the *Impregilo*, *Soufraki*, and *Cyprus Popular Bank ad hoc* committees—

[259] *See* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 41 ("[E]ven if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy.").

[260] **RALA-14**, *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *Ad Hoc* Committee, March 1, 2011, at para. 99 (emphasis added).

[261] **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, December 23, 2010 ("*Fraport* Decision on Annulment"), at para. 44.

[262] Memorial on Partial Annulment at para. 50.

"substantially serious."[263] As the *Kiliç* committee stated, Article 52(1)(b) "should not be invoked unless the tribunal's excess had serious consequences for a party."[264]

146. *Third*, when reviewing annulment requests concerning an alleged manifest excess of powers arising from a tribunal's purported failure to exercise jurisdiction, *ad hoc* committees have consistently acknowledged that: (i) a tribunal has the authority to determine its own jurisdiction under the parties' arbitration agreement, and that, therefore, (ii) ICSID annulment proceedings do not permit a *de novo* review of a tribunal's determination on jurisdiction.[265] This principle has been confirmed, *inter alia*, by the *Perenco*, *Niko Resources*, *RREEF*, and *Enron ad hoc* committees:

- The committee in *Perenco* concluded that "[u]nder the principle of *compétence de la compétence*, a tribunal is the judge of its own competence and has the power to determine whether it has jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not avail for a de novo review of jurisdiction. That would be tantamount to an appeal."[266]

- The *Niko Ressources* committee—quoting the *Perenco* committee—explained that "[u]nder the competence-competence principle, a tribunal has the authority

[263] **RALA-10**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment, January 24, 2014, para. 128 (emphasis added); **RALA-6**, *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007 ("*Soufraki v. UAE*, Decision on Annulment"), at para. 40 (emphasis added). *See also* **RALA-15**, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, November 30, 2022 (redacted and excerpted in original), at para. 203 (*citing Soufraki v. UAE*); **RALA-49**, *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, May 19, 2014, at para. 122 ("textually obvious and substantively serious"); **RALA-27**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013, at para. 56 ("both obvious and serious").

[264] **RALA-11**, *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, at para. 53.

[265] *See* **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 94; **RALA-16**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX)*, ICSID Case No. ARB/10/18, Decision on Annulment, October 12, 2023 ("*Niko Resources v. Bangladesh Oil Gas*, Decision on Annulment") at para. 71; **RALA-17**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment Application, June 10, 2022, para. 26.

[266] **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 94 (emphasis added).

to determine its own jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not permit a de novo review of jurisdiction, as that would be tantamount to an appeal. Indeed, allowing an *ad* hoc committee to simply substitute its views on jurisdiction for those of the tribunal would jeopardize the stability of the ICSID system."[267]

- Similarly, the committee in *RREEF* concluded that it "agree[d] . . . that *ad hoc* committees do not have the power to reconsider ICSID tribunals' jurisdictional decisions de novo" [268] and that "[a]ny attempt to establish a ground under Article 52 must be scrupulously examined to ensure that it is not a 'back door' attack on the tribunal's decision on its substantive jurisdiction, viz. whether there is party consent to arbitrate and the jurisdictional requirements under the Convention are met."[269] It further added that "[t]he burden to show that such a ground is established must necessarily lie with the applicant."[270]

- Finally, the *ad hoc* committee in *Enron* concluded that "in cases where there is any uncertainty or doubt as to whether or not a tribunal has jurisdiction, that question falls to be settled by the tribunal itself in exercise of its compétence-compétence under Article 41(1) of the ICSID Convention, and Article 52(1)(b) does not provide a mechanism for de novo consideration of, or an appeal against, a decision of a tribunal under Article 41(1) after the tribunal has given its award."[271]

147. As Professor Schreuer has observed, "the stability of the system could be threatened if an *ad hoc* committee could simply substitute its view on jurisdiction for that of the tribunal."[272]

[267] **RALA-16**, *Niko Resources v. Bangladesh Oil Gas*, Decision on Annulment, at para. 71 (emphasis added).

[268] **RALA-17**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment Application, June 10, 2022, para. 19 (emphasis added).

[269] **RALA-17**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment Application, June 10, 2022, para. 19.

[270] **RALA-17**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment Application, June 10, 2022, para. 19.

[271] **RALA-31**, *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Decision on the Application for Annulment of the Argentine Republic, July 30, 2010 ("*Enron v. Argentina*, Decision on Annulment"), para. 69 (emphasis added).

[272] **RALA-18**, Christoph H. Schreuer, *et al.*, *The ICSID Convention: A Commentary*, Cambridge University Press (2nd ed. 2009) (excerpt), Art. 52, at para. 148.

148. With those preliminary observations, Perú now turns to Claimant's arguments. As discussed below, Claimant distorts its application for partial annulment under Article 52(1)(b) in an effort to repackage its disagreements with the Tribunal's determinations as an annulment claim.

B. THE TRIBUNAL DID NOT MANIFESTLY EXCEED ITS POWERS WHEN IT DISMISSED CLAIMANT'S PENALTIES AND INTEREST CLAIMS

149. Claimant's Article 52(1)(b) argument must be rejected as the Tribunal did not manifestly exceed its powers when it dismissed Claimant's penalties and interest claims.

150. *First*, contrary to Claimant's assertion, the Tribunal did dismiss Freeport's claims concerning penalties and interest on Royalty Assessments on the basis that it lacked jurisdiction to hear such claims. According to Claimant, the Tribunal acted in a contradictory manner by (i) dismissing on jurisdiction Claimant's penalties and interest claims related to Tax Assessments; (ii) remaining silent on Claimant's claims related to penalties and interest on Royalty Assessments; and (iii) not deciding the latter on the merits.[273] There is no contradiction. There is no manifest excess of powers.

151. Notably, Claimant is relying on alleged silence from the Tribunal regarding penalties and interest on Royalty Assessments to assert that the Tribunal affirmatively found it had jurisdiction over those claims. It did not. Indeed, Claimant does not cite to any section of the Award in which the Tribunal states that it had jurisdiction over Claimant's penalties and interest claims on Royalty Assessments—because there is none. When the Award is read in *toto,* it is clear that the Tribunal did not find that it had jurisdiction over those claims. Accordingly, the Tribunal did not have to address those claims on the merits.

[273] *See* Memorial on Partial Annulment at paras. 51-54.

152. As explained above in Section II.C.2.a, the Tribunal defined the issue to be decided as whether "Claimant's claims based on penalties and interest [fall] outside of the Tribunal's jurisdiction because they constitute '*taxation measures'* which are excluded from the scope of the TPA under Article 22.3.1 of the TPA?"[274] To answer that question, the Tribunal analyzed whether penalties and interest, regardless of whether they resulted from unpaid tax assessments or royalty assessments, constituted a taxation measure for purposes of the TPA.[275]

153. As Respondent explains in Section II.C.2 above and Section V.B.1 below, in paragraph 986 of the Award, the Tribunal concluded that penalties and interest—whether arising from tax or royalty assessments—constitute "taxation measures" within the meaning of the TPA.[276] As a result, the Tribunal dismissed Claimant's claims on penalties and interests on the basis that it lacked jurisdiction to hear those claims.[277]

154. To reach this conclusion, the Tribunal conducted a detailed analysis beginning in paragraph 540 of the Award.[278] It interpreted "taxation measure" in accordance with international law principles, particularly those enshrined in the VCLT, emphasizing that domestic labels under Peruvian law were not determinative.[279] Applying the rules of treaty interpretation, the Tribunal analyzed the ordinary meaning of the term "taxation measure," and found that it broadly encompasses laws, regulations, procedures, requirements, or practices related to revenue-generating actions within a State's authority—including enforcement mechanisms such as

[274] **AA-1**, *Freeport* Award, at para. 455.b.

[275] *See supra* at Section II.C.2.a.

[276] *See supra* at para. 91.

[277] *See supra* at para. 181.

[278] *See supra* at para. 182.

[279] *See supra* at para. 183.

penalties and interest.[280] The Tribunal also relied on comparative case law and the object and purpose of the TPA, which is to preserve States' sovereign authority over fiscal matters.[281]

155. Importantly, the Tribunal concluded that penalties and interest—though not classified as taxes under Peruvian law—are nonetheless integral components of Perú's domestic tax regime and qualify as "taxation measures" under the TPA.[282] This conclusion was supported by expert testimony and legal provisions cited by Respondent's tax law experts, which confirmed that such measures were integral elements of Perú's domestic tax regime.[283] Based on the aforementioned analysis, the Tribunal determined in paragraph 553 of the Award that Claimant's claims under Article 10.5 of the TPA concerning penalties and interest on SMCV's Tax Assessments were excluded from its jurisdiction pursuant to the carve-out in Article 22.3.1.[284] This jurisdictional ruling, however, was not confined to tax assessments alone. The Tribunal reaffirmed in paragraph 986 that penalties and interest, in general, qualify as "taxation measures," and thus fall outside its jurisdiction.[285] Crucially, the Tribunal made no distinction between Tax and Royalty Assessments.[286] Thus, it concluded that penalties and interest arising from either type of assessment are "taxation measures" under Article 22.3.2 of the TPA.

156. Claimant cannot say that they are surprised by the Tribunal's conclusion, even if they disagree with it. Indeed, this conclusion was foreshadowed during the hearing when

[280] *See supra* at para. 183.

[281] *See supra* at paras. 184-188.

[282] *See supra* at para. 189.

[283] *See supra* at para. 189.

[284] *See supra* at para. 191.

[285] *See supra* at para.192.

[286] *See supra* at para. 193.

Arbitrator Cremades, posed the following hypothetical questions to Respondent's legal expert Prof. Eguiguren:

- "Perhaps when the Treaty talks about that taxes are not going to be covered by the Treaty, from the international viewpoint, perhaps Royalties need to be dealt with in the same manner as taxes[;]"[287] and
- "The law may say that they were not taxes, but perhaps the signatories of the Treaty, the U.S. and Perú, well, what they wanted to do was to exclude actual or fictitious taxes, and a royalty, from the viewpoint of the taxpayer, well, the taxpayer sees the royalty as a tax."[288]

157. Even if the Committee were to find that the Tribunal did determine that it had jurisdiction to hear Claimant's claim related to penalties and interest on Royalty Assessments (it should not), certainly any such claim would fail on the merits. As discussed in greater detail in paragraphs 164-165 below, the Tribunal—consistent with the findings of all relevant Peruvian authorities, including SUNAT, the Tax Tribunal, and the Peruvian courts (including the Supreme Court)—found the Stabilization Agreement, the Mining Law, and its Regulations were clear and unambiguous.[289] In so holding, the Tribunal necessarily rejected the very premise of Claimant's penalties and interest claim: that there was "reasonable doubt" in the interpretation of the Mining Law and its Regulations that could have warranted a waiver of penalties and interest.

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[287] **RA-1**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Transcript, Day 8, May 10, 2023 (Unredacted) (Question from Arbitrator Cremades to Prof. Eguiguren), 2436:2-9. *See also* **RA-1**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Transcript, Day 8, May 10, 2023 (Unredacted) (Answer from Prof. Eguiguren to Arbitrator Cremades's question), 2436:19-2437:2 ("If you are asking my opinion without any kind commitment, I don't know the Treaty and I don't know about those things, truth be told. But if you ask me, I think Royalties are much closer to being taxes . . . Royalties are much closer to being a taxable contribution, a contribution. It is very, very close to a tax, I think, a 'tributo,' we call it in Spanish.").

[288] **RA-1**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Transcript, Day 8, May 10, 2023 (Unredacted) (Question from Arbitrator Cremades to Prof. Eguiguren), 2437:14-20. *See also* **RA-1**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Transcript, Day 8, May 10, 2023 (Unredacted) (Answer from Prof. Eguiguren to Arbitrator Cremades's question), 2437:21-2438:3 ("Well, it is a 'tributo,' I think. And if we were to re-interpret those things--That is why I said, without committing to anything or anybody, I also think that the royalty is closer to 'tributo.'").

[289] *See infra* at paras. 164–165.

158. *Second*, Claimant's reliance on annulment decisions such as *Vivendi I*, *Malaysian Historical Salvors*, *Helnan*, and *Khudyan* to support its position that the Tribunal allegedly exceeded its powers is misplaced.

159. The *Vivendi I* and *Helnan* decisions cited by Claimant discuss situations in which tribunals expressly found jurisdiction over certain claims, but then failed to decide those claims on the merits.[290] That is not the case here. The Tribunal did not find that it had jurisdiction over Claimant's penalties and interest claims regarding Royalty Assessments. Instead, grounded in Article 22.3.1 of the TPA, the Tribunal found that claims predicated on penalties and interest, whether arising out of Tax or Royalty Assessments, fell outside its *ratione materiae* jurisdiction as "taxation measures."[291] Similarly the *Malaysian Historical Salvors* and *Khudyan* decisions are distinct from the case at hand, as they concerned situations where tribunals failed to consider the BIT's definition of investment or the claimant's nationality when determining their jurisdiction over certain claims.[292] By contrast, as explained in Section II.C.2., the Tribunal, applying the applicable treaty, and without ignoring a *ratione personae* analysis, found that it lacked jurisdiction to hear Claimant's claims regarding penalties and interest.[293]

160. In other words, the fact that Claimant disagrees with the Tribunal's decision on jurisdiction (finding no jurisdiction on claims related to penalties and interest stemming from both the Tax Assessments and the Royalties Assessments) does not mean that the Tribunal manifestly

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[290] *See* **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, July 3, 2002, at para. 86; **AALA-8**, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad hoc Committee, June 14, 2010, at paras. 46-55.

[291] *See supra* at Section II.C.2.a

[292] *See* **RALA-20**, *Edmond Khudyan v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment, July 21, 2023, at paras. 185-221; **AALA-7**, *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009, at paras. 23-80.

[293] *See* at Section II.C.2.

exceeded its powers in reaching that decision. Under the principle of *competence-competence*, the Tribunal had the authority to determine its own jurisdiction. And, as discussed above, that determination is not reviewable *de novo* by an *ad hoc* committee.[294]

161. Indeed, *ad hoc* committees have held that a tribunal's jurisdictional determinations are annullable only where they are either unreasonable or untenable—a decision that is questioned or debatable is not subject to annulment.[295] As the committee observed in *Sodexo v. Hungary*:

> Indeed, considering that the tribunal is the judge of its own competence, the "manifest" requirement gains particular relevance in the context of jurisdiction. An *ad hoc* committee must be mindful of and, therefore, respect the tribunal's margin of appreciation, rather than undertake a *de novo* evaluation of the facts and law supporting the tribunal's jurisdiction. It need only be satisfied that the decision on jurisdiction is clearly neither unreasonable nor untenable. A debatable solution is not subject to annulment since the excess of powers would not then be "manifest."[296]

162. Claimant has failed to prove that the Tribunal's decision in this case was unreasonable or untenable. To the contrary, as explained in Section II.C.2 above and in Section V.B.1 below, the Tribunal's decision was reasonable.

163. *Third*, even assuming, *arguendo*, that the Tribunal found it lacked jurisdiction over Claimant's claims concerning penalties and interest related to Tax Assessments—but not related to Royalty Assessments—and thereby failed to exercise jurisdiction over those specific claims (it did not), Claimant did not demonstrate that any alleged excess of power that resulted from that

[294] *See supra* at para. 146.

[295] *See* **RALA-19**, *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, May 7, 2021 (redacted and excerpted in original), at para. 93; **RALA-50**, *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on the Annulment Application, October 14, 2022, at para. 130 ("the Tribunal's reasoning is in any case not obviously wrong, unreasonable or untenable; it is at best debatable.").

[296] **RALA-19**, *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on Annulment, May 7, 2021 (redacted and excerpted in original), at para. 93 (emphases added).

failure was "manifest," within the meaning of Article 52(1)(b), *i.e.*, that it was "obvious or clear" and "substantially serious."[297]

164. The Award makes clear that had the Tribunal ruled on the merits of Claimant's penalties and interest claim on Royalty Assessments, it would have ruled in favor Perú—namely that Perú was under no obligation to waive penalties and interest based on alleged "reasonable doubt" and, therefore, did not breach the Treaty. In particular, the Tribunal concluded that:

- Neither the language of the Mining Law nor its Regulations support Claimant's interpretation that stabilization agreements must apply to all "concessions" or "mining units."[298] The Tribunal explicitly stated that no provision in the General Mining Law or its Regulations leads to such a conclusion.[299] The Tribunal was firm in its interpretation, noting that even under Claimant's contextual and functional approach—considering the parties' conduct before and after the 1998 Stabilization Agreement—the Tribunal had no doubt that the Concentrator was not covered by that Agreement.[300]

- Claimant failed to demonstrate the existence of an administrative practice establishing that future investments made in a given concession would be covered by a stabilization agreement entered into for a different investment.[301] The Tribunal found instead that there was a practice of having mining concessions with both stabilized and non-stabilized projects, contradicting Claimant's position that stability guarantees should apply to all mining concessions.[302]

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[297] *See supra* at para. 145.

[298] **AA-1**, *Freeport* Award, at para. 698 ("in the Tribunal's view, it does not follow from the plain text of the Mining Law and Regulations that stabilization agreements should apply to entire '*concessions*' or '*mining units*' as the Claimant argues.") (italics in the original).

[299] *See* **AA-1**, *Freeport* Award, at para. 698 ("the Tribunal finds that nothing in the Mining Law and Regulations provide for such a reading. In this regard, the Tribunal notes that the term '*mining unit*' referred to by the Claimant is not defined in the Mining Law or Regulations, as acknowledged by the Claimant's expert Mr. Otto.") (italics in the original).

[300] *See* **AA-1**, *Freeport* Award, at Section V.A.4(a) (including Sections V.A.4(a)(6) and V.A.4(a)(7)).

[301] *See* **AA-1**, *Freeport* Award, at para. 716 ("Finally, for the sake of completeness, the Tribunal addresses the Claimant's argument that there was allegedly an administrative practice to apply stability guarantees to entire concessions or mining units. Contrary to the Claimant's argument, the Tribunal finds that the Claimant has not shown that there was a clear administrative past practice and understanding that all future investments made in a given concession would be covered by a stabilization agreement.").

[302] *See* **AA-1**, *Freeport* Award, at para. 716.

- Contrary to Claimant's contention, the Tribunal held that the relevant version of Article 83 of the General Mining Law applicable in this case was the one in force at the time the Stabilization Agreement was signed, excluding any subsequent amendments.[303] Accordingly, the Tribunal concluded that the law in effect at the time of the Agreement—prior to the 2014 amendment—established that the scope of stabilization agreements was limited to what was set out in the feasibility study submitted with the request for such an agreement.[304]

165. Thus, the Tribunal found that the scope of stabilization agreements under the Mining Law and its Regulations was well-defined and not vague, obscure, or ambiguous. This means there was no reasonable doubt (even under Claimant's incorrect characterization and interpretation of Article 170 of the Tax Code) about the scope of the Stabilization Agreement that would justify the waiver of penalties and interest on Royalty Assessments. Thus, a comprehensive reading of the Award shows that Claimant's alternative claim could not have succeeded on the merits, and the outcome of the award would have remained unchanged.

166. But even if the Committee were to find that there was a manifest excess of powers (it should not), annulment is not automatic, and the Committee should exercise its discretion and not partially annul the Award.[305] As Professor Schreuer has observed, and as discussed in Section III above, annulment is an extraordinary remedy reserved for unusual cases involving situations that are grossly illegitimate, and "even where a ground may be made out, *ad hoc* committees retain discretion whether to annul."[306] Professor Schreuer emphasizes that such discretion is essential to preserve the stability and finality of the ICSID system.[307] As Respondent explains in Section VIII

[303] *See* **AA-1**, *Freeport* Award, at para. 704.

[304] *See* **AA-1**, *Freeport* Award, at paras. 711, 717.

[305] *See supra* at Section III.

[306] **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 37 (*citing* Christopher Schreuer, *Three Generations of ICSID Annulment Proceedings*, p. 19).

[307] *See* **RALA-18**, Christoph H. Schreuer, *et al.*, *The ICSID Convention: A Commentary*, Cambridge University Press (2nd ed. 2009) (excerpt), Art. 52, at paras. 37-38.

below, deciding in favor of annulment in this case would only allow Claimant to resubmit for the sixth time its claims to new dispute resolution body, only to end up with the same result. The Tribunal's decision on the scope of the Agreement and its interpretation of the Mining Law and Regulations is not being challenged in these proceedings and, thus, is *res judicata*, and a new Tribunal would therefore be bound by the Tribunal's interpretation of those rules.

167. In conclusion, Article 52(1)(b) of the ICSID Convention provides no basis for annulment in this case. Claimant has failed to demonstrate that the Tribunal exceeded its powers, much less that it did so manifestly and, thus, Claimant's Article 52(1)(b) claim must be dismissed.

V. CLAIMANT IS UNABLE TO SHOW THAT THE TRIBUNAL FAILED TO STATE REASONS IN ITS AWARD IN ACCORDANCE WITH ARTICLE 52(1)(E) OF THE ICSID CONVENTION

168. Article 52(1)(e) of the ICSID Convention allows for annulment where an "award has failed to state the reasons on which it is based."[308] Claimant claims that the Award failed to provide "any coherent reasoning for dismissing Freeport's claims based on penalties and interest on the Royalty Assessments."[309] Specifically, Claimant alleges that the Tribunal's dismissal in paragraph 986 of the Award of Claimant's claims based on penalties and interest on Royalty Assessments is "entirely absent" of reasoning.[310] In the alternative, Claimant asserts that even if the Tribunal's reference in paragraph 986 to its jurisdictional findings on Claimant's penalties and interest claims on Tax Assessments could be treated as reasoning with respect to the Royalty Assessments, that reasoning is allegedly contradictory and, thus, insufficient.[311]

[308] **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), Article 52(1)(e).

[309] Memorial on Partial Annulment at para. 58 (emphasis omitted).

[310] Memorial on Partial Annulment at para. 59. *See also* Application for Partial Annulment at para. 50.

[311] *See* Memorial on Partial Annulment at para. 60.

169. The Committee should reject Claimant's claims. Below, Perú shows that, Article 52(1)(e) imposes a high bar for what constitutes a "failure" to state reasons and prohibits a review based on the Award's quality and length (**Section V.A**). Then, Perú demonstrates why Freeport's claims under Article 52(1)(e) fail (**Section V.B**).

A. CLAIMANT'S DESCRIPTION OF THE STANDARD UNDER ARTICLE 52(1)(E) FOR ASSESSING ALLEGED FAILURES TO STATE REASONS IN AN AWARD IS INACCURATE

170. Annulment under Article 52(1)(e) of the ICSID Convention may result from a failure to state reasons, but only in very limited circumstances. As the ICSID Secretariat has emphasized, not every omission, obscurity, or drafting imperfection in an award justifies annulment. With respect to omissions in an award, the ICSID Background Paper on Annulment explains that "[w]hile a Tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment."[312] As the ICSID Secretariat explains, the ICSID Convention itself provides other remedies for situations in which a tribunal has failed to address a claim or a clarification of a point in the award is required:

> Instead, the ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed. In addition, if there is a dispute between the parties as to the meaning or scope of the award, either party may request interpretation of the award by the original Tribunal. Therefore, certain issues relating to the reasoning or lack of reasoning in an award can be heard by the Tribunal that rendered the award.[313]

[312] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, para. 109 (emphasis added).

[313] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, para. 109 (emphases added).

171. As the committee in *Occidental* explained, "Contradictions, inconsistencies and unreasonable statements in the award can be cured applying the procedures set forth in Articles 49 and 50 of the Convention, which provide the parties with the opportunity to request that the tribunal address omissions, rectify material errors and clarify the interpretation of dubious points."[314] In contrast, the threshold for meeting the requirements under Article 52(1)(e) is high. Consequently, a mere incidental omission, contradiction, or lack of reasoning in an award is not sufficient in and of itself to justify annulment.

172. In its Memorial on Annulment, Claimant asserts that a tribunal fails to state reasons when a reader cannot follow how the tribunal proceeded from Point A to Point B.[315] Claimant also alleges that *ad hoc* committees have held that an award should be annulled when there is no express reasoning for the tribunal's decisions, including cases where the reasoning is entirely absent, frivolous, or contradictory.[316] Claimant further specifies that reasoning is contradictory where two (or more) contradictory premises supporting a conclusion cannot stand together and cannot both be true.[317] Claimant also appears to assert that annulment automatically follows when a tribunal fails to address an issue or answer a question, thereby rendering an award unintelligible.[318]

173. While Perú agrees with portions of Claimant's description of the standard under Article 52(1)(e), Claimant's account overlooks critical nuances of the Article 52(1)(e) standard

[314] **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, November 2, 2015, at para. 67 (emphasis added).

[315] *See* Memorial on Partial Annulment at para. 57.

[316] *See* Memorial on Partial Annulment at para. 57.

[317] *See* Memorial on Partial Annulment at para. 57.

[318] *See* Memorial on Partial Annulment at para. 57.

and incorrectly suggests that annulment under Article 52(1)(e) is triggered automatically by any apparent omission—in fact, the threshold for annulment under Article 52(1)(e) is exceptionally high.

174. *First*, Claimant fails to mention that *ad hoc* committees are reluctant to conclude that an award lacks reasoning entirely. Several decisions show annulment committees' willingness to "infer" or "reconstruct" reasoning that is not explicitly stated in an award. For example, the *ad hoc* committee in *Rumeli v. Kazakhstan* held that if reasoning is not expressly stated but is evident and a logical consequence of what is set out in the award, the committee should be able to uphold the award.[319] Similarly, the committee in *Cube v. Spain* emphasized the need for a balanced assessment of a tribunal's reasoning, and noted that it is especially important to consider the award as a whole—given that many arguments presented in arbitration are interdependent and overlapping.[320] In this vein, *ad hoc* committees have emphasized that they have discretion to further explain, clarify, or infer the reasoning of a tribunal rather than annul the award.[321] In the words of the *Wena Hotels ad hoc* committee:

> It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for

[319] *See* **RALA-47**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, at paras. 83, 138.

[320] *See* **RALA-9**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, March 28, 2022, para. 325.

[321] *See* **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at para. 24 ("For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so."); **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, at para. 248 (it is "understood that in the matter of adequate reasoning, upon a hearing, an ICSID *ad hoc* Committee may, if it deems it necessary, further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision"); **RALA-21**, *Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, April 15, 2019, para. 97.

> annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the ad *hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself.[322]

175. *Second*, legal traditions differ in how reasons are articulated and so tribunals must be allowed "a degree of discretion as to the way in which they express their reasoning."[323] As the *ad hoc* committee in *Soufraki* concluded, a tribunal is not even required to set out every reason or line of reasoning in its award, so long as the reader can understand the basis of the tribunal's decision.[324]

176. Indeed, the reasoning of a decision need not always be explicit. As most annulment committees have recognized, annulment committees must consider whether the tribunal's reasons may be implicit. This was the conclusion reached by, among others, the *ad hoc* committees in *Wena Hotels* and *Vivendi I*:

- The *Wena* Hotel committee held that the object of Article 52(1)(e) "does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision."[325]

[322] **RALA-8**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, February 5, 2002 ("*Wena Hotels v. Egypt*, Decision on Annulment"), at para. 83 (emphasis added).

[323] **RALA-48**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, March 18, 2022, at para. 132.

[324] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 111. *See also* **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, para. 128 ("It is also possible that a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons. So long as those reasons in fact make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided.").

[325] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 81.

- The *Vivendi I ad hoc* committee likewise explained that "reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning."[326]

177. Article 52(1)(e) does not specify the manner in which a tribunal must state its reasons—it is up to the arbitrators' discretion to be as succinct (or as verbose) as they wish.[327] It is sufficient that an annulment committee be able to "reconstruct" a tribunal's reasoning. In the words of Professor Reisman, annulment committees should "actively seek to get inside the skin of the tribunal whose award is under review and to track its explicit and implicit ratiocination before concluding that its reasoning is insufficient."[328] To refuse to consider a tribunal's implicit reasoning would run counter to the principle of finality at the core of the ICSID Convention.[329]

178. *Third, ad hoc* committees have clarified that apparent inconsistencies need not warrant annulment under Article 52(1)(e) on the basis of an alleged contradiction in the tribunal's reasoning. Indeed, committees are invited to favor a reading of an award that does not lead to a contradiction. Along those lines, the committee in *Pawlowski* concluded that:

> [a] specific manifestation of (potentially) failing to state reasons is providing contradictory or conflicting reasons . . . However, here too, committees need to be careful not to stray into an impermissible or substantive assessment of the tribunal's reasoning. A mere or apparent inconsistency is not sufficient; annulment may be warranted only where the contradiction in reasons is so fundamental that they "cancel each other out." An annulment committee "should prefer an interpretation which confirms an award's consistency as opposed to its inner contradictions." In undertaking its review, a

[326] **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, July 3, 2002, at para. 64.

[327] *See* **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 81.

[328] **RALA-22**, W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration: Breakdown and Repair* (1992) (excerpt), p. 95 (emphasis added).

[329] *See* **RALA-39**, W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, Duke Law Journal, Vol. 4 (1989) (excerpt), pp. 764-65.

> committee must "look to the totality of an award to understand the motivation of the decision, and not just particular parts."[330]

179. As explained below, in its Memorial on Annulment, Claimant attacks the quality of the Tribunal's reasoning, rather than showing that the reasoning in the Award is absent or contradictory.

B. THE TRIBUNAL DID NOT FAIL TO STATE REASONS WHEN IT REJECTED CLAIMANT'S CLAIMS ON PENALTIES AND INTEREST ON ROYALTY ASSESSMENTS

1. The Tribunal Stated Its Reasons for Rejecting, for Lack of Jurisdiction, Claimant's Claims on Penalties and Interest

180. Contrary to Claimant's allegations,[331] the Tribunal's dismissal in paragraph 986 of the Award of Claimant's claims on penalties and interest on Royalty Assessments is not "entirely absent" of reasoning. As discussed in Section II.C.2.a, the Tribunal addressed and ruled on Claimant's claims regarding penalties and interest tied to Royalty and Tax Assessments, concluding that penalties and interest on such assessments constitute "taxation measures" under Article 22.3.1 of the TPA, and, therefore, that the Tribunal lacked jurisdiction to hear those claims.[332]

181. The Tribunal's analysis can be followed from Point A to Point B. As noted in Section II.C.2.a above, the Tribunal defined the issue to be decided as whether "Claimant's claims based on penalties and interest [fall] outside of the Tribunal's jurisdiction because they constitute '*taxation measures'* which are excluded from the scope of the TPA under Article 22.3.1 of the TPA?"[333] In paragraph 986, the Tribunal concluded:

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[330] **RALA-23**, *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Decision on Annulment, March 7, 2025 ("*Pawlowski v. Czech Republic*, Decision on Annulment"), at para. 76 (emphases added).

[331] *See* Memorial on Partial Annulment at para. 59.

[332] *See supra* at Section II.C.2.a.

[333] **AA-1**, *Freeport* Award, at para. 455.b (emphasis in the original).

> 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.[334]

182. To reach that conclusion, the Tribunal conducted a thorough analysis, starting in paragraph 540 of the Award (in Section IV.B), of the nature of penalties and interest, regardless of whether they result from tax or royalty assessments.

183. *First*, the Tribunal turned to the meaning of the term "*taxation measure*."[335] The Tribunal explained that because the TPA is an international treaty, the meaning of "*taxation measure*" must be determined using international law principles—specifically, the rules of treaty interpretation under the VCLT.[336] Hence, the Tribunal found that "although domestic law may play a role as a matter of fact," the interpretation of the term "taxation measure" is a "matter of international law."[337] In other words, in the Tribunal's view, just because Peruvian law may or may not label a measure as a tax measure, does not determine in and of itself whether it qualifies as a "*taxation measure*" under the TPA.[338]

184. *Second*, the Tribunal applied the rules of treaty interpretation to understand the meaning of "*taxation measure*" under the TPA.[339] As a first step, the Tribunal examined the ordinary meaning of the term "*taxation measure*" under the Treaty.[340] The Tribunal noted that the TPA defines "*measure*" as "*any law, regulation, procedure, requirement or practice*," and

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[334] **AA-1**, *Freeport* Award, at para. 986 (emphasis in the original).

[335] **AA-1**, *Freeport* Award, at para. 544 (emphasis in the original).

[336] **AA-1**, *Freeport* Award, at para. 544 (emphasis in the original).

[337] **AA-1**, *Freeport* Award, at para. 544 (emphasis added).

[338] **AA-1**, *Freeport* Award, at para. 544.

[339] **AA-1**, *Freeport* Award, at para. 545 (emphasis in the original).

[340] **AA-1**, *Freeport* Award, at para. 546-47 (emphasis in the original).

therefore, any law, regulation, procedure, requirement, or practice related to "*taxation*" is addressed by the carve-out provision under Article 22.3.1 of the TPA.[341]

185. The Tribunal also observed that the use of both "*taxes*" and "*taxation measures*" in the TPA indicates that these terms refer to different concepts.[342] In the Tribunal's view "*taxation*" is a broader concept than "*tax*."[343] To support its interpretation, the Tribunal referred to the *Link Trading v. Moldova* case, where the tribunal understood that the term "taxation" could include not just taxes, but also customs duties and "*other forms of raising revenue* within *the State's power*."[344] The Tribunal emphasized that other investment tribunals have similarly interpreted "taxation measure" as a broad concept.[345]

186. Therefore, based on its interpretation of Article 22.3.1 of the TPA in light of international law, the Tribunal concluded that taxation measures encompass laws, regulations, procedures, requirements, or practices related to revenue-generating actions within a State's authority, including—but not limited to—taxes.[346]

187. *Third*, after establishing the broad scope of "taxation measures," the Tribunal opined that such measures also include those that are part of the tax imposition and enforcement regime.[347] According to the Tribunal, both the "application of, or failure to apply a tax, as well as the enforcement or failure to enforce a tax constitute '*practice(s)*' related to '*taxation*.'"[348] As part

[341] **AA-1**, *Freeport* Award, at para. 547 (emphasis in the original).

[342] **AA-1**, *Freeport* Award, at para. 547.

[343] **AA-1**, *Freeport* Award, at para. 547 (emphasis in the original).

[344] **AA-1**, *Freeport* Award, at para. 547 (emphasis in the original).

[345] *See* **AA-1**, *Freeport* Award, at para. 547.

[346] *See* **AA-1**, *Freeport* Award, at paras 546-47.

[347] *See* **AA-1**, *Freeport* Award, at para. 548.

[348] **AA-1**, *Freeport* Award, at para. 548 (emphasis in the original).

of its analysis, the Tribunal then examined the language of Article 22.3.4 of the TPA, which it considered to provide meaningful context for determining whether tax enforcement measures—such as penalties and interest—fall within the scope of "*taxation measures*."[349] According to the Tribunal, the text of Article 22.3.4 was a clear indication that the Treaty Parties did not intend for the Treaty to apply to "the enforcement of taxation measures," such as penalties and interest.[350]

188. *Finally*, the Tribunal looked at the object and purpose of the TPA and concluded that "the purpose of Chapter Twenty-Two is to preserve the States' sovereign power in matters of legitimate regulatory interest to States."[351] The Tribunal agreed with the *Murphy v. Ecuador* tribunal in that (i) Article 22.3's tax carve-out provision is specifically intended to safeguard each State's sovereign authority to levy taxes within its territory; and (ii) it was necessary to assess whether the measure in question falls within the scope of the State's domestics tax regime.[352]

189. In light of that analysis, the Tribunal opined that the application of penalties and interest on Tax Assessments, as well as the decision not to waive them, falls within the scope of Perú's domestic tax regime.[353] The Tribunal found support for this conclusion in the testimony of Respondent's Peruvian tax law experts, Messrs. Bravo and Picón, who concurred that even though penalties and interest do not qualify as taxes under Peruvian Law, they nonetheless constitute "*tax measures*."[354] The Tribunal further referred to various legal provisions and authoritative sources

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[349] **AA-1**, *Freeport* Award, at para. 549 (emphasis in the original).

[350] **AA-1**, *Freeport* Award, at para. 549 (*quoting* Article 22.3.4(g) of the TPA "*to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes*.") (emphasis in the original)).

[351] **AA-1**, *Freeport* Award, at para. 550 (*quoting Murphy Exploration & Production Company – International v. The Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, at para. 165) (internal quotation omitted).

[352] *See* **AA-1**, *Freeport* Award, at para. 550.

[353] *See* **AA-1**, *Freeport* Award, at para. 551. *See also id.* at para. 552.

[354] **AA-1**, *Freeport* Award, at para. 551 (*citing* Bravo-Picón II, at paras. 255 *et seq*) (emphasis in the original).

cited by Respondent's Peruvian tax law experts, which confirm that penalties and interest are integral elements of Perú's domestic tax regime and thus qualify as "*tax measures*."[355] Indeed, the legal authorities cited by Messrs. Bravo and Picón, as well as by the Tribunal, include provisions that address penalties and interest which the State may impose either as a consequence of an infringement involving the payment of taxes or other forms of public revenue, or as a mechanism to enforce such payments.

190. Notably, the legal basis in Perú to impose penalties and interest on unpaid tax assessments is the exact same legal basis used to impose penalties and interest on overdue royalty assessments. This legal basis is provided under Articles 75, 76, 82, 165, and 166 of the Peruvian Tax Code and Article 3 of the Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Mining Royalties (Law No. 28969).[356]

191. Having found that penalties and interest are taxation measures, the Tribunal concluded in paragraph 553 of the Award (at the end of Section IV.B) that Claimant's claims under Article 10.5 of the TPA concerning penalties and interest on SMCV's Tax Assessments are excluded from the Tribunal's jurisdiction, under the carve-out provision in Article 22.3.1 of the Treaty. However, contrary to what Claimant alleges in its Memorial on Annulment, the Tribunal did not limit its jurisdictional ruling to claims arising solely from penalties and interest on the Tax

[355] **AA-1**, *Freeport* Award, at para. 551 (*citing* Law Delegating to the Executive Branch the Power to Legislate on Matters of Economic Reactivation and Formalization, Citizen Security, Fight Against Corruption, Water and Sanitation and Reorganization of Petroperú S.A., Law No. 30506, October 6, 2016 (published on 9 October 2016), Article 2(1)(a)(5); Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing; Investment in the Country, Law No. 30230, July 12, 2014, Articles 4.1-4.3; Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, Article 28; Tax Tribunal, Resolution No. 04170-1-2011 dated March 16, 2011, p. 4.) (emphasis in the original).

[356] *See* **AA-16**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, First Expert Report of Prof. Bravo and Prof. Picon, May 4, 2022, at paras. 62-63 (*citing* Tax Code, at paras. 75-76, 82); para. 67 (*citing* Tax Code at paras. 165-66); para. 133 (Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Mining Royalties, Law No. 28969, January 12, 2007, Arts. 3 and Second Complementary Provision (d)).

Assessments imposed by SUNAT against SMCV.[357] The conclusion in Section IV.B cannot be read in isolation: it must be read in conjunction with paragraph 986.

192. In paragraph 986, the Tribunal expressly reaffirmed its earlier jurisdictional ruling that penalties and interest constitute "taxation measures" under Article 22.3.1 of the TPA.

> 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.[358]

193. This time, the Tribunal did not draw a distinction between Royalty Assessments or Tax Assessments. The Tribunal indicated that penalties and interest, regardless of whether they are imposed on Tax or Royalty Assessments, are "taxation measures" within the meaning of Article 22.3.2 of the Treaty. The Tribunal referred back to its analysis of the nature of penalties and interest, included in paragraph 540 *et.seq.* As discussed above, in those paragraphs, the Tribunal established that the interpretation of the term "taxation measures" provided in Article 22.3.2 of the TPA is governed by international law, which the Tribunal applied to conclude that the term encompasses any law, regulation, procedure, requirement, or practice related to taxation—including taxes, customs duties, and other revenue-generating mechanisms within the State's authority.[359]

[357] *See* Memorial on Partial Annulment, at paras. 45-47.

[358] **AA-1**, *Freeport* Award, at para. 986 (emphases added).

[359] *See supra* at paras. 154-155.

194. Although royalties are not classified as taxes under Peruvian law, they constitute a revenue-generating mechanism within the scope of the State's fiscal authority.[360] Given the broad definition of "taxation measures" under the Treaty, the Tribunal concluded that it also lacked jurisdiction to decide on Claimant's claims arising from the assessment of penalties and interest on Royalty Assessments. It is not accurate for Claimant to allege that the Tribunal "inexplicably and inappropriately appeared to conflate or confuse" Claimant's claims based on penalties and interest on Royalty Assessments with those based on penalties and interest on Tax Assessments.[361] Rather, it expressly found that penalties and interest arising from both Tax and Royalty Assessments constitute "taxation measures" and, consequently, excluded the related claims from its jurisdiction pursuant to the tax carve-out provided in Article 22.3.2 of the TPA.

195. Therefore, it is possible to follow the Tribunal's reasoning from Point A to Point B:

- Under the TPA, "taxation measures" include any law, regulation, procedure, or practice related to taxation—including taxes, customs duties, and other revenue-generating mechanisms under the authority of the State (Point A);
- Royalties constitute a revenue-generating mechanisms within the scope of the State's fiscal authority;
- Because royalties constitute a revenue-generating mechanism, the Tribunal considered penalties and interest on Royalty Payments to constitute "taxation measures" under the TPA; and
- Because Claimant's penalties and interest claims on Royalty Assessments pertain to "taxation measures," Claimant's claims regarding the same fall outside the Tribunal's jurisdiction (Point B).

[360] *See* **AA-1**, *Freeport* Award, at para. 214.

[361] Memorial on Partial Annulment at para. 48.

196. The fact that the Tribunal developed the rationale behind paragraph 986 in the section addressing Perú's jurisdictional objection (Section IV.B) does not imply that it failed to provide justification for its decision. To the contrary, the reasoning in that section supports the Tribunal's conclusion to dismiss Claimant's claims related to penalties and interest generally, including those tied to Royalty Assessments.

197. As articulated by the annulment committee in *Soufraki*, an annulment may be avoided so long as the reader can reasonably understand the basis of the decision—specifically, if the facts or law of the case can be connected to the conclusions reached in the award.[362] As demonstrated above, the Tribunal's reasoning is traceable and coherent. Its conclusion to dismiss Claimant's claims concerning penalties and interest on Royalty Assessments, as set out in paragraph 986 of the Award, was grounded in the analysis developed earlier in Section IV.B of the Award.

198. Furthermore, in light of the Tribunal's jurisdictional findings, it was neither necessary nor appropriate for it to conduct a separate merits analysis of Claimant's claims concerning penalties and interest on Royalty Assessments, contrary to what Claimant argues.[363] As discussed above, the Tribunal considered those claims in Section V.B.2 of the Award. That section shows the Tribunal carefully took into consideration the parties' arguments and reviewed the relevant evidence, including material related to Article 170 of the Peruvian Tax Code and the waiver requirements.[364] Nonetheless, the Tribunal ultimately concluded that it lacked jurisdiction over those claims and, as a result, was neither required nor permitted to assess their merits or issue a ruling on them.

[362] *See supra* at para. 175.

[363] *See* Memorial on Partial Annulment at para. 59(a).

[364] *See supra* at para. 81.

199. As explained above, even if certain aspects of the Tribunal's reasoning were implicit, they should nevertheless be upheld "provided they can be reasonably inferred from the terms used in the decision."[365] In this case, as explained above,[366] they plainly can.

200. In sum, the Tribunal's decision was reasoned, and no ground for annulment arises on this basis.

2. The Tribunal's Decision to Reject Claimant's Claims Is Not Contradictory

201. As Respondent showed in Section IV.B above, the Tribunal's reasoning is not contradictory, as Claimant asserts. The Tribunal's jurisdictional ruling based on the TPA's exclusion of "taxation measures" was not limited to penalties and interest on Tax Assessments. In Section IV.B of the Award, the Tribunal interpreted the term "taxation measures" broadly, and penalties and interest on both tax and royalty assessments fell within that definition. In paragraph 986, the Tribunal reaffirmed that conclusion expressly stating that penalties and interest constitute "*taxation measures*" within the meaning of Article 22.3.1 of the TPA.[367]

202. Moreover, the Tribunal's statement in the *dispositif* that "[it] [had] jurisdiction over the Claimant's claims except for the Claimant's claims based on the disputed Tax Assessments' penalties and interest"[368] does not reflect any contradiction. Rather, it is consistent with the Tribunal's earlier reasoning and jurisdictional findings. The absence of an explicit reference in the *dispositif* to the Tribunal's lack of jurisdiction over claims concerning penalties and interest on Royalty Assessments does not negate or cancel out the conclusions reached in the

[365] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 81.

[366] *See supra* at para. 195.

[367] **AA-1**, *Freeport* Award, at para. 986.

[368] **AA-1**, *Freeport* Award, at para. 1047.a.

jurisdiction and merits sections of the Award. This omission appears to be a typographical or clerical error, not an error of substance.

203. Following the approach adopted by the *Pawlowski ad hoc* committee, this Committee should interpret the Award as a whole and adopt a reading that preserves its internal consistency[369]—namely, that the Tribunal determined it lacked jurisdiction over claims related to penalties and interest generally, including those associated with Royalty Assessments.

3. Even If the Committee Were to Find that the Tribunal Failed to Expressly State Reasons (It Should Not), the Committee Should Deny Claimant's Request to Partially Annul the Award

204. Even if the Committee were to find that the Tribunal did find it had jurisdiction over Claimant's claims related to penalties and interest on Royalty Assessments but failed to provide reasons for the alleged failure to address the claims on the merits (it should not), Claimant's annulment application should still fail. The Tribunal addressed and rejected the arguments underlying Claimant's claim that there was "reasonable doubt" in the interpretation of the Mining Law and Regulations, which warranted a waiver of penalties and interest on Royalty Assessments. Accordingly, even if not expressly dismissed in the Award, those claims were implicitly rejected by the Tribunal when it rendered its findings regarding the scope of the Stabilization Agreement and the clear provisions in the Mining Law and its Regulation and rejected Claimant's main claims. For the sake of procedural economy, Respondent refers the Tribunal to Section II.C.2 and Section VIII. of this submission.

[369] *See supra* at para. 178.

VI. CLAIMANT IS UNABLE TO SHOW THAT THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE UNDER ARTICLE 52(1)(D) OF THE ICSID CONVENTION

205. Claimant also reformulates its grievance regarding the Tribunal's alleged failure to address penalties and interest on Royalty Assessments as a basis for seeking annulment under Article 52(1)(d) of the Convention.[370] According to Claimant, the Tribunal's alleged omission constitutes a serious departure from a fundamental rule of procedure for two reasons: (i) the Tribunal allegedly failed to consider claims that were properly before it; and (ii) the Tribunal purportedly relied on reasoning never argued by the parties, thereby depriving Claimant of an opportunity to be heard.[371] Claimant's allegations are unfounded.

206. There was no departure from a fundamental rule of procedure. As explained above, the Award demonstrates that the Tribunal did consider and resolve all claims within its jurisdiction and that both parties were afforded the opportunity to present their positions on the issues raised by the Tribunal.[372] What Claimant labels an alleged procedural violation is, in fact, nothing more than Claimant's disagreement with the Tribunal's reasoning. This is not a ground for annulment. In any event, even assuming, *arguendo*, that a procedural defect did occur (it did not), it falls short of the seriousness threshold required under Article 52(1)(d) for annulment to be warranted.

207. In the following sections, Respondent explains (i) the applicable standard under Article 52(1)(d) of the Convention, which Claimant misrepresents (**Section VI.A**); and (ii) why Claimant's allegations collapse against the stringent requirements for an award or a portion of an award to be annullable (**Section VI.B**).

[370] *See* Memorial on Partial Annulment at paras. 62-66.

[371] *See* Memorial on Partial Annulment at paras. 63-65.

[372] *See supra* paras. 90-128, 150-56, 180-200.

A. THE STANDARD FOR ANNULMENT UNDER ARTICLE 52(1)(D) FOR ESTABLISHING A SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

208. As Claimant accepts, an applicant for annulment under Article 52(1)(d) of the ICSID Convention bears the burden of proving that an award's shortcomings meet a two-pronged test: (i) the alleged departure concerns a "fundamental" rule of procedure; and (ii) any departure from that rule must be "serious."[373] An award is not annullable if one of those requirements is not met.

209. The Convention's drafting history makes clear that "this ground is concerned with the integrity and fairness of the arbitral process."[374] Although often pleaded, annulment under this ground has only been granted in exceptional cases.[375] Its demanding scope has been shaped by a consistent line of annulment decisions, which require that both prongs be satisfied.[376]

210. In its Memorial on Partial Annulment, Claimant glosses over the jurisprudence on each of these two prongs resting on a selective reading of a few decisions. Claimant's approach ignores the fact that annulment committees have expressed differing views on how the standard is to be satisfied, especially in relation to the seriousness prong.

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[373] Memorial on Partial Annulment at para. 62. *See also* **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), Art. 52(1)(d); **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 105; **RALA-24**, Stephan W. Schill, Loretta Malintoppi, *et al.* (eds), *Schreuer's Commentary on the ICSID Convention* (Third Edition), Kluwer Law International (2022) (excerpt), at para. 332 (p. 1312).

[374] **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 104.

[375] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 107.

[376] *See*, *e.g.*, **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 4.06; **AALA-17**, *AMCO II*, Decision on Annulment, at para. 9.07; **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 56; **AALA-9**, *Fraport* Decision on Annulment, at para. 180; **RALA-2**, *Iberdrola I*, Decision on Annulment, at para. 103; **RALA-5**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015 ("*Tulip v. Turkey*, Decision on Annulment"), at para. 70; **RALA-25**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Application for Annulment, February 2, 2018, at para. 211; **RALA-21**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, April 15, 2019, at para. 112; **RALA-26**, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, September 17, 2020 ("*Orascom v. Algeria*, Decision on Annulment"), at para. 137.

211. As discussed below, Claimant's case fails under whichever interpretation of the standard is applied.

B. THE TRIBUNAL DID NOT SERIOUSLY DEPART FROM A FUNDAMENTAL RULE OF PROCEDURE WHEN IT REJECTED FREEPORT'S CLAIMS REGARDING PENALTIES AND INTEREST ON ROYALTY ASSESSMENTS

212. Claimant alleges a departure of two rules of procedure: (i) "the Tribunal's duty to consider the questions before it[,]" and (ii) "[its] right to be heard."[377] Perú will (i) address the departure Claimant alleges on each rule individually and show that Claimant's arguments do not withstand scrutiny (**Subsections 1 and 2**); and (ii) demonstrate that any alleged departure was not serious (**Subsection 3**).

1. The Tribunal Did Not Fail to Address the Question on Penalties and Interest Over Royalty Assessments

213. Claimant alleges that by purportedly declining to consider or decide on the merits Claimant's claims for penalties and interest on Royalty Assessments, the Tribunal breached Article 48(3) of the ICSID Convention, which requires a tribunal to address every question submitted to it.[378] According to Claimant, this obligation has been recognized as a fundamental rule of procedure.[379] In its view, "there is no question" the Tribunal failed entirely to address the merits of these claims despite being squarely presented with the issue, thereby departing from this provision.[380] This allegation fails both as a matter of law and as a matter of fact.

[377] Memorial on Partial Annulment at para. 63.

[378] *See* Memorial on Partial Annulment at para. 64.

[379] *See* Memorial on Partial Annulment at para. 64.

[380] Memorial on Partial Annulment at para. 64.

214. Perú does not contest that a tribunal's failure to decide a claim before it may, in principle, amount to a departure from a fundamental rule of procedure.[381] However, annulment committees have clarified that not every failure amounts to a basis for annulling an award,[382] a qualification that Claimant omits.

215. *First*, annulment committees have drawn a clear distinction between a tribunal's failure to decide a claim and a tribunal's decision not to address a particular argument advanced in support of that claim.[383] Only the former could amount to a departure under Article 52(1)(d). This distinction is explained by the *ad hoc* committee in *Pawlowski v. Czech Republic* which, relying on the annulment decision of *Continental Casualty v. Argentina,* stated:

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[381] *See*, *e.g.*, **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 60 ("In some cases, an applicant invoking a serious departure from a fundamental rule of procedure may also invoke the failure to state reasons on which the award is based pursuant to Article 52(1)(e) . . ."); **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125 ("[T]he Committee considers that a failure to consider a question or a point raised by a Party that is critical to the Tribunal's decision may, in certain cases, amount to a serious departure from a fundamental rule of procedure."); **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, May 16, 1986, at para. 32*;* **AALA-9**, *Fraport* Decision on Annulment, at para. 271.

[382] *See*, *e.g.*, **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125 ("[T]he Committee observes that Article 48(3) of the ICSID Convention states that '[t]he award shall deal with every question submitted to the tribunal, and shall state the reasons upon which it is based.' This provision does not envisage that the Award shall address every argument, piece of evidence, or fact presented by the Parties. A Tribunal is therefore not obliged to give express consideration to every argument or issue raised by the Parties to guarantee their right to be heard. As concluded by the *Azurix* committee, 'it is not a serious departure from a fundamental rule of procedure for a tribunal to decline to consider an issue that it considers to be irrelevant, merely because one of the parties considers it to be important.' Nonetheless, the Committee considers that a failure to consider a question or a point raised by a Party that is critical to the Tribunal's decision may, in certain cases, amount to a serious departure from a fundamental rule of procedure.) (internal citations omitted). *See also* **RALA-24**, Stephan W. Schill, Loretta Malintoppi, *et al.* (eds), *Schreuer's Commentary on the ICSID Convention* (Third Edition), Kluwer Law International (2022) (excerpt), at para. 384 (p. 1326) ("The failure to refer to every argument put forward by the parties will not, in and of itself, indicate a violation of the right to be heard, and is more properly considered in the light of the obligations to address questions, in Art. 48(3), or to state reasons, in Art. 52(1)(e).") (emphasis added).

[383] *See* **RALA-31**, *Enron v. Argentina*, Decision on Annulment, at para. 222 ("As has been noted, pursuant to these provisions, a tribunal has a duty to deal with each of the *questions ('pretensiones')* submitted to it, but is not required to comment on all arguments of the parties in relation to each of those questions.") (emphasis in the original); **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 55; **RALA-28**, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011 ("*Continental Casualty v. Argentina*, Decision on Annulment"), at para. 97.

> The tribunal is required to deal with all claims and/or defenses specifically raised for the tribunal's determination. It is the tribunal's prerogative to assess the relevance and importance of the issues at stake and evidence submitted. That does not, however, imply a requirement that "*a tribunal [ ] give express consideration to every argument or issue advanced by a party in support of its position in relation to a particular question*." The arbiter of relevance is the tribunal, not the parties.[384]

216. The *Pawlowski* committee explained—while making the caveat that no comprehensive guidance can be provided in the abstract—that the inquiry ultimately requires "distinguish[ing] between a genuine 'question' or claim submitted to the tribunal, as opposed to a mere argument or reference to a particular piece of evidence."[385]

217. *Second*, and consistent with the foregoing, multiple annulment committees have rejected the idea that tribunals are required explicitly to mention every argument or piece of evidence submitted before it.[386] The annulment committee in *Perenco v. Ecuador* was explicit on this point when discussing Article 48(3) of the ICSID Convention, holding that "[t]his provision does not envisage that the Award shall address every argument, piece of evidence, or fact presented

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[384] **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 55 (emphasis in the original) (*citing Continental Casualty v. Argentina*, Decision on Annulment, at para. 97 ("As observed above, a failure by a tribunal to consider one of the *questions* submitted to it for decision, such as a specific defence raised by the respondent, may in certain circumstances amount to a serious departure from a fundamental rule of procedure. However, no fundamental rule of procedure requires a tribunal to give express consideration to *every* argument or issue advanced by a party in support of its position in relation to a particular question.") (emphasis in original)).

[385] **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 59.

[386] *See, e.g.*, **RALA-32**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010 ("*Rumeli v. Kazakhstan*, Decision on Annulment"), at para. 84 ("In relation to the arguments raised by the Applicant on Annulment concerning the Tribunal's failure to address certain of its arguments, it is the position of this Committee that it is not necessary for a tribunal explicitly to deal with all the arguments raised by the parties."); **RALA-11**, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, at para. 133; **RALA-33**, *Magyar Farming Company Limited, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Decision of the *ad hoc* Committee on the Application for Annulment Submitted by Klöckner, May 3, 1985, at para. 133 ("It is well established that awards need not be exhaustive in expressly addressing each and every argument raised by the parties, particularly when the implicit rejection of an argument follows clearly from the stated reasoning of the award."). *See also* **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 54; **RALA-28**, *Continental Casualty v. Argentina*, Decision on Annulment, at para. 97.

by the Parties."[387] Similarly, the Committee in *Kiliç* observed that "arbitral tribunals have no obligation to expressly address, in their awards, every single issue and argument raised by the parties. Tribunals have discretion to focus on those issues and arguments that they find determinative for their decision and not to address in their awards arguments of the parties that they find to be irrelevant."[388] Accordingly, a tribunal's decision not to engage with an argument or issue does not constitute an annullable error.

218. *Third,* the committees in *Rumeli v. Kazakhstan,* and more recently *Pawlowski,* confirmed that "[i]f the arguments of the parties have been correctly summarized and all the claims have been addressed, there is no need explicitly to address each and every one of the arguments raised in support of the particular claims, and it is in the discretion of the tribunal not to do so."[389] As explained by the annulment committee in *Pawloski*, "Without more, a failure to address every question will not in and of itself justify annulment."[390]

219. Against this backdrop, it becomes evident that Freeport's annulment claim has no merit.

220. Applying the test developed in *Pawlowski*—namely, distinguishing between a tribunal's failure to decide a claim and its decision not to address certain arguments—it is clear that Claimant conflates the two. Claimant's grievance is not about an undecided claim, but, rather, about the Tribunal's handling of the arguments pleaded by the parties.

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[387] **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125. *See also* **RALA-31**, *Enron v. Argentina*, Decision on Annulment, at para. 222.

[388] **RALA-11**, *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, at para. 133.

[389] **RALA-32**, *Rumeli v. Kazakhstan*, Decision on Annulment, at para. 84. *See also* **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 201.

[390] **RALA-23**, *Pawlowski v. Czech Republic*, Decision on Annulment, at para. 201.

221. As explained above, the Award itself shows that the Tribunal did decide the claim.[391] In the merits section, in paragraphs 830-832, the Tribunal expressly listed within the "second major issue to be determined in [the] Award" whether Perú had violated Article 10.5 of the BIT "each time it failed to waive the assessment of penalties and interest against SMCV."[392] It then devoted seventeen paragraphs to summarizing the parties' positions on this issue.[393] Finally, the Tribunal decided that because the claim concerned penalties and interest, which are taxation measures, it did not have jurisdiction to hear the claim on the merits. Under the reasoning of *Rumeli* and *Pawlowski*, that is more than enough to satisfy Article 48(3) requirement: the Tribunal correctly identified the claim, summarized the arguments, and resolved the issue before it.

222. Claimant's real grievance with the Tribunal's decision is that the Tribunal did not adopt either party's arguments when deciding its penalties and interest claim regarding Royalty Assessments. That, however, is not an annullable error, as Respondent demonstrates in the next section.[394] Accordingly, there is no basis to conclude that the Tribunal violated Article 48(3) of the ICSID Convention.

2. The Tribunal Did Not Violate Claimant's Right to be Heard by Adopting Its Own Reasoning

223. Conscious of the weakness of its allegation that the Tribunal failed to decide Claimant's penalty and interest claim regarding Royalty Assessments, Claimant seeks refuge in a

[391] *See supra* paras. 91-95, 150-56.

[392] **AA-1**, *Freeport* Award, at paras. 830-31. *See also id.*, at para. 832.

[393] *See* **AA-1**, *Freeport* Award, at paras. 967-84.

[394] *See infra* at paras. 225-32.

second, alternative theory: that the Tribunal violated Claimant's right to be heard by adopting reasoning the parties had not expressly pleaded.[395]

224. Claimant contends that, even assuming the Tribunal rejected Claimant's claim on penalties and interest on Royalty Assessments on jurisdictional grounds, the manner in which it did so violated Claimant's right to be heard.[396] According to Claimant, the parties never briefed the reasoning on which the Tribunal relied, and Claimant was, therefore, deprived of the opportunity to be heard. To support this allegation, Claimant invokes *Pey Casado I* and *TECO*, where the committees found a serious departure from a fundamental procedural rule when the tribunals relied on theories—such as damages for breaches never pleaded, or unjust enrichment—that had not been raised during the proceedings.[397] Claimant asserts that the same occurred here, alleging that Perú did not raise the tax-exclusion objection with respect to penalties and interest on Royalty Assessments, yet the Tribunal nonetheless relied on that reasoning to dismiss the claim.[398] Claimant's allegations are without merit.

225. While Perú does not dispute that the right to be heard qualifies as a fundamental rule, *ad hoc* committees have clarified that this right is not without limits. According to the *Wena Hotels v. Egypt ad hoc* committee, a party's right to be heard "includes the right to state its claim or its defense and to produce all arguments and evidence in support of it."[399] Similarly, the *ad hoc* committee in *Tulip v. Turkey* established that:

> [t]he right to be heard affords the parties the opportunity to present all the arguments and all the evidence that they deem relevant and

[395] *See* Memorial on Partial Annulment at para. 65.

[396] *See* Memorial on Partial Annulment at para. 65.

[397] *See* Memorial on Partial Annulment at para. 65.

[398] *See* Memorial on Partial Annulment at para. 65.

[399] **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 57. *See also* **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at para. 144.

> to respond to arguments and evidence submitted by their opponent. In particular, each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case.[400]

226. More importantly, the annulment committee in *Tulip v. Turkey* clarified that the right to be heard "does not relate to the manner in which tribunals deal with the arguments and evidence presented to them."[401] The committee expressly determined that "absence in an award of a discussion of an argument or piece of evidence put forward by a party does not mean that a tribunal has violated the right to be heard."[402] This understanding was echoed more recently by the *ad hoc* committee in *Perenco v. Ecuador,* which stated: "A Tribunal is therefore not obliged to give express consideration to every argument or issue raised by the Parties to guarantee their right to be heard."[403]

227. Moreover, annulment jurisprudence has consistently rejected the idea that a tribunal violates the right to be heard simply because it relies on legal reasoning not expressly pleaded by the parties.[404] As the *Niko Resources* committee explained, "[T]he parties' right to be heard is not

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[400] **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 80 (emphasis added).

[401] **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 82.

[402] **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 82.

[403] **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125.

[404] *See* **RALA-34**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, May 3, 1985 (Unofficial English Translation), at para. 91; **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at paras. 66-70; **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, July 3, 2002, at para. 84; **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, at paras. 254-57; **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 90-94; **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014, at para. 284; **RALA-25**, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/22, Decision on the Application for Annulment, February 2, 2018, at para. 218; **AALA-14**, *Perenco*

violated if the tribunal bases its decision on legal reasoning that was not specifically argued by the parties, as long as its reasoning can be aligned with the legal framework established by the parties."[405]

228. This understanding is longstanding. The *Klöckner* annulment committee in 1983 was the first to address this issue, concluding:

> Within the dispute's "legal framework", arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a "serious departure from a fundamental rule of procedure." Any other solution would expose arbitrators to having to do the work of the parties' counsel for them and would risk slowing down or even paralyzing the arbitral solution to disputes.[406]

229. Since then, numerous committees have recognized and upheld this principle.[407] In *Vivendi I*, the committee observed that a tribunal's reasoning may indeed come as a surprise to the parties, but "this would by no means be unprecedented in judicial decision making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by

Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125; **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at paras. 145-48; **RALA-16**, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX)*, ICSID Case No. ARB/10/18, Decision on Annulment, October 12, 2023, at para. 77.

[405] **RALA-16**, *Niko Resources v. Bangladesh Oil Gas*, Decision on Annulment, at para. 77.

[406] **RALA-34**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, May 3, 1985, at para. 91 (emphasis added).

[407] *See, e.g.*, **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 125 ("[T]he Committee observes that a tribunal does not necessarily depart from the right to be heard by not adopting either of the positions raised by the Parties. A tribunal may conduct its own analysis based on the documents, evidence, pleadings, and legal authorities presented by the Parties and reach a conclusion different from the positions submitted by the Parties."). *See also* **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at paras. 145-48; **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 90-94.

Article 52(1)(d)."[408] More recently, the *Orascom v. Algeria* committee reaffirmed this settled line of authority.[409]

230. This approach is closely connected to the application of the principle of *iura novit curia*—in arbitration referred as *iura novit arbiter* ("an arbitrator knows the law").[410] Under this principle, an arbitral tribunal may obtain evidence and evaluate it independently of the parties' pleadings (evidence of fact or evidence of law) to form its opinion or make a determination on the law.[411] In doing so, a tribunal does not breach the right to be heard as long as it stays within the legal framework of the dispute.

231. This understanding is further reinforced by Article 41 of the ICSID Convention, which codifies the principle of *competence-competence*,[412] and by Arbitration Rule 41(2) which expressly authorizes tribunals to consider questions of jurisdiction on their own initiative.[413] In

[408] **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, July 3, 2002, at para. 84.

[409] *See* **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at paras. 145-48 (*citing Vivendi I* at para. 84.).

[410] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at para. 91 ("What the parties are discussing is, in fact, the relationship between two legal principles:- the parties' right to be heard, and - the tribunal's right (or even duty - a tribunal confronted with inept pleadings cannot content itself with the less implausible of the parties' arguments) to apply the principle *iura novit curia*.") (internal citations omitted).

[411] *See* **RALA-43**, Giuditta Cordero-Moss, Chapter 6: *Iura Novit Curia*, in Franco Ferrari and Friedrich Jakob Rosenfeld (eds), *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues*, Kluwer Law International (April 2022), at p. 122.

[412] *See* **AALA-1**, ICSID Convention, Article 41(1) ("The Tribunal shall be the judge of its own competence"); *see also* **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 94; **RALA-42**, *Fisheries Jurisdiction (Spain v. Canada)*, Judgment - Jurisdiction of the Court, 1998 I.C.J. (4 December), at para. 37 ("The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it [ ], this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts'[ ].") (internal citations omitted).

[413] *See* **AALA-1**, ICSID Convention, Rule 41(2) ("The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.").

other words, tribunals have both the authority and the duty to determine their jurisdiction independently of the manner in which the parties frame their objections.

232. It is therefore immaterial whether Peru invoked the taxation-measures exclusion clause in connection with penalties and interest on Royalty Assessments: the Tribunal was entitled—indeed obliged—to independently assess its own jurisdiction.

233. Moreover, Freeport's reliance on *Pey Casado I* and *TECO* overlooks the broader and more consistent body of jurisprudence. In multiple cases, tribunals have adopted legal reasoning or remedies not expressly pleaded by the parties without any annulment consequence. In *Wena Hotels v. Egypt*, the tribunal awarded compound interest despite Claimant not having specifically requested it.[414] In *Vivendi II*, the tribunal rejected both parties' valuation methods and applied its own.[415] In each case, annulment committees upheld the awards, confirming that a tribunal may reach its own conclusions within the legal framework of the dispute, even where the parties did not articulate the precise argument.

234. The most illustrative precedent is *Caratube v. Kazakhstan*. In that case, Kazakhstan had objected to jurisdiction on the basis of Article 25 of the ICSID Convention.[416] The tribunal, however, found it had no jurisdiction on different grounds—its own interpretation of the investment treaty.[417] In the annulment proceedings, the committee confirmed that this did not

[414] *See* **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at paras. 66-70.

[415] See **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010, at paras. 254-57.

[416] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 113-16.

[417] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 54-58.

breach the claimant's right to be heard, since the tribunal's reasoning remained squarely within the legal framework of the dispute.[418]

235. The same is true here. The Tribunal excluded its jurisdiction on the basis of its own interpretation of Article 22.3.1 of the TPA's taxation measures exclusion clause.[419] That provision had been pleaded by both parties in the context of penalties and interest of Tax Assessments, and both Perú and Freeport had ample opportunity to brief and argue its scope during the proceedings.[420]

236. Indeed, during the hearing the Tribunal questioned both sides' experts on Peruvian tax law on whether interest and penalties—in general—were considered taxation measures under Peruvian law. Both Mr. Hernández[421] (Claimant's expert) and Mr. Bravo (Perú's expert)[422] were afforded the opportunity to present their views comprehensively.

237. For example, the President of the Tribunal asked Mr. Hernández:

> PRESIDENT HANEFELD: And so, I have one really important thing to better understand, which concerns the question whether Penalties or Interest constitute taxation measures. This Penalties and Interest Claim is 662 million [the value of Claimant's claims for

[418] *See* **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at paras. 178-79.

[419] *See* **AA-1**, *Freeport* Award, at paras. 540-53, 986.

[420] *See* **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, May 4, 2022, at paras. 446, 456-58, 490, fn. 904; **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, November 8, 2022, at paras. 770-77; **AA-11**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Respondent's Post-Hearing Brief, July 14, 2023, at paras. 285-87; **AA-4**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Reply and Counter-Memorial on Jurisdiction, September 13, 2022, at paras. 271-75; **RA-2**, *Freeport-McMoRan Inc. v. Republic of Perú*, ICSID Case No. ARB/20/8, Claimant's Rejoinder on Jurisdiction, December 16, 2022, at paras. 77-84; **AA-10**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Claimant's Post- Hearing Brief , July 14, 2023, at paras. 117-21.

[421] *See* **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at pp. 2592:6-2600:5.

[422] *See* **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at pp. 2686:17-2690:13.

> both Royalty and Tax Assessments], so, for us, it's really important to understand the Peruvian law concept on these Penalties and Interest. And I understand your colleagues, the Respondent's Experts, Mr. Bravo and Mr. Picón, saying in their Second Report, in Paragraphs 259 and 260, that they say Penalties and Interest are clearly taxation measures under the Peruvian Tax Code. They quote there Article 28 of the Tax Code, which states that: "Components of the tax debt are Tax, Penalties, and Interest." And I see now on your Slide 18 of today that you say, no, there is no definition of taxation measures, and this is more a legislative technique rather than a qualification. Can you please explain again now what you mean with this "legislative technique" rather than qualification of the nature?[423]

238. Mr. Hernández responded that the Peruvian tax system creates a legal fiction by including penalties, interest, and the owed tax within the same concept of "tax debt." In his words,

> Article 28 of the Tax Code simply and plainly as a matter of legislative technique fundamentally adopts a legal fiction, under which the concept--under the term "debt"--under the expression "tax debt" groups elements, or components, that clearly do not all refer to the tax itself. It's distinguishing between Tax, Penalty, and Interest, and then it groups them together under the concept of "tax debt."[424]

239. Mr. Hernández also explained that royalties are also part of the "tax debt" under Peruvian law:

> Then, the fact that the Royalty was incorporated under the idea of a tax debt is clearly a legal fiction. This does not respond to the nature of things. This is a legislative technique that has allowed them to simplify, to avoid, for example, the existence of dispersed regulations. Because of the legal fiction it was not necessary to say, for example, "that this is the process to challenge royalties" and to issue a whole regulation about it. One goes straight to the Tax Code. So, this has been a way, a legal fiction that has allowed to simplify the legislation.[425]

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[423] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at pp. 2592:6-2593:8 (President Hanefeld).

[424] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at p. 2595:10-18 (Mr. Hernández).

[425] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at p. 2598:11-22 (Mr. Hernández).

240. Finally, Mr., Hernández explained that the concept of "tax measures" does not exist under Peruvian law.

> I don't know if I am answering your question, but, at any rate, this also leads me to say, how about Tax Measures? While the concept of tax debt that, once again, is a legal fiction, is part of the code as to Tax Code; as to Tax Measures, there is nothing like that. Keep in mind, that the Tax Code in Perú is the one that gathers the main concepts to be applied to tax issues for all sorts of levies. When someone would like to introduce a key issue in connection with taxes, they introduce an amendment to the Tax Code by inserting whatever is relevant. Neither the Tax Code, nor any other rule, includes this concept of "tax measures." And we are going to find some regulations, such as the 30230, cited by Bravo, and the 30506, also cited by Bravo, which is a delegation rule, that refer to Taxation Measures, but without it having a specific significance. [426]

241. Then, the Tribunal asked similar questions to Mr. Bravo and Mr. Picón:

> PRESIDENT HANEFELD: And I start, and I know you will not be surprised by my questions, they are very similar to the ones I had for Mr. Hernández. So, my first question relates to the question whether the Penalties and Interest constitute Taxation Measures. And just to better understand, if one takes the position and this is undisputed. You just confirmed it that Royalties are not taxes, one could arguably think, okay, Penalties and Interest, which are also a civil law, whatever, in our concept, are separate, and like an Annex only to this nontax. So, there can be no Taxation Measures if one imposes Penalties and Interest. And I understand you saying, oh, no. They are, nevertheless, taxation measures. Do I understand correctly that you base this on Article 3 of the Mining Royalty Law? Because you say and now on your last slide, this is the term "Tax Measures refers to decisions of the State that may hand it down through its legal or regulatory provisions," and Article 3 of the Royalty Law exactly constitutes such legal provisions?[427]

242. Mr. Bravo explained to the President that while royalties are not taxes, Article 3 of the Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of

[426] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at pp. 2599:10-2600:5 (Mr. Hernández).

[427] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at pp. 2686:17-2687:15 (President Hanefeld).

Mining Royalties (Law No. 28969) does refer to the Tax Code indicating that certain tax regulations do apply to royalties. In his words:

> Yes, Madam President, indeed. What we said is that one must not confuse a "tax" with Taxation Measures. There's something that needs to be clear, first and foremost. Royalties, in principle, are not taxes. That's true. They're not taxes. Does that mean that there are no tax regulations that govern certain aspects of Royalties? No, because they exist. And you made mention of them. Article 3 of that Law indicates, expressly, what the tax rules of the Tax Code are that are applicable to the Royalties, and that transforms the Royalties in taxes. Of course not. But there are certain tax rules that apply to Royalties, and that is the explanation.[428]

243. Then, the President had a follow-up question, where Mr. Bravo indicated that in his view, penalties and interest, even those derived from royalty assessments, constitute taxation measures:

> PRESIDENT HANEFELD: My apologies. Now, I think you said they are not taxes, the Penalties and Interest, but, nevertheless, they qualify as Taxation Measures. Is my understanding correct?
>
> THE WITNESS: Yes, you understood that correctly. That is what I was saying. Although they are not taxes, taxes may not exist by themselves. They need, for example, procedural rules, a penalty regime. They need also other kinds of rules so that the tax may be complied with. And formalities may comply with. And they had that nature as taxation norms.[429]

244. The exchange between the Tribunal and the experts shows that the Tribunal was already considering whether penalties and interest, irrespective of whether they derived from unpaid royalty or tax assessments, could be considered taxation measures for purposes of considering Claimant's alternative claims. This is evident, at a minimum, by the fact that the Tribunal said in its question to Claimant's tax expert, Mr. Hernández, that Claimant's claim

[428] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at pp. 2687:16-2688:8 (Mr. Bravo).

[429] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at p. 2689:2-13 (President Hanefeld and Mr. Bravo).

regarding penalties and interest was an important one, in part, because it was valued at USD 662 million. That amount reflects the total of Claimant's penalty and interest claims for both Tax and Royalty Assessments—*i.e.*, USD 417 million (royalty) and USD 245 million (tax).[430] More importantly, the fact that the Tribunal asked both parties' experts about this issue underscores that the parties were, in fact, heard on this issue.

245. After hearing the parties on the nature of penalties and interest, the Tribunal applied its own interpretation of the law to the penalties and interest on Royalty Assessments, acting within the legal framework of the case and with the evidence submitted before it. As in *Caratube*, the Tribunal's reasoning remained firmly anchored in the applicable law and closely connected to the issues debated by the parties and, thus, cannot be recharacterized as a violation of Claimant's right to be heard.

246. The conclusion reached by the Tribunal may have surprised Claimant, but as the committees in *Vivendi* and *Orascom* confirmed, surprise alone does not equate to a basis for annulment. The Tribunal's reasoning remained firmly anchored in the parties' pleadings and legal framework, and, thus, there was no violation of Claimant's right to be heard and certainly no serious departure from a fundamental rule of procedure.

3. Any Departure from a Fundamental Rule Was Not Serious

247. Even if the Committee were to consider that Claimant has shown a departure from a fundamental rule of procedure (it has not), Claimant's annulment request would still fail, because it has not demonstrated that any such departure was "serious" as required under Article 52(1)(d) of the ICSID Convention. To satisfy this requirement, Claimant would need to prove that, had the

[430] *See* **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at p. 2592:6-15 (Mr. Hernández); *see also* Claimant's Memorial on Partial Annulment, at para. 3.

Tribunal expressly addressed Claimant's arguments on the merits, this could have potentially altered the outcome of the Award. In this case, even if the Tribunal had decided Claimant's alternative claims on the merits, the outcome (*e.g.*, the dismissal of Claimant's claims) would not have been different.

248. A departure is "serious" if a party is deprived of the benefit of the procedure intended by the fundamental rule in question.[431] The *ad hoc* committee in *MINE* articulated that this requirement "establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide."[432]

249. Committees have articulated different approaches as to how this requirement should be satisfied. Some have required a showing that the deviation had an actual material effect on the award, *i.e.*, that the result would have been substantially different had the rule been respected.[433] Other committees have instead found it sufficient that the departure could have potentially affected the outcome.[434] Claimant's claims fail under either interpretation.

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[431] *See* **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.05.

[432] **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.05.

[433] *See, e.g.*, **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 58; **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005; **AALA-9**, *Fraport* Decision on Annulment, at para. 246; **RALA-27**, *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited, July 3, 2013, at paras. 33-35, **RALA-28**, *Continental Casualty v. Argentina*, Decision on Annulment, at para. 96; **RALA-29**, *OI European Group B.V. (OIEG) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, December 6, 2018, at para. 248; **RALA-30**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, at para. 234; **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014, at para. 269.

[434] *See, e.g.*, **AALA-12**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016, at paras. 82-85; **RALA-11**, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, at para. 70; **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at paras. 133-34; **RALA-2**, *Iberdrola I*, Decision on Annulment, at para. 104; **AALA-10**, *Víctor Pey*

250. Claimant's contention that the outcome would have been different had the Tribunal ruled on Claimant's penalties and interest claim on Royalty Assessments on the merits rests on Perú's alleged failure to apply Article 170 of the Peruvian Tax Code, which allows for the resolution of doubt in favor of the taxpayer where there is reasonable ambiguity in the applicable provision.[435] However, as explained above, the Tribunal found that the Mining Law and its Regulations created no such doubt.[436] The Tribunal found that the legal framework limited stability guarantees to the specific investment projects identified in the feasibility study for which the agreement was entered into—they did not extend to entire concessions or mining units.[437]

251. In light of the Tribunal's unequivocal interpretation of the Mining Law and its Regulations, it is evident that the Tribunal would have denied Claimant's alternative claim on the merits. The Award shows that the Tribunal regarded the law as clear and not doubtful and, therefore, found no space for Claimant's interpretation of the same.[438] This is confirmed by the hypotheticals posed by the exchange between the President and Claimant's tax expert, Mr. Hernández, during the hearing. President Hanefeld specifically asked Claimant's tax expert:

> PRESIDENT HANEFELD: My hypothetical that I put to you is: If the Tribunal came to the conclusion that the Concentrator did not enjoy stability, and clearly did not enjoy stability, but Royalties were to be paid, is there, nevertheless, still room for this reasonable doubt rule under Article 170 and 92 of the Tax Code that Penalties and Interest should be waived?[439]

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, December 18, 2012, at paras. 77-78, 80; **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 78.

[435] *See* **AA-1**, *Freeport* Award, at paras. 969-70.

[436] *See supra* paras. 96-122; *see also* **AA-1**, *Freeport* Award, at paras. 706-11; 716-18.

[437] *See* **AA-1**, *Freeport* Award, at paras. 701-03.

[438] *See supra* Section II.C.2.

[439] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at p. 2605:10-16 (President Hanefeld).

252. Mr. Hernández's reply at the hearing is strikingly revealing. In response to the President's hypothetical, he explained that "[t]he waiver of penalties and interest takes as its assumption that there is an imprecise rule. So first we have to determine whether or not there is actually an imprecise rule, because, if there is an imprecise or vague rule, if there's a rule that allows for more than one reasonable interpretation, then it's not clear."[440]

253. The conclusion from this exchange is unavoidable: if the law is clear, Article 170 of the Tax Code would not have been applicable, *i.e.*, there was no "reasonable doubt" in the Mining Law and Regulations that could have justified Cerro Verde's misinterpretation so as to entitle it to the waiver of penalties and interest. The President's question, and the answer it elicited, made clear that once the Tribunal concluded that the Mining Law and its Regulation unequivocally provided that mining stabilization agreements applied only to the investment project for which they are entered into, there was no basis to apply the "reasonable doubt" rule.

254. Put differently, even had the Tribunal expressly addressed Claimant's Article 170 argument on the merits, the outcome of the arbitration would not have changed: the Tribunal's conclusion that the legal framework was unequivocal forecloses any such possibility.

255. Accordingly, Claimant has failed to establish that the alleged departure from a fundamental rule of procedure was sufficiently serious as required under Article 52(1)(d) of the ICSID Convention. Claimant's complaint is not that it was deprived of the benefit of a procedural safeguard but, rather, that the Tribunal disagreed with its interpretation of Peruvian law and the BIT. That is a matter that pertains to the merits of Claimant's argument, not one that triggers partial annulment of an award.

[440] **AA-8**, *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Hearing on Jurisdiction, Merits, and Quantum, Hearing Transcript Day 9, May 11, 2023, at p. 2605:17-2606:2 (Mr. Hernández).

VII. CLAIMANT'S ALLEGATIONS OF "OTHER ERRORS" FAIL TO JUSTIFY PARTIAL ANNULMENT OF THE AWARD

256. In a last-ditch attempt to undermine the Tribunal's decision, Claimant advances a list of supposed flaws that amount to nothing more than mere disagreements with the Tribunal's Award.[441]

257. Claimant alleges that the Tribunal's alleged failure to decide Claimant's claims for penalties and interest on Royalty Assessments was not an isolated flaw but, rather, symptomatic of an Award that it characterizes as superficial, error-ridden, and unpersuasive.[442] According to Claimant, the Tribunal ignored critical evidence, failed to engage with key provisions of Peruvian law, relied on self-serving government statements, and adopted Perú's positions without adequate explanation.

258. By way of illustration, Claimant asserts five examples: (i) the Tribunal's alleged failure to address SUNAT and Tax Tribunal resolutions supporting Claimant's interpretation of stability guarantees; (ii) its dismissal of Article 2 of the Mining Regulations; (iii) its reliance on the 2014 Statement of Reasons to interpret pre-amendment law; (iv) its disregard of the adhesion-contract nature of stability agreements; and (v) its narrowing of Claimant's due process claims to exclude SUNAT's conduct.[443] In short, Claimant is upset, because the Tribunal did not rule in its favor, and Claimant wishes the result had been different.

259. The Committee should decline to entertain these grievances for the following reasons.

[441] *See* Memorial on Partial Annulment at para. 67.

[442] *See* Memorial on Partial Annulment at para. 67.

[443] *See* Memorial on Partial Annulment at paras. 67 (a)-(e).

260. *First*, Claimant's list of alleged flaws is, on its face, inadmissible. Claimant knows this. It is not even asking for annulment of those sections of the Award. Claimant's request is confined to the annulment of "the Award's rejection of [Claimant's] Article 10.5 claims concerning Peru's alleged failure to waive penalties and interest on the Royalty Assessments."[444]

261. As discussed in Section III, annulment under the ICSID Convention is a limited remedy.[445] As the committee in *Niko Resources* emphasized, "[A]nnulment of an award is limited to the five grounds listed in Article 52(1) of the ICSID Convention. . . . That list is exhaustive and the authority of ad hoc committees to annul an award is therefore limited to these grounds."[446] Likewise, in *Orascom v. Algeria*, the committee confirmed that "[t]he grounds listed in Article 52(1) are the only grounds on which an award may be annulled."[447] Freeport's "other grievances" are not tied to any of those limited grounds and should therefore be rejected outright. The Committee should see the "other grievances" for what they are: a distraction seeking to cast a shadow on the Award without making an annulment claim, which constitutes an abuse of the annulment process.

262. *Second*, the criticisms advanced by Claimant amount to nothing more than disagreement with how the Tribunal weighed the evidence and applied the law. But numerous annulment committees have emphasized that this is not a basis for annulment.[448] ICSID tribunals

[444] Memorial on Partial Annulment at para. 68 (a).

[445] *See supra* paras. 129-38.

[446] **RALA-16**, *Niko Resources v. Bangladesh Oil Gas*, Decision on Annulment, at para. 62. *See also* **AALA-14**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, May 28, 2021, at para. 58.

[447] **RALA-26**, *Orascom v. Algeria*, Decision on Annulment, at para. 128(1) (emphasis added).

[448] *See, e.g.*, **RALA-35**, *Caratube International Oil Company LLP v. Republic of Kazakhstan (I)*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, February 21, 2014, at para. 158 ("Factual findings and weighing of evidence made by a tribunal are outside the powers of review of an annulment committee, except if the applicant can prove that the errors of fact are so egregious, or the weighing of evidence so irrational, as to constitute an independent cause for annulment. The respect for tribunals' factual findings

enjoy broad discretion in assessing the relevance and weight of evidence, and *ad hoc* committees are not tasked with revisiting those determinations. As the *Dogan v. Turkmenistan* explained:

> It is not within an *ad hoc* committee's remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. A tribunal's discretion in such matters of appreciation and evaluation of evidence is recognized by the ICSID system. An *ad hoc* committee cannot sit in appeal on a tribunal's assessment of the evidence. If the Committee were to proceed to a re-examination of the facts of the present case and an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body. That is not a function envisaged for it by the ICSID Convention.[449]

263. Similarly, the *Kılıç* annulment committee stated, "The appreciation of evidence is the prerogative of the Tribunal and it is not the Committee's mandate to re-appraise it."[450] In light of this well-established principle, this Committee should similarly decline to entertain Claimant's request to revisit how the Tribunal weighted the evidence.

264. *Third*, as discussed in Section V above, the jurisprudence makes clear that the obligation to state reasons does not require tribunals to address every argument or piece of

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is normally justified because it is the tribunal who controlled the marshalling of evidence, and had the opportunity of directly examining witnesses and experts."); **RALA-36**, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, June 10, 2022, at para. 405 ("members of *ad hoc* committees must refuse the 'temptation' of looking to ICSID awards as if they could enter into the shoes of the arbitrators to reassess facts and law and to 'recreate' a solution that eventually might be considered by them as a better outcome for the case. The committees cannot 'review the awards' findings for errors of fact or law."); **RALA-41**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014, at para. 271 ("[T]he alleged failure to analyze other evidence do not constitute grounds for annulment of the Award for a serious departure from fundamental rules of procedure[.]"); **RALA-37**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, May 29, 2019, at para. 175 ("An annulment committee has no powers to revisit the assessment of evidence made by the tribunal. Pursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility as well as of the probative value of the evidence, and it is not up to an annulment committee to second-guess its findings in this regard. As a consequence, as said above, an error in the assessment of the evidence is no ground for annulment under Article 52.").

[449] **RALA-38**, *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, January 15, 2016, at para. 129.

[450] **RALA-11**, *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, at para. 172.

evidence presented by the parties.[451] What is required is that the award enable the reader to understand the reasons upon which the decision rests—not that the tribunal provide a detailed answer to each contention.[452] Accordingly, even if Claimant's miscellaneous challenges were entertained by the Committee (they should not be), they would still fall far short of justifying partial annulment of the Award.

265. In sum, Claimant's catalogue of alleged errors seeks to have this Committee second-guess the Tribunal's assessment of the record, its determination of the weight to give certain documents, and its assessment of the persuasiveness of legal arguments of the parties. This is precisely what annulment committees have consistently rejected. As explained in Section III, the ICSID Convention does not provide for an appeal on the merits. Instead, it establishes narrow bases for annulling an award and only allows for annulment of the same in exceptional cases where one of the enumerated grounds has been met.[453] Claimant's "other grievances" do not come close to meeting that threshold and, therefore, must be dismissed.

VIII. EVEN IF AN ANNULLABLE ERROR EXISTED, THE FINALITY OF THE AWARD SHOULD BE PRESERVED

266. Perú has demonstrated that none of the grounds advanced by Claimant justifies annulment: the Tribunal did not fail to state reasons, did not exceed its powers, and did not seriously depart from a fundamental rule of procedure. For these reasons alone, the Award must stand. But even assuming, *arguendo*, that the Committee were to conclude that an annullable error exists (which it should not), annulment would still be unwarranted. *First*, Claimant is abusing the system by seeking annulment when it had a more reasonable remedy available in the form of a

[451] *See supra* Section V.B.1.

[452] *See supra* Section V.B.1.

[453] *See supra* at paras. 130-37.

supplementary decision under Article 49(2) of the ICSID Convention (**Section VIII.A**). *Second,* annulment is not mandatory: the Committee retains discretion to preserve the Award and, in this case, finality must prevail (**Section VIII.B**).

A. CLAIMANT'S STRATEGY TO SEEK ANNULMENT RATHER THAN ASK THE TRIBUNAL TO ADDRESS AN ALLEGED OMISSION IS AN ABUSE OF THE ANNULMENT PROCESS

267. Even if the Committee were to determine that the Tribunal failed to address an issue that was subject to its jurisdiction as Claimant alleges (*i.e.,* Freeport's claims concerning penalties and interest on Royalty Assessments) (it should not), partial annulment of the Award would be unwarranted as Claimant did not avail itself of the remedy for omissions that was available to it at the time the Award was issued. Rather than seeking the exceptional remedy of annulment, Claimant ought to have requested supplementation of the Award under Article 49(2) of the ICSID Convention. Article 49(2) provides a mechanism through which parties may request the tribunal to address issues that were submitted to the tribunal but not resolved in the award:

> (2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.[454]

268. The essence of Claimant's annulment claim is that the Tribunal found it had jurisdiction over Claimant's claim concerning penalties and interest on Royalty Assessments but failed to decide whether collecting penalties and interest on Royalty Assessments was a Treaty violation. It was open to Claimant to request the Tribunal to decide this question, which Claimant

[454] **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), at Art. 49(2) (emphasis added).

now says the Tribunal failed to decide. Claimant did not do so, because it knew what the Tribunal's decision would have been, as is evident from the Award.

269. As discussed in Section III, the drafting history of the ICSID Convention confirms that a tribunal's failure to address every issue presented does not, in and of itself, constitute grounds for annulment.[455] Indeed, the ICSID Secretariat acknowledges that the Convention expressly provides that such omissions may be remedied by a supplementary decision issued by the same tribunal, indicating that a dissatisfied party may request such a decision concerning a question not previously addressed.[456]

270. *Ad hoc* committees have consistently affirmed that Article 49(2) is the appropriate remedy in cases of omission.[457] In *MINE v. Guinea* (II), the *ad hoc* committee observed that although the Committee of Legal Experts (tasked with advising the Executive Directors of the World Bank on the draft Convention) added to the draft of the ICSID Convention a requirement that an award should address every question submitted to the tribunal (in Article 48(3)), failure to meet this requirement was not expressly designated as a ground for annulment.[458] The *MINE v. Guinea (II) ad hoc* committee went on to clarify that the only explicit provision dealing with a

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[455] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 109. *See also* **RALA-7**, ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II-2 (1968) (excerpt), at p. 849 ("Mr. BROCHES (Chairman) . . . Whereupon a vote was taken on the question whether arbitrators should be required to rule on every issue presented, with 32 delegates voting in the affirmative and none against. The meeting then voted on the question whether a failure to comply with this duty would give the parties the right to seek annulment and the motion was defeated by 8 to 6. Thirty delegations, however, then voted in favor of there being some kind of remedy where the Tribunal has failed to discharge its duty. A majority of 32 to none then indicated that the remedy should be in the nature of a supplemental review which was not identical with the revision of the award, and the Chairman announced that the Secretariat would try and prepare a draft provision giving effect to the sense of the meeting.").

[456] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 109.

[457] *See* **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.12; *see also* **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 113; **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at paras. 80, 100-01; **RALA-9**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, March 28, 2022, at para. 325.

[458] *See* **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.11.

tribunal's failure to rule on every issue was Article 49(2) of the ICSID Convention, concluding that it "provides a satisfactory remedy for the case of a tribunal having failed to exercise its jurisdiction in full."[459] The committee further held that where the tribunal failed to rule on a particular claim, "Article 49(2) would have provided a specific remedy, and not having invoked it, MINE could not have relied on that failure for purposes of annulment."[460]

271. Likewise, the *ad hoc* committee in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* held that "annulment [is not] the appropriate remedy in case of omissions and technical errors in the award," noting that "[u]nder Article 49(2) of the ICSID Convention a tribunal may, upon the request of a party, supplement omissions in the award and rectify any clerical, arithmetical or similar error."[461] In *Wena Hotels Limited v. Arab Republic of Egypt*, the *ad hoc* committee adopted a similar approach, determining that when a tribunal omits to decide a question or the award contains an error, the appropriate remedy lies in Article 49(2) of the ICSID Convention—not in annulment under Article 52(1)(e).[462] According to the *Wena* annulment committee, this reflects the ICSID's Convention's distinction between a tribunal's duty to address all submitted questions and its obligation to state reasons, with annulment only applicable to the latter.[463] In *Cube Infrastructure Fund SICAV v. Spain*, the *ad hoc* committee agreed with the reasoning in *Wena Hotels*, affirming that a tribunal is not required to address every argument or piece of evidence submitted by the parties, clarifying that where a tribunal fails to

[459] **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.12.

[460] **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.12.

[461] **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 113.

[462] *See* **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 80. *See also* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 70.

[463] *See* **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 100.

resolve a question presented to it, the appropriate remedy under the ICSID Convention is not annulment, but, rather, a request for a supplementary decision under Article 49(2).[464]

272. Thus, Claimant cannot now claim in an annulment proceeding what it should have claimed in an Article 49(2) proceeding seeking a supplemental decision. If Claimant genuinely believed that the Tribunal failed to decide on the penalties and interest waiver issue with respect to the Royalty Assessments, it should have sought a supplemental decision under Article 49(2) of the ICSID Convention. It did not do so for one simple reason—it knew that the Tribunal would rule against it. But that is not an adequate basis for using these annulment proceedings to do what it should have done under Article 49(2) before the original Tribunal.

273. While annulment committees have consistently recognized that a request for a supplementary decision under Article 49(2) of the ICSID Convention is the appropriate remedy when a tribunal omits to address a question raised by the parties, certain committees have acknowledged that this remedy may not be adequate when the reasoning supporting the Award may be affected by the supplemental decision.[465] That is not the present case.

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[464] *See* **RALA-9**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, March 28, 2022, at para. 325.

[465] *See* **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 5.13 ("Guinea's complaint against the Award falls into a different category. Article 49(2) would not have provided a remedy for the Award's failure to deal with questions submitted by Guinea to the Tribunal. The defect complained of by Guinea could not have been cured by supplementing the Award, but would have required in effect that it be reconsidered in the light of the Tribunal's decision on the 'omitted' question. The Committee accepts that in such a case failure to deal with a question may render the award unintelligible and thus subject to annulment for failure to state reasons."); *see also* **RALA-8**, *Wena Hotels v. Egypt*, Decision on Annulment, at para. 101 ("However, the remedy provided for in Article 49(2) is not always sufficient in such a case, as other *ad hoc* Committees have pointed out. Indeed, the answer to the question the Tribunal omitted to decide may have direct or collateral effects upon the arguments which are at the basis of the Tribunal's conclusions. A proceeding under Article 49(2) would not allow the Tribunal to go further than to decide upon the question it had omitted to deal with. It is not a sufficient remedy when such a decision may affect the sequence of arguments contained in the Award and require that it be reconsidered in the light of the Tribunal's decision on the omitted question. The ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award."); **RALA-9**, *Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, March 28, 2022, at para. 324 ("The Committee also notes that in reviewing a tribunal's reasoning, the committee may clarify the reasons of the decision when they are implicit.

274. In this case, the Tribunal stated quite clearly and explicitly its views on the interpretation of the Stabilization Agreement and the applicable Peruvian laws and regulations. It found, without any ambiguity, that the Stabilization Agreement covered only the specific project for which it was entered into and nothing more. This was entirely consistent with the conclusions of all relevant Peruvian administrative and judicial organs. Claimant knew, and knows, that a supplemental decision by the Tribunal would not have altered the fundamental reasoning underlying the Award.

275. Even assuming *quod non* that the Tribunal agreed with Claimant that it had inadvertently omitted to issue a decision on Freeport's claim regarding the waiver of penalties and interest on Royalty Assessments, the Tribunal's decision would have undoubtedly followed the logic of the Tribunal's analysis in the Award: there was no "reasonable doubt" as to the interpretation of the Stabilization Agreement, the Mining Law, and its Regulation and Freeport, Phelps Dodge, or SMCV had no reasonable basis to understand otherwise. Thus, it follows inevitably from the Tribunal's analysis in the Award that, faced with a request for a supplemental decision, the Tribunal would have necessarily rejected Claimant's alternative claim on Perú's alleged failure to waive penalties and interest on Royalty Assessments under Article 170 of the Tax Code. This is the real reason why Claimant did not seek the appropriate remedy available to it under the ICSID Convention to resolve its alleged complaint regarding the Tribunal's Award.

276. In sum, even assuming, *arguendo*, that the *ad hoc* Committee were to find that the Tribunal failed to address Claimant's claim concerning penalties and interest on Royalty Assessments (it should not), Claimant's strategy of waiting to seek annulment with a new panel

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Finally, the Committee also agrees with the Respondents when referring to the considerations of the committee in *Teinver*, 'that a tribunal has no duty to follow the parties in the detail of their arguments, and that the sole fact of failing to address one or more of the same does not in itself entail annulment, unless the argument in question was so important that it would clearly have been determinative of the outcome.'").

rather than seeking supplementation under Article 49(2) with the original Tribunal whose view on the alleged omission was known to Claimant is an abuse of the annulment process under the ICSID Convention. As such, Claimant's application for annulment should be dismissed.

277. The appropriate course of action would have been for Claimant to pursue a supplementary decision from the original Tribunal rather than to seek annulment of the Award. Claimant failed to seek supplementation of the Award from the original Tribunal, because it knew the Tribunal's supplementation of the Award would not favor Claimant. Thus, even if the Committee were to identify a basis for annulment, it should consider the circumstances discussed in this section—including Claimant's failure to request a supplementary decision—and exercise its discretion to uphold the Award in its entirety.

B. THE COMMITTEE HAS BROAD DISCRETION TO UPHOLD THE AWARD

278. Even if the Committee were to find that the Tribunal committed an annullable error (it should not), the Committee should exercise its discretion to not partially annul the Award. Annulment committees have consistently held that they must exercise their discretion in a manner that preserves the purpose of the annulment remedy and upholds the binding nature and finality of arbitral awards.[466] In particular, *ad hoc* committees have recognized that annulment is an exceptional recourse that should respect and consider the finality of the award.[467] Similarly, in its Draft Convention on Arbitral Procedure—which served as the foundation for the annulment grounds in the ICSID Convention—the International Law Commission ("ILC") acknowledged that

[466] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 80.

[467] *See* **RALA-10**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment, January 24, 2014, at para. 118; *see also*, **RALA-45**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016, at para. 165; **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, December 27, 2016, at para. 123.

the finality of arbitral awards is a fundamental aspect of arbitral practice.[468] The ILC also recognized that there remains a need for exceptional remedies designed to preserve both the judicial nature of the award and the parties' consent as the basis of the tribunal's jurisdiction.[469] As noted by ICSID's Updated Background Paper, the ILC aimed to strike a balance between respecting the finality of awards and addressing egregious instances of jurisdictional overreach or injustice.[470]

279. This purpose means, first, that the narrow and precise grounds for annulment in the ICSID Convention are the only ones that permit annulment of an award. Second, the above purpose means that, even when an annullable error is identified (none exists in this case), absent any "egregious violations of certain basic principles,"[471] *ad hoc* committees are not obliged to annul the award—rather, they retain discretion to uphold the award.

280. Indeed, annulment committees have consistently concluded that (i) annulment is not mandatory; and (ii) even when one of the grounds under Article 52(1) is satisfied, the *ad hoc* committee retains discretion to decide whether to annul the award.[472] For example, the *ad hoc* committee in *EURUS Energy Holdings Corporation v. Spain* recently observed that:

> if it determines that a ground for annulment is present, an annulment committee has the authority, but not the obligation, to annul the award. As explained by the *Orascom v. Algeria* committee, *ad hoc* committees retain a degree of discretion whether to annul awards, even if an annullable error is identified. Undoubtedly, a factor that

[468] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 8.

[469] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 8.

[470] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 8.

[471] **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 39.

[472] *See* **AALA-16**, ICSID Secretariat, *Updated Background Paper on Annulment*, March 2024, at para. 80 (4). *See also* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 37 (*citing* Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings* in Annulment of ICSID Awards (Emmanuel Gaillard and Yas Banifatemi eds. 2004), at p. 19). *See also* **RALA-5**, *Tulip v. Turkey*, Decision on Annulment, at para. 45; **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at para. 24.

> will weigh heavily in their analysis is the impact of the error on the award itself. In this regard, the *Vivendi I* committee cautioned against "the annulment of awards for trivial cause."[473]

281. In the same vein, the annulment committee in *MINE* held that:

> Article 52(3) provides that an *ad hoc* Committee "shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)." The Convention does not require automatic exercise of that authority to annul an award whenever a timely application for its annulment has been made and the applicant has established one of the grounds for annulment. Nor does the Committee consider that the language of Article 52(3) implies such automatic exercise.[474]

282. In this case, the alleged (but denied) annullable error does not amount to a situation that would warrant the partial annulment of the Award. In particular, it does not come close to constituting an egregious violation of any fundamental principle. Even if the *ad hoc* Committee were to determine that the Tribunal manifestly exceeded its powers, failed to state the reasons, or seriously departed from a fundamental rule of procedure with respect to Claimant's claims on the penalties and interest issued on the Royalty Assessments (it should not), annulment is not justified in this case.

283. As Respondent explained in Section II.C.2.b. above, the Tribunal (consistent with the rulings of the relevant Peruvian agencies and courts) has already ruled that:

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[473] **RALA-3**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Annulment, July 31, 2025, at para. 75. (emphasis added).

[474] **AALA-4**, *MINE v. Guinea*, Decision on Annulment, at para. 4.09 (emphasis added). *See also* **RALA-4**, *CDC Group plc v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, at para. 37 ("Keeping the object and purpose of the Convention as well as these underlying policy considerations in mind, we note that the *ad hoc* Committees operating during the last two decades have considered that a Committee has discretion to determine not to annul an Award even where a ground for annulment under Article 52(1) is found to exist... We thus should consider the significance of the [alleged annullable] error relative to the legal rights of the parties."); **RALA-44**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic)*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment, August 10, 2010 ("*Vivendi II*, Decision on Annulment"), at para. 252 ("[E]ven in the case of annullable error, the *ad hoc* Committee still has a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so.").

- The language in the Mining Law and its Regulations was clear: mining stabilization agreements provided stability guarantees only to the investment project for which the agreement was entered into.[475] Indeed, the Tribunal found that "it does not follow from the plain text of the Mining Law and Regulations that stabilization agreements should apply to entire 'concessions' or 'mining units' as the Claimant argues."[476] The Tribunal was unequivocal in its conclusion that "nothing in the Mining Law and its Regulations provide[s] for such a reading."[477] The Tribunal added that it was "convinced that the Mining Law and Regulations limit the scope of stability guarantees to specific mining projects set out in the investment program in the feasibility study."[478]

- The language of the Stabilization Agreement was also clear: the agreement provided stability guarantees only for the Leaching Project.[479] Specifically, the "Tribunal f[ound] that it ha[d] conclusively established under the applicable rules of contract interpretation that the [Stabilization] Agreement did not extend to the entire Mining and Beneficiation Concessions. Rather, the stabilization guarantees only extended to the Leaching Project, which was the subject matter of the Feasibility Study and was the subject matter of the [Stabilization] Agreement."[480]

- The scope of mining stabilization agreements was already defined under the original Mining Law, and the 2014 amendment did not change that.[481] In the Tribunal's words when analyzing the 2014 amendment, the Mining Law (in its original form) "already provided that the scope of stabilization agreements was limited to what was foreseen in the feasibility study."[482]

- SUNAT consistently treated mining stabilization agreements as limited to the investment project for which the agreement was entered into.[483]

284. These rulings show that the Tribunal found that there was no doubt (much less reasonable doubt) that the Stabilization Agreement did not cover the Concentrator Project. Thus,

[475] *See supra* at paras. 97-110.

[476] **AA-1**, *Freeport* Award, at para. 698; *see also id*. at paras. 694, 697-814.

[477] **AA-1**, *Freeport* Award, at para. 698 (emphasis added).

[478] **AA-1**, *Freeport* Award, at para. 717.

[479] *See supra* at paras. 111-22.

[480] **AA-1**, *Freeport* Award, at para. 813.

[481] *See* **AA-1**, *Freeport* Award, at para. 707.

[482] **AA-1**, *Freeport* Award, at para. 707.

[483] *See* **AA-1**, *Freeport* Award, at para. 716.

the Tribunal has already ruled on the merits of the question whether there is reasonable doubt related to the correct application of the Mining Law and its Regulation (there is none). In other words, the alleged annullable error has no impact on the Tribunal's decision and does not warrant partial annulment.

285. Moreover, any partial annulment would force Perú into a futile but costly arbitration. The Tribunal's rulings described above remain unchallenged and constitute *res judicata*. Accordingly, any tribunal subsequently constituted to decide on Claimant's claim related to alleged "reasonable doubt" and the waiver of penalties and interest, in the event of partial annulment (which should not occur), would be bound by the Tribunal's determination that the language in the Mining Law and Regulation was clear, which would not support a waiver of penalties and interest. Thus, if the Committee were to decide to partially annul the Award as Claimant requests, it would only create a situation where Perú could face a new and lengthy arbitration only to end in the same place it is now—total dismissal of Claimant's unsubstantiated claims. Hence, there is no compelling basis for the Committee to partially annul the Award.

286. Annulling the Award would not only undermine the intentionally narrow scope of annulment proceedings under the ICSID Convention, but it would also impose an undue and unjustified financial burden on the Republic of Perú. To recall, this is not the first time Claimant is submitting its claims on the scope of the Stabilization Agreement to litigation—this is a 20-year dispute, where Claimant's deep pockets have forced Perú to defend itself at every level nationally and internationally. The Committee should put an end to Claimant's actions and not allow it to continue to litigate this dispute yet again simply because it disagrees with the Tribunal's decision.

IX. CLAIMANT SHOULD BE HELD LIABLE FOR ALL COSTS AND LEGAL FEES INCURRED IN THESE PROCEEDINGS

287. In accordance with Articles 52(4) and 61(2) of the ICSID Convention, together with Rule 47(1)(j) of the ICSID Arbitration Rules, *ad hoc* committees have considerable discretion to determine the allocation of costs and fees of annulment proceedings.[484] Consequently, there is no strict or predetermined rule for the distribution of costs and legal fees in ICSID annulment cases; instead, such decisions are made according to the particular circumstances of each proceeding.

288. Indeed, in the exercise of their discretion, several *ad hoc* committees have ordered that each party bear its own legal fees and that the costs of the annulment proceeding be shared equally between the parties.[485]

289. Perú has not always sought recovery of its legal fees in annulment proceedings, on the principle that even if the award is annulled, the losing party in the annulment proceeding is not responsible for any defects in the award. But Claimant's application goes far beyond what the annulment remedy was designed to address and, thus, warrants a different result. For the reasons stated below, in this case, Claimant should bear the cost of Respondent's legal fees.

290. *First*, the essence of Claimant's challenge is its allegation that the Tribunal failed to decide an issue before it when, in fact, the Tribunal did decide that issue, declining jurisdiction over Claimant's claim that penalties and interest on Royalty Assessments should be waived.

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[484] *See* **AALA-1**, International Centre for Settlement of Investment Disputes: ICSID Convention, Regulations and Rules (2006), Arts. 52(4) and 61(2); *see also id.* at Rules 47(1)(j) and 53.

[485] *See* **RALA-51**, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Annulment, June 2, 2025, at para. 432; **RALA-40**, *Agility Public Warehousing Company K.S.C.P. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, February 8, 2024, at para. 208; **RALA-52**, *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Annulment, July 7, 2020, at para. 187; **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, December 18, 2012, at paras. 352, 357-58; **AALA-9**, *Fraport* Decision on Annulment, at paras. 282-86; **RALA-6**, *Soufraki v. UAE*, Decision on Annulment, at para. 138; **RALA-53**, *MTD Equity Sdn Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, at paras. 110-12.

291. *Second*, even if the Tribunal failed to decide an issue before it (it did not), Claimant had a straightforward and effective remedy under Article 49(2) of the ICSID Convention. It intentionally chose not to pursue that remedy and, instead, initiated a meritless annulment proceeding — thereby abusing the annulment process.

292. *Third*, it is evident that the Tribunal would have rejected Claimant's alternative Royalty Assessment claim had it addressed Claimant's arguments on the merits. Claimant's insistence to the contrary lacks merit.

293. Claimant's unfounded application has forced Perú to incur unnecessary costs.

294. For these reasons, Respondent respectfully requests that, if Claimant's application is dismissed, consistent with the principle that "costs follow the event,"[486] the Committee order Claimant to bear the full costs of these proceedings, including all fees and expenses of the Committee and the Centre, and Perú's full legal fees and costs, together with interest. But even if Claimant were to prevail on any ground of annulment, it should still bear Perú's legal costs in the proceedings, as extraordinary circumstances apply here. At a minimum, Claimant had a more appropriate remedy available in the form of a request for a supplementary decision under Article 49(2) of the ICSID Convention. By pursuing annulment instead of an Article 49(2) remedy, Claimant engaged in an abuse of the annulment process, the costs of which Respondent should not be required to bear.

[486] **RALA-54**, *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Annulment, June 11, 2025, at para. 192; **RALA-46**, *9REN Holding S.a.r.l v. Kingdom of Spain,* ICSID Case No. ARB/15/15, Decision on Annulment, November 17, 2022, at paras. 325-30; **RALA-37**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina's Application for Annulment, May 29, 2019, at paras. 253, 256-57; **RALA-29**, *OI European Group B.V. (OIEG) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment of the Bolivarian Republic of Venezuela, December 6, 2018, at paras. 384-85.

X. RELIEF REQUESTED

295. The claims submitted by Claimant in its Memorial on Partial Annulment are unfounded and do not belong in an annulment proceeding. Claimant is attempting to reargue issues that have already been decided, with full reasoning, in accordance with due process, and within the Tribunal's authority.

296. Accordingly, the Republic of Perú respectfully requests that the *ad hoc* Committee reject Claimant's application for partial annulment in its entirety and order Claimant to bear all costs and expenses related to this annulment proceeding, including ICSID's charges, the expenses and fees of the *ad hoc* Committee, and Perú's legal representation costs.

Respectfully submitted,

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