

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.,**

*Claimant,*

v.

**Republic of Perú,**  
*Respondent.*

Case N° ARB/20/8

**Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction**

May 4, 2022

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## I. INTRODUCTION

1. At the heart of almost everything that Claimant, Freeport McMoRan Inc. (“Claimant”), seeks to litigate before this Tribunal is a single question of Peruvian law that has already been finally and definitively resolved, through litigation all the way up to and including Perú’s Supreme Court.

2. All of Claimant’s claims arise out of a contract—an agreement signed between Peruvian company Sociedad Minera Cerro Verde S.A.A. (“SMCV”) and Perú’s Ministry of Mines and Energy (“MINEM”) on February 13, 1998 (“1998 Stabilization Agreement”) that granted legal stability benefits. The question is about the scope of that Agreement, which is a matter of Peruvian law. Claimant maintains that the Agreement encompassed all of SMCV’s activities and investment projects of any kind that might be conducted within the area of its mining concessions at any time during a period of fifteen years. But that is not what the contract said or meant—and on July 12, 2017, Perú’s Supreme Court ruled on that precise question. The Supreme Court held that the 1998 Stabilization Agreement shielded from legislative and regulatory changes only the SMCV activities related to the specific investment project for which the Agreement was signed (namely, a leaching plant that processes a particular type of copper ore). The core problem with this arbitration is that Claimant is attempting to dress up that local law question as an investment treaty dispute, in order to use this Tribunal as a court of last resort to overturn the Peruvian Supreme Court’s answer to that Peruvian law question.

3. In 2007, almost a decade after SMCV had signed the 1998 Stabilization Agreement, Claimant, a U.S. company, acquired an indirect majority stake in SMCV. SMCV, in turn, holds a series of mining concessions (“Mining and Beneficiation Concessions”) that grant it the right to operate the Cerro Verde copper mine located in Arequipa, Perú (“Cerro Verde Mine”). SMCV was established much earlier, in 1993, after Perú decided to privatize the operation of the Cerro Verde Mine.

4. In 1992, Perú enacted important legislation to promote investments in its mining sector. In particular, Perú opened the door for mining sector investors (domestic and foreign) to sign legal stabilization agreements that would shield specific capital investment projects and their related activities (*e.g.*, ore sales, profits) and assets from legislative or regulatory changes in tax, foreign currency exchange, and administrative matters for up to fifteen years, depending on the size of the investment (“mining stabilization agreements”). These mining stabilization agreements are regulated by Title Nine of the Single Unified Text of the General Mining Law (*Texto Único Ordenado de la Ley General de Minería* –“Mining Law”).

5. In January 1996, SMCV—owned at the time by Cyprus Amax Minerals Company (“Cyprus”)—requested that MINEM enter into a mining stabilization agreement with SMCV with respect to a US \$238 million dollar investment project to expand SMCV’s leaching facilities to increase its production capacity of cathodes of copper from certain types of copper ore (oxides and secondary sulfides) (the “Leaching Project”). That investment project was specifically described and analyzed in a feasibility study that was attached to SMCV’s request, as required under Peruvian law. In May 1996, MINEM approved the feasibility study (the “1996 Feasibility Study”) for the Leaching Project. In February 1998, MINEM and SMCV entered into the 1998 Stabilization Agreement, which shielded all the activities related to the Leaching Project from any tax, foreign currency exchange, or administrative legislative and regulatory changes for a period of fifteen years.

6. In 2004, SMCV—by that time owned by Phelps Dodge Mining Corporation (“Phelps Dodge”)—started to develop a new capital investment project in relation to the Cerro Verde Mine. SMCV wanted to build a concentrator plant (“Concentrator”) to process a different type of copper ore (primary sulfides) from the Cerro Verde Mine (“Concentrator Project”). Until 2004, SMCV had discarded any plans to build a concentrator plant, because it was not economically viable; SMCV had not been able to economically extract and process the necessary

primary sulfides from the Cerro Verde Mine. In 2004, access to water and energy supply improved significantly in Arequipa, which allowed SMCV to go forward with the project to build the Concentrator, and construction was completed in 2006.

7. The Concentrator Project is entirely separate and distinct from the Leaching Project. While the Leaching Project processes oxides and secondary sulfide ore to produce copper cathodes (*i.e.*, refined copper), the Concentrator Project processes primary sulfides to produce copper concentrate (25% copper) which is sold for export. Primary sulfides are a type of copper ore (different from oxides and secondary sulfides) which cannot be economically processed in a leaching facility. The Concentrator Project, thus, was a new and separate capital investment plan, distinct from the Leaching Project that was constructed years earlier.

8. Claimant insists in this arbitration—as SMCV already did, unsuccessfully, before Perú’s administrative bodies and eventually its Supreme Court—that all of SMCV’s activities and assets related to this new capital project were entitled to receive the 1998 Stabilization Agreement’s stability benefits. In other words, according to Claimant, SMCV’s new project—which was constructed between 2004 and 2006—was entitled to operate under the legal and regulatory regime that had been stabilized for the Leaching Plant in 1998, some 6 years before the new project was launched. According to Claimant, SMCV’s 1998 Stabilization Agreement was an unlimited, blanket agreement for anything that the company might elect to do at the Cerro Verde Mine for 15 years. On Claimant’s theory, the Republic of Perú granted those stability benefits to any and all current and future activities and assets that were or would be located within the same Mining and Beneficiation Concessions in which SMCV implemented the “initial investment.”

9. Perú did no such thing. As Respondent establishes in this Counter-Memorial—and as Perú’s Supreme Court has already ruled—SMCV’s interpretation of the 1998 Stabilization Agreement is contradicted by the plain meaning of the language of Title Nine of the

Mining Law and the Agreement itself. The 1998 Stabilization Agreement granted stability guarantees solely and exclusively to the activities related to the investment project (the Leaching Project) for which the Stabilization Agreement was approved.

10. In addition, SMCV's (and Claimant's) interpretation of the Agreement is contradicted by contemporaneous evidence that shows that SMCV (and Claimant) knew or should have known that the Concentrator Project fell outside the scope of the 1998 Stabilization Agreement.

11. First, SMCV was worried about this question and so it sought, but never obtained, confirmation in writing from Perú that SMCV's interpretation of its 1998 Stabilization Agreement was correct. Instead, SMCV relied (and Claimant claims to have relied derivatively) on alleged oral confirmations from select government officials (only one of whom provides a witness statement in these proceedings) and written documents that do not actually provide confirmation of SMCV's (untenable) interpretation.

12. Second, although Claimant spins a narrative in which MINEM officials agreed with SMCV's interpretation of its 1998 Stabilization Agreement up until June 2006, when the government allegedly (and according to Claimant, secretly) gave in to political pressure from Congress to narrow the scope of the Agreement, the truth is very different. Contemporaneous evidence shows that Perú has consistently maintained that the scope of mining stabilization agreements, and SMCV's 1998 Stabilization Agreement in particular, is limited to only the specific investment project or projects for which the stabilization agreements were signed. Most notably, prior to June 2006:

- 2002: The National Superintendency of Customs and Taxes (*Superintendencia Nacional de Aduanas y Tributos* –“SUNAT”) issued a report explaining the limited scope of mining stabilization agreements.
- September 2003: In a Report signed by Ms. Maria Chappuis—Claimant's own witness—MINEM explained to SMCV that the 1998 Stabilization Agreement covered only the Leaching Project and did not grant benefits to the company as a whole.

- March 2005: MINEM officials meet with Phelps Dodge at a mining conference in Toronto, Canada and discuss the limited scope of SMCV's 1998 Stabilization Agreement and, in particular, the fact that it did not cover the Concentrator Project.
- April 2005: MINEM's Legal Director, Mr. Felipe Isasi—a witness in this arbitration—prepared a report explaining the limited scope of stabilization agreements and the application of the 2004 Mining Royalty Law to mining companies with such agreements.
- June 2005: Minister of Mines and Energy, Mr. Glodomiro Sánchez, gave a televised, public presentation to Peru's Congress, specifically before the Energy and Mines Congressional Committee, to explain that mining companies were obliged to pay royalties with respect to every investment mining project that was not covered by a mining stabilization agreement at the time the Royalty Law was enacted (2004).
- September 2005: Mr. Isasi prepared another report explaining the limited scope of stabilization agreements in general, and the limited scope of SMCV's 1998 Stabilization Agreement in particular. This report was forwarded to Congress in October 2005.
- October 2005: Minister Sánchez sent a letter to Congressman Oré forwarding Mr. Isasi's September 2005 report, highlighting in the cover letter the fact that SMCV's primary sulfide plant (*i.e.*, the Concentrator Project) was not covered by the 1998 Stabilization Agreement.
- November 2005: Minister Sánchez sent a letter to Congressman Diez essentially repeating what Mr. Isasi's April 2005 and September 2005 reports explained.
- May 2006: Minister Sánchez and Mr. Isasi made another televised presentation before Congress's Energy and Mines Congressional Committee, specifically explaining the scope of the 1998 Stabilization Agreement and SMCV's obligation to pay royalties with respect to the Concentrator Project.

13. In its Memorial, Claimant never even mentions the 2002 SUNAT report, the language in the 2003 MINEM Report, or the presentations made before Congress in 2005-2006—which were public. And, while it acknowledges the existence of the reports prepared by Mr. Isasi in 2005, Claimant misrepresents their content in order to support its dramatic, but invented, narrative that MINEM suddenly changed its position in June 2006.

14. Finally, Claimant does not put on the record any evidence of credible due diligence that it undertook before it invested in SMCV in March 2007, or that SMCV undertook at the time it approved its investment in the Concentrator Project in October 2004—even though

the record shows that Claimant knew that this was a looming and economically significant issue for SMCV, and SMCV was clearly alert to and concerned about it. For example, Claimant does not submit any report, study, or legal memorandum prepared for it by internal or external counsel about the Mining Law or the scope of the 1998 Stabilization Agreement. Instead, the only evidence it has put on the record are bald claims about alleged oral confirmations made to SMCV and Claimant's predecessor, Phelps Dodge, that the Concentrator Project was entitled to the stability benefits provided by the Agreement. Claimant, it seems, dove head-first into the Cerro Verde Project without doing its homework.

15. In sum, SMCV and Claimant knew or should have known that the Concentrator Project could not benefit from the stabilized regime granted to the Leaching Project and would be subject to paying taxes and administrative fees (such as royalties) in accordance with Peruvian law. Nevertheless, they chose to ignore that information—or, perhaps, chose to cross their fingers and hope that SMCV could get away with its interpretation. When construction of the Concentrator Project was completed in 2006, SMCV acted as if the new investment project were covered by the Agreement. It did not pay royalties owed in relation to that Project, it failed to keep separate accounts for the operations of the Leaching Project (the stabilized project) and the Concentrator Project (the non-stabilized project), and it failed to pay other taxes, among other omissions.

16. Not surprisingly, Perú's tax authority SUNAT—in an obviously legitimate exercise of its oversight authority—took note of those omissions and started to audit SMCV's accounts in 2009. SUNAT discovered that SMCV had failed to pay royalties and other taxes in relation to the Concentrator Project and, thus, began to assess the past-due royalties and taxes.

17. SMCV was provided ample opportunity to be heard and to challenge SUNAT's decisions. SMCV appealed SUNAT's assessments internally within SUNAT, then before Perú's Tax Tribunal (an administrative body that resolves disputes between taxpayers and SUNAT),

and then before Perú's judiciary, including before the Supreme Court. SMCV was unsuccessful at every instance save one (a first-instance decision that was subsequently overturned). Both the Tax Tribunal and Peruvian courts, acting reasonably and in accordance with Peruvian law, held that the Concentrator Project was not covered by the 1998 Stabilization Agreement and that SMCV was obligated to pay royalties and taxes accordingly in connection with that project. Not happy with SMCV's litigation results, Claimant has decided to try again in a new forum. It is here before this Tribunal to take a second (or third or fourth) bite at the apple, to relitigate the same issues, and to try to overturn the Peruvian Supreme Court's decision through this arbitration.

18. Claimant's case is also defective because the Tribunal lacks jurisdiction over the claims that Claimant has asserted in this arbitration. The Tribunal lacks jurisdiction on four grounds: First, Claimant has failed to file claims based on the Royalty and Tax Assessments within the limitations period under Article 10.18.1 of the U.S. – Perú Trade Promotion Agreement ("TPA"). Claimant first knew or should have known about the alleged breaches and that it incurred loss or damage related to those alleged breaches more than three years before it submitted its Notice of Arbitration to ICSID on February 28, 2020 (*i.e.*, Claimant first knew or should have known about the alleged breaches long before February 28, 2017). Second, Claimant's claims concerning the Royalty and Tax Assessments are based on acts or facts that occurred before the TPA entered into force on February 1, 2009, and thus, those claims fall outside of the jurisdiction of the Tribunal in accordance with Article 10.1.3 of the TPA. Third, because SMCV elected to submit most of the claims that Claimant presses in these proceedings (*i.e.*, those challenging the Royalty and Tax Assessments against SMCV) to administrative tribunals of Respondent and binding dispute settlement procedures (*i.e.*, SUNAT's appeal body (Claims Division), and in some cases, the Tax Tribunal), Claimant may not submit (on behalf of SMCV) those same claims to this Tribunal in accordance with Article 10.18.4 of the TPA.

Fourth, because Claimant failed to prove that it relied on the 1998 Stabilization Agreement when it established or acquired its covered investments, Claimant may not submit (on behalf of SMCV) claims of breaches of the 1998 Stabilization Agreement pursuant to Article 10.16.1(b) of the TPA.

19. But, even if the Tribunal were to find that it has jurisdiction to hear Claimant's claims (it should not), Claimant's claims fail on the merits. Claimant asserts two claims in this arbitration, namely that: (i) Perú breached the 1998 Stabilization Agreement; and (ii) Perú breached Article 10.5 of the TPA (requiring fair and equitable treatment ("FET") limited to the customary international law minimum standard of treatment). Neither of these claims survives scrutiny.

20. Claimant's breach-of-contract claim, brought on behalf of SMCV, is based on Claimant's allegation that Perú breached obligations owed to SMCV under the 1998 Stabilization Agreement when it imposed certain Royalty and Tax Assessments on the Concentrator Project activities. The key dispute between the Parties is the interpretation of the contract, *i.e.*, whether the stability guarantees covered the Concentrator Project. However, this is a question of Peruvian law that SMCV has already fully litigated in Peruvian courts, including before the Supreme Court of Perú. Specifically, the Peruvian Supreme Court ruled against SMCV and held that the stability guarantees provided in the 1998 Stabilization Agreement are limited to the capital investment project that was the subject of that Agreement—namely, the Leaching Project—and did not include the Concentrator Project. Thus, as a finally-decided matter of Peruvian law, Perú's imposition of the Royalty and Tax Assessments on SMCV's Concentrator-related activities does not violate the 1998 Stabilization Agreement. And, SMCV (on whose behalf Claimant asserts this claim) is collaterally estopped from arguing otherwise. Even were that not the case, the Tribunal should (and arguably, must) respect the Peruvian

Supreme Court's definitive ruling on the meaning of Peruvian law and its application to this Peruvian-law contract.

21. Moreover, even if the Tribunal were to consider the merits of Claimant's contract-breach arguments anew, for itself, the Mining Law and Regulations and the 1998 Stabilization Agreement are clear: the stability guarantees apply to the investment project that gave rise to and was specifically identified in the Agreement, not to the entire mining unit or the entire concession(s) and whatever SMCV might do there. Perú has been consistent and transparent on this point, including in numerous reports and publicly televised presentations to Congress. This being the case, Perú's imposition of the Assessments did not violate its obligations under the 1998 Stabilization Agreement.

22. Claimant's Article 10.5 claim is equally deficient. Specifically, Claimant argues that Perú's actions violated its FET obligations (limited to the customary international law minimum standard of treatment) under Article 10.5, because they (i) frustrated Freeport's and SMCV's legitimate expectations; (ii) were arbitrary and based on political calculations; (iii) were inconsistent and non-transparent; and (iv) as to certain acts, constituted a denial of justice. Claimant presents these claims by diving directly into details, hoping that the Tribunal will ignore the fundamental—and fatal, for Claimant—proposition that an FET provision limited to the customary international law minimum standard of treatment will only be breached by truly egregious government misconduct and that it does not afford many of the protections that Claimant seeks to invoke. That proposition is all the more powerful here, where SMCV could and did avail itself of a full range of administrative and judicial means to challenge the government's alleged missteps. Given that, the Tribunal could uphold Claimant's FET claims only if it were to find either that SMCV was denied due process in those proceedings, or that Perú's applicable laws and legal system themselves are impermissibly unfair and inequitable under international law standards.

23. The facts do not support, and instead clearly preclude, any such finding. As elaborated in Section II, Perú has consistently interpreted the 1998 Stabilization Agreement and the Mining Law and Regulations to provide stability guarantees only to the investment project defined in the feasibility study that served as the basis for the stabilization agreement, not to unlimited and unrelated investment projects that the investor might undertake at any point during the 15-year period in which the stabilization agreement is in force. Given that the facts show that Perú's interpretation of the 1998 Stabilization Agreement has not changed, it certainly could not be the case, as Claimant alleges, that Perú somehow changed its approach as a result of any undue political pressure. Moreover, Perú has been transparent about its interpretation from the outset. Perú cannot be held liable for Claimant's failure to perform its own due diligence.

24. In addition, as just noted, SMCV has had, and has availed itself of, every possible opportunity to adjudicate this matter in administrative proceedings and in Peruvian national courts. From SUNAT, to the Tax Tribunal, to the first-instance Contentious Administrative Courts, to the appellate Superior Courts, and all the way up to the Supreme Court of Perú, SMCV has litigated the scope of the stability guarantees and whether they extend to the Concentrator Project (and sought a waiver of interest and penalties to which, under Peruvian law, it was not entitled). SMCV has lost at nearly every step of the way. In the decisive blow to Claimant's case, the Peruvian Supreme Court issued a thorough and well-reasoned 80-page decision in which it held that the 1998 Stabilization Agreement's stability guarantees do not apply to the Concentrator Project. Claimant disagrees with these decisions, but, notably, it only raises a denial of justice claim with respect to certain Tax Tribunal proceedings. But there is no evidence on the record that SMCV was treated unfairly or somehow denied its due process rights (and there is a very high bar to such a finding, particularly when the due process claims involve administrative, not judicial, proceedings).

25. What Claimant is really seeking in this arbitration is an appeal from the Peruvian Supreme Court's decision, not a remedy for any kind of fundamental unfairness assessed under international standards. The facts show that Perú has upheld its obligations under TPA Article 10.5 to act fairly and equitably towards Claimant (and SMCV) throughout this dispute, and this Tribunal must reject Claimant's attempt to use this forum to challenge an issue which has been fully and fairly resolved in Perú.

26. Even if, contrary to the facts and law of the case, the Tribunal were to somehow assign international liability to Perú (it should not), Claimant's damages calculation is also flawed. Defects undermine Claimant's calculation of its alleged damages both for its main claim (*i.e.*, that all the Royalty and Tax Assessments breached the 1998 Stabilization Agreement and/or violated the TPA) and its alternative claim (*i.e.*, that, even if the Royalty and Tax Assessments were proper, the imposition of penalties and interest on those Assessments, Perú's refusal to reimburse certain GEM payments, and Perú's calculation of certain taxes breached the 1998 Stabilization Agreement and/or violated the TPA).

27. Claimant's damages theory is that, but for the Royalty and Tax Assessments (or, for Claimant's alternative claim, but for the penalties and interest, the refusal to reimburse certain GEM payments, and the allegedly erroneous calculation of certain taxes), SMCV would have obtained additional cash flows and SMCV would have subsequently distributed that cash to its shareholders, including Claimant. In general terms, Perú does not resist that approach. However, Claimant's calculation of its damages under that approach is another matter entirely. In particular, Claimant includes in its calculation tax obligations that SMCV has not actually paid yet, and that, if Claimant is successful in this arbitration, likely will never pay. The Tribunal cannot compensate Claimant for damages it has not sustained. In addition, in some instances, Claimant is overly optimistic about the dates on which it claims SMCV would have decided the amount of dividends to be distributed and would have distributed those funds to

Claimant. Claimant also applies an excessive and improper interest rate that further inflates its damages. Claimant ignores SMCV's failure to mitigate its damages by waiting so long to pay its obligations while racking up significant interest and penalties. And Claimant includes in its calculation damages related to certain Tax Assessments that are explicitly excluded from protection under the TPA. When these (and other) errors are corrected, Claimant's alleged damages are significantly reduced.

28. For the reasons described more fully herein, the Tribunal must reject all of Claimant's claims in full. In the sections that follow, Respondent explains that: (i) Claimant's claims are contradicted by the factual record (Section II below); (ii) the Tribunal lacks jurisdiction to hear Claimant's claims (Section III below); (iii) Claimant's legal claims have no merit (Section IV below); and (iv) Claimant's damages calculations are improperly inflated (Section V below).

29. Respondent's Counter-Memorial is accompanied by 174 factual exhibits numbered RE-1 to RE-174, and 90 legal authorities numbered RA-1 to RA-90. Respondent also submits the following witness statements and expert reports:

- Witness Statement of César Polo (RWS-1);
- Witness Statement of Felipe Isasi (RWS-2);
- Witness Statement of Oswaldo Tovar (RWS-3);
- Witness Statement of Gabriela Bedoya (RWS-4);
- Witness Statement of Zoraida Olano (RWS-5);
- Witness Statement of Marco Camacho (RWS-6);
- Witness Statement of Haraldo Cruz (RWS-7);
- Expert Report of Francisco Eguiguren (RER-1);
- Expert Report of Rómulo Morales (RER-2);
- Expert Report of Jorge Bravo and Jorge Picón (RER-3);

- Expert Report of Stephen Ralbovsky (RER-4); and
- Expert Valuation Report of Isabel Kunsman of AlixPartners (RER-5).

## II. FACTUAL BACKGROUND

30. In its Memorial, Claimant asserts that Respondent breached the TPA when it allegedly violated the 1998 Stabilization Agreement.<sup>1</sup> According to Claimant, the 1998 Stabilization Agreement granted tax and administrative stability benefits for all of SMCV's assets and investments within its Mining and Beneficiation Concessions, including the construction and operation of the Concentrator Project.<sup>2</sup>

31. In particular, Claimant describes a series of acts and/or omissions by Respondent that Claimant alleges constitute breaches of Respondent's obligations under the 1998 Stabilization Agreement and Article 10.5 of the TPA: (i) MINEM's alleged inconsistent interpretation of the scope of the 1998 Stabilization Agreement;<sup>3</sup> (ii) SUNAT's alleged incorrect application of the 1998 Stabilization Agreement when it ordered SMCV to pay royalties on ore that was processed in the Concentrator Project;<sup>4</sup> (iii) the Tax Tribunal's alleged violation of SMCV's due process rights in the context of reviewing SMCV's administrative appeals against SUNAT's orders to SMCV to pay royalties related to the Concentrator Project;<sup>5</sup> (iv) Perú's acceptance of SMCV's voluntary financial contributions for investments in local infrastructure and social projects on the alleged understanding that SMCV was making those contributions only because it was not obliged to pay royalties related to the Concentrator Project, and its failure to reimburse SMCV for part of the GEM payments SMCV had incorrectly made;<sup>6</sup> (v)

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<sup>1</sup> See Claimant's Memorial, October 19, 2021 ("Claimant's Memorial"), at paras. 19-26.

<sup>2</sup> See Claimant's Memorial at paras. 2-9.

<sup>3</sup> See Claimant's Memorial at Sections III.F, III.G, III.H, III.K.

<sup>4</sup> See Claimant's Memorial at Sections III.L, III.O.

<sup>5</sup> See Claimant's Memorial at Section III.N.

<sup>6</sup> See Claimant's Memorial at Sections III.I, III.M., III.P.

SUNAT's assessment of certain taxes against SMCV that, according to Claimant, should have been barred by the 1998 Stabilization Agreement; and (vi) SUNAT's and the Tax Tribunal's failure to waive the penalties and interest assessed on each of the Royalty and Tax Assessments.<sup>7</sup> As to all of these allegations, Claimant's description of the facts is incorrect and misleading. Perú's interpretation and application of the 1998 Stabilization Agreement has been consistent, reasonable, and in accordance with Peruvian law.

32. In the sections that follow, Respondent describes the relevant facts to this dispute:
- First, Respondent describes the legal framework applicable to stabilization agreements in Perú at the time SMCV entered into the 1998 Stabilization Agreement—years before Freeport became an indirect majority shareholder in SMCV (Section A).
  - Second, Respondent explains the correct interpretation of the scope of SMCV's 1998 Stabilization Agreement and demonstrates that it was never intended to cover SMCV's investment in the Concentrator Project (Section B).
  - Third, Respondent shows that SMCV, Cyprus (Phelps Dodge's predecessor), Phelps Dodge (Freeport's predecessor), and Freeport failed to conduct any serious or adequate due diligence with respect to the correct interpretation of the 1998 Stabilization Agreement's scope (Section C).
  - Fourth, Respondent demonstrates that, contrary to Claimant's allegations, it did not and could not have confirmed that the 1998 Stabilization Agreement covered SMCV's investment in the Concentrator Project (Section D).
  - Fifth, Respondent explains the voluntary contribution regimes adopted by Perú, demonstrating that these programs could not be interpreted by SMCV (or Freeport) as somehow endorsing SMCV's interpretation of the scope of the 1998 Stabilization Agreement (Section E).
  - Sixth, Respondent describes SUNAT's Royalty Assessments on ore processed through the Concentrator Project and demonstrates that these actions did not violate SMCV's 1998 Stabilization Agreement (Section F).
  - Seventh, Respondent describes the Tax Tribunal's review of SMCV's challenges to SUNAT's orders to pay royalties and shows that the Tax Tribunal acted reasonably and in accordance with Peruvian law (Section G).
  - Eighth, Respondent shows that Claimant's allegations before this Tribunal have already been reviewed and decided by Peruvian local courts, finding in favor of Perú's interpretation of the 1998 Stabilization Agreement. In particular, Perú's

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<sup>7</sup> See Claimant's Memorial at Section III.Q.

Supreme Court confirmed that MINEM's and SUNAT's interpretation and application of the 1998 Stabilization Agreement is correct. In other words, Perú's Supreme Court has already ruled on the heart of this dispute and found in favor of Perú's position—that the scope of the 1998 Stabilization Agreement is limited to the investment project that was described in the 1996 Feasibility Study, namely, the Leaching Project (Section H).

- Finally, Respondent shows that SUNAT acted reasonably and in accordance with Peruvian law when it issued other tax assessments applicable to SMCV's activities and investment projects outside the Leaching Project (Section I).

**A. STABILIZATION AGREEMENTS ARE INTENDED TO ENCOURAGE, AND THEREFORE BENEFIT, SPECIFIC INVESTMENT PROJECTS**

33. Claimant alleges that SMCV's 1998 Stabilization Agreement granted tax, administrative, and foreign currency exchange stability benefits to all of SMCV's mining activities within its concessions and so-called "mining unit."<sup>8</sup> In particular, Claimant claims that the 1998 Stabilization Agreement's terms covered SMCV's activities related to the Concentrator Plant (which was built by the end of 2006), because the Concentrator Project is part of SMCV's Beneficiation Concession, which is part of SMCV's so-called "mining unit."<sup>9</sup> To support this proposition, Claimant asserts that the applicable legal framework in force at the time the 1998 Stabilization Agreement was signed provides that stabilization agreements granted benefits to investors for the "entire mining unit or concession(s) in which the qualifying minimum investment was made, without distinguishing whether the investments were included in the investment program in the feasibility study, different processing methods were used within the mining unit, or otherwise."<sup>10</sup> Claimant's description of the legal framework applicable to stabilization agreements is incorrect and misleading. In addition, as Respondent discusses in Section II.B below, Claimant's description of the scope of the 1998 Stabilization Agreement is also incorrect.

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<sup>8</sup> See, e.g., Claimant's Memorial at para. 6.

<sup>9</sup> See, e.g., Claimant's Memorial at para. 9.

<sup>10</sup> Claimant's Memorial at para. 302 (emphasis omitted).

34. In the following sections, Respondent explains the legal framework applicable to stabilization agreements in Perú and shows that these agreements are intended to grant stability benefits only to the specific investment projects—as carefully detailed and assessed in a feasibility study—for which they were signed.

**1. Mining Stabilization Agreements in Perú Are Targeted and Thus Grant Stabilized Tax, Administrative, and Foreign Currency Exchange Regimes to Specific Investment Projects in the Mining Sector**

35. In the mining sector in Perú, there are two types of stabilization agreements potentially available: legal stabilization agreements which are governed by Legislative Decrees Nos. 662 (“L.D. No. 662”) and 757 (“L.D. No. 757”), and mining stabilization agreements governed by Title Nine of the General Mining Law.<sup>11</sup> Respondent explains the relevant provisions with respect to mining stabilization agreements in Sections 2 and 3 below.

36. The main purpose of these agreements is to encourage specific kinds of investment projects by shielding them from legislative or regulatory reforms for a period of time. These agreements, thus, stabilize the laws and regulations in force at the time an investment is made. Mining stabilization agreements are only available to mining titleholders in Perú, while legal stabilization agreements are available to investors in the designated kinds of investments that comply with the legal requirements to obtain a stabilization agreement.<sup>12</sup> Moreover, in addition to the traditional tax stability benefits, mining stabilization agreements also grant administrative stability benefits (shielding the investment project from, for example, changes in environmental regulations, or the creation of surcharges or fees (like royalties) other than taxes

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<sup>11</sup> See Exhibit RER-1, Expert Report of Francisco Eguiguren, May 4, 2022 (“Eguiguren Report”), at para. 16; Exhibit CA-1, General Mining Law, Supreme Decree No. 014-92-EM, June 3, 1992 (“General Mining Law”); Exhibit CE-304, Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662, August 29, 1991; Exhibit CE-306, Framework Law for Private Investment Growth, Legislative Decree No. 757, November 13, 1991; see also Exhibit RE-21, Regulation on the Guarantee Regimes for Private Investment, Approved by Supreme Decree No. 162-92-EF, October 9, 1992, at Art. 1.

<sup>12</sup> See Exhibit RER-1, Eguiguren Report at paras. 16, 20-21, 36.

that might be imposed on mining activities), and foreign currency exchange benefits.<sup>13</sup> In both cases, stability benefits apply only to the investment project that is the subject of the mining or legal stabilization agreement.<sup>14</sup> The agreement that is subject of this arbitration is a 15-year mining stabilization agreement.

37. Dr. Francisco Eguiguren, Respondent’s constitutional law expert and a prominent jurist in Perú, explains in his expert report that stabilization agreements grant exceptional benefits to investors.<sup>15</sup> Through stabilization agreements, the State agrees to deprive itself of the ability to exercise certain of its sovereign legislative and regulatory powers for a period of time. With respect to tax regulations, for example, the State agrees to lock income tax rates at the level that exists at the time the stabilization agreement comes into force and to not impose new taxes on those companies while the agreement is in force. That, of course, impacts the State’s fiscal policy and ability to collect additional taxes.<sup>16</sup> Necessarily, the State sets careful limits on such an unusual, self-imposed restriction on its important, sovereign powers to tax and to regulate. Although Perú has made a decision, balancing the public interest, that such a temporary sacrifice is worthwhile in order to encourage specific investment projects, the State needs to limit the reach and impact of any such agreement, both in time and in scope.<sup>17</sup>

38. For this reason, stabilization agreements in Perú are limited to specific investment projects that have been carefully assessed and defined at the time the agreement is signed. For example, the State analyzes the size of the investment and its expected revenue, including its projected profits. That way, the State knows the amount of taxes that it expects to collect during

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<sup>13</sup> See Exhibit RER-1, Eguiguren Report at para. 36.

<sup>14</sup> See *infra* Sections II.A.2, II.A.3.

<sup>15</sup> See Exhibit RER-1, Eguiguren Report at paras. 25, 27, 68, 117.

<sup>16</sup> See Exhibit RWS-6, Witness Statement of Marco Camacho, April 18, 2022 (“Camacho Statement”), at paras. 10-11.

<sup>17</sup> See Exhibit RER-4, Expert Report of Stephen Ralbovsky, May 4, 2022 (“Ralbovsky Report”), at paras. 38-39.

the time the agreement is in force and the benefits that the investment project is expected to bring to the economic development of the country.<sup>18</sup>

39. Claimant, however, would have this Tribunal believe that the State goes blindly into that agreement and grants stability benefits to any and all present and future activities and investments that a mining titleholder may someday wish to make within its mining concessions. That cannot be correct, because it would be too unbounded—a mining concession could potentially involve a too-unpredictable range of activities, equipment, and plants. According to Peruvian law, a mining concession grants the right to explore and/or exploit a mineral resource within a specific geographical area for a period of time.<sup>19</sup> Within the area of a mining concession, the titleholder of the concession may develop one or more investment projects to explore and/or exploit the mineral resources encompassed by the concession and to increase its production.<sup>20</sup> For example, the titleholder may opt to invest in multiple mining pits, or any number of different types of plants and equipment (facilities) to process the minerals, or in a range of extractive equipment to separate the ore from the soil, among others.<sup>21</sup> According to Claimant, all of these types of investments—whatever the investor might choose, at whatever point in the economic life of the concession—are automatically stabilized for the sole reason that they are developed within the physical area covered by the mining concession. Claimant’s position is untenable.

40. A State cannot be expected to deprive itself of its legislative and regulatory powers, and, importantly, of potential income to the State treasury to be used to meet its citizens’

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<sup>18</sup> See Exhibit RER-1, Eguiguren Report at para. 39; Exhibit RER-3, Expert Report of Jorge Bravo and Jorge Picón, May 4, 2022 (“Bravo and Picón Report”), at paras. 30-35; Exhibit RER-4, Ralbovsky Report at para. 36.

<sup>19</sup> See Exhibit RE-20, Organic Law for the Sustainable Use of Natural Resources, Law No. 26821, June 25, 1997, at Art. 23; Exhibit CA-1, General Mining Law at Art. 9.

<sup>20</sup> See Exhibit RWS-3, Witness Statement of Oswaldo Tovar, April 18, 2022 (“Tovar Statement”), at paras. 19.

<sup>21</sup> See Exhibit RWS-3, Tovar Statement at paras. 19.

needs, in such an unlimited and unqualified manner.<sup>22</sup> More importantly, Claimant’s position is directly contradicted by the laws and regulations applicable to stabilization agreements in Perú, as Respondent describes in the following sections. According to these laws and regulations, the benefits that are granted to investors through stabilization agreements apply exclusively to the activities related to the investment project for which the agreement was signed.

## **2. Legislative Decree No. 708 and the Single Unified Text of the General Mining Law Regulate Stabilization Agreements in the Mining Sector**

41. In the early 1990s, Perú introduced a series of measures to promote investments in the country. Among others, on November 6, 1991, Perú adopted L.D. No. 708,<sup>23</sup> which supplemented Legislative Decree No. 109, the General Mining Law (“L.D. No. 109”), that provided the legal framework for mining activities at the time.<sup>24</sup> In particular, L.D. No. 109 provided that the State may sign stabilization agreements with mining companies that grant stability benefits to specific investment projects.<sup>25</sup> Depending on the value of the investment committed by the investor, mining stabilization agreements are signed for 10-year or 15-year terms.<sup>26</sup> L.D. No. 708, in turn, sets out more specific terms for these stabilization agreements in the mining sector.

42. In its Ninth Transitory Provision, L.D. No. 708 authorized MINEM to consolidate Perú’s General Mining Law into a single unified text (in Spanish, a *Texto Unico Ordenado*, or “TUO”), which would combine the provisions included in L.D. 109 and L.D. No. 708.<sup>27</sup> Perú

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<sup>22</sup> See Exhibit RER-1, Eguiguren Report at paras. 38-39; Exhibit RER-3, Bravo and Picón Report at paras. 27-29; Exhibit RER-4, Ralbovsky Report at para. 44.

<sup>23</sup> See generally Exhibit CA-46, Law for the Promotion of Investment in the Mining Sector, Legislative Decree No. 708, November 6, 1991.

<sup>24</sup> See Exhibit RWS-1, Witness Statement of César Polo, April 18, 2022 (“Polo Statement”), at para. 6.

<sup>25</sup> See Exhibit CA-37, General Mining Law, Legislative Decree No. 109, June 12, 1981, at Arts. 155, 157.

<sup>26</sup> See Exhibit CA-37, General Mining Law, Legislative Decree No. 109, June 12, 1981, at Arts. 155, 157.

<sup>27</sup> See Exhibit CA-46, Law for the Promotion of Investment in the Mining Sector, Legislative Decree No. 708, November 6, 1991, at Ninth Transitory Provision.

published the TUO of the General Mining Law (“Mining Law”) on June 3, 1992.<sup>28</sup> Title Nine of the Mining Law incorporated L.D. No. 708’s provisions on mining stabilization agreements and governs SMCV’s 1998 Stabilization Agreement.<sup>29</sup>

43. Claimant, along with its witness, Ms. Chappuis, and its legal experts, Dra. Vega and Dr. Bullard, all contend that Title Nine of the Mining Law created a legal stability regime that granted generous benefits to mining companies and that should be interpreted broadly in the companies’ favor.<sup>30</sup> Specifically, according to Claimant, these agreements are meant to cover any activity or investment carried out by the mining company anywhere within the entirety of its Economic-Administrative Unit (referred to by Claimant as a so-called “mining unit”) or concession(s), during the entire 10 -year or 15-year term of the agreement.<sup>31</sup> Claimant’s assertions are incorrect and contrary to Peruvian law. As explained by Mr. César Polo, the Vice Minister of Mines who spearheaded the drafting of the provisions of L.D. 708 (and Title Nine of the Mining Law), stabilization agreements were meant to cover only the specific investment projects for which each agreement was signed—they were never meant to grant unlimited benefits, as Claimant argues in this case.<sup>32</sup>

44. Contrary to Claimant’s allegations, the language of Title Nine of the Mining Law itself shows mining stabilization agreements’ limited scope. First, nothing in Title Nine of the Mining Law indicates that stabilization agreements grant benefits with respect to an entire Economic-Administrative Unit or a so-called “mining unit.” An Economic-Administrative Unit consists of mining concessions located within a radius of 5-20 km (depending on the type of

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<sup>28</sup> See Exhibit CA-1, General Mining Law.

<sup>29</sup> See Exhibit CA-1, General Mining Law at Arts. 78-90.

<sup>30</sup> See Claimant’s Memorial at para. 303; Exhibit CWS-3, Chappuis Statement at paras. 22-24; Exhibit CER-5, Expert Report of María del Carmen Vega, October 19, 2021 (“Vega Report”), at paras. 33-34.

<sup>31</sup> See Claimant’s Memorial at paras. 6, 303.

<sup>32</sup> See Exhibit RWS-1, Polo Statement at paras. 15-20.

mineral), associated beneficiation plants, and other assets that constitute a single production unit because they share “supply, administration, and services . . . .”<sup>33</sup> As Vice Minister César Polo explains in his witness statement, an Economic-Administrative Unit is simply an administrative construct that is used in order to group together mining concessions and other mining activities that share the same location.<sup>34</sup>

45. Importantly, SMCV’s Mining and Beneficiation Concessions have not been declared an “Economic-Administrative Unit.” Article 44 of the Mining Law provides that the grouping of concessions under one Economic-Administrative Unit requires an approval from the General Mining Directorate.<sup>35</sup> Claimant has not demonstrated that SMCV obtained that approval. Instead, Claimant simply uses loosely the term “mining unit”—which is not defined nor used in any provision of the Mining Law<sup>36</sup>—to try to allege that all of the activities conducted under SMCV’s Mining and Beneficiation Concessions constitute a single production unit and that the 1998 Stabilization Agreement covered every activity and investment conducted in that unit. It did not.

46. Claimant relies on Article 82 of the Mining Law to assert that stabilization agreements grant benefits to a mining company’s entire so-called “mining unit.” Article 82 provided that:

[i]n order to promote investment and facilitate the financing of mining projects with an initial capacity of not less than 5,000 MT/day or expansions intended to reach a capacity of not less than 5,000 MT/day referring to one or more Economic-Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the

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<sup>33</sup> Exhibit CA-1, General Mining Law at Arts. 44, 82.

<sup>34</sup> See Exhibit RWS-1, Polo Statement at para. 29.

<sup>35</sup> See Exhibit CA-1, General Mining Law at Art. 44.

<sup>36</sup> See generally Exhibit CA-1, General Mining Law.

execution of the investment or expansion, as the case may be, is accredited.<sup>37</sup>

47. According to Claimant, this article confirms that the Mining Law granted stability guarantees to mining companies for the purpose of promoting investments within a so-called “mining unit” and that investors obtain these guarantees by making significant investments within that “unit.”<sup>38</sup> However, that is not what the law says.

48. Instead, Article 82 identified the minimum operational size of a mining company that would be eligible to enter into a 15-year stabilization agreement. Specifically, in order to qualify for a 15-year stabilization agreement, a mining company is required to have operations of (or expected to reach) at least 5,000 MT/day. Article 82 explained that those qualifying 5,000 MT/day may come from one or more Economic-Administrative Units. Contrary to Claimant’s proposition, it does not say that if the State agrees to sign a stabilization agreement with a mining company that has operations of at least 5,000 MT/day, then the benefits of that agreement will apply to every activity and investment that the company undertakes in that Economic-Administrative Unit or Units in which the investment project is executed.

49. Second, Articles 79 and 83 of the Mining Law provided that mining companies are entitled to benefit from a stabilization agreement only if they commit to make an investment project for a minimum required value.<sup>39</sup> Article 83 of the Mining Law—referring to 15-year stabilization agreements—provided that:

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<sup>37</sup> Exhibit CA-1, General Mining Law at Art. 82 (“*A fin de promover la inversión y facilitar el financiamiento de los proyectos mineros con capacidad inicial no menor de 5,000 TM/día o de ampliaciones destinadas a llegar a una capacidad no menor de 5,000 TM/día referentes a una o más Unidades Económicas Administrativas, los titulares de la actividad minera gozarán de estabilidad tributaria que se les garantizará mediante contrato suscrito con el Estado, por un plazo de quince años, contados a partir del ejercicio en que se acredite la ejecución de la inversión o de la ampliación, según sea el caso.*”). The cited text corresponds to the version of Article 82 that was in force between 1992 and 2014. In 2014, Congress amended Article 82, including reducing the term of the stabilization agreements from fifteen years for agreements signed after 2014. *See id.* at Art. 82 (as amended by Law No. 30230 published on July 12, 2014.)

<sup>38</sup> *See* Claimant’s Memorial at para. 303(a).

<sup>39</sup> *See* Exhibit CA-1, General Mining Law at Art. 79 (“Mining activity titleholders who submit investment programs for the equivalent in local currency of US \$2,000,000.00 shall be entitled to enter into the agreements referred to in

[m]ining activity titleholders who submit investment programs of not less than the equivalent in local currency of US \$20,000,000.00 for the start of any mining industry activities shall have the right to enter into the agreements referred to in the preceding article.

In the case of investments in existing mining companies, an investment program of not less than the equivalent in local currency of US\$50,000,000.00 will be required.<sup>40</sup>

50. That investment project must be clearly defined in an “investment program,” which the mining company must submit to the State (MINEM) for its approval.<sup>41</sup> An “investment program” is a detailed description of the investment project that the mining company is going to undertake (including the schedule for the investment and the projected value of the investment to be made), which will be covered by the stabilization agreement.<sup>42</sup>

51. In the case of 15-year stabilization agreements, “investment programs” are included within a technical-economic feasibility study which is submitted to and approved by MINEM and which is a prerequisite for executing a stabilization agreement.<sup>43</sup> Vice Minister Polo explains in his witness statement that this provision was included precisely, because it was

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the preceding article”), Art. 83 (“Mining activity titleholders who submit investment programs of not less than the equivalent in local currency of US \$20,000,000.00 for the start of any mining industry activities shall have the right to enter into the agreements referred to in the preceding article. In the case of investments in existing mining companies, an investment program of not less than the equivalent in local currency of US\$50,000,000.00 will be required.” (emphasis added)). The cited text corresponds to the versions of Articles 79 and 83 that were in force between 1992 and 2014. In 2014, Congress amended these articles to increase the minimum investment program amount required to qualify for the different types of stabilization agreements. *See id.* at Arts. 79, 83 (as amended by Law No. 30230 published on July 12, 2014.)

<sup>40</sup> Exhibit CA-1, General Mining Law at Art. 83 (emphasis added) (“*Tendrán derecho a celebrar los contratos a que se refiere el artículo anterior, los titulares de la actividad minera, que presenten programas de inversión no menores al equivalente en moneda nacional a US\$ 20’000,000.00, para el inicio de cualquiera de las actividades de la industria minera. Tratándose de inversiones en empresas mineras existentes, se requerirá un programa de inversiones no menor al equivalente en moneda nacional a US\$ 50’000,000.00.*”). The cited text corresponds to the version of Article 83 that was in force between 1992 and 2014. In 2014, Congress amended this article to require an investment program of at least US \$100,000,000 for new mining companies and US \$250,000,000 in order to qualify for a 15-year stabilization agreement. *See id.* at Art. 83 (as amended by Law No. 30230 published on July 12, 2014.)

<sup>41</sup> *See* Exhibit CA-1, General Mining Law at Arts. 72, 79, 83.

<sup>42</sup> *See* Exhibit RWS-1, Polo Statement at paras. 21.

<sup>43</sup> *See* Exhibit CA-1, General Mining Law at Art. 85.

important to clearly define the investment project that would benefit from the stabilization agreement.<sup>44</sup>

52. Third, Articles 79 (referring to 10-year stabilization agreements) and 83 (referring to 15-year stabilization agreements) of the Mining Law also provide 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.”<sup>45</sup> Perú’s Supreme Court has explained that this provision means that mining stabilization agreements grant benefits “exclusively” to the activities related to the investment project that was undertaken—that is, the investment project that was detailed in an investment plan submitted to and approved by MINEM.<sup>46</sup>

53. In its Memorial, Claimant cites to this language and asserts that it means that the benefits were granted to the “activities of the mining company.”<sup>47</sup> Claimant takes that to mean that stabilization agreements benefit all of the activities of a mining company within its concession or so-called “mining unit.” Claimant, however, conveniently, and to its detriment, ignores the language that precedes the words “activities of the mining company.”<sup>48</sup> The stability benefits do not apply to all activities of the company; they apply “exclusively” to those specific activities related to the investment project identified in the stabilization agreement. If the benefits applied to all the activities of the mining company, as Claimant alleges, then the word “exclusively” would be superfluous and would not have been included in the provision. That benefit-limiting investment, in turn, is the particular investment project that was set out in the

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<sup>44</sup> See Exhibit RWS-1, Polo Statement at para. 21-22.

<sup>45</sup> Exhibit CA-1, General Mining Law at Arts. 79, 83 (“*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión.*”) (emphasis added). That provision has been included since 1992, when the first version of the Mining Law was published. See Exhibit RE-22, Single Unified Text of the General Mining Law, Annotated and Updated as of 2021.

<sup>46</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 73; see also *infra* at Section II.H.1.c.

<sup>47</sup> See Claimant’s Memorial at para. 303(b).

<sup>48</sup> See Claimant’s Memorial at para. 303(b).

investment plan previously reviewed and approved by MINEM. That approval granted to the company the right to apply for and sign the stabilization agreement—which covers the company’s activities to which the investment project is directed. Vice Minister Polo explains in his witness statement that he also proposed this language precisely for the purpose of clarifying that the benefits of a stabilization agreement apply only to the activities related to the investment project for which the agreement was approved and signed, nothing more.<sup>49</sup>

54. Claimant also tries to rely on language in other articles of the Mining Law that states that stability benefits are granted to the “mining activity titleholder.”<sup>50</sup> Claimant concludes that this language indicates that stability benefits apply to the mining title, which is the concession or group of concessions. Claimant’s argument is baseless and takes the language of the Mining Law out of context. According to the Mining Law, not everyone can be a party to a stabilization agreement. In order to have the right to sign a mining stabilization agreement, a company needs to have (i) a mining title (a concession); (ii) operations of at least 350 MT/day (to sign a 10-year agreement) or 5,000 MT/day (to sign a 15-year agreement); and (iii) an “investment program.”<sup>51</sup> The mining company (the mining titleholder) will be the party to the stabilization agreement (*i.e.*, it will be the beneficiary of the stability benefits). That, in and of itself, does not mean that those benefits apply to the entire concession(s) of the company or to all activities performed by the company. As indicated above, the Mining Law expressly limits the stability benefits exclusively to the activities related to the investment project for which the stabilization agreement was signed.

55. Fourth, other provisions in the Mining Law provide further evidence that the scope of a stabilization agreement is limited to the investment project that is described in the

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<sup>49</sup> See Exhibit RWS-1, Polo Statement at paras. 17-18.

<sup>50</sup> See Claimant’s Memorial at paras. 303(c)-(e) (citing Exhibit CA-1, General Mining Law at Arts. 72, 80, 84).

<sup>51</sup> See Exhibit CA-1, General Mining Law at Arts. 78-79, 82-83.

investment plan. For example, the Mining Law provides that stability benefits only start taking effect after the mining company has completed the investment project that was detailed in the investment plan.<sup>52</sup> If it were the case that stability benefits would apply to any activities in the so-called “mining unit,” as Claimant alleges, it would not be necessary to wait for the execution of a specific investment project to start applying the stability benefits.

### 3. The Mining Regulations

56. In 1993, MINEM issued Supreme Decree No. 024-93-EM, a regulation implementing Title Nine of the Mining Law (“1993 Regulation”).<sup>53</sup> In particular, the 1993 Regulation regulates the Mining Law’s provisions relating to stabilization agreements. According to Claimant, this Regulation also provides that stabilization agreements grant benefits to all activities in a concession or Economic-Administrative Unit or the so-called “mining unit.”<sup>54</sup> In support of its assertion, similar to what it did with respect to language in the Mining Law, Claimant points to language in the 1993 Regulation referencing “titleholders,” “concessions,” and “Economic-Administrative Units.”<sup>55</sup>

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<sup>52</sup> See Exhibit CA-1, General Mining Law at Art. 78 (“Mining activity titleholders who start or are carrying out operations greater than 350 MT/day and up to 5,000 MT/day, or those who make the investment provided for in Article 79 of this text, shall enjoy tax stability that will be guaranteed to them by agreement entered into with the State for a term of ten years, counted as from the fiscal year in which the execution of the investment is accredited.”) (emphasis added), Art. 82 (“In order to promote investment and facilitate the financing of mining projects with an initial capacity of not less than 5,000 MT/day or expansions intended to reach a capacity of not less than 5,000 MT/day referring to one or more Economic-Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the execution of the investment or expansion, as the case may be, is accredited.”) (emphasis added). The cited text corresponds to the version of Article 82 that was in force between 1992 and 2014. In 2014, Congress amended Article 82, including reducing the term of the stabilization agreements from fifteen years for agreements signed after 2014. See *id.* at Art. 82 (as amended by Law No. 30230 published on July 12, 2014.)

<sup>53</sup> See generally Exhibit CA-2, Mining Regulations, Supreme Decree No. 024-93-EM, June 7, 1993 (“Mining Regulations”).

<sup>54</sup> See Claimant’s Memorial at para. 56.

<sup>55</sup> See Claimant’s Memorial at para. 304.

57. Claimant relies, in particular, on the following articles:<sup>56</sup>

- Article 1, which provides that stabilization agreements grant tax, exchange rate, and administrative stability guarantees to mining titleholders to perform their activities.<sup>57</sup>
- Article 2, which provides certain conditions with which mining titleholders (defined as individuals or companies that perform mining activities in a concession or Economic-Administrative Unit) must comply in order to have the right to apply for and sign a stabilization agreement.<sup>58</sup>
- Article 18, which sets out the process to apply for a 10-year or a 15-year agreement. Claimant focuses on the fact that one of these requirements is to name the mining rights that are subject to the request.<sup>59</sup>
- Article 22, which provides that stability guarantees “shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.” According to Claimant, this confirms that the “scope [of stabilization agreements] was bounded by the mining unit or concession in which the qualifying minimum investment was made.”<sup>60</sup>
- Article 25, which sets out instructions for certain tax filings in situations where expansion of facilities or new investments benefit from stabilization agreements. According to Claimant, this provision reinforces Article 22’s alleged confirmation that stabilization agreements cover all activities in a concession or Economic-Administrative Unit or the so-called “mining unit.”<sup>61</sup>

58. Contrary to Claimant’s arguments, the 1993 Regulation does not support Claimant’s understanding regarding the scope of stabilization agreements. First, as Dr. Eguiguren explains in his expert report, the 1993 Regulation must be interpreted in a manner consistent with Title Nine of the Mining Law and not in a manner that would contradict it.<sup>62</sup> As just explained above, Title Nine of the Mining Law provides that benefits of stabilization agreements apply “exclusively” to activities related to the investment project that is the subject

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<sup>56</sup> See Claimant’s Memorial at para. 304.

<sup>57</sup> See Claimant’s Memorial at para. 304(a).

<sup>58</sup> See Claimant’s Memorial at para. 304(b).

<sup>59</sup> See Claimant’s Memorial at para. 304(c).

<sup>60</sup> See Claimant’s Memorial at para. 304(d).

<sup>61</sup> See Claimant’s Memorial at para. 304(e).

<sup>62</sup> See Exhibit RER-1, Eguiguren Report at Section II.C.

of the agreement—that is, the investment project that is clearly detailed in the investment plan or feasibility study approved by MINEM.

59. Second, requirements in the 1993 Regulation reinforce the fact that stabilization agreements grant benefits only to activities related to the investment project that is the subject of the agreement. Consistent with the Mining Law, the 1993 Regulation provides that a mining titleholder needs to prepare a detailed feasibility study/investment plan in order to apply for a stabilization agreement and that the stabilization agreement benefits the activities related to the investment project that is described in that feasibility study/investment plan. For example:

- Article 18 provides that a mining titleholder who wishes to apply for a stabilization agreement must submit a feasibility study / investment plan to the General Mining Directorate of MINEM. Thus, the feasibility study / investment plan is a key requirement to qualify to apply for a stabilization agreement.<sup>63</sup>
- Article 19 further specifies that, in the case of 15-year contracts, the feasibility study must include, at minimum, a detailed description of, for example: (i) all the works that will be completed; (ii) the schedule to execute the investment project; (iii) the amount (value) of the investment project; (iv) the minimum amount of production expected to be obtained from the investment; (v) the projected sales volumes and prices for the final products produced from the investment; and (vi) the profitability of the project, among other information.<sup>64</sup> If it were the case, as Claimant alleges, that the stabilization agreement applied to all investments made within a concession or Economic-Administrative Unit or the so-called “mining unit,” there would be no reason for the State to request the above-referenced information. If any activities at any point in time within the concession or group of concessions receiving the investment are allegedly covered by the agreement, then it would be irrelevant to know the projected production or sales resulting from the investment, for example.

Moreover, it would be illogical for the State to request all of this information as a condition for approving a mining titleholder to enter into a stabilization agreement if the stabilization agreement benefitted not only the initial investment project and its related activities but the activities related to any other investment project developed thereafter in the same concession or Economic Administrative Unit or the so-called “mining unit.” If it were the case that the stabilization agreement applied automatically to any investment done within a concession or mining unit, then the State would not request detailed information only about the original

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<sup>63</sup> See Exhibit CA-2, Mining Regulations at Art. 18.

<sup>64</sup> See Exhibit CA-2, Mining Regulations at Art. 19.

investment project—it would either request such information about all investments covered or to be covered by the agreement, or none of them.

- Article 22 echoes the language of Articles 79 and 83 of the Mining Law, which provides that the benefits of a stabilization agreement “shall apply exclusively to the activities of the mining company in whose favor the investment is made.”<sup>65</sup> Article 22 of the 1993 Regulation provides that the stability guarantees “shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.”<sup>66</sup> Thus, both articles limit the scope of the stabilization agreements to a specific investment project. Vice Minister Polo, one of the drafters of Title Nine of the Mining Law, confirms in his witness statement that these benefits do not relate to any eventual and undefined investments, but to the investment that was carefully described in the feasibility study.<sup>67</sup>
- More importantly, Article 24 provides that the General Mining Directorate of MINEM must submit to the Office of the Vice Minister of Mines the Resolution that approved the feasibility study/investment plan, “which will serve as the basis to determine the investments that are the subject matter of the agreement. . . .”<sup>68</sup> The language in Article 24 is fatal to Claimant’s argument. It provides that the investments detailed in the feasibility study—not any eventual and undefined investments done within a concession or so called “mining unit”—are the investments that are the “subject matter” of the agreement. Notably, Claimant mentions this article only once, using an incorrect English translation, ignoring its actual language and the consequences on its (mis)interpretation of the Mining Law and the scope of SMCV’s 1998 Stabilization Agreement.<sup>69</sup>

60. In sum, the legal framework that was and is applicable to stabilization agreements in Perú shows that the benefits granted through these agreements are limited to the specific investment project as to which a given agreement was signed. As we discuss in the next section, the language of the 1998 Stabilization Agreement itself also demonstrates that the scope of the agreement was limited to SMCV’s investment in the Leaching Project—which was outlined in

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<sup>65</sup> Exhibit CA-1, General Mining Law at Arts. 79, 83 (emphasis added). That provision has been included since 1992, when the first version of the Mining Law was published. See Exhibit RE-22, Single Unified Text of the General Mining Law, Annotated and Updated as of 2021.

<sup>66</sup> Exhibit CA-2, Mining Regulations at Art. 22 (emphasis added).

<sup>67</sup> See Exhibit RWS-1, Polo Statement at paras. 15-22.

<sup>68</sup> Exhibit CA-2, Mining Regulations at Art. 24 (emphasis added). Claimant has translated this clause as “which will serve as the basis to determine the investments set out in the agreement . . . .” However, the original Spanish version provides “*la misma que servirá de base para determinar las inversiones materia del contrato,*” which is better translated as “which will serve as the basis to determine the investments that are the subject matter of the agreement . . . .” (emphasis added). Respondent will provide a corrected translation of this article.

<sup>69</sup> See Claimant’s Memorial at para. 337(c).

the feasibility study that was submitted at the time the State and SMCV entered into the agreement.

**B. SMCV'S 1998 STABILIZATION AGREEMENT COVERS ONLY SMCV'S LEACHING PROJECT**

61. In its Memorial, Claimant alleges that, in addition to the provisions of the Mining Law, the language of the 1998 Stabilization Agreement shows that all investments made for any reason anywhere within SMCV's so-called "mining unit" during the 15-year period of the Agreement received stability guarantees under the Agreement.<sup>70</sup> Claimant alleges that Respondent has impermissibly amended the Agreement unilaterally, by restricting its application to the Leaching Project.<sup>71</sup> Respondent agrees that the Agreement cannot be modified unilaterally, but it is Claimant's interpretation, not Respondent's, that is at odds with the plain meaning of the Agreement and, thus, would impermissibly modify its terms.

62. More importantly, SMCV's own actions contradict its interpretation of the language of the Mining Law and the 1998 Stabilization Agreement. SMCV's own actions show that it understood very well that, in order for a new investment project to obtain stability benefits, the investor must sign a new stabilization agreement with the State. Since the date that the Cerro Verde Mine was privatized, SMCV has entered into three separate mining stabilization agreements—in 1994, 1998, and 2012—for different investment projects within the same concessions (Cerro Verde's Mining and Beneficiation Concessions).<sup>72</sup> Two of them (the 1994 and the 1998 Agreements)—signed years before Freeport invested in SMCV—even overlapped in time, between 1998 and 2003. The 1994 Agreement concerned a US \$2.2 million investment project to install a new sorting plant and chutes and to add improvements to the existing leaching

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<sup>70</sup> See Claimant's Memorial at paras. 4, 6.

<sup>71</sup> See Claimant's Memorial at paras. 10-11.

<sup>72</sup> See generally Exhibit CE-12, 1998 Stabilization Agreement; Exhibit CE-344, 1994 Stabilization Agreement; Exhibit CE-644, 2012 Stabilization Agreement.

plant to allow three crushers to work simultaneously and to compile the end product in one location.<sup>73</sup> The 1998 Agreement—at issue in this arbitration—concerned a US \$237 million investment project to expand the production capacity of the leaching plant from 72 million pounds of copper cathodes per year to 105 million pounds.<sup>74</sup> This fact alone is fatal to Claimant’s case. If stabilization agreements covered any and all present and future investments and activities anywhere within the concession or Economic-Administrative Unit or the so-called “mining unit” in which the original investment project was made, as Claimant alleges, then SMCV would only have had to sign one agreement—not two separate agreements with respect to two different investment projects in the same mining concessions with substantially overlapping durations. As MINEM explained in a 1998 memo signed by the Legal Director of the Ministry and sent to the Vice Minister of Mines at the time, both contracts were able to coexist because, each contract was intended to protect a “different investment.”<sup>75</sup>

63. In the following sections, Respondent first needs to lay a technical foundation for explaining the different investment projects made by SMCV in its concessions over time. Respondent describes the different types of ore that exist in the Cerro Verde Mine, the different methods used to process that ore, and the final products produced through those processes—which gave rise to distinct investment projects to be covered by specific stabilization agreements. Second, Respondent describes the scope of the investment project that was covered by SMCV’s 1994 Stabilization Agreement. Third, Respondent discusses the specific scope of the investment

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<sup>73</sup> See Exhibit CE-344, 1994 Stabilization Agreement at Clauses 1.3, 5.1.

<sup>74</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.3, 5.1. The 2012 Agreement was signed one year before the 1998 Stabilization Agreement was set to expire. The 2012 Agreement concerned a US \$3.5 billion investment to build, among other things, a second concentrator plant to expand Cerro Verde’s copper concentrate production, as well as improve the existing facilities (existing leaching and concentrator facilities). See Exhibit CE-644, 2012 Stabilization Agreement at Clause 1.2.1, 5.1. Similar to the two other Agreements that were signed in 1994 and 1998, the 2012 Agreement describes a specific investment which is protected by the Agreement. The new investments would start benefitting from the stabilized regime in 2016, once the investments were completed. See Exhibit CE-644, 2012 Stabilization Agreement at Clause 8.

<sup>75</sup> Exhibit RE-23, MINEM, Report No. 002-98-EM/OGAJ, January 6, 1998, at p. 2.

project covered by SMCV's 1998 Stabilization Agreement. Respondent also explains why that agreement cannot be understood as encompassing new investments made by SMCV in 2006 to build the Concentrator Project. Finally, for completeness, Respondent describes the investment project that is covered by SMCV's 2012 Stabilization Agreement.

### **1. The Cerro Verde Mine**

64. The Cerro Verde Mine is a copper mine located in Arequipa, Perú that has been in operation since the early 1900s—decades before Freeport became an indirect majority shareholder of SMCV (current owner of the Cerro Verde Mine).<sup>76</sup> As Claimant describes in its Memorial, Cerro Verde's mineral deposits contain copper and molybdenum ores.<sup>77</sup> In particular, Cerro Verde's mineral deposits contain three types of copper ores: oxides, secondary sulfide, and primary sulfide.<sup>78</sup> Erosion and the effects of air and water cause primary sulfide to break down into secondary sulfides and oxides.<sup>79</sup> Each type of ore contains a different level of copper. Oxides contain the lowest copper content (because oxides are found closer to the earth's surface and the copper has largely been oxidized), but they are usually the easiest and cheapest to process.<sup>80</sup> Secondary sulfides have the next highest copper content, as they have been only partially oxidized as a result of being further below the surface.<sup>81</sup> Primary sulfides contain high copper content, as they are closest to the earth's core, but they are more costly to process.<sup>82</sup>

65. As a general matter, each type of ore is processed in a different manner, reflecting its copper content, the composition of the ore, and the cost to process the ore.<sup>83</sup> Oxides and

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<sup>76</sup> See Claimant's Notice of Arbitration, February 28, 2020 ("Claimant's Notice of Arbitration"), at para. 24.

<sup>77</sup> See Claimant's Memorial at para. 30.

<sup>78</sup> See Claimant's Memorial at para. 30.

<sup>79</sup> See Exhibit RER-4, Ralbovsky Report at para. 51; *see also* Claimant's Memorial at para. 30.

<sup>80</sup> See Exhibit RER-4, Ralbovsky Report at n. 62; Exhibit RE-41, W. Scott Dunbar, *How Mining Works*, Society for Mining, Metallurgy & Exploration (2016) ("Dunbar, *How Mining Works*"), at p. 25.

<sup>81</sup> See Exhibit RER-4, Ralbovsky Report at paras. 51, 53; Exhibit RE-41, Dunbar, *How Mining Works* at p. 25.

<sup>82</sup> See Exhibit RER-4, Ralbovsky Report at paras. 51, 55; Exhibit RE-41, Dunbar, *How Mining Works* at p. 25.

<sup>83</sup> See Exhibit RER-4, Ralbovsky Report at para. 52; Claimant's Memorial at para. 35.

secondary sulfides are not processed through a concentrator plant, because they are lower grade ores and oxides cannot be floated (which is what occurs in a concentrator plant).<sup>84</sup> Oxides and secondary sulfides are processed through leaching and solvent extraction/electrowinning (“SX/EW”) facilities to obtain cathodes of 99.99% of copper (refined copper). Leaching places crushed ore on a leach pad and irrigates it with a weak acidic solution. The solution travels through the leach pad by gravity and collects copper molecules. The resulting solution, called pregnant leach solution (“PLS”), is then pumped to a solvent extraction (“SX”) facility. In an SX facility, a chemical process redissolves copper out of the PLS, resulting in a high concentration copper sulfate solution. That solution then goes to the EW facility where the copper is extracted by electrolysis, resulting in the cathodes of copper.<sup>85</sup>

66. Primary sulfides, however, cannot be efficiently processed using leaching. Primary sulfides are most commonly processed through flotation in a concentrator plant (also known as a flotation plant), which produces copper concentrate. A concentrator mixes crushed and ground ore with chemicals and other liquids to create a froth, on which the copper floats. That froth dries and results in the concentrate, a fine black powder that is 20-30% copper. Copper concentrate must then be smelted and refined, by the miner or a third party, to yield copper cathodes (refined copper). Importantly, refined copper (99.99% copper) and copper concentrate (usually 25% copper) are two different products sold in the market.<sup>86</sup>

67. For most of the Cerro Verde Mine’s history, the mining operations focused on exploiting and processing oxides through leaching facilities. A short summary of the Cerro Verde Mine’s history, up through Freeport’s acquisition of its majority stake in SMCV, is summarized below:

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<sup>84</sup> See Exhibit RER-4, Ralbovsky Report at para. 53, n. 64.

<sup>85</sup> See Exhibit RER-4, Ralbovsky Report at paras. 53-54.

<sup>86</sup> See Exhibit RER-4, Ralbovsky Report at paras. 55-56.

- From 1916 to 1970, Cerro Verde was owned by the U.S. company Anaconda Copper Mining.<sup>87</sup>
- In 1970 and 1972, the government granted mining rights to the state-owned company, Empresa Minera del Perú (“Minero Perú”), to extract ore from the two open pits at Cerro Verde.<sup>88</sup>
- In 1972, a feasibility study submitted by British Smelter Constructions Ltd. and Wright Engineers Ltd. explored the possibility of exploiting the Cerro Verde Mine in two different stages: first, the oxides near the surface (which are processed through a leaching process); then, the primary sulfides (which would be processed through a concentrator plant). As Claimant admits, at the time, the cost of the second stage was “prohibitive.”<sup>89</sup>
- In 1976, Minero Perú decided to proceed to construct an on-site leaching plant to process oxide ore, abandoning for the moment any plans to build a concentrator plant.<sup>90</sup> In July 1976, MINEM granted Minero Perú’s request to expand its special mining rights within Cerro Verde’s so-called “mining unit” to cover three specific mining areas: Cerro Verde 1, Cerro Verde 2, Cerro Verde 3.<sup>91</sup>
- On January 13, 1977, MINEM granted Minero Perú an additional “special right” to process the minerals that it extracted from Cerro Verde 1, Cerro Verde 2, and Cerro Verde 3 through a Beneficiation Plant (in this case, through a leaching plant).<sup>92</sup> The leaching plant started to operate on April 1, 1977 with a capacity to produce 33,000 MT/year of copper cathodes from oxide ore.<sup>93</sup>
- Minero Perú conducted additional feasibility studies about the possibility of building a concentrator plant to process Cerro Verde’s primary sulfide ore in 1975, 1977, and 1980, but none of them indicated it would be economically justifiable to build such a plant.<sup>94</sup>
- In 1979, Minero Perú constructed a pilot concentrator plant with a capacity of 100 MT/day. This pilot plant was used to test the efficiency of the flotation process

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<sup>87</sup> See Claimant’s Memorial at para. 32.

<sup>88</sup> See Claimant’s Memorial at para. 33; Exhibit CE-287, Direct Exploitation by the State of Mining Rights in the Department of Arequipa, Supreme Decree No. 023-70-EM/DGM, December 15, 1970; Exhibit CE-289, Establishing the Right of the State Over Expired Metal Concessions, Supreme Decree No. 012-72-EM/DGM, January 20, 1972.

<sup>89</sup> See Claimant’s Memorial at para. 35(b); Exhibit CE-290, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú, Vol. I, February 1, 1972.

<sup>90</sup> See Claimant’s Memorial at paras. 36-37.

<sup>91</sup> See Claimant’s Memorial at para. 37; Exhibit CE-2, Mining Concession, Supreme Decree No. 027-76-EM/DGM, July 19, 1976.

<sup>92</sup> See Claimant’s Memorial at para. 37; Exhibit CE-295, Supreme Decree No. 002-77-EM/DGM, January 13, 1977.

<sup>93</sup> See Claimant’s Memorial at paras. 37-38.

<sup>94</sup> See Claimant’s Memorial at para. 39.

for Cerro Verde's primary sulfides.<sup>95</sup> The pilot project never went any further for some 25 years, until SMCV started to build the Concentrator Project in 2004.

- On December 16, 1991, Minero Perú requested MINEM to convert its “special mining rights” into a single mining concession “Cerro Verde 1, 2, and 3” (the “Mining Concession”) and a single beneficiation concession (the “Beneficiation Concession”). MINEM approved Minero Perú's request.<sup>96</sup>
- In the early 1990s, Perú sought to privatize Minero Perú's mining assets. On June 1, 1993, Minero Perú created SMCV for purposes of privatizing the Cerro Verde Mine.<sup>97</sup>
- On November 4, 1993, Cyprus Minerals Company, a U.S. company, submitted the only bid for the Cerro Verde Mine.<sup>98</sup>
- On March 17, 1994, Minero Perú and Cyprus Amax Minerals Company (“Cyprus”), a subsidiary of Cyprus Minerals Company, executed a share purchase agreement under which Minero Perú sold 91.65% of its shares in SMCV to Cyprus.<sup>99</sup>
- On May 26, 1994, Perú and SMCV (by then owned by Cyprus) signed a 10-year mining stabilization agreement under Article 78 of the Mining Law (“1994 Stabilization Agreement”).<sup>100</sup>
- On January 25, 1996, with the purpose of stabilizing a new planned investment project—the Leaching Project—within its Mining and Beneficiation Concessions, SMCV filed an application before the General Mining Directorate of MINEM to enter into a 15-year agreement pursuant to Article 82 of the Mining Law.<sup>101</sup> The investment project was designed to process secondary sulfides to produce copper cathodes.<sup>102</sup>
- On February 13, 1998, SMCV entered into the 1998 Stabilization Agreement for the Leaching Project, which is being discussed in this arbitration.<sup>103</sup>

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<sup>95</sup> See Claimant's Memorial at para. 39.

<sup>96</sup> See Claimant's Memorial at para. 63; Exhibit CE-307, Directorial Resolution No. 126-91-EM/DGM, December 20, 1991; Exhibit CE-308, Directorial Resolution No. 140-91-EM/DGM, December 20, 1991.

<sup>97</sup> See Claimant's Memorial at para. 64.

<sup>98</sup> See Claimant's Memorial at para. 66; Exhibit CE-334, Cyprus Minerals Company Privatization Proposal, November 4, 1993; Exhibit CE-351, CEPRI, Minutes for SMCV, July 3, 1996, at pp. 24-25.

<sup>99</sup> See Claimant's Memorial at para. 67; Exhibit CE-4, Share Purchase Agreement between Cyprus Climax Metals Company and Empresa Minera del Peru S.A., March 17, 1994.

<sup>100</sup> See Claimant's Memorial at para. 70; Exhibit CE-344, 1994 Stabilization Agreement.

<sup>101</sup> See generally Exhibit CE-7, Stabilization Agreement Request, January 25, 1996.

<sup>102</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.3.

<sup>103</sup> See Exhibit CE-12, 1998 Stabilization Agreement. Notably, Claimant has failed to provide any documents related to Cyprus' or SMCV's due diligence before SMCV entered into the 1998 Stabilization Agreement.

- In October 1999, Phelps Dodge acquired Cyprus, becoming SMCV's majority shareholder.<sup>104</sup>
- On October 11, 2004, SMCV's and Phelps Dodge's Boards of Directors conditionally approved an investment of US \$850 million for the construction of the Concentrator.<sup>105</sup>
- In December 2004, SMCV began construction of the Concentrator Project, which was completed in 2006.<sup>106</sup> The Concentrator Project was built for purposes of processing primary sulfide ore to produce copper concentrate.
- On November 19, 2006, Freeport and Phelps Dodge signed a merger agreement according to which Freeport would acquire Phelps Dodge.<sup>107</sup>
- On March 19, 2007, Freeport completed its acquisition of Phelps Dodge, acquiring a majority stake (53.56%) in SMCV.<sup>108</sup>

68. In sum, until 2006, the Cerro Verde Mine had primarily extracted oxide ore and had processed it through its leaching facilities.<sup>109</sup> It had not extracted primary sulfide ore, nor had it ever built a full-scale concentrator plant to process such ore. Moreover, as shown in the timeline, when Freeport indirectly acquired its majority stake in SMCV, the Cerro Verde Mine had been operating for almost a century, and the 1998 Stabilization Agreement had been in force for some nine years.

69. Claimant alleges that Minero Perú undertook a series of activities to promote private investment in the mining sector and to attract a private investor to buy Minero Perú's assets.<sup>110</sup> In particular, Claimant alleges that one of the items that was used to promote

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<sup>104</sup> See Claimant's Memorial at para. 84; Exhibit CWS-8, Witness Statement of Cristián Morán, October 19, 2021 ("Morán Statement"), at para. 10. Notably, Claimant has failed to provide any documents related to Phelps Dodge's acquisition of Cyprus.

<sup>105</sup> See Claimant's Memorial at para. 112. Notably, Claimant has failed to provide any documents related to Phelps Dodge or SMCV's due diligence on whether the 1998 Stabilization Agreement covered the Concentrator Project, before approving an additional investment of US \$850 million for the construction of the Concentrator.

<sup>106</sup> See Claimant's Memorial at paras. 117, 155.

<sup>107</sup> See Claimant's Memorial at para. 156; *see also* CE-902, Freeport-McMoRan Copper & Gold Inc., Annual Report 2006 (March 15, 2007), p. 25.

<sup>108</sup> See Claimant's Memorial at paras. 28, 158; *see also* Exhibit CE-265, Freeport-McMoRan Inc., Sociedad Minera Cerro Verde S.A.A. Corporate Organizational Chart, February 21, 2020.

<sup>109</sup> See Exhibit RER-4, Ralbovsky Report at para. 61.

<sup>110</sup> See Claimant's Memorial at para. 65.

investment was the new stabilization regime that had been adopted at the time.<sup>111</sup> According to Claimant, because stabilization agreements were used to promote investment in the mining sector, they necessarily applied to all the activities and investments in a concession or so-called “mining unit.”<sup>112</sup> Claimant’s contention simply does not follow. The mere fact that Minero Perú discussed the possible availability of agreements in the course of promoting investment does not mean that those agreements, if then obtained, would have a broad and unlimited scope. Nor did Perú promise in any way that those agreements would have such a broad scope.

70. In promoting the privatization of Cerro Verde, Minero Perú explained that stabilization agreements were an important tool that were potentially available to mining companies, but they clarified that those agreements were limited in scope. For example, Minero Perú prepared and distributed to interested companies a document called “Heads of Agreement,” which served as a basis for negotiations related to a share purchase agreement for the Cerro Verde assets.<sup>113</sup> With respect to mining stabilization agreements, this document stated that (i) the buyer would have the right to sign a mining stabilization agreement in accordance with Title Nine of the Mining Law, if it complied with all legal requirements to sign such an agreement; (ii) in order to enter into such an agreement, the buyer would have to prepare and submit a feasibility study—which would describe a specific investment project to be made by the company; and (iii) the seller—Minero Perú—would cooperate and assist the buyer in requesting an approval to sign a mining stabilization agreement.<sup>114</sup> Importantly, the document did not state that any such stabilization agreement would be approved automatically, nor that any such stabilization

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<sup>111</sup> See Claimant’s Memorial at para. 65.

<sup>112</sup> See Claimant’s Memorial at para. 311.

<sup>113</sup> See Claimant’s Memorial at para. 65; Exhibit CE-332, CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement, October 26, 1993.

<sup>114</sup> See Exhibit CE-332, CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement, October 26, 1993, at Section 9.

agreement would cover all investments made within the Cerro Verde Mine, as Claimant claims in this arbitration.

71. Minero Perú also prepared a bilingual primer on stabilization agreements.<sup>115</sup> Language contained in these documents made clear that stabilization agreements were intended to grant stability guarantees to activities related to specific investment projects. In particular, Minero Perú explained: “[stabilization agreements] fix the legal framework applicable to a company, in certain defined matters over a specified period of time.”<sup>116</sup> Minero Perú also explained that, at the time, the State offered two stability systems—a general one governed by L.D. Nos. 662 and 757, and a special regime applicable to the mining sector—which were complementary.<sup>117</sup> Then, in describing the general characteristics of stabilization agreements, Minero Perú stated that “Stability Contracts must be entered into and registered with the relevant national organisation . . . before the investments covered by the Contracts are made.”<sup>118</sup> Thus, if Claimant’s theory were true and mining stabilization agreements covered the entirety of SMCV’s concessions, then the company owning the Cerro Verde concessions should have entered into the agreement when the concessions were first granted in the 1970s. A much more credible interpretation is that mining stabilization agreements cover only specific investment projects and that those agreements need to be entered into before the mining company undertakes the specific investment project it intended to stabilize.

72. Moreover, in describing 15-year mining stabilization agreements, in particular, Minero Perú again tied stabilization agreements to specific investment projects. It explained that holders of the 15-year agreements would enjoy their benefits for a term of 15 years from the “beginning of the investment,” referring, of course, to the investment project that has been

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<sup>115</sup> See Exhibit CE-331, Minero Perú, Stability Contracts, September 7, 1993.

<sup>116</sup> Exhibit CE-331, Minero Perú, Stability Contracts, September 7, 1993, at Section 1 (emphasis added).

<sup>117</sup> See Exhibit CE-331, Minero Perú, Stability Contracts, September 7, 1993, at Section 1.

<sup>118</sup> Exhibit CE-331, Minero Perú, Stability Contracts, September 7, 1993, at Section 2.1.1 (emphasis added).

described in the investment plan/feasibility study.<sup>119</sup> In fact, as explained by Minero Perú, if the company failed to complete that investment project, the agreement would be terminated.<sup>120</sup>

73. Finally, and more importantly, Minero Perú did not state in this detailed description of the stabilization agreement regime that a mining stabilization agreement would cover all investments made within a concession or so-called “mining unit,” whether or not they were described and detailed in the approved investment plan/feasibility study. Thus, contrary to Claimant’s allegations, Minero Perú’s promotional statements do not confirm Claimant’s (mis)interpretation of its 1998 Stabilization Agreement.

## **2. The 1994 Mining Stabilization Agreement**

74. On May 26, 1994, Perú and SMCV (by then owned by Cyprus) signed a 10-year mining stabilization agreement under Article 78 of the Mining Law.<sup>121</sup> To apply for this agreement, SMCV submitted an investment plan.<sup>122</sup> The investment plan described an investment project to implement relatively modest improvements to Cerro Verde’s leaching facilities.<sup>123</sup> As already mentioned, the investment plan discussed installing a new sorting plant and chutes and adding improvements to the leaching plant to allow three crushers to work simultaneously and to compile the end product in one location.<sup>124</sup> As provided by the Mining Law, the Agreement would enter into force once the investment project described in the investment plan had been completed.<sup>125</sup>

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<sup>119</sup> See Exhibit CE-331, Minero Perú, Stability Contracts, September 7, 1993, at Sections 3.2.2, 3.3.2(c).

<sup>120</sup> See Exhibit CE-331, Minero Perú, Stability Contracts, September 7, 1993, at Section 3.2.4.

<sup>121</sup> See Claimant’s Memorial at para. 70; Exhibit CE-344, 1994 Stabilization Agreement.

<sup>122</sup> See Claimant’s Memorial at para. 70; Exhibit CE-344, 1994 Stabilization Agreement at Section 1.2.

<sup>123</sup> See Claimant’s Memorial at para. 70; Exhibit CE-344, 1994 Stabilization Agreement at Section 1.3.

<sup>124</sup> See Exhibit CE-344, 1994 Stabilization Agreement at Section 1.3.

<sup>125</sup> See Exhibit CE-344, 1994 Stabilization Agreement at Section 8.1.

75. The investment project was described as being completed in Cerro Verde's Mining and Beneficiation Concessions.<sup>126</sup> These are the same concessions in connection with which SMCV later completed the Leaching Project—which was the subject of the 1998 Stabilization Agreement. Thus, if Claimant's theory—*i.e.*, that all investments made within the same concession or so-called “mining unit” are covered by a stabilization agreement, regardless of whether or not they are detailed in the investment plan submitted to obtain the agreement—had any merit, SMCV simply would have relied on the 1994 Stabilization Agreement just a few years later when it decided to pursue the much larger investment project in the same facilities. SMCV would not have seen any need to request and sign a new Stabilization Agreement for that new investment project in 1998.

### **3. The 1998 Mining Stabilization Agreement**

76. On January 25, 1996, with the purpose of stabilizing a new planned investment project within its Mining and Beneficiation Concessions, SMCV filed an application before the General Mining Directorate of MINEM to enter into a 15-year agreement pursuant to Article 82 of the Mining Law.<sup>127</sup> “For these purposes,” SMCV's application was accompanied by a feasibility study (the “1996 Feasibility Study”) for a US \$237,517,133 project to significantly expand its leaching facilities to increase its “production capacity to from 72,000,000 to 105,000,000 pounds (48,000 metric tons) of copper cathodes” (the “Leaching Project”).<sup>128</sup> As discussed in detail in the section below, that Feasibility Study analyzed and outlined the investment on only one project—the Leaching Project.<sup>129</sup> It did not analyze, much less outline,

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<sup>126</sup> See Exhibit CE-344, 1994 Stabilization Agreement at Sections 1.1, 3.

<sup>127</sup> See *generally* Exhibit CE-7, Stabilization Agreement Request, January 25, 1996.

<sup>128</sup> Exhibit CE-7, Stabilization Agreement Request, January 25, 1996, at pp. 1-3. SMCV describes that the Feasibility Study described a US \$240,247,000 investment deducted by the US \$2,729,867 investment that was already protected under the 1994 Stability Agreement. See *also generally* Exhibit CE-9, Feasibility Study, Executive Summary, 1996.

<sup>129</sup> See Exhibit CE-9, Feasibility Study, Executive Summary, 1996, at pp. 2-3.

anything in relation to the Concentrator Project. On May 6, 1996, the General Mining Directorate approved the 1996 Feasibility Study.<sup>130</sup> The investment project (the Leaching Project) was planned to be completed in 1997.<sup>131</sup> On February 13, 1998, SMCV and the State signed the stabilization agreement (the 1998 Stabilization Agreement).<sup>132</sup>

77. Claimant alleges that the 1998 Stabilization Agreement was intended to cover every activity and investment within SMCV's Mining and Beneficiation Concessions, including any future investments above and beyond the specific improvements to be made to the Leaching Project that were contemplated in the 1996 Feasibility Study. In particular, Claimant alleges that certain language included in the 1996 Feasibility Study and the 1998 Stabilization Agreement shows the broad scope of the Agreement.<sup>133</sup> That is not the case. The scope of the 1998 Stabilization Agreement, as with all stabilization agreements in Perú, was limited to the specific investment project that formed the basis of the Agreement, which, in this case, concerned certain improvements to the Leaching Project. Respondent discusses the 1996 Feasibility Study and the 1998 Stabilization Agreement in the following sections.

a. The 1996 Feasibility Study

78. Claimant acknowledges that the Feasibility Study was conducted to support additional investments “for the improvements, upgrades, and further development of the existing leaching facility and infrastructure.”<sup>134</sup> However, Claimant claims that the 1996 Feasibility

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<sup>130</sup> See Exhibit RE-24, MINEM, Directorial Resolution No. 158-96-EM/DGM, May 6, 1996; see also Exhibit RE-25, MINEM, Report No. 033-96-EM-DGM-DFM/DFAE, March 27, 1996; Exhibit CE-8, Feasibility Study Approval, Informe No. 043-96-EM-DGM-DFM/DFAE, May 6, 1996.

<sup>131</sup> See Exhibit RE-24, MINEM, Directorial Resolution No. 158-96-EM/DGM, May 6, 1996, Art. 1.

<sup>132</sup> See Exhibit CE-12, 1998 Stabilization Agreement.

<sup>133</sup> See Claimant's Memorial at paras. 76-80.

<sup>134</sup> Claimant's Memorial at para. 73.

Study also laid the groundwork for building a concentrator plant next to the leaching facilities.<sup>135</sup>

Claimant's argument is irrelevant and misleading.

79. The 1996 Feasibility Study, which served as the basis for the 1998 Stabilization Agreement, outlined SMCV's investment in the Leaching Project. As the 1996 Feasibility Study states:

#### 1.1 Scope of Feasibility Study

The feasibility study covers the Cerro Verde leaching project, from geological study through cathode production and sales. The study describes all operations, including those that form part of the leach process and its support facilities. . .

#### 1.2 Objective of the Study

The objective of the study is to evaluate the feasibility of producing 105 million (MM) lb./year (48,000 mtpy) of cathode copper from the heap leaching of copper ore at the Cerro Verde facilities. . .

#### 1.3 Basis of the Study

The study is based on test data results and operating experience obtained to date from leaching secondary sulfide ore at Cerro Verde, as well as from operating experience in the other unit processes at Cerro Verde.<sup>136</sup>

80. Thus, the 1996 Feasibility Study set out and analyzes an investment only on the Leaching Project. It did not set out any type of investment plan to build the Concentrator Plant that was finally constructed in 2006 and that is the subject of this dispute. To the contrary, the 1996 Feasibility Study made clear that the planned investment project did not encompass a concentrator plant, when it budgeted for an additional study to be conducted to determine the feasibility of an investment in a "mill" (according to Claimant that is a reference to the concentrator plant).<sup>137</sup> As Claimant admits in its Memorial, those additional studies, which were

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<sup>135</sup> See Claimant's Memorial at para. 73.

<sup>136</sup> Exhibit CE-9, Feasibility Study, Executive Summary, 1996, at pp. 2-3 (emphasis added).

<sup>137</sup> See Exhibit CE-9, Feasibility Study, Executive Summary, 1996, at p. 124; Exhibit CWS-3, Witness Statement of Marita Chappuis Cardich, October 19, 2021 ("Chappuis Statement"), at para. 41.

carried out in 1996, before the 1998 Stabilization Agreement, concluded that it was uneconomical to invest in a concentrator plant at that moment,<sup>138</sup> and, thus, SMCV did not pursue any such investment plans (until many years later).

81. Significantly, in 2000, there was litigation between Phelps Dodge (as Cyprus's acquirer) and Minero Perú (as the seller) over this very issue.<sup>139</sup> The Sale Purchase Agreement between Cyprus and Minero Perú envisioned building a concentrator plant, which Cyprus failed to do because it was uneconomical.<sup>140</sup> Notably, the concentrator plant that was envisioned in the Sale Purchase Agreement was much smaller than the one that was actually built in 2004 (it was supposed to have a capacity for 28,000 MT/D, while the one that was actually constructed had a capacity of 147,000 MT/D).<sup>141</sup> Thus, the Concentrator Project was different than that which had been envisioned—and never executed—in the sale between Minero Perú and Cyprus. The matter was settled in March 2001, when Phelps Dodge agreed to make additional investments into the Cerro Verde so called “mining unit” and to continue exploring the possibility of building the concentrator plant.<sup>142</sup> Pursuant to the first part of the settlement, Phelps Dodge made investments of US \$25 million to expand Cerro Verde's leaching facilities.<sup>143</sup>

82. Thus, the fact that the 1996 Feasibility Study mentions a possible investment in a concentrator plant that would be located next to Cerro Verde's leaching facilities is irrelevant to determining the scope of the 1998 Stabilization Agreement. This is particularly true when the issue of building a concentrator plant was resolved in favor of not building a plant at that time. The 1998 Stabilization Agreement was entered into in order to stabilize SMCV's investment in

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<sup>138</sup> See Claimant's Memorial at para. 75.

<sup>139</sup> See Claimant's Memorial at para. 85.

<sup>140</sup> See Claimant's Memorial at paras. 66-67; Exhibit RE-100, Aide Memoire (Cyprus), July 9, 1999.

<sup>141</sup> See Exhibit RE-100, Aide Memoire (Cyprus), July 9, 1999, at p. 1; Claimant's Memorial at paras. 67(d), 157.

<sup>142</sup> See Claimant's Memorial at para. 86.

<sup>143</sup> See Claimant's Memorial at para. 87.

the Leaching Project—which was the only investment that was actually analyzed in the 1996 Feasibility Study.

83. On May 6, 1996, the General Mining Directorate approved the 1996 Feasibility Study.<sup>144</sup> MINEM’s analysis of the Study and its approval also shows that MINEM understood that the 1996 Feasibility Study, and, thus, SMCV’s request for a new stabilization agreement, was related only to the Leaching Project. For example, the report that supports MINEM’s approval of the project states:

The objective of the Study is to evaluate the feasibility of producing 105 million pounds per year of copper cathodes in Cerro Verde’s facilities, considering the results of the experimental tests and operating experience with leaching secondary sulfides in Cerro Verde, [it] will expand the processing capacity of Cerro Verde by installing the necessary equipment to improve the leaching process using the latest technology.<sup>145</sup>

84. In addition, the Resolution that approved the Feasibility Study provides:

[t]hat [SMCV] has submitted a Feasibility Study to the General Mining Directorate . . . which objective is the production of approximately 105 million pounds per year of copper cathodes in Cerro Verde’s facilities. . .

Article 1. Approve the Feasibility Study submitted by [SMCV] in the amount of approximately US \$237,517,000, which is part of this Resolution as an annex . . .

Article 3. Submit to the Office of the Vice Minister of Mines the information regarding the Feasibility Study that is approved in this Resolution in order to sign the corresponding Tax Stability Agreement, with [SMCV], which shall communicate to the General Mining Directorate the completion of the execution of the investments committed in the Feasibility Study.<sup>146</sup>

85. Thus, the 1996 Feasibility Study, the report by the General Mining Directorate analyzing the study, and the Resolution approving the study all indicated that the investment

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<sup>144</sup> See Exhibit RE-24, MINEM, Directorial Resolution No. 158-96-EM/DGM, May 6, 1996; see also Exhibit RE-25, MINEM, Report No. 033-96-EM-DGM-DFM/DFAE, March 27, 1996; Exhibit CE-8, Feasibility Study Approval, Informe No. 043-96-EM-DGM-DFM/DFAE, May 6, 1996.

<sup>145</sup> Exhibit RE-25, MINEM, Report No. 033-96-EM-DGM-DFM/DFAE, March 27, 1996, at “Objective.”

<sup>146</sup> See Exhibit RE-24, MINEM, Directorial Resolution No. 158-96-EM/DGM, May 6, 1996, at pp. 1-2.

project was for the purposes of expanding SMCV leaching facilities to increase the production of copper cathodes. None of them outlined, analyzed, or approved an investment on any type of concentrator plant.

b. The 1998 Stabilization Agreement

86. On February 13, 1998, SMCV and Perú signed the 1998 Stabilization Agreement, a 15-year agreement under Article 82 of the Mining Law, based on the 1996 Feasibility Study.<sup>147</sup>

Claimant maintains that because the Agreement stated that it applied to SMCV's Mining and Beneficiation Concessions, it thus also made clear that it covered all investments and activities that might possibly be conducted within those concessions in the ensuing 15 years.<sup>148</sup>

Claimant's assertions are incorrect. The 1998 Stabilization Agreement was applicable only to the activities related to investments made to the Leaching Project as discussed in the 1996 Feasibility Study.

87. First, the First Clause of the Agreement provided the purpose and defined the scope of the Agreement. In particular, Clause 1 of the Agreement provided that:

- On January 25, 1996, SMCV requested that a stabilized regime be “granted to it, in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3, hereinafter ‘The leaching project of Cerro Verde.’”<sup>149</sup>
- SMCV submitted a feasibility study, the objective of which was to evaluate the “feasibility to extend the production capacity from 72,000,000 to 105,000,000 lbs. (48,000 MT) of [c]opper cathodes per year coming from the heap leaching of the copper mineral in the facilities of Cerro Verde with recovery of 65%, that will be installed with the necessary equipment to improve the leaching of the secondary sulfides using the last technology and at the same time increase the production.”<sup>150</sup>

88. Thus, Clause 1 shows the State's understanding that SMCV had requested a mining stability agreement with respect to the Leaching Project, which was outlined in the 1996

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<sup>147</sup> See Exhibit CE-12, 1998 Stabilization Agreement.

<sup>148</sup> See Claimant's Memorial at paras. 76-77.

<sup>149</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1 (emphasis added).

<sup>150</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clauses 1.2-1.3 (emphasis added).

Feasibility Study. Moreover, Clause 1 shows that the stated purpose of the investment project was to increase SMCV's production capacity of copper cathodes through the leaching of secondary sulfide ore extracted from the Cerro Verde Mine. Nothing in this text mentions a future investment in a concentrator plant to process primary sulfide ore (a different type of copper ore) to produce copper concentrate (a different product), which was the purpose of the investment carried out years later, in 2004-2006, to develop the Concentrator Project that is the subject of this arbitration.

89. Claimant's Peruvian legal expert Dr. Bullard asserts that this clause is irrelevant for purposes of interpreting the 1998 Stabilization Agreement, because it referred to background facts of the Agreement.<sup>151</sup> As Dr. Morales and Dr. Eguiguren, leading jurists in Peruvian contract and constitutional law, explain, Dr. Bullard's interpretation is incorrect. The main purpose of this clause was to define the investment that is covered by the Agreement, not to provide irrelevant background facts, as Dr. Bullard alleges. In defining the scope of SMCV's request to sign the Agreement, the First Clause made it clear that to the 1998 Stabilization Agreement was triggered by, and therefore was addressed to, the investment in the Leaching Project.<sup>152</sup>

90. Second, the Second Clause of the Agreement provides that the General Mining Directorate of MINEM approved the 1996 Feasibility Study on May 6, 1996, via Resolution No. 155-96-EM/DGM.<sup>153</sup> As explained above, that feasibility study outlined the investment plan for the Leaching Project which would be completed in 1997 and disclaimed any feasibility analysis of a possible Concentrator Project.

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<sup>151</sup> See Exhibit CER-2, Expert Report of Alfredo Bullard, October 19, 2021 ("Bullard Report"), at paras. 32, 40.

<sup>152</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clauses 1.1-1.3; Exhibit RER-1, Eguiguren Report at paras. 51-52, 59; Exhibit RER-2, Expert Report of Rómulo Morales, May 4, 2022 ("Morales Report"), at paras. 51-53, 62.

<sup>153</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 2.

91. Third, the Third Clause of the Agreement provided that “[a]ccording to what is expressed in 1.1, the Leaching Project of Cerro Verde is circumscribed to the concessions, related in Exhibit I, with the corresponding areas.”<sup>154</sup> Exhibit I describes SMCV’s Mining and Beneficiation Concessions.<sup>155</sup> Claimant alleges that the third clause of the Agreement thus makes it clear that the Agreement applies to any and all investments in SMCV’s Mining and Beneficiation Concessions, including any investments in the future that may be included within those concessions.<sup>156</sup> But, contrary to Claimant’s assertion, the Third Clause does not state that the terms of the 1998 Stabilization Agreement apply to every investment made within SMCV’s Mining and Beneficiation Concessions. Notably, Claimant is unable to refer to any language that specifically makes such a claim. As Respondent’s witnesses Mr. Oswaldo Tovar (former Director of Mining Promotion of MINEM), and Ms. Gabriela Bedoya (from SUNAT’s Claims Division in Arequipa), explain, the Third Clause, including the cross-reference to Exhibit I of the Agreement, simply identifies the location where the Leaching Project would be developed.<sup>157</sup>

92. Claimant also focuses on the second paragraph in the Third Clause, which provided that the fact that the Leaching Project is “circumscribed” to the Mining and Beneficiation Concessions “does not prevent [SMCV] from incorporating other mining rights to the Cerro Verde Leaching Project, after approval by the General Direction of Mining.”<sup>158</sup> According to Claimant, the reference to such additional “mining rights” (*e.g.*, mining concessions) indicated that the guarantees included in the Agreement would apply to all investments made within the concessions.<sup>159</sup> Claimant takes this provision out of context.

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<sup>154</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

<sup>155</sup> *See* Exhibit CE-12, 1998 Stabilization Agreement at Exhibit I.

<sup>156</sup> *See* Claimant’s Memorial at para. 323.

<sup>157</sup> *See* Exhibit RWS-3, Tovar Statement at paras. 26-27; Exhibit RWS-4, Witness Statement of Gabriela Bedoya, April 18, 2022 (“Bedoya Statement”), at paras. 38.

<sup>158</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 3 (emphasis added).

<sup>159</sup> *See* Claimant’s Memorial at para. 77(b).

93. Claimant ignores that Clause 3 provides that SMCV was allowed to incorporate additional mining rights in relation only “to the Cerro Verde Leaching Project.”<sup>160</sup> As Respondent’s witnesses Mr. Tovar explains, this clause simply provides that if SMCV’s mining concessions were expanded (*e.g.*, to include new mine pits on new land to be included within the existing concession), with MINEM approval, then the processing at the leaching facilities of secondary ore from that new land would also be stabilized.<sup>161</sup> In other words, the expansion had to be related to the Leaching Project in order to be stabilized, with MINEM’s approval. This provision does not mean, however, that the Agreement would cover an entirely new investment within SMCV’s mining rights, like the Concentrator Project.

94. Fourth, Claimant prefers to ignore the Fourth, Fifth, Sixth, Seventh, and Eighth Clauses, because they all refer to the investment plan that was included in the 1996 Feasibility Study, and they all linked and limited the effects of the Agreement to the investment that was outlined in that investment plan (*i.e.*, the Leaching Project).

- Clause 4.1 provides that the investment plan, which was prepared and approved for the purposes of the “execution” of the Agreement, “forms an integral part of it . . . .”<sup>162</sup>
- Clause 4.2 provides that any change to that investment plan required prior approval from the General Mining Directorate.<sup>163</sup>
- Clause 4.3 outlines the main works that were contained in the investment plan. None of them referred to a concentrator plant to process primary sulfides and produce copper concentrate.<sup>164</sup>
- Clause 5.1 provides that the execution of the investment plan required an approximate investment of US \$237,517,000.<sup>165</sup>

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<sup>160</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

<sup>161</sup> See Exhibit RWS-3, Tovar Statement at para. 27; see also Exhibit RWS-4, Bedoya Statement at para. 38.

<sup>162</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.1 .

<sup>163</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.2.

<sup>164</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.3.

<sup>165</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 5.1.

- Clause 7.1 provides that upon completion of the investment plan, SMCV had to submit to the General Mining Directorate an affidavit and financial statements detailing the works and acquisitions that were done to complete the investment plan.<sup>166</sup>
- Clause 7.2 provides that if there were any discrepancy between the information provided to the General Mining Directorate and the investment plan, and if SMCV failed to provide a reasonable explanation for such differences, then the effects of the Agreement would be suspended.<sup>167</sup> If the Agreement's effects were not defined by the investment that was outlined in the investment plan, such suspension would be unnecessary. This provision makes it very clear that the Agreement's effects are limited to the activities and investments related to the investment project outlined in the 1996 Feasibility Agreement.
- Clause 8.1 provides that the guarantees agreed to in the Agreement would extend for 15 years, counted from the completion of the investment—*i.e.*, the investment that was outlined in the investment plan.<sup>168</sup> If the Agreement's effects were not limited to the investment that was outlined in the investment plan, it would be unnecessary to wait until the completion of the investment to allow the effects of the Agreement to commence. The purpose of waiting is to ensure that the new project can enjoy the benefits of the Agreement only after the specific investment that was approved is actually completed.

95. In sum, the 1998 Stabilization Agreement expressly limited its effects to the Leaching Project—the project that was outlined in the 1996 Feasibility Study, which was entirely unrelated to the Concentrator Project.

96. On June 15, 1998, SMCV sent a letter to MINEM stating that it had been operating the Leaching Project for ninety consecutive days, in accordance with Clause 6.1 of the Agreement. Notably, SMCV's letter stated that on "March 31, 1998, the project for which the contract was entered into has completed the ninetieth day of continuous operation."<sup>169</sup> Thus, in SMCV's own words, the Agreement was entered into with respect to the Leaching Project, not with respect to its concessions, as Claimant now alleges in this arbitration. On November 23, 1998, MINEM certified that SMCV had substantially implemented the 1996 Feasibility Study,

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<sup>166</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 7.1.

<sup>167</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 7.2.

<sup>168</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 8.1.

<sup>169</sup> See Exhibit RE-101, Letter from SMCV to MINEM, June 15, 1998 ("*con fecha 31 de marzo de 1998 se cumplió con el nonagésimo día de operación continua del proyecto a que se contrae el contrato.*") (emphasis added).

confirming that SMCV could benefit from the stabilized regime.<sup>170</sup> In accordance with Article 83 of the Mining Law, SMCV was thus entitled to receive benefits from the stabilized regime—exclusively limited to the activities and investments related to the investment project outlined in the 1996 Feasibility Study.<sup>171</sup>

#### 4. The 2012 Stabilization Agreement

97. In 2004, SMCV commenced construction of a new investment project, the Concentrator Project—different and unrelated to the Leaching Project—which would permit SMCV to start what was essentially a new line of business: extracting and processing primary sulfide ore to produce copper concentrate.<sup>172</sup> SMCV chose not to apply for a stabilization agreement with respect to that investment. Thus, that investment and its related activities did not enjoy any stability benefits.

98. Contrary to what happened in 2004, however (which is the subject of Section II.D below), SMCV did request a new stabilization agreement in 2011 with respect to another new investment project. On March 16, 2011, SMCV submitted to MINEM a request to sign a new 15-year stabilization agreement.<sup>173</sup> Similar to SMCV’s 1994 and 1998 Stabilization Agreements, the 2012 Stabilization Agreement was entered into to protect a new investment within Cerro Verde’s Mining and Beneficiation Concessions.<sup>174</sup> As Clause 1.1 of the Agreement provides, SMCV submitted a request that a stabilized regime be granted to it “in relation to the investment and startup of the ‘Cerro Verde Unit Expansion’ Project, which comprises the one hundred seven (107) mining concessions included in Annex I of this agreement.”<sup>175</sup>

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<sup>170</sup> See Claimant’s Memorial at para. 82; Exhibit CE-360, MINEM, Directorial Resolution No. 342-98-EM/DGM, November 23, 1998.

<sup>171</sup> See Exhibit CA-1, General Mining Law at Art. 83; Exhibit RWS-1, Polo Statement at paras. 17-19.

<sup>172</sup> See *supra* at Section II.B.1.

<sup>173</sup> See Exhibit CE-644, 2012 Stabilization Agreement at Clause 1.1.

<sup>174</sup> See Exhibit CE-644, 2012 Stabilization Agreement at Clause 3.

<sup>175</sup> See Exhibit CE-644, 2012 Stabilization Agreement at Clause 1.1 (emphasis added).

99. Specifically, the 2012 Agreement concerned a US \$3.5 billion investment to build, among other things, a second concentrator plant to expand Cerro Verde's copper concentrate production, as well as to improve the existing processing facilities (both the leaching and concentrator facilities), as described in the accompanying feasibility study.<sup>176</sup> According to the agreement, the new investments would start benefitting from the stabilized regime in 2016, once the investments were completed.<sup>177</sup>

100. Thus, both before and after the 2004-2006 Concentrator Project investments, SMCV knew how to, and knew that it should, enter into new stabilization agreements to cover activities that were associated with new investments in the same Mining and Beneficiation Concessions.

**C. CYPRUS, PHELPS DODGE, AND FREEPORT FAILED TO CONDUCT ADEQUATE DUE DILIGENCE REGARDING THE SCOPE OF THE STABILIZATION AGREEMENT**

101. In its Memorial, Claimant discusses multiple alleged confirmations from government officials with respect to the scope of the 1998 Stabilization Agreement,<sup>178</sup> which Respondent will address in detail in the next section. First, however, it is important to note what Claimant does not want to discuss: Claimant cannot establish that it undertook adequate due diligence before its investment in March 2007 about the scope of the 1998 Stabilization Agreement and whether it would apply to the activities and investment related to the Concentrator Project—which was completed prior to Claimant's March 2007 investment, at the end of 2006.

102. Claimant seems to have dived head-first into the Cerro Verde Project without doing its homework. For example, Claimant never mentions any study, legal memoranda, or report prepared for it by internal or external counsel with respect to the Mining Law, the scope of

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<sup>176</sup> See Exhibit CE-644, 2012 Stabilization Agreement at Clause 1.2.1, 5.1.

<sup>177</sup> See Exhibit CE-644, 2012 Stabilization Agreement at Clause 8.

<sup>178</sup> See Claimant's Memorial at paras. 128, 314-18.

the 1998 Stabilization Agreement, or any written confirmation from the government of Claimant's interpretation of the Agreement. Either Claimant is hiding its due diligence documents, because they would show that it knew full well that the Concentrator Project was not covered by the 1998 Stabilization Agreement, or Claimant did not do any meaningful due diligence before it acquired an interest in SMCV. Either explanation is fatal to Claimant's claims, because it would mean that Claimant knew or should have known that the Concentrator Project was not covered by the 1998 Stabilization Agreement, but SMCV went ahead and treated it as if it were included.

103. Instead of providing evidence of adequate due diligence conducted at the time of its investment in 2007, Claimant—that is, Freeport—attempts to support its understanding of the scope of the Agreement through witness testimony from former officials of Phelps Dodge Mining Corporation (“Phelps Dodge”) (Freeport's predecessor) and SMCV—Mr. Randy L. Davenport and Mr. Cristian Morán.<sup>179</sup> Mr. Davenport's and Mr. Morán's testimonies, however, show that Phelps Dodge also failed to conduct any adequate due diligence on the scope of the Agreement at the time Phelps Dodge invested in SMCV (1999) and at the time its Board of Directors approved the investment on the Concentrator Project (2004). Moreover, Claimant offers no documents showing any due diligence conducted by either Cyprus (Phelps Dodge's predecessor and owner of SMCV at the time the 1998 Stabilization Agreement was signed) or SMCV at the time SMCV signed the Agreement. Respondent discusses these facts in the sections below.

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<sup>179</sup> See Exhibit CWS-5, Witness Statement of Randy L. Davenport, October 19, 2021 (“Davenport Statement”), at paras. 30-42; Exhibit CWS-8, Morán Statement at paras. 10-16.

## **1. Cyprus and SMCV Failed to Conduct Adequate Due Diligence when SMCV Entered Into the 1998 Stabilization Agreement**

104. In its Memorial, Claimant alleges that Cyprus “viewed the stability guarantees as a ‘prerequisite’ to its purchase of SMCV.”<sup>180</sup> Claimant, however, fails to provide any evidence of Cyprus’s or SMCV’s understanding of the scope of those stability guarantees.

105. As discussed in Sections II.B.2 and II.B.3 above, SMCV (under the ownership of Cyprus) signed two mining stabilization agreements, the 10-year 1994 Stabilization Agreement and the 15-year 1998 Stabilization Agreement (the subject of this arbitration).<sup>181</sup> Claimant alleges in this arbitration that the 1998 Stabilization Agreement covered every activity conducted within SMCV’s Mining and Beneficiation Concessions.<sup>182</sup> In its Memorial, however, Claimant fails even to mention or to provide any document showing any due diligence conducted either by Cyprus or SMCV at the time SMCV entered into the 1994 and 1998 Agreements with the State that would support Claimant’s or SMCV’s interpretation of the scope of the 1998 Stabilization Agreement. Either Claimant is hiding Cyprus’s and SMCV’s due diligence documents, or Cyprus and SMCV did not conduct any due diligence before SMCV entered into the 1998 Stabilization Agreement. Either explanation is fatal to Claimant’s claims, because it would mean that it knew or should have known that the 1998 Stabilization Agreement granted stability guarantees only to the Leaching Project.

## **2. Phelps Dodge Failed to Conduct Adequate Due Diligence when It Invested in the Cerro Verde Mine in 1999**

106. In October 1999, a year and some 8 months after Perú and SMCV (then owned by Cyprus) entered into the 1998 Stabilization Agreement, Phelps Dodge acquired Cyprus.<sup>183</sup>

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<sup>180</sup> Claimant’s Memorial at para. 69.

<sup>181</sup> See *supra* at Sections II.B.2 and II.B.3. See also Exhibit CE-344, 1994 Stabilization Agreement; Exhibit CE-12, 1998 Stabilization Agreement.

<sup>182</sup> See Claimant’s Memorial at para. 6.

<sup>183</sup> See Claimant’s Memorial at para. 84; Exhibit CWS-8, Morán Statement at para. 10.

107. Claimant asserts that Phelps Dodge understood that the Stabilization Agreement would apply to the entire Cerro Verde Mine, including the development of the extraction and processing of primary sulfides.<sup>184</sup> Claimant cites to the witness statements of Mr. Cristian Morán, former Director of Finance at Phelps Dodge Mining Services, who was involved in Phelps Dodge’s 1999 acquisition of Cyprus, in support of this assertion.<sup>185</sup> Mr. Morán’s testimony, however, shows that Phelps Dodge did not conduct any adequate due diligence when it first invested in SMCV.

108. In his witness statement, Mr. Morán alleges that he was involved in Phelps Dodge’s financial analysis of SMCV that was conducted after Phelps Dodge’s acquisition of the Cyprus.<sup>186</sup> Mr. Morán’s description of Phelps Dodge’s analysis with respect to the scope of the 1998 Stabilization Agreement borders on the absurd.

109. First, Mr. Morán provides no evidence of any due diligence conducted at the time to understand the scope of the 1998 Stabilization Agreement or its importance in Phelps Dodge’s investment decision. Mr. Morán simply testifies that when Phelps Dodge acquired Cyprus, it “assigned great importance” to the 1998 Stabilization Agreement “in determining the company’s future plans,”<sup>187</sup> and that he understood that all of SMCV’s future investments in the Cerro Verde Mine will be covered by the 1998 Stabilization Agreement—even those that were not set forth in the Feasibility Study.<sup>188</sup> However, Mr. Morán cites to no contemporaneous studies, reports, or legal memoranda that would support his understanding with respect to the scope of the Agreement or its relevance in Phelps Dodge’s decision to invest in the Cerro Verde Mine.

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<sup>184</sup> See Claimant’s Memorial at para. 84.

<sup>185</sup> See Exhibit CWS-8, Morán Statement at paras. 10-12; Claimant’s Memorial at para. 84.

<sup>186</sup> See Exhibit CWS-8, Morán Statement at para. 11.

<sup>187</sup> Exhibit CWS-8, Morán Statement at para. 14. See also Claimant’s Memorial at para. 84.

<sup>188</sup> See Exhibit CWS-8, Morán Statement at para. 16.

110. Second, Mr. Morán states that, at the time of Phelps Dodge’s acquisition of Cerro Verde, he was involved in conversations with the government of Chile regarding an expansion of one of Phelps Dodge’s mines in that country.<sup>189</sup> He states that in his discussions with Chilean (not Peruvian) officials, the Chilean authorities never questioned whether the stabilization agreement applicable to Phelps Dodge’s investment in Chile covered the planned expansion.<sup>190</sup> Mr. Morán concludes that because Perú usually competed with Chile on mining matters, he assumed that the 1998 Stabilization Agreement in Perú would also cover SMCV’s investment in the Concentrator Project.<sup>191</sup> Silence from Chilean authorities with respect to a different mine, a different investment, and a different stabilization agreement certainly cannot be considered any sort of serious due diligence on SMCV’s 1998 Stabilization Agreement in Perú. Mr. Morán’s testimony is telling. It is, in effect, an admission that Phelps Dodge did not do any adequate due diligence and did not receive any confirmation from Peruvian authorities that the 1998 Stabilization Agreement would cover additional investment projects, including any investment in the Concentrator Project.

111. Claimant also submits a witness statement by Randy L. Davenport, President and General Manager of SMCV between 2000 and 2005. Mr. Davenport testifies that “[g]uarantees of tax and administrative stability were a prerequisite for Phelps Dodge to invest in large-scale mining investment in developing economies such as Perú,”<sup>192</sup> and that “the Stabilit[ization] Agreement was therefore ‘of paramount importance’ to the prospective Concentrator investment.”<sup>193</sup> Mr. Davenport, however, fails to cite to or submit any contemporaneous documents, reports, studies, or legal memoranda that would support his understanding that, as a

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<sup>189</sup> See Exhibit CWS-8, Morán Statement at para. 15.

<sup>190</sup> See Exhibit CWS-8, Morán Statement at para. 15.

<sup>191</sup> See Exhibit CWS-8, Morán Statement at para. 15.

<sup>192</sup> Exhibit CWS-5, Davenport Statement at para. 30 (emphasis added). See also Claimant’s Memorial at para. 90.

<sup>193</sup> Claimant’s Memorial at para. 90; see also Exhibit CWS-5, Davenport Statement at para. 30.

prerequisite for Phelps Dodge to invest in the Cerro Verde Mine, the Stabilization Agreement had to cover other projects outside the Leaching Project, such as the Concentrator Project.

**3. Phelps Dodge Failed to Conduct Adequate Due Diligence When It Decided to Make an Additional Investment to Develop the Concentrator Project**

112. On October 11, 2004, Phelps Dodge's and SMCV's Boards of Directors conditionally approved an additional investment of US \$850 million for the construction of the Concentrator Project, "contingent upon receiving all required permits from the Peruvian government and placing necessary financing."<sup>194</sup> According to Claimant and its witnesses, the required permits and approvals were obtained in the fourth quarter of 2004.<sup>195</sup> Claimant and its witnesses refer, in particular, to MINEM's approval to expand the Beneficiation Concession to include the Concentrator Project (obtained on October 26, 2004) and MINEM's approval for SMCV to reinvest the Leaching Project's profits in the Concentrator Project, free of tax (obtained on December 9, 2004). In February 2005, after receiving these approvals, Phelps Dodge confirmed its approval to go forward with the Concentrator Project.<sup>196</sup> As Respondent discusses in detail in Section II.D.4 below, none of these approvals related to determining or confirming the scope of the 1998 Stabilization Agreement. Claimant and its witnesses, however, argue that at the time Phelps Dodge and SMCV were considering the additional capital investment in the Concentrator Project, they understood that the 1998 Stabilization Agreement would grant stability guarantees to that Project and that the October 2004 approval from MINEM to expand the Beneficiation Concession confirmed this understanding.<sup>197</sup> Claimant provides no

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<sup>194</sup> Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5; Exhibit CE-470, SMCV, Board of Directors Meeting Minutes, October 11, 2004, at p. 1 (of PDF). *See also* Exhibit CWS-5, Davenport Statement at para. 40; Exhibit CWS-8, Morán Statement at para. 30; Claimant's Memorial at para. 112.

<sup>195</sup> *See* Exhibit CWS-5, Davenport Statement at para. 41; Exhibit CWS-8, Morán Statement at para. 30.

<sup>196</sup> *See* Exhibit CWS-8, Morán Statement at para. 30; Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5.

<sup>197</sup> *See* Claimant's Memorial at paras. 112, 114-17; Exhibit CWS-5, Davenport Statement at paras. 40-41; Exhibit CWS-8, Morán Statement at para. 30.

evidence of any adequate due diligence undertaken either by Phelps Dodge or SMCV at the time to support this allegation; instead, it relies on witness testimony. Claimant's witnesses' testimony is revealing. It shows that Phelps Dodge's and SMCV's understanding of the scope of the 1998 Stabilization Agreement was (and is) based on mere unsubstantiated assumptions.

113. First, Mr. Davenport testifies that he understood that the 1998 Stabilization Agreement covered the investment in the Concentrator Project. As explained by Mr. Davenport, “[Phelps Dodge] w[as] confident that any expansion would be legally entitled to the protection of the Stabili[zation] Agreement.”<sup>198</sup> Mr. Davenport, however, fails to cite to or submit any contemporaneous documents, reports, studies, or legal memoranda that would support or provide any basis for his claimed “confiden[ce].”<sup>199</sup>

114. Second, Claimant alleges that, in light of the approval of the Royalty Law in 2004, Phelps Dodge and SMCV “decided it would be prudent ” to seek confirmation that the Concentrator would be covered by the 1998 Stabilization Agreement.<sup>200</sup> Mr. Davenport testifies that “Phelps Dodge wanted to obtain express confirmation from the Government that SMCV's mining stability agreement would shield the concentrator from the royalty and any other legislative changes that could affect the plant's economics.”<sup>201</sup> However, he fails to describe any real due diligence conducted to, in fact, confirm Phelps Dodge's claimed understanding regarding the scope of the 1998 Stabilization Agreement.

115. Mr. Davenport alleges that he had “discussions with various Government officials around that time about obtaining a written assurance such as an amendment to the Stabili[zation]

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<sup>198</sup> Exhibit CWS-5, Davenport Statement at para. 31 (emphasis added). *See also* Claimant's Memorial at para. 96.

<sup>199</sup> Exhibit CWS-5, Davenport Statement at para. 31.

<sup>200</sup> Claimant's Memorial at para. 106

<sup>201</sup> Exhibit CWS-5, Davenport Statement at para. 35 (emphasis added). *See also* Exhibit CWS-8, Morán Statement at para. 21.

Agreement that would expressly state that the Agreement would cover the concentrator.”<sup>202</sup>

Mr. Davenport, however, fails to cite to any actual written confirmation; instead, he alleges that Ms. Chappuis “told” his team that “SMCV could count” on the Stabilization Agreement protections.<sup>203</sup> Mr. Davenport further testifies that his team “accordingly assumed in the 2004 Feasibility Study that the Stabili[zation] Agreement would protect the concentrator.”<sup>204</sup> Mr. Davenport’s testimony is, again, telling. Neither Phelps Dodge nor SMCV ever obtained the written confirmation they (correctly) thought would be “prudent” to obtain. Instead, Phelps Dodge and SMCV—based on alleged oral statements—assumed that their alleged understanding of the scope of the Agreement was correct. Such an assumption is certainly not any type of adequate due diligence. Moreover, as Respondent discusses in further detail in Section II.D.4 below, this unsubstantiated oral statement from Ms. Chappuis (assuming it was, in fact, made at the time) cannot be taken as an official confirmation from the State.

116. Ms. Torreblanca, SMCV’s legal representative, also discussed in her witness statement these alleged meetings with government officials, which were to allegedly seek confirmation regarding the scope of the 1998 Stabilization Agreement.<sup>205</sup> Ms. Torreblanca, however, also fails to provide evidence of any written confirmation from the State on the matter.

117. Third, Claimant cites to witness testimony to support its understanding that the expansion of the Beneficiation Concession served as confirmation that the 1998 Stabilization Agreement would apply to the Concentrator. Mr. Morán testifies that, at the time Phelps Dodge was considering whether to invest in the Concentrator Project, “approvals were still outstanding in Perú, including one of the most important—the permission to expand the Beneficiation

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<sup>202</sup> Exhibit CWS-5, Davenport Statement at para. 36 (emphasis added).

<sup>203</sup> Exhibit CWS-5, Davenport Statement at para. 36.

<sup>204</sup> Exhibit CWS-5, Davenport Statement at para. 37 (emphasis added).

<sup>205</sup> See Exhibit CWS-11, Witness Statement of Julia Torreblanca, October 19, 2021 (“Torreblanca Statement”), at paras. 24-25.

Concession to include the Concentrator, which would ensure that it would be covered by the Stabili[zation] Agreement.”<sup>206</sup> Also, Ms. Torreblanca alleges that, once MINEM approved SMCV’s request to construct the Concentrator and to expand the Beneficiation Concession in October 2004,<sup>207</sup> she “understood that this MINEM resolution confirmed that the Stabili[zation] Agreement would cover the Concentrator . . . .”<sup>208</sup> Mr. Davenport similarly testifies that MINEM’s approval “confirm[ed] [SMCV’s and Phelps Dodge’s] understanding that the Stabili[zation] Agreement would cover the Concentrator because it covered the entire beneficiation concession.”<sup>209</sup>

118. However, as Respondent discusses in further detail in Section II.D.4 below, MINEM’s approval of the extension of the Beneficiation Concession does not indicate that the Concentrator Project would be covered by the 1998 Stabilization Agreement as a result of the extension. The Beneficiation Concession approval is entirely silent on the matter. To the contrary, Mr. Oswaldo Tovar, MINEM’s Director of Mining Promotion who was in charge of reviewing and approving the extension of the Beneficiation Concession, explains in his witness statement that that approval was never meant to be a confirmation of whether the Stabilization Agreement applied or not to the Concentrator Project.<sup>210</sup> Thus, Mr. Morán’s, Mr. Davenport’s, and Ms. Torreblanca’s claimed reliance on that approval was misplaced.

119. Fourth, Mr. Davenport states that “[i]n approving the investment, Phelps Dodge’s and SMCV’s Boards of Directors relied on financial projections that assumed the Stabili[zation] Agreement’s guarantees would apply to the concentrator, consistent with Ms. Chappuis’s advice

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<sup>206</sup> Exhibit CWS-8, Morán Statement at para. 28 (emphasis added). *See also* Claimant’s Memorial at para. 112.

<sup>207</sup> *See* Exhibit CWS-11, Torreblanca Statement at para. 27; Claimant’s Memorial at para. 114.

<sup>208</sup> Exhibit CWS-11, Torreblanca Statement at para. 27.

<sup>209</sup> Exhibit CWS-5, Davenport Statement at para. 41.

<sup>210</sup> *See* Exhibit RWS-3, Tovar Statement at paras. 5, 17-23.

to SMCV.”<sup>211</sup> Similarly, Mr. Morán, testifies that Phelps Dodge’s Board “based its approval [of the Concentrator Project] on the Finance Committee’s recommendation, as well as the 2004 Feasibility Study and its update. . . [which] reflected our understanding that the Stability Agreement’s guarantees would apply to the Concentrator.”<sup>212</sup> Mr. Davenport’s and Mr. Morán’s testimonies are, once more, telling. Both Phelps Dodge’s and SMCV’s Boards decided to approve the investment in the Concentrator Project relying on mere assumptions and descriptions of alleged discussions with Government officials, not on any type of adequate due diligence.

120. Moreover, Mr. Morán’s reliance on the 2004 Feasibility Study to show confirmation of Phelps Dodge’s understanding of the scope of the Stabilization Agreement borders on the absurd. As Mr. Davenport explains in his witness statement, it was SMCV and Mr. Davenport’s team who asked Fluor Daniel Wright Ltd. (*i.e.*, the company in charge of conducting the 2004 Feasibility Agreement and its update) to assume that the 1998 Stabilization Agreement would apply to the Concentrator Project, based on Ms. Chappuis’s alleged assurances.<sup>213</sup> Therefore, the 2004 Feasibility Study and its update cannot possibly constitute a reasonable basis to conclude that the 1998 Stabilization Agreement covered the Concentrator Project, nor is it evidence of any type of adequate due diligence on the matter.

121. Fifth, Mr. Davenport submits a copy of the meeting minutes of the meeting where SMCV’s Board of Directors approved the investment in the Concentrator Project.<sup>214</sup> The meeting minutes, however, do not mention the 1998 Stabilization Agreement as a variable that was considered when making the decision to invest in the Project, nor do they discuss the

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<sup>211</sup> Exhibit CWS-5, Davenport Statement at para. 40.

<sup>212</sup> Exhibit CWS-8, Morán Statement at para. 29.

<sup>213</sup> See Exhibit CWS-5, Davenport Statement at paras. 37, 39-40; Exhibit CE-20, Fluor Feasibility Study, *Cerro Verde Primary Sulfide Project*, May 2004, pp. 55-57; Exhibit CE-459, Fluor, *Sociedad Minera Cerro Verde S.A.A.: Primary Sulfide Project Feasibility Study, Project Update*, September 2004, at p. 46.

<sup>214</sup> See Exhibit CWS-5, Davenport Statement at para. 40 (citing Exhibit CE-470, SMCV, Board of Directors Meeting Minutes, October 11, 2004).

Board's understanding of the scope of the Agreement or any due diligence undertaken on the matter.<sup>215</sup>

122. Sixth, Mr. Morán submits a copy of Phelps Dodge's 10-K Form submitted before the United States Securities and Exchange Commission ("SEC") for fiscal year December 31, 2004, to show Phelps Dodge's Board decision to invest in the Concentrator Project.<sup>216</sup> Notably, he does not provide any relevant Phelps Dodge Board meeting minutes. Similar to SMCV's Board Meeting Minutes, Phelps Dodge's 10-K Form does not mention the scope of the 1998 Stabilization Agreement as a variable that was considered when making the decision to invest in the Project, nor does it discuss the Board's understanding of the scope of the Agreement or any due diligence undertaken on the matter.<sup>217</sup> In fact, in discussing the approval of the new Royalty Law, Phelps Dodge's 10-K Form states, "[I]t is not clear what, if any, effect the new royalty law will have on the operations at Cerro Verde."<sup>218</sup> Had Phelps Dodge done any due diligence on the scope of the Agreement, it would have known the effects of the new legislation on its operations.

123. Finally, Claimant cites to statements from President Toledo in a news article dated October 2004 after a meeting with Phelps Dodge's president at the time it approved the

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<sup>215</sup> See Exhibit CE-470, SMCV, Board of Directors Meeting Minutes, October 11, 2004.

<sup>216</sup> See Exhibit CWS-8, Morán Statement at para. 29 (citing Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5).

<sup>217</sup> See Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 5 ("On October 11, 2004, the Phelps Dodge board of directors announced conditional approval for an \$850 million expansion of the Cerro Verde mine. Final approval was contingent upon receiving all required permits from the Peruvian government and placing necessary financing. The required permits and approvals were obtained in the 2004 fourth quarter. In early February 2005, the board approved moving forward on financing and project development. We expect to finalize financing during 2005."), and p. 73 ("Cerro Verde's Mining Stability Agreement of 1998 contains a provision that allows it to exclude from taxable income any profits reinvested in an investment program that is duly filed with and approved by the Ministry of Energy and Mines (the Mining Authority). The annual exclusion is limited to 80 percent of the lesser of book profits after tax or taxable income. On December 9, 2004, Cerro Verde received confirmation from the Mining Authority that Cerro Verde's reinvestment of profits from its current operation into its planned expansion qualifies for the taxable income exclusion for the period from October 2004 through February 2007. This period can, at the discretion of the Mining Authority, be extended for up to three years. Any amounts excluded from taxable income must be set aside in separate equity accounts, capitalized, and may not be repatriated for a period of four years after the reinvestment program is completed and approved by the Mining Authority.").

<sup>218</sup> See Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 80.

investment in the Concentrator Project, to support its interpretation of the 1998 Stabilization Agreement.<sup>219</sup> Claimant asserts that President Toledo applauded Phelps Dodge's Concentrator Project and allegedly said that Perú would fulfill its responsibility to maintain economic and legal stability.<sup>220</sup> This is certainly not a confirmation that the 1998 Stabilization Agreement covered the Concentrator Project, nor can it be understood as any type of due diligence by Phelps Dodge.

#### **4. Freeport Failed to Conduct Adequate Due Diligence Before Investing in Perú in 2007**

124. In November 2006, Phelps Dodge and Freeport signed a merger agreement according to which Freeport would acquire Phelps Dodge.<sup>221</sup> At the time, Phelps Dodge was the majority shareholder of SMCV.<sup>222</sup> On March 19, 2007, Freeport completed its acquisition of Phelps Dodge and, with that, became the indirect majority owner of SMCV.<sup>223</sup>

125. In its Memorial, Claimant fails to mention any specific due diligence undertaken by Freeport before acquiring Phelps Dodge regarding the scope of the 1998 Stabilization Agreement.<sup>224</sup> Claimant fails to submit any study, legal memoranda, or report prepared for it by internal or external counsel with respect to the Mining Law, the scope of the 1998 Stabilization Agreement, or any written confirmation from the government with respect to Claimant's interpretation of the Agreement. In fact, Claimant has failed to provide any evidence that Freeport in fact relied on the 1998 Stabilization Agreement when making its decision to invest in Perú.

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<sup>219</sup> See Claimant's Memorial at para. 332(d).

<sup>220</sup> See Claimant's Memorial at para. 332(d). See also Exhibit CE-471, "Peru: President Toledo Announces and Investment of US\$850 Million in Cerro Verde," *Europa Press*, October 12, 2004.

<sup>221</sup> See Claimant's Memorial at para. 156.

<sup>222</sup> See Claimant's Memorial at para. 120.

<sup>223</sup> See Claimant's Memorial at para. 158.

<sup>224</sup> See Claimant's Memorial at paras. 155-58.

126. Instead, Claimant simply asserts that, at the time Freeport was considering acquiring Phelps Dodge and with it the Cerro Verde Mine, SMCV had obtained another alleged confirmation that the 1998 Stabilization Agreement would cover the Concentrator Project.<sup>225</sup> Specifically, Claimant refers to testimony of Ms. Torreblanca, SMCV's Legal and Environmental Director at the time of Freeport's acquisition of Phelps Dodge<sup>226</sup> Ms. Torreblanca testifies that MINEM's February 2007 resolution formalizing the expansion of the Beneficiation Concession to include the Concentrator "assure[d] [SMCV] that [it] had complied with all the steps to guarantee its stability, as Director Chappuis confirmed."<sup>227</sup> However, neither Claimant nor Ms. Torreblanca has submitted any contemporaneous evidence that would support or provide any basis for this understanding. And, more importantly, neither Claimant nor Ms. Torreblanca have submitted evidence showing that Ms. Torreblanca shared the alleged assurances she received from Peruvian government with SMCV's management, its then shareholders, or Freeport.

127. In sum, Cyprus, SMCV, Phelps Dodge, and Freeport failed to conduct any serious or adequate due diligence on the scope of the 1998 Stabilization Agreement. Freeport (and its predecessors) and SMCV knew, or should have known, that the 1998 Stabilization Agreement did not cover the Concentrator Project. However, they and SMCV elected to overlook the lack of any written confirmation from the government of their alleged understanding of the Agreement. Serious due diligence would have shown that SMCV's investment in the Concentrator Project would not be covered by the Agreement. Respondent cannot be held liable under international law for Claimant's own shortcomings in making its investment.

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<sup>225</sup> See Claimant's Memorial at para. 157.

<sup>226</sup> See Claimant's Memorial at para. 157.

<sup>227</sup> Claimant's Memorial at para. 157.

**D. PERÚ DID NOT AND COULD NOT HAVE CONFIRMED THAT THE 1998 STABILIZATION AGREEMENT COVERED ANY FUTURE INVESTMENT PROJECTS**

128. As noted above, Claimant failed to perform adequate due diligence before it invested in SMCV. Notwithstanding that failure, Claimant either knew or should have known that the 1998 Stabilization Agreement would not apply to the Concentrator Project based on information that was publicly available as early as 2002. Moreover, as Respondent explains in detail in this section, in June 2005 and May 2006, MINEM’s highest officials, namely the Minister, Vice Minister of Mines, and Legal Director, appeared before the Energy and Mines Commission of Perú’s Congress to explain the scope of mining stabilization agreements, and, in particular, SMCV’s 1998 Stabilization Agreement. At those presentations, they unequivocally stated that mining companies were not exempt from paying royalties with respect to investment projects that had not been stabilized at the time and that SMCV’s Concentrator Project was not covered by the 1998 Stabilization Agreement—thus, SMCV was not entitled to stability benefits with respect to that investment project.<sup>228</sup> For example, in a presentation made before Congress on May 3, 2006, Mr. Isasi stated, “Cerro Verde’s [Concentrator Project] is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract. It is a new project that does not benefit from tax, exchange rate and administrative stability.”<sup>229</sup> These presentations were televised and, thus, available to the public.<sup>230</sup> At the very least, SMCV (and Phelps Dodge, Freeport’s predecessor) either knew or should have known about the Ministry’s position on the correct interpretation of the 1998 Stabilization Agreement as of June 2005.

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<sup>228</sup> See Exhibit RWS-2, Witness Statement of Felipe Isasi, April 18, 2022 (“Isasi Statement”), at paras. 46-51; Exhibit RWS-3, Tovar Statement at paras. 60-61; Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, at slide 12 (“*El proyecto de sulfuros primarios de Cerro Verde no forma parte del Proyecto de Lixiviación, razón por la que no goza del régimen estabilizado materia del contrato del 13 de Febrero de 1998.*”) (emphasis added).

<sup>229</sup> Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, at slide 12.

<sup>230</sup> See Exhibit RWS-2, Isasi Statement at paras. 46, 51, 59.

129. Notwithstanding the Minister, Vice Minister, and Legal Director’s public statements to the Congress, Claimant alleges in its Memorial that it obtained multiple confirmations from State authorities that SMCV’s investment in the Concentrator Project would be covered by the 1998 Stabilization Agreement.<sup>231</sup> Claimant cites, for example, to (i) a 2001 decision from the Mining Council;<sup>232</sup> (ii) statements by other government officials at the time Congress was discussing the 2004 Royalty Law;<sup>233</sup> (iii) MINEM’s approval to expand the area of SMCV’s Beneficiation Concession in 2004;<sup>234</sup> (iv) MINEM’s approval allowing SMCV to reinvest its profits from the Leaching Project into the Concentrator Project, free of taxes in 2004;<sup>235</sup> (v) an exchange with the Head of SUNAT’s Regional Office in Arequipa in 2005;<sup>236</sup> and (vi) two reports issued by MINEM’s Legal Affairs Office in April and September 2005.<sup>237</sup> Claimant then alleges that MINEM did an “abrupt about-face” and changed its interpretation in June 2006 as a result of political pressure from Congress, which supposedly led to SUNAT’s Royalty Assessments against SMCV starting in 2009.<sup>238</sup> Claimant misconstrues all of those events, in many cases attributing to them meaning or significance that they simply did not have.

130. As discussed below, Perú has consistently held that mining stabilization agreements apply exclusively to the specific investment project for which the agreement is signed, as outlined in the feasibility study that is the basis for that investment project. For SMCV’s purposes, that means that the scope of SMCV’s 1998 Stabilization Agreement is limited to the Leaching Project. In the next sections, Respondent discusses—in chronological

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<sup>231</sup> See Claimant’s Memorial at paras. 95-122.

<sup>232</sup> See Claimant’s Memorial at para. 316.

<sup>233</sup> See Claimant’s Memorial at para. 319(c).

<sup>234</sup> See Claimant’s Memorial at para. 109.

<sup>235</sup> See Claimant’s Memorial at paras. 110, 115-16.

<sup>236</sup> See Claimant’s Memorial at paras. 123-24.

<sup>237</sup> See Claimant’s Memorial at paras. 128, 134.

<sup>238</sup> See Claimant’s Memorial at para. 142.

order—each of the actions allegedly taken by the government that Claimant has highlighted. Respondent demonstrates that none of the actions Claimant lists can be understood as confirming Claimant’s interpretation of the scope of the 1998 Stabilization Agreement. The important Congressional testimonies of the Minister and MINEM Legal Director are also presented in their place in the chronology.

### **1. The 2001 Mining Council Decision**

131. Claimant alleges that MINEM’s General Mining Directorate and, in particular, its Mining Council, understood that stability guarantees applied to the entirety of the activities of and investments in whatever “mining rights” (that is, the mining concessions) are designated in a particular stabilization agreement.<sup>239</sup> According to Claimant, a November 2001 Mining Council resolution relating to the “Parcoy” mining unit (located in the north of Perú and owned by Consorcio Minero Horizonte S.A.) confirmed Claimant’s understanding of the scope of the 1998 Stabilization Agreement by stating that (i) “tax stability [is applicable to] the Parcoy EAU [Economic Administrative Unit], which is where the investments of the Parcoy Project were made. . . .”<sup>240</sup> and that (ii) “[t]he concessions created in the Parcoy EAU and the Parcoy Plant beneficiation concession . . . are subject to the [s]tabili[zation] [a]greement.”<sup>241</sup> Properly read, however, nothing in the Mining Council’s resolution regarding the Parcoy Project could be understood as confirming Claimant’s view that stability benefits provided in the 1998 Stabilization Agreement extended to all investments in Cerro Verde’s concessions, including SMCV’s investment in the Concentrator Project.

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<sup>239</sup> See Claimant’s Memorial at paras. 6, 316.

<sup>240</sup> Claimant’s Memorial at para. 316 (citing Exhibit CE-377, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, at p. 2).

<sup>241</sup> Claimant’s Memorial at para. 316 (citing Exhibit CE-377, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, at p. 2).

132. As an important threshold matter, however, Claimant does not assert in these proceedings that it knew about or relied on this other company's 2001 resolution when forming its understanding of the scope of the 1998 Stabilization Agreement. Thus, the content of the resolution cannot have formed the basis of any expectation (legitimate or not) on the part of Claimant before making its investment.

133. In any event, Claimant takes the language from the Mining Council resolution out of context. The Mining Council resolution could not have confirmed Claimant's understanding of the scope of MINEM stabilization agreements, because the Council was considering a different issue when it made those statements.

134. The Mining Council is an administrative body within MINEM that is in charge of reviewing administrative appeals against MINEM's decisions.<sup>242</sup> In the case cited by Claimant, the Mining Council was reviewing an appeal brought by a mining company that had requested the General Mining Directorate to include, within a project that was already covered by a stabilization agreement, other mining rights that were part of the same production unit as the project and to extend the stability benefits to those mining rights.<sup>243</sup> The General Mining Directorate had rejected the request because that mining company's stabilization agreement was limited to the mining unit that was originally named in the agreement.<sup>244</sup> The Mining Council concluded that the mining company could add other mining rights into the agreement—if the company complied with all of the requirements for doing so that were set out in the agreement—because the language of that agreement allowed the company to do so.<sup>245</sup>

135. The Parcoy Plant case is substantially different than that of Claimant's in this arbitration. In the Parcoy Plant case, the Mining Council was not asked whether a stabilization

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<sup>242</sup> See Exhibit CA-1, General Mining Law at Art. 94(1).

<sup>243</sup> See Exhibit CE-377, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, at p. 1.

<sup>244</sup> See Exhibit CE-377, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, at p. 2.

<sup>245</sup> See Exhibit CE-377, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, at pp. 2-3.

agreement automatically covered all investment projects within the same Economic-Administrative Unit or concession, regardless of whether they had been included or not in the feasibility study or the agreement itself. The Mining Council was also not considering whether additional investment projects in the same Economic-Administrative Unit would expand the stabilization agreement; it was considering whether ore retrieved from additional mining sites not named in the agreement could be processed in the stabilized project and benefit from its stability provisions (lower taxes and royalties, *etc.*). The Mining Council was asked whether the General Mining Directorate should have approved a request from a mining company to incorporate into a project other mining rights (mine sites) that were part of the same production unit as the project, and thus extend those stability benefits to the processing and sale of ore from other mine sites. Thus, the Mining Council was asked a different question, which is irrelevant to the facts in this case.

136. In addition, by law, the Mining Council resolution is applicable only to the parties involved in that dispute and, thus, does not create any precedent.<sup>246</sup> Claimant tries to rely on the fact that one of the Mining Council's roles is to standardize administrative jurisprudence on mining issues.<sup>247</sup> While that may be correct, that does not mean that every decision of the Mining Council sets a precedent. They do not. Precedent is set only when the Mining Council is interpreting the meaning of legislation.<sup>248</sup> Precedent is not set where, as here, the Mining Council is interpreting a particular provision in a specific contract between a mining company and the State.

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<sup>246</sup> See Exhibit RE-102, Juan Carlos Morón Urbina, *Comments on the Law of the General Administrative Procedure*, Volume I (2017) (excerpts), at p. 173.

<sup>247</sup> See Claimant's Memorial at para. 316.

<sup>248</sup> See Exhibit RE-102, Juan Carlos Morón Urbina, *Comments on the Law of the General Administrative Procedure*, Volume I (2017) (excerpts), at p. 169.

137. In sum, the Mining Council’s resolution in 2001 could not have confirmed Claimant’s understanding regarding the scope of SMCV’s 1998 Stabilization Agreement.

## 2. The 2002 SUNAT Report

138. SUNAT, as the tax authority in Perú, receives inquiries from taxpayers with respect to their tax obligations. In response to these inquiries, SUNAT prepares reports in which it sets the entity’s position on the matter. Those reports are made available to the public.

139. In September 2002, SUNAT issued a report in which it explained the scope of mining stabilization agreements. In particular, the taxpayer asked SUNAT if a mining company, that had signed a mining stabilization agreement with respect to one of its beneficiation plants, had to pay a newly created tax with respect to certain activities that were related to its investment project.

140. After analyzing the Mining Law provisions with respect to mining stabilization agreements, SUNAT responded by describing the scope of mining stabilization agreements: “Tax Stability Contracts entered into pursuant to Title Nine of the TUO of the General Mining Law only stabilize the applicable tax regime with respect to the investment activities that are the subject matter of the agreements, for their execution in a determined concession or an Administrative-Economic Unit.”<sup>249</sup> In other words, and as Respondent explained above, the stability benefits are granted exclusively to the activities related to the investment project that was subject of the agreement—*i.e.*, the investment project that was outlined in the feasibility study.

141. Thus, as early as 2002, SMCV (and Phelps Dodge, Freeport’s predecessor) knew or should have known that a new investment project—different to the Leaching Project—would

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<sup>249</sup> Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, available at <https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm> (“Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa”) (emphasis added).

not be covered by the 1998 Stabilization Agreement. Claimant omits this key fact in its Memorial.

### **3. The Drafting History of the 2004 Mining Royalty Law**

142. Claimant points to the fact that throughout the drafting and approval process of the new Royalty Law that was promulgated in 2004, the government made clear that the Royalty Law would not apply to companies with stabilization agreements.<sup>250</sup> Where Claimant errs, however, is when it takes these statements to be saying anything about the scope of the stabilization agreements in question. Government officials confirmed that the Royalty Law would not affect (*e.g.*, terminate, or override) extant stabilization agreements—and, indeed, after the law was enacted, SMCV’s stabilization agreement was respected and ores processed in the Leaching Project were not subjected to the new royalties. But those statements during the legislative process simply were not about the scope or reach of any particular existing stabilization agreement, so they could not speak to, *e.g.*, whether the royalties would apply to ores processed in SMCV’s Concentrator Project. Perú did not confirm Claimant’s understanding of the scope of the 1998 Stabilization Agreement in the process of issuing the 2004 Royalty Law.

143. In late 2002 and 2003, the Peruvian Congress worked on the first drafts of a law to require mining companies to pay royalties. The law was eventually adopted on June 23, 2004 (“2004 Royalty Law”).<sup>251</sup> The law imposes a royalty on mining concession holders for the extraction of ore.<sup>252</sup> The royalty is paid based on the value (on international markets) of ore concentrate produced from a concession.<sup>253</sup> Claimant relies in this arbitration on statements made by government officials when the law was being considered regarding the relationship

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<sup>250</sup> See Claimant’s Memorial at paras. 97-105.

<sup>251</sup> See Exhibit CA-6, Mining Royalty Law, Law No. 28258, June 23, 2004 (“Mining Royalty Law”).

<sup>252</sup> See Exhibit CA-6, Mining Royalty Law, at Art. 3 (modified by Art. 2 of Law No. 29788, published on September 28, 2011).

<sup>253</sup> See Exhibit CA-6, Mining Royalty Law, at Art. 3.

between the 2004 Royalty Law and stabilization agreements. In particular, Claimant focuses on statements made by government officials who indicated that the law would not affect companies with stabilization agreements.<sup>254</sup> For example, Claimant refers to a November 2003 report from the Energy and Mines Commission of the Peruvian Congress which Claimant alleges endorsed the concept of a royalty but recommended to clarify that companies with mining stabilization agreements would be exempt.<sup>255</sup> Claimant asserts that SMCV was “repeatedly” included in the category of companies with stabilization agreements that would be exempt from paying royalties.<sup>256</sup>

144. Any such statements by government officials, however, do not constitute confirmation that Claimant’s interpretation of the scope of the 1998 Stabilization Agreement is correct. Perú agrees that the 2004 Royalty Law applies only to mining activities in Perú that are not covered by stabilization agreements. That is not confirmation, however, that if a mining company had a stabilization agreement that was in force at the time the 2004 Royalty Law was enacted, the company did not have to pay any royalties on any ore it extracted and processed. That simply means that Perú would—as it has done historically—respect the stabilization agreements in force at the time the 2004 Royalty Law was enacted on their terms. That is, the stabilization agreements would be respected, and they would exempt from the new royalties the specific activities and investment projects that were covered by the terms of each specific agreement. SMCV was a company that held such an agreement, and so it was mentioned when officials identified the companies that would be able to rely on their stabilization agreements to shield their covered mining activities from royalties for the duration of those agreements. That says nothing about the scope of those agreements, nor was it a promise that every stabilization

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<sup>254</sup> See Claimant’s Memorial at paras. 99, 102.

<sup>255</sup> See Claimant’s Memorial at para. 99.

<sup>256</sup> See Claimant’s Memorial at para. 99.

agreement would exempt all of the identified companies' ore from royalties. In SMCV's case, this meant that some of its ore (namely, the oxides and secondary sulfides processed into copper cathodes in the Leaching Project) would be covered by the 1998 Stabilization Agreement and exempt from the new royalties during its term, but other ore (namely, primary sulfides processed into copper concentrate in the Concentrator Project) would not be. This was because the investment in the Concentrator Project was not covered within the 1998 Stabilization Agreement.<sup>257</sup>

145. In sum, statements made during the drafting and enacting of the 2004 Royalty Law could not have confirmed SMCV's, Phelps Dodge's, or Claimant's understanding regarding the scope of SMCV's 1998 Stabilization Agreement.

**4. MINEM's Approvals of the Expansion of the Beneficiation Concession and the Request to Reinvest Undistributed Profits in the Concentrator Project Did Not Indicate that the Concentrator Project Would Be Covered by the 1998 Stabilization Agreement**

146. In its Memorial, Claimant explains that between 2002 and 2004 changes occurred in the area where the Leaching Plant was located that finally made it economical for SMCV to build a Concentrator Plant.<sup>258</sup> According to Claimant, SMCV then sought confirmation that the Concentrator Project would be covered under the 1998 Stabilization Agreement, even though it had not been included in the 1996 Feasibility Study (which was the basis for that 1998 Agreement). Claimant alleges that SMCV obtained its requested confirmation through three means: (a) meetings with MINEM's General Mining Director at the time, Ms. Marita Chappuis; (b) MINEM's approval of the construction of the Concentrator Project and extension of the Beneficiation Concession to cover that Plant; and (c) MINEM's approval that SMCV could, based on the 1998 Stabilization Agreement, reinvest its undistributed profits obtained from the

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<sup>257</sup> See Exhibit RER-4, Ralbovsky Report at paras. 67, 78, 80.

<sup>258</sup> See Claimant's Memorial at paras. 89-90, 95-96.

Leaching Project into the Concentrator Project.<sup>259</sup> Claimant's allegations are misleading and incorrect.

a. SMCV's Meetings with the General Mining Director of MINEM

147. Claimant alleges that, in 2004, after SMCV confirmed that it was economically feasible to build the Concentrator Project, SMCV sought to obtain confirmation from MINEM on whether the 1998 Stabilization Agreement would cover the Concentrator Project and shield its products from royalties and higher taxes.<sup>260</sup> According to Claimant, Ms. Julia Torreblanca of SMCV raised the issue several times with the government to try to obtain a “written assurance explicitly confirming that the Stability Agreement covered the Concentrator investment.”<sup>261</sup> SMCV was never able to obtain such a written confirmation—a fact that is significant in its own right, because it was a warning to SMCV that its understanding was incorrect. But SMCV decided to proceed nevertheless. According to Claimant, it did so because Ms. Torreblanca allegedly obtained oral (not written) confirmation from Ms. Chappuis that the 1998 Stabilization Agreement would apply to any investment project that SMCV made in its concessions throughout the term of the Agreement.<sup>262</sup> Even if Ms. Chappuis made such a statement (which certainly has not been proven), any such statement could not be understood as adequate confirmation from Perú that the Concentrator Project was entitled to stability under the 1998 Stabilization Agreement.

148. First, even though SMCV requested a written confirmation that the Concentrator would be entitled to stability benefits under the 1998 Stabilization Agreement, MINEM never provided SMCV with any such written confirmation. Had the Concentrator actually been covered by the Agreement, MINEM would have provided the required confirmation in writing.

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<sup>259</sup> See Claimant's Memorial at paras. 91-94, 108, 110, 114, 116.

<sup>260</sup> See Claimant's Memorial at paras. 106-08.

<sup>261</sup> Claimant's Memorial at para. 107 (emphasis in original).

<sup>262</sup> See Claimant's Memorial at paras. 107-08.

As Mr. Oswaldo Tovar has explained, “[A] confirmation of this nature must be in writing.”<sup>263</sup>

An unsubstantiated oral statement from a government official (assuming it was, in fact, made at the time) cannot be taken as official confirmation from the State.

149. Second, Claimant admits that “[o]ne of [Ms. Chappuis’s] colleagues, César Polo, disagreed, taking the position that the Concentrator would have to pay royalties . . .”<sup>264</sup> This, too, was a clear and obvious warning to SMCV, but Claimant dismisses his statement as having been “politically motivated.”<sup>265</sup> What Claimant fails to mention (misleadingly) is that the “colleague” of Ms. Chappuis that Claimant wishes to dismiss as a rogue actor was, in fact, her superior, the Vice Minister of Mines.<sup>266</sup> Significantly, Vice Minister Polo was also one of the drafters of the stability provisions in the Mining Law. And, as he explains in his witness statement, he was the person who suggested the language in the law that limited the effects of the stabilization agreement to the particular investment project that was outlined, reviewed, and approved in the feasibility study.<sup>267</sup> Thus, his opinion cannot be dismissed as merely “politically motivated;”<sup>268</sup> that clearly stated opinion was founded on Vice Minister Polo’s direct and personal knowledge as a drafter of the provisions included in the Mining Law.

150. Third, Claimant alleges that, in the conversations between Ms. Chappuis and Phelps Dodge, Ms. Chappuis suggested that SMCV obtain an approval to expand the Beneficiation Concession to the area in which the Concentrator would be constructed.<sup>269</sup> Claimant alleges that Ms. Chappuis made this suggestion because—in her own view—by obtaining this approval, SMCV would somehow extend the 1998 Stabilization Agreement to

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<sup>263</sup> Exhibit RWS-3, Tovar Statement at para. 14.

<sup>264</sup> Claimant’s Memorial at para. 108.

<sup>265</sup> Claimant’s Memorial at para. 108.

<sup>266</sup> See Exhibit RWS-1, Polo Statement at paras. 1, 5.

<sup>267</sup> See Exhibit RWS-1, Polo Statement at paras. 11-18.

<sup>268</sup> Claimant’s Memorial at para. 108.

<sup>269</sup> See Claimant’s Memorial at para. 108.

apply to the Concentrator Project.<sup>270</sup> Implicit even in that supposed (and ultimately incorrect) theory, though, is the understanding that, without such maneuver, the Concentrator Project and the processing of “sulfide” was not covered.

151. Moreover, even if this description of the conversations between Phelps Dodge and MINEM were taken at face value, MINEM did not confirm that the 1998 Stabilization Agreement covered the Concentrator Project. At best, it appears that someone at MINEM simply suggested that SMCV obtain an extension of the Beneficiation Concession—which was required in any case in order to operate the Concentrator Project. As Respondent discusses in the next section, nothing in MINEM’s approval of the expansion of the Beneficiation Concession to include the Concentrator Project stated that the scope of the 1998 Stabilization Agreement, a different legal construct, would also be expanded to the Concentrator Project.

b. MINEM’s Approval to Extend the Beneficiation Concession

152. On August 27, 2004, SMCV submitted a request to expand the Beneficiation Concession.<sup>271</sup> In that request, SMCV described the new project, which included building the Concentrator Plant for the purpose of processing primary sulfides in order to produce copper concentrate that would be sold and exported.<sup>272</sup> SMCV, however, did not mention the 1998 Stabilization Agreement at all—it did not ask about or request any type of confirmation of whether the 1998 Stabilization Agreement covered the Concentrator Project for which it was requesting the expansion of the Beneficiation Concession.

153. On October 26, 2004, MINEM’s Director of Mining Promotion and Development, Mr. Tovar, approved SMCV’s request to construct the Concentrator and expand

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<sup>270</sup> See Claimant’s Memorial at para. 108.

<sup>271</sup> See generally Exhibit CE-457, SMCV, Petition No. 1487019 to MINEM, August 27, 2004.

<sup>272</sup> See Exhibit CE-457, SMCV, Petition No. 1487019 to MINEM, August 27, 2004, at p. 2.

the Beneficiation Concession.<sup>273</sup> Claimant alleges that MINEM's approval to build the Concentrator Plant and expand the Beneficiation Concession was the confirmation it needed to be sure that the 1998 Stabilization Agreement covered the Concentrator Project.<sup>274</sup> But no such significance can be attached to that approval.

154. First, MINEM's approval does not mention the 1998 Stabilization Agreement nor any link between the Agreement and the new Concentrator Project.<sup>275</sup> It thus in no way confirms that the 1998 Stabilization Agreement somehow already included, or was being expanded to include, the Concentrator Project. As such, SMCV and Phelps Dodge (Freeport's predecessor) could not have credibly understood that this document was somehow confirmation from MINEM of the State's understanding of the scope of the 1998 Stabilization Agreement. If it were so important for SMCV and Phelps Dodge to ensure that the Concentrator was entitled to stability benefits, as Claimant alleges in this arbitration, they should have and would have insisted on obtaining written confirmation of the matter from MINEM—as any diligent business would have done. They did not.

155. Second, Mr. Tovar explains in his witness statement that, in authorizing SMCV to build the Concentrator Project and in granting SMCV's request to expand the Beneficiation Concession to include the Concentrator Project, MINEM in no way confirmed SMCV's and Phelps Dodge's belief (and later Claimant's belief) that the 1998 Stabilization Agreement—a different legal instrument—also covered the Concentrator Project.<sup>276</sup> That was never part of Mr. Tovar's analysis, because the request before his office was to approve the construction of a

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<sup>273</sup> See Claimant's Memorial at para. 114; *see also* Exhibit CE-476, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM, October 26, 2004.

<sup>274</sup> See Claimant's Memorial at para. 114.

<sup>275</sup> See Exhibit CE-476, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM, October 26, 2004.

<sup>276</sup> See Exhibit RWS-3, Tovar Statement at paras. 4, 20-31.

new processing plant and to expand the area of a concession, not to change the scope of a stabilization agreement.

156. Moreover, as Mr. Tovar also explains, a request to expand a concession can never be taken as confirmation of the expansion of the scope of a stabilization agreement.<sup>277</sup> The former type of request relates only to the delineation of the geographical area that is covered by the concession.<sup>278</sup> Without the expansion of the Beneficiation Concession to cover the area where the Concentrator would be located, SMCV could not have operated the plant.<sup>279</sup> That was the real purpose for SMCV's request. It had nothing to do with, and the office reviewing it did not consider or analyze, the application of stability benefits contained in a stabilization agreement.<sup>280</sup> There is no reason for that office to know or even care whether the applicant who makes that request happens to have a stabilization agreement in force.

157. In sum, Claimant makes a large (and unsupportable) leap from the mere expansion of a geographical boundary of a concession to a conclusion that that expansion somehow confirmed the scope of the 1998 Stabilization Agreement as Claimant interprets it.

158. In late 2006, SMCV finished building the Concentrator Project. On February 26, 2007, MINEM issued a final confirmation for the expansion of the Beneficiation Concession and authorized SMCV to begin to operate the Concentrator.<sup>281</sup> Ms. Torreblanca testifies that this second approval of the Beneficiation Concession expansion somehow assured SMCV that it had complied with all the steps needed to guarantee that the Concentrator was covered under the 1998 Stabilization Agreement.<sup>282</sup> Ms. Torreblanca's conclusion is incorrect. As just explained,

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<sup>277</sup> See Exhibit RWS-3, Tovar Statement at para. 19.

<sup>278</sup> See Exhibit RWS-3, Tovar Statement at para. 19.

<sup>279</sup> See Exhibit RWS-3, Tovar Statement at para. 19.

<sup>280</sup> See Exhibit RWS-3, Tovar Statement at paras. 20-22.

<sup>281</sup> See Claimant's Memorial at para. 157.

<sup>282</sup> See Claimant's Memorial at para. 157.

the fact that the Beneficiation Concession was expanded to include the Concentrator had nothing to do with the scope of the 1998 Stabilization Agreement.

c. MINEM's Approval to Reinvest the Leaching Project's Undistributed Profits into the Construction of the Concentrator Plant

159. In parallel to its request to expand the area of the Beneficiation Concession to include the area where the Concentrator Plant would be built, SMCV also requested MINEM to approve SMCV's reinvestment of the Leaching Project's undistributed profits into the construction of the Concentrator Plant, free of tax. According to the versions of Article 72(b) of the Mining Law and Article 10 of the Mining Regulation that were in force on May 6, 1996—the date when taxes applicable to the Leaching Project were stabilized under the 1998 Stabilization Agreement—SMCV was entitled to request approval from MINEM to reinvest its undistributed profits, free of tax, in other, new investment projects if doing so would guarantee an increase in the company's production levels.<sup>283</sup> That benefit was repealed in 2000, with the enactment of Law No. 27343.<sup>284</sup> But, thanks to the 1998 Stabilization Agreement, SMCV retained the right (with MINEM's approval) to reinvest its undistributed profits that resulted from the Leaching Project in such production-improving investments, notwithstanding the 2000 repeal.

160. In its Memorial, Claimant alleges that the fact that SMCV was allowed to reinvest its undistributed profits from the Leaching Project—which was stabilized—into the Concentrator Project, somehow confirmed that the latter project would receive the same stabilization benefits as the first project (*i.e.*, that the 1998 Stabilization Agreement would also cover the Concentrator Project).<sup>285</sup> This is another clear overreach.

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<sup>283</sup> See Exhibit CA-1, General Mining Law at Art. 72(b); Exhibit CA-2, Mining Regulations at Art. 10.

<sup>284</sup> See Exhibit CA-79, Stability Agreements with the State, Law No. 27343, September 5, 2000, at Art. 6.

<sup>285</sup> See Claimant's Memorial at paras. 91-94, 110, 116.

161. Claimant’s argument assumes, without any support, some kind of waterfall effect whereby the reinvestment of profits that resulted from one stabilized investment project would carry with it a flow of stability benefits to all of the new works in which those profits were reinvested. That is, profits and stability benefits would spill over from the first project (the stabilized project) to the new project (the non-stabilized project), which would then become stabilized, and the new, stabilized project would make profits, and its profits and stability benefits could be transferred to a third project, and that that effect could be replicated *ad infinitum*. No such regime existed in Perú, and no regulator would endorse such a system.

162. As Dr. Eguiguren and Mr. Ralbovsky, Respondent’s Peruvian constitutional law and international mining and tax experts, respectively, explain in their expert reports, it would be poor fiscal policy—and completely illogical—for a State to allow a company to expand and enjoy stabilization benefits in such a broad and unlimited way.<sup>286</sup> And that is not what Perú did: as Vice Minister Polo and Mr. Isasi explain in their witness statements, the stability benefits extend only to the activities related to the project that was subject to the stabilization agreement.<sup>287</sup> The fact that, as part of those benefits (for a time), the mining company had the option to reinvest its profits into some new and productive investment project does not mean that all of the activities related to the new investment project would also receive all the stability benefits that were conferred upon the first project.<sup>288</sup>

163. Thus, MINEM’s approval granted to SMCV to reinvest the profits that resulted from the Leaching Project on the Concentrator Project—a new investment project—did not constitute confirmation that the 1998 Stabilization Agreement would cover the Concentrator Project.

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<sup>286</sup> See Exhibit RER-1, Eguiguren Report at para. 39; Exhibit RER-4, Ralbovsky Report at paras. 37-38, 43-44.

<sup>287</sup> See Exhibit RWS-1, Polo Statement at para. 19; Exhibit RWS-2, Isasi Statement at paras. 24, 27-28, 37, 49, 55, 67.

<sup>288</sup> Exhibit RWS-2, Isasi Statement at paras. 33, 43, 49.

164. Moreover, nothing in MINEM’s approval process provided any such confirmation, either. On July 3, 2003, SMCV wrote to the General Mining Directorate to confirm that SMCV was entitled to apply for the profit reinvestment benefit as a result of the 1998 Stabilization Agreement (notwithstanding that reinvestment rule’s 2000 repeal).<sup>289</sup> In its inquiry, SMCV asked whether the investment plan for the Concentrator Project—that is, the plan to reinvest some of the company’s Leaching Project profits tax-free into the new investment project—would be approved, notwithstanding the fact that the new investment project was not outlined or mentioned in the 1998 Stabilization Agreement nor was it related to the Leaching Project (the stabilized project).<sup>290</sup> That is not the same as an inquiry on whether the 1998 Stabilization Agreement would extend to the new investment project. In its request, SMCV was not asking whether the new project would be covered by the 1998 Stabilization Agreement; it was simply asking whether it could reinvest its undistributed Leaching Project profits into the new project free of tax. Notably, in that request, SMCV acknowledged that “the executed stability agreement makes reference therein to the Leaching Project rather than to the Cerro Verde Project, which also includes the Primary Sulfides Project,” and that the Concentrator Project was not included in the Leaching Project (which was the project that had been included

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<sup>289</sup> See Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003.

<sup>290</sup> See Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1 (“As you are well aware, Sociedad Minera Cerro Verde S.A.A. is conducting a Feasibility Study of the Primary Sulfides Mining Project. The decision of whether or not to implement the project is directly related to my company’s right to reinvest non-distributed profits back into the project in question . . . Given that the executed stability agreement makes reference therein to the Leaching Project rather than to the Cerro Verde Project, which also includes the Primary Sulfides Project, we request clarification that the Investment Program using Non-Distributed Profits to be submitted would be approved regardless of the fact that it is not confined to the Leaching Project.”) (“*Que, conforme es de su conocimiento, Sociedad Minera Cerro Verde S.A.A. está desarrollando el Estudio de Factibilidad del Proyecto de Explotación de los Sulfuros Primarios. La decisión de ejecutar o no el proyecto, está directamente relacionada con la facultad de mi representada de reinvertir las utilidades no distribuidas en el proyecto en mención. . . Debido a que el contrato de estabilidad suscrito hace referencia en su tenor al Proyecto de Lixiviación y no al Proyecto Cerro Verde, que si comprendía también al Proyecto de los Sulfuros Primarios, requerimos aclarar que el Programa de Inversión con cargo de Utilidades No Distribuidas a presentarse, sería aprobado independientemente de no estar circunscrito al Proyecto de Lixiviación.*”) (emphasis added).

in the 1998 Agreement).<sup>291</sup> In other words, SMCV admitted that the Concentrator Project was new and unrelated to the Leaching Project (the project that was actually stabilized in 1998).

165. On September 15, 2003, SMCV received two reports from MINEM from the General Mining Directorate, signed by Claimant's own witness Ms. Chappuis. In the first report, the General Mining Directorate responded to SMCV's inquiry, stating that SMCV could apply to reinvest its profits into the Concentrator Project.<sup>292</sup> In other words, MINEM answered the question that SMCV asked. However, MINEM did not state that the Concentrator Project and all of its related activities would be covered by the stability benefits that had been granted to the Leaching Project.

166. In the second report, more importantly, the General Mining Directorate stated:

About the question whether the stabilized regime would be applicable to the company, the prohibition contained in Article 8 of Supreme Decree No. 027-98-EF points out that the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company and the Regime is the one described in the aforementioned agreement.<sup>293</sup>

167. Thus, MINEM—and Claimant's own witness Ms. Chappuis—made clear to SMCV that the stabilized regime applied exclusively to the Leaching Project, and not to SMCV as a general matter. This report from 2003 directly contradicts Ms. Chappuis's testimony in this arbitration.

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<sup>291</sup> Exhibit CE-394, SMCV, Petition No. 1418719 to MINEM, July 3, 2003, at p. 1 (“*Debido a que el contrato de estabilidad suscrito hace referencia en su tenor al Proyecto de Lixiviación y no al Proyecto Cerro Verde, que si comprendía también al Proyecto de los Sulfuros Primarios, requerimos aclarar que el Programa de Inversión con cargo de Utilidades No Distribuidas a presentarse, sería aprobado independientemente de no estar circunscrito al Proyecto de Lixiviación.*”).

<sup>292</sup> See Exhibit CE-399, MINEM, Report No. 510-2003-MEM-DGM-TNO, September 8, 2003, at p. 2.

<sup>293</sup> Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, p. 1 (“*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8 del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado está otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato*”) (emphasis added).

168. On January 28, 2004, SMCV submitted a formal request to MINEM for permission to reinvest its undistributed profits from the (stabilized) Leaching Project to construct the Concentrator Project.<sup>294</sup> After a significant delay caused by missing documentation from SMCV,<sup>295</sup> on November 30, 2004, Mr. Tovar recommended the request's approval,<sup>296</sup> and on December 9, 2004, the General Mining Directorate approved SMCV's request to use the profit reinvestment benefit to help finance the construction of the Concentrator Plant.<sup>297</sup> Neither the report recommending the approval nor the actual approval said anything about whether the 1998 Stabilization Agreement would cover all the activities related to the new investment in the Concentrator Project. Moreover, Mr. Tovar explains that, MINEM's approval did not entail any type of confirmation that the Concentrator Project would become subject to the 1998 Stabilization Agreement as a result of the reinvestment of profits from the Leaching Project; on the contrary, it confirmed that the Agreement covered only the Leaching Project.<sup>298</sup>

#### **5. The 2005 Exchange Between SUNAT's Regional Intendent for Arequipa and SMCV**

169. On February 17, 2005, after Perú enacted the 2004 Royalty Law, Mr. Haraldo Cruz, Regional Intendent in Arequipa for SUNAT, sent a letter to SMCV with instructions regarding how to declare and pay royalties.<sup>299</sup> On March 4, 2005, SMCV responded stating that it was protected from the new royalty regime by the 1998 Stabilization Agreement and, therefore, did not need to pay royalties.<sup>300</sup> In addition, Claimant alleges that Ms. Torreblanca

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<sup>294</sup> See Exhibit CE-421, SMCV, Petition No. 3616468 to MINEM, January 28, 2004.

<sup>295</sup> On May 11, 2004, MINEM rejected the request because SMCV had failed to submit all the required documentation. See Exhibit CE-436, MINEM, Report No. 454-2004-MEM, May 11, 2004, at p. 2. Four months later, on September 3, 2004, SMCV re-filed its request, providing the additional information sought. See Exhibit CE-462, SMCV, Petition No. 1488199 to MINEM, September 3, 2004.

<sup>296</sup> See Exhibit CE-479, MINEM, Report No. 841-2004-MEM/DGM/PDM, November 30, 2004, at p. 5.

<sup>297</sup> See Exhibit CE-23, MEF, Ministerial Resolution No. 510-2004-MEM/DM, December 9, 2004, at Art. 1.

<sup>298</sup> See Exhibit RWS-3, Tovar Statement at para. 36.

<sup>299</sup> See Exhibit CE-482, Letter from SUNAT to SMCV, February 17, 2005.

<sup>300</sup> See Claimant's Memorial at para. 124.

met with Mr. Cruz to explain SMCV's position and that he accepted her explanation.<sup>301</sup>

Claimant contends that SUNAT did not raise the issue again until several years later, and that that is proof that Mr. Cruz and/or SUNAT initially agreed with SMCV.<sup>302</sup> Claimant thus takes SUNAT's alleged silence as equivalent to confirmation that the 1998 Stabilization Agreement covered the Concentrator Project. No such meaning can be read into these events.

170. As Mr. Cruz explains in his witness statement, he never confirmed SMCV's understanding of the scope of the 1998 Stabilization Agreement.<sup>303</sup> In fact, he could not possibly have confirmed that understanding, because SUNAT had no power to establish or interpret the scope of the 1998 Stabilization Agreement.<sup>304</sup> MINEM, as party to the Agreement, was the entity in charge of interpreting the contract, not SUNAT. SUNAT's role is to oversee the collection of taxes and enforcement of tax law, not to assess or confirm the scope of a stabilization agreement.<sup>305</sup>

171. Moreover, as Mr. Cruz explains, SUNAT's silence after receiving SMCV's letter in March 2005 was not a tacit agreement with SMCV's interpretation of the 1998 Stabilization Agreement.<sup>306</sup> SUNAT remained silent simply because SMCV did not yet owe any royalties. SMCV was indeed exempt under the 1998 Stabilization Agreement from royalties for its ore processed in the Leaching Plant, so no royalties were due there. And SMCV had not completed construction of the Concentrator Project and had not started its operation, so no royalties were (yet) due from that plant's activities, either. Thus, at the time, it was simply not necessary for SUNAT to oversee SMCV's obligation to pay royalties on the ore processed in the Concentrator

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<sup>301</sup> See Claimant's Memorial at para. 124.

<sup>302</sup> Claimant's Memorial at paras. 123-24, 318.

<sup>303</sup> See Exhibit RWS-7, Witness Statement of Haraldo Cruz, April 18, 2022 ("Cruz Statement"), at paras. 18-19.

<sup>304</sup> See Exhibit RWS-7, Cruz Statement at para. 20.

<sup>305</sup> See Exhibit RWS-7, Cruz Statement at paras. 8-10.

<sup>306</sup> See Exhibit RWS-7, Cruz Statement at para. 16.

Project.<sup>307</sup> SUNAT started to issue royalty assessments only after the Concentrator Project commenced operations in 2007.<sup>308</sup>

## **6. The March 2005 Meeting between MINEM Officials and Phelps Dodge**

172. In his witness statement, Mr. Tovar describes a meeting between MINEM officials and Phelps Dodge President, Mr. Harry Conger in Toronto.<sup>309</sup> Mr. Tovar describes that he traveled to Toronto for the Prospectors & Developers Association of Canada (“PDAC”) Mineral Exploration and Mining Convention. During that visit he met with several mining companies and investment banks to discuss their possible investments in Perú.

173. During those meetings, Mr. Tovar met with Mr. Conger, at the request of Julia Torreblanca (SMCV). The lunch was also attended by Mr. Luis Carlos Rodrigo (Claimant’s counsel in this arbitration). Mr. Tovar explains that during the meeting, MINEM’s officials explained what the MINEM’s position was on the scope of the mining stabilization agreements and the payment of royalties. In particular, MINEM explained, that in the case of SMCV, the Leaching Project would be exempt from royalty payments under its 1998 Stabilization Agreement, but that the Concentrator Project would have to pay royalties, as it was not stabilized. As Mr. Tovar describes, Mr. Conger did not dispute MINEM’s position. Notably, Mr. Rodrigo stated that this was a legal issue that would be discussed in the future—which is what Claimant is trying to do now in this arbitration, even though SMCV and Phelps Dodge (Claimant’s predecessor) knew since 2005 that SMCV’s 1998 Stabilization Agreement covered only the Leaching Project. Finally, Mr. Tovar recalls that after the 2005 March meeting, SMCV

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<sup>307</sup> See Exhibit RWS-7, Cruz Statement at para. 21.

<sup>308</sup> See Exhibit RWS-7, Cruz Statement at para. 21.

<sup>309</sup> See Exhibit RWS-3, Tovar Statement at paras. 54-55.

never filed a claim or sent MINEM a communication requesting a clarification of the position stated at the meeting.<sup>310</sup>

#### **7. The April 2005 Report from MINEM's Legal Affairs Directorate**

174. In its Memorial, Claimant alleges that on April 14, 2005, MINEM's Legal Affairs Directorate (led by Mr. Felipe Isasi) confirmed that the 2004 Royalty Law would not apply to companies with stabilization agreements ("MINEM's April 2005 Report").<sup>311</sup> Claimant alleges that, through the general statements in this report, MINEM somehow confirmed, in particular, that the Concentrator Project was covered by the 1998 Stabilization Agreement and that SMCV would not have to pay royalties on the ore that would be processed in that Plant.<sup>312</sup> Claimant's reading is directly at odds with the plain meaning of the language of the report.

175. Mr. Isasi, the author of MINEM's April 2005 Report, explains that his position, and MINEM's official position, has always been consistent regarding the scope of stabilization agreements—that is, while stabilization agreements do indeed protect against new legal requirements like the Royalty Law, the question is about the scope of the stabilization agreements. And as to that question, MINEM has consistently taken the position that stabilization agreements only cover the investment project that is outlined and planned in the feasibility study that serves as the basis for any such agreement.<sup>313</sup>

176. Mr. Isasi explains the context of MINEM's April 2005 Report. It was issued as a result of the Constitutional Tribunal's 2005 judgment upholding the 2004 Royalty Law.<sup>314</sup> The Tribunal had held that all mining titleholders were obliged to pay royalties, as provided in the

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<sup>310</sup> See Exhibit RWS-3, Tovar Statement at para. 55.

<sup>311</sup> See Claimant's Memorial at paras. 128-29.

<sup>312</sup> See Claimant's Memorial at paras. 128-29.

<sup>313</sup> See Exhibit RWS-2, Isasi Statement at paras. 12-21, 57.

<sup>314</sup> See Exhibit RWS-2, Isasi Statement at para. 12.

law.<sup>315</sup> That decision, however, left open some uncertainty regarding the effect of the law on companies that had signed stabilization agreements with the State prior to the enactment of the law.<sup>316</sup>

177. To clarify MINEM's position on the matter, Mr. Isasi prepared the April 2005 Report.<sup>317</sup> Claimant alleges that, in the report, Mr. Isasi concluded—as a blanket proposition, without regard to the scope of any particular stabilization agreement—that companies with stabilization agreements would not have to pay royalties (and, thus, according to Claimant, because SMCV had a stabilization agreement in place, it did not have to pay any royalties on any of its projects, including the Concentrator). However, that is not what Mr. Isasi concluded.

178. In MINEM's April 2005 Report, Mr. Isasi concluded that companies with stabilization agreements would not have to pay royalties with respect to the projects that were subject to those agreements. The report specifically provided that:

Emphasis should be placed on this last aspect: The stability granted by the Agreements on Guarantees and Measures to Promote Investment guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. If a mining titleholder has economic administrative units or mining concessions that are not part of the project subject to stability, the regulation establishes that such titleholder must keep the accounting of the project separately. Consequently, it is not the mining titleholder (individuals or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.<sup>318</sup>

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<sup>315</sup> See Exhibit RWS-2, Isasi Statement at para. 15.

<sup>316</sup> See Exhibit RWS-2, Isasi Statement at paras. 15-16.

<sup>317</sup> See Exhibit RWS-2, Isasi Statement at para. 17.

<sup>318</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (*"Debe ponerse énfasis en este último aspecto: La estabilidad que otorgan los contratos de Garantías y Medidas de Promoción a la Inversión garantizan el régimen jurídico referido a materia tributaria, cambiaria y administrativa, del proyecto de inversión, al cual están referidos. Si un titular minero tuviera unidades económicas administrativas, o concesiones*

Thus, the report states unequivocally that only the projects covered by the stabilization agreements would be exempt from paying royalties.

179. In its Memorial, Claimant focuses on the words “mining concessions” to allege that Mr. Isasi thought that the agreements applied to an entire concession where any stabilized project was located and not to the specified investment project itself.<sup>319</sup> Mr. Isasi explains that this is an incorrect interpretation of the report that he authored. In his view, there is no doubt that stabilization agreements only cover the specific investment projects for which they were signed.<sup>320</sup>

180. The Report further concluded that:

[i]t is the opinion of this Office of the General Counsel that the mining royalty is not applicable to the investment projects of the titleholder of mining companies that prior to the royalty law came into force, had entered into Agreements on Guarantees and Measures to Promote Investment in which Administrative Stability had been agreed upon in the terms expressed in this report.<sup>321</sup>

181. Thus, contrary to Claimant’s allegations, in April 2005, Mr. Isasi had already clarified that only the projects covered by stabilization agreements would be exempt from paying royalties under the 2004 Royalty Law. For SMCV’s purposes, that meant that, unlike the copper cathodes processed in the Leaching Project (an investment project that had been stabilized by

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*mineras, que no forman parte del proyecto objeto de la estabilidad, la norma establece que dicho titular deberá mantener la contabilidad del proyecto EN forma separada. En consecuencia, no es el titular minero (persona natural o jurídica) el que estará exento o no del pago de regalías, integralmente como empresa, sino que lo serán las concesiones mineras de las que es titular, dependiendo si estas integran o no un proyecto materia de contrato de estabilidad suscrito, antes de la vigencia de la Ley No. 28258. Así pues, únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía.”) (emphasis added).*

<sup>319</sup> See Claimant’s Memorial at para. 314 (emphasis omitted).

<sup>320</sup> See Exhibit RWS-2, Isasi Statement at para. 20.

<sup>321</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 19 (“[e]s opinión de esta Oficina General de Asesoría Jurídica, que la regalía minera es inaplicable a los proyectos de inversión de los titulares mineros que con anterioridad a la vigencia de la ley de regalía, tuvieron celebrados contratos de Garantías y Medidas de Promoción a la Inversión en los que se hubiere pactado la Estabilidad Administrativa en los términos expresados en este informe”) (emphasis added).

such an agreement), the copper concentrate processed in the Concentrator Project (an investment project that had not been stabilized) was not exempt from being assessed royalties.<sup>322</sup>

## 8. The June 2005 Presentation Before Congress

182. In June 2005, Minister of Mines Glodomiro Sánchez and MINEM's Legal Director, Mr. Isasi, made a presentation before the Energy and Mines Congressional Committee explaining the relationship between the Royalty Law and mining stabilization agreements. In particular, they explained that mining companies would be subject to paying royalties with respect to their investment projects that were not part of a mining stabilization agreement.<sup>323</sup> Critically, this presentation was televised and available to the public.<sup>324</sup>

183. During the presentation, Minister Sánchez explained:

Then, who pays royalties? All mining titleholders pay royalties, but not for all of their projects. The mining titleholders that before the Mining Royalty Law entered into law-contracts with administrative stability, will exclude from the royalty calculation basis the value of concentrates or equivalents, derived from the stabilized project. . . .<sup>325</sup>

184. Then, Mr. Isasi further explained to the Congressional Committee:

[I]t must not be confused who is the obliged subject, which is the company, with how much it has to pay; that is, the obliged subject is a mining company but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects.

The non-stabilized mining projects pay royalties, the stabilized projects do not pay royalties. Stabilized, of course, before the

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<sup>322</sup> See Exhibit RWS-2, Isasi Statement at paras. 21.

<sup>323</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts).

<sup>324</sup> See Exhibit RWS-2, Isasi Statement at para. 46-47, 59.

<sup>325</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 26 (“*Entonces, ¿quiénes pagan regalía? Todos los titulares mineros pagan, pero no por todos sus proyectos. Los titulares mineros que antes de la Ley de Regalía Minera celebraron contratos ley con estabilidad administrativa, excluirán de la base de cálculo de la regalía el valor de los concentrados o equivalentes, proveniente del proyecto estabilizado . . .*”) (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at 08:54.

royalty law because there are stability contracts that were entered into after, where it has been expressly indicated that royalties must be paid.<sup>326</sup>

185. Thus, both Minister Sánchez and Mr. Isasi unequivocally stated before Congress in June 2005 that mining companies would be exempt from paying royalties only with respect to the project that had been stabilized prior to the Royalty Law. For SMCV, that meant that it would only be exempt from paying royalties with respect to the Leaching Project. The Minister and Mr. Isasi's presentation was televised and, therefore, publicly known.<sup>327</sup> That SMCV is not aware of the Minister's presentation before Congress is not credible. Nevertheless, Claimant omits this key fact in its Memorial.

#### **9. The September 2005 Report from MINEM's Legal Affairs Division and the October 2005 Letter from MINEM to Congress**

186. In its Memorial, having ignored MINEM officials' contrary public testimony to Congress, Claimant next alleges that Mr. Isasi confirmed Phelps Dodge and Claimant's interpretation of the 1998 Stabilization Agreement's scope in another report MINEM prepared in September 2005 (MINEM's "September 2005 Report").<sup>328</sup> According to Claimant, Mr. Isasi confirmed in that further report that stabilization agreements automatically granted benefits to the entire concession or group of concessions where the investment project that was the subject of the agreement was located.<sup>329</sup> Claimant arrives at this conclusion because Mr. Isasi's report

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<sup>326</sup> Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29 (" *no hay que confundir lo que es sujeto obligado, que es la empresa, con cuánto tiene que pagar; o sea, el sujeto obligado es una empresa minera pero al momento de determinar cuánto es lo que debe pagar la administración tributaria tiene que determinar cuál es la base de referencia, y para determinar cuál es la base de referencia tiene que determinar cuáles son los proyectos mineros estabilizados y cuáles son los proyectos no estabilizados. Los proyectos mineros no estabilizados pagan regalías, los proyectos mineros estabilizados no pagan regalías. Estabilizados, por supuesto, antes de la ley de regalías, porque hay contratos de estabilidad celebrados con posterioridad donde está ya expresamente señalado que se pague las regalías.* ") (emphasis added); Exhibit RE-104, Audio of the Session of the Energy and Mines Congressional Committee, June 8, 2005 (excerpts), at 25:26.

<sup>327</sup> See Exhibit RWS-2, Isasi Statement at paras. 46, 59.

<sup>328</sup> See Claimant's Memorial at para. 134.

<sup>329</sup> See Claimant's Memorial at paras. 134-36.

allegedly made no distinction between SMCV's two projects (the Leaching and the Concentrator Projects).<sup>330</sup> Claimant is once again misreading and taking language in Mr. Isasi's report out of context.

187. As Respondent explained above, in December 2004, MINEM had approved SMCV's request to reinvest its undistributed profits from the Leaching Project into the construction of the Concentrator Project.<sup>331</sup> That approval raised concerns in Congress about the scope of mining stabilization agreements because that benefit had been repealed in 2000. Members of Congress wanted to understand how SMCV could be entitled to take advantage of a legal benefit that had been repealed some four years earlier. As a result, on September 15, 2005, Congressman Alejandro Oré asked the Minister of Energy and Mines, Mr. Glodomiro Sánchez at the time, to provide information about SMCV's 1998 Stabilization Agreement and MINEM's authorization to reinvest undistributed profits in the Concentrator Project.<sup>332</sup> In response to that request, Mr. Isasi prepared MINEM's September 2005 Report.<sup>333</sup>

188. Similar to MINEM's December 2004 review of SMCV's own request to reinvest its undistributed profits in the Concentrator Project, Mr. Isasi explained in September 2005 that SMCV was entitled to the profit reinvestment benefit that had been stabilized under the 1998 Stabilization Agreement.<sup>334</sup> Mr. Isasi explains in his witness statement, however, that—contrary to Claimant's allegations—this conclusion did not mean that MINEM agreed with Phelps Dodge's (Freeport's predecessor) assertion that the 1998 Stabilization Agreement covered both the Leaching Project and the Concentrator Project.<sup>335</sup>

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<sup>330</sup> See Claimant's Memorial at para. 134.

<sup>331</sup> See *supra* at Section II.D.4(c).

<sup>332</sup> See Exhibit CE-507, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía, September 15, 2005.

<sup>333</sup> See Exhibit RWS-2, Isasi Statement at para. 23.

<sup>334</sup> See Exhibit RWS-2, Isasi Statement at paras. 24, 32-33.

<sup>335</sup> See Exhibit RWS-2, Isasi Statement at paras. 24-25.

189. Contrary to Claimant’s allegations, the September 2005 Report does make a distinction between the Leaching Project and the Concentrator Project.<sup>336</sup> First, MINEM’s September 2005 Report explains the scope of the 1998 Stabilization Agreement as being limited to the Leaching Project that was described in the 1996 Feasibility Study to increase the production of copper cathodes.<sup>337</sup> Second, the analysis of the Report focuses on the scope of the stability applied to the Leaching Project. The September 2005 Report analyzes whether undistributed profit from an existing and stabilized investment (the Leaching Project) could be reinvested in a new—non-stabilized—investment project (the Concentrator). By referring to the Concentrator as a “new” investment project, the Report made a clear distinction between the Leaching Project (the existing project, which was stabilized) and the Concentrator Project (the new investment project, which was not subject to the 1998 Stabilization Agreement).<sup>338</sup>

190. More importantly, Mr. Isasi explains in his witness statement that Claimant cannot confuse an approval to reinvest undistributed profits in a new investment project with a confirmation from MINEM to extend the benefits of a stabilization agreement to all the activities related to that new investment project.<sup>339</sup> According to Mr. Isasi, “That conclusion lacks logic and pretends to extend, indefinitely, the benefits of an investment project to other investment projects that were never contemplated in the Stabilization Agreement.”<sup>340</sup>

191. MINEM’s September 2005 Report was forwarded to Congress on October 3, 2005 (the “October 2005 Letter”).<sup>341</sup> In the cover letter, the Minister explained to the

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<sup>336</sup> See Exhibit RWS-2, Isasi Statement at para. 24-27.

<sup>337</sup> See Exhibit RWS-2, Isasi Statement at paras. 27-28; Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, at paras. 2.1.1, 2.2.1-2.2.2, 3.1.1.

<sup>338</sup> See Exhibit RWS-2, Isasi Statement at paras. 30-1.

<sup>339</sup> See Exhibit RWS-2, Isasi Statement at paras. 31-33.

<sup>340</sup> Exhibit RWS-2, Isasi Statement at para. 26 (“*Esa conclusión carece de lógica y pretende extender, de manera infinita, los beneficios de un proyecto de inversión a otros proyectos de inversión que nunca estuvieron contemplados en el Contrato de Estabilidad*”).

<sup>341</sup> See Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005.

congressman that, although SMCV was entitled to use the profit reinvestment benefit under the 1998 Stabilization Agreement (*i.e.*, to reinvest profits tax-free from the Leaching Project—the stabilized project—into a new investment project), the Concentrator Project—the new investment project in which the profits would be invested—“will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of [a Stabilization Agreement] has not been applied for.”<sup>342</sup> That, of course, is precisely the opposite of how Claimant tries to read the September 2005 Report.

192. Claimant tries to dismiss the Minister’s statement, claiming that it was unfounded and saying this was the first time that the government had adopted that position. As already discussed, that is simply untrue. As Mr. Isasi explains in his witness statement, Minister Sánchez’s statement was based on MINEM’s September 2005 Report. Moreover, this certainly was not the first time that the government had stated that position. As explained in Section II.D.8 above, in addition to MINEM’s April 2005 Report, high-level officials of the Ministry (including Minister Sánchez and Legal Director, Mr. Isasi) had appeared before Congress’s Energy and Mines Commission to explain the limited scope of stabilization agreements.<sup>343</sup> Thus, SMCV (and Phelps Dodge, Freeport’s predecessor) must have known of MINEM’s position on the scope of the 1998 Stabilization Agreement before October 2005.

#### **10. The November 2005 Letter from MINEM to Congress**

193. Claimant also asserts that on September 16, 2005 (one day after Congressman Alejandro Oré sent to Minister Sánchez the request for information on the 1998 Stabilization Agreement that led to the September 2005 Report), another congressman, Congressman Diez Canseco, threatened to impeach Minister Sánchez if he did not (i) revoke SMCV’s authorization

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<sup>342</sup> Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005 (“*no gozará del régimen de estabilidad tributaria, cambiaria y administrativa, toda vez que para dicho Proyecto no se ha solicitado la suscripción de un [Convenio de Estabilidad]*”).

<sup>343</sup> See Exhibit RWS-1, Polo Statement at para. 38; Exhibit RWS-2, Isasi Statement at paras. 46-51; Exhibit RWS-3, Tovar Statement at paras. 60-61.

to reinvest profits that had been granted in December 2004; and (ii) demand that SMCV pay royalties.<sup>344</sup> Claimant alleges that, four days after receiving the threat from Congressman Diez Canseco, on September 20, 2005, Minister Sánchez gave in to the political pressure and made statements to the press insisting that SMCV would have to pay royalties on ore processed in the Concentrator Project. There was no change of heart or capitulation, however, because Minister Sánchez's statements were consistent with MINEM's position on the matter, as stated in a meeting with Phelps Dodge in March 2005, before Congress in June 2005, and as explained in the April 2005 Report, the September 2005 Report, and the October 2005 letter.<sup>345</sup>

194. After Minister Sánchez's statements to the press, Congressman Diez Canseco wrote to Minister Sánchez, formally requesting information on MINEM's position regarding SMCV's payment of royalties in relation to the Leaching Project and the Concentrator Project.<sup>346</sup> On November 8, 2005, Minister Sánchez responded to Congressman Diez Canseco (the "November 2005 Letter").<sup>347</sup>

195. In that letter, Minister Sánchez again repeated what had already been explained to Phelps Dodge in March 2005, in the April 2005 Report, to Congress in the 2005 Presentation, in the September 2005 Report, and in the October 2005 letter. In particular, the Minister explained that the Concentrator Project was not subject to the 1998 Stabilization Agreement (*i.e.*, it would not receive any stabilization benefits).<sup>348</sup> Minister Sánchez explained the legal bases for MINEM's position, which were the same as had already been outlined in the April and September 2005 Reports. Additionally, in the letter, Minister Sánchez reiterated that the profit reinvestment benefit was permitted, but would apply only to profits generated by the Leaching

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<sup>344</sup> See Claimant's Memorial at para. 132.

<sup>345</sup> See *supra* at Sections II.D.7 and II.D.9; Exhibit RWS-2, Isasi Statement at paras. 37, 47.

<sup>346</sup> See Exhibit RE-2, Letter No. 0461-2005-JDC/CR, October 4, 2005.

<sup>347</sup> See Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005.

<sup>348</sup> See Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at para. 1.

Project and not to the Concentrator Project.<sup>349</sup> Minister Sánchez clarified that the Concentrator Project was merely the recipient of the profits derived from the Leaching Project; the reinvestment benefit would not be available in turn for any profits generated by the activities of the Concentrator Project.<sup>350</sup>

196. Consequently, the November 2005 letter is yet one more piece of evidence that Perú had maintained a consistent position on the scope of the 1998 Stabilization Agreement.

### **11. The May 2006 Presentation Before Congress**

197. In May 2006, high-level officials from MINEM, namely the Vice Minister of Mines at the time, Rómulo Mucho, and Legal Director Mr. Isasi, appeared before the Energy and Mines Congressional Committee and the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee to explain the scope of mining stabilization agreements and, in particular, the scope of SMCV's 1998 Stabilization Agreement.<sup>351</sup> With respect to SMCV's Agreement, Mr. Isasi addressed questions from members of Congress in relation to (i) MINEM's permission to SMCV to reinvest its undistributed profits, free of taxes, into its new investment in the Concentrator Project; and (ii) SMCV's obligations to pay royalties with respect to the Concentrator Project.<sup>352</sup>

198. With respect to the profit reinvestment benefit, Mr. Isasi explained why the reinvestment benefit did apply to the Leaching Project, but not to the Concentrator Project—namely, that the latter was a new and different project from the Leaching Project, which was the investment project that had actually been stabilized in 1998. Specifically, the presentation stated

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<sup>349</sup> See Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at paras. 8-10.

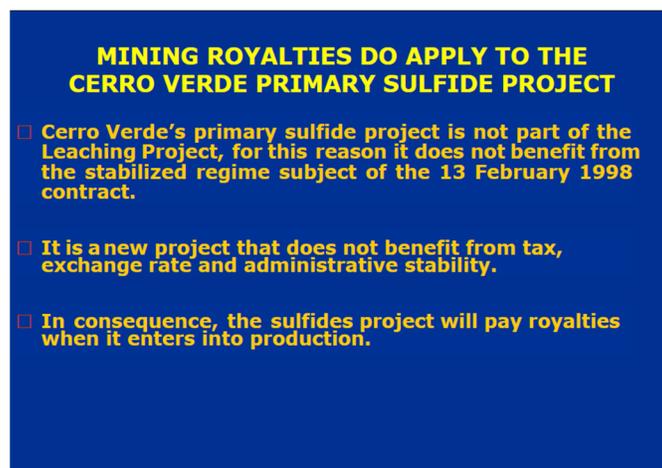
<sup>350</sup> See Exhibit RWS-2, Isasi Statement at paras. 42-43; Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, at para. 10.

<sup>351</sup> See *generally* Exhibit RE-103, Audio of the Cerro Verde Working Group Before the Energy and Mines Congressional Committee, May 3, 2006; Exhibit RE-88, Audio of the Session of the Energy and Mines Commission, Congress of the Republic, May 3, 2006.

<sup>352</sup> See Exhibit RWS-2, Isasi Statement at para. 48; Exhibit RWS-3, Tovar Statement at paras. 60-61.

that “stability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession.”<sup>353</sup> Therefore, although SMCV was allowed to use the profit reinvestment benefit to finance the Concentrator Project with tax-free funds obtained from the (stabilized) Leaching Project, that was where the benefit would end. The profits resulting from the sale of the ore that was processed at the Concentrator Project would not, in turn, receive the profit reinvestment benefit.<sup>354</sup>

199. With respect to the issue regarding the payment of royalties, Mr. Isasi explained that mining royalties did apply to the Concentrator Project, because that project was not covered by the 1998 Stabilization Agreement. The slides used in that presentation could not possibly be any more explicit.<sup>355</sup>



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<sup>353</sup> Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 8 (“*la estabilidad se otorga al proyecto de inversión claramente delimitado por el Estudio de Factibilidad y pactado en el Contrato. No se otorga a la empresa de modo general ni a la Concesión*”).

<sup>354</sup> See Exhibit RWS-2, Isasi Statement at para. 49; Exhibit RWS-3, Tovar Statement at para. 61.

<sup>355</sup> Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 12 (“*El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaría ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción.*”).

200. Mr. Isasi's presentation to the Congress was public—it was televised and recorded.<sup>356</sup> Therefore, SMCV (and Phelps Dodge, Freeport's predecessor) knew or should have known that its Concentrator Project was not covered by the 1998 Stabilization Agreement and that it would have to pay royalties with respect to the sales of the ore that was processed in that Plant (*i.e.*, the sale of copper concentrate resulting from processing primary sulfides ore).

## **12. The June 2006 Report from MINEM's Legal Affairs Division**

201. In its Memorial, Claimant alleges that, in 2006, due to growing political pressure, MINEM as an institution (like the Minister in his 2005 statements) changed its position with respect to the scope of SMCV's 1998 Stabilization Agreement.<sup>357</sup> MINEM did no such thing. Claimant points in particular to yet a third report prepared by Mr. Isasi on June 16, 2006 (MINEM's "June 2006 Report"), in which it was stated that the Concentrator Project was outside the scope of the 1998 Stabilization Agreement.<sup>358</sup> According to Claimant, this was a novel interpretation of the scope of the agreement which, Claimant alleges, was an "abrupt about-face" from the position(s) MINEM had taken in the previous report(s).<sup>359</sup> It was not.

202. First, Mr. Isasi categorically denies in his witness statement that he changed any views and positions, or that his views were susceptible to political pressure. He conducted a thorough analysis of the language of Title Nine of the Mining Law (which he helped to write) and the 1998 Stabilization Agreement, and he concluded that the Concentrator Project was outside the scope of the 1998 Stabilization Agreement.<sup>360</sup> As was explained in the June 2006 Report, Article 83 of the Mining Law and Article 22 of the Mining Regulations provide that

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<sup>356</sup> See Exhibit RWS-2, Isasi Statement at paras. 46, 51. Exhibit RE-103, Audio of the Cerro Verde Working Group Before the Energy and Mines Congressional Committee, May 3, 2006.

<sup>357</sup> See Claimant's Memorial at paras. 142-44.

<sup>358</sup> See Claimant's Memorial at paras. 142-44.

<sup>359</sup> See Claimant's Memorial at paras. 142-44.

<sup>360</sup> See Exhibit RWS-2, Isasi Statement at paras. 53-56.

stability benefits apply exclusively to the specific investment project for which the agreement was signed:

It follows that stabilization is not granted in a general way to a company or for a specific mining concession, but in relation to a specific project, clearly delimited and approved by the Ministry of Energy and Mines, because the purpose is to confer legal certainty on the investor in the sense that the internal rate of return of their new guaranteed investment will not be affected by subsequent legislative innovations.<sup>361</sup>

203. Second, the June 2006 Report was consistent with MINEM's opinions discussed with Phelps Dodge in March 2005, submitted before Congress in the 2005 Presentation, and discussed in the April 2005 Report, the September 2005 Report, the October 2005 Letter, the November 2005 Letter, and the June 2006 Presentation. In short, there was never a change in interpretation on behalf of the Ministry, let alone an "abrupt about-face." MINEM's interpretation, which was founded on the plain language of the law and the Agreement, had always been the same.<sup>362</sup>

204. Claimant alleges that this June 2006 Report was kept secret from SMCV.<sup>363</sup> Whether or not SMCV received this report, is irrelevant. SMCV (and Phelps Dodge, Freeport's predecessor) knew or should have known of the Ministry's position since MINEM's meeting with Phelps's Dodge in March 2005, Minister Sánchez's and Mr. Isasi's presentation made before Congress in June 2005 and May 2006, and in meetings with local authorities from Arequipa, where SMCV was present, in June 2006 (described below in Section II.E).

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<sup>361</sup> Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006, at para. 5.2 ("*De ello se colige que la estabilidad no se otorga de forma general a una empresa ni a favor de una concesión minera determinada, sino con relación a un proyecto específico, claramente delimitado y aprobado por el Ministerio de Energía y Minas, porque de lo que se trata es de conferir una seguridad jurídica al inversionista en el sentido que la tasa interna de retorno de su nueva inversión garantizada no se vería afectada por innovaciones legislativas ulteriores*") (emphasis added).

<sup>362</sup> See Exhibit RWS-2, Isasi Statement at paras. 52-57.

<sup>363</sup> Claimant's Memorial at para. 144.

205. Therefore, contrary to Claimant’s allegations in this arbitration, Perú has consistently held the understanding that mining stabilization agreements’ scope is limited to the specific project for which the agreement was signed, which is carefully outlined and described in the feasibility study created for a particular project. In SMCV’s case, that means that the Leaching Project was stabilized, but the Concentrator Project was not.

**E. SMCV MADE VOLUNTARY CONTRIBUTIONS, ALL WHILE IT KNEW OR SHOULD HAVE KNOWN THAT IT WOULD HAVE TO PAY ROYALTIES ON THE CONCENTRATOR PROJECT’S PRODUCTION**

206. In its Memorial, Claimant complains that Perú induced SMCV to make contributions to the State and to Arequipa, and that SMCV agreed to do so only because it understood that it was not subject to the Royalty Law during the term of the 1998 Stabilization Agreement and, accordingly, that it would not need to pay royalties related to any of its investment projects in Perú during that time.<sup>364</sup> Claimant describes three sets of local and national programs under which SMCV made voluntary contributions: (i) in August 2006, following an SMCV-government roundtable, SMCV agreed to pay approximately US \$125 million to be invested in a potable water plant in Arequipa and other social needs of the local communities;<sup>365</sup> (ii) in January 2007, under the Voluntary Contribution Program created by the national government, SMCV agreed to invest in local and regional infrastructure and social projects (“2007 Voluntary Contribution Program”);<sup>366</sup> and (iii) in 2012, under the *Gravamen Especial a la Minería* (Special Mining Contribution, “GEM” for its acronym in Spanish) program, SMCV agreed to pay a certain percentage of its profits to the State.<sup>367</sup>

207. According to Claimant, SMCV made these contributions on the understanding that both its Leaching Project and Concentrator Project were covered by the 1998 Stabilization

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<sup>364</sup> See Claimant’s Memorial at paras. 12, 18, 140-54, 180-95.

<sup>365</sup> See Claimant’s Memorial at para. 148.

<sup>366</sup> See Claimant’s Memorial at paras. 149-54.

<sup>367</sup> See Claimant’s Memorial at para. 193.

Agreement and, thus, that none of its ore production was subject to the 2004 Royalty Law for the duration of that Agreement.<sup>368</sup> Claimant asserts, in effect, that Perú wrongfully induced SMCV to make those contributions under a false premise or by hiding its intentions. Claimant complains, for example, that when SMCV agreed to make these contributions it was not aware of MINEM's June 2006 Report that contained MINEM's alleged novel interpretation of the Mining Law.<sup>369</sup> But Claimant's complaint conflicts with the facts. As Respondent demonstrated in Section II.D above, MINEM's position was both public (per the Congressional testimony) and consistently held, appearing in multiple documents and letters long before June 2006, whether or not SMCV was aware of the June 2006 Report.<sup>370</sup> SMCV knew or should have known that, under the Mining Law, its 1998 Stabilization Agreement did not cover all of its investment projects. And by June 2005, at a minimum, SMCV knew or should have known that it would be obliged to pay royalties on ore processed through the Concentrator Project.<sup>371</sup> Perú cannot in any way be accused of misleading SMCV or Phelps Dodge (Freeport's predecessor) into making the voluntary contributions; if anything, SMCV has only its own misreading of its legal obligations to blame.

208. Respondent describes each of the contribution programs below and demonstrates that none of these programs was premised on the notion, or in any way promised, that SMCV was exempt from paying royalties on all of its mining investment projects in Perú.

### **1. SMCV Agreed to Make Voluntary Contributions to Arequipa**

209. In its Memorial, Claimant alleges that in June 2006, SMCV agreed to make voluntary contributions to Arequipa—but did so only because of its understanding that it did not

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<sup>368</sup> See Claimant's Memorial at paras. 153-54, 187-95.

<sup>369</sup> See Claimant's Memorial at para. 12.

<sup>370</sup> See *supra* at Section II.D.

<sup>371</sup> See *supra* at Section II.D.7.

have to pay royalties for the Concentrator Project.<sup>372</sup> According to Claimant, Perú somehow induced SMCV to make these payments by misleading SMCV to believe that it would be entirely exempt from paying royalties under the 1998 Stabilization Agreement.<sup>373</sup> To the contrary, Perú did not hide its interpretation of the 1998 Stabilization Agreement and the Royalty Law or suggest any contrary interpretation as part of the Arequipa voluntary contribution program. Moreover, SMCV very likely would have made the contributions regardless of its “understanding” on royalties, as part of its internationally recognized responsibility as a mining company to secure and maintain a social license from the communities affected by its activities.

210. In mid-2006, local Arequipa leaders voiced objections against what they considered to be an illegal benefit provided to SMCV. In particular, they were concerned that because MINEM had approved SMCV’s reinvestment of profits from the Leaching Project into the Concentrator Project, tax free, the MINEM approval would result in Arequipa (where the Cerro Verde mine is located) suffering a fiscal shortfall.<sup>374</sup> As Mr. Isasi explains in his witness statement, Arequipa leaders were mostly concerned because the local governments’ income is partly dependent on the income taxes that mining companies pay—the Ministry of Economy and Finance (“MEF”) distributes 50% of the income tax paid by mining companies to local and regional governments to develop infrastructure and social projects.<sup>375</sup> Accordingly, if SMCV paid lower taxes, that would directly and negatively impact Arequipa’s treasury.

211. On June 23, 2006, the Congressional Committee overseeing Proinversión, Perú’s investment promotion agency, held roundtable discussions to address the local leaders’

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<sup>372</sup> See Claimant’s Memorial at paras. 145-48.

<sup>373</sup> See Claimant’s Memorial at paras. 12, 142-44.

<sup>374</sup> See Exhibit CE-535, “Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000,” *La República*, June 19, 2006.

<sup>375</sup> See Exhibit RWS-2, Isasi Statement at para. 61.

concerns.<sup>376</sup> MINEM and MEF officials, local leaders, and SMCV representatives attended the meeting to try to address Arequipa's fiscal and social concerns.<sup>377</sup> The discussions continued on June 29 and July 10, 2006.<sup>378</sup> On August 2, 2006, the participants reached and signed an agreement as the culmination of the roundtable discussions ("Roundtable Agreement"). In the agreement, SMCV agreed to contribute funds to Arequipa to construct a potable water plant and to invest in other social and infrastructure projects.<sup>379</sup>

212. Claimant finds it blameworthy that during these meetings no one from the MINEM alerted SMCV about the MINEM June 2006 Report that had allegedly adopted for the first time a novel and harmful (to SMCV) interpretation of the scope of SMCV's 1998 Stabilization Agreement.<sup>380</sup> Claimant also complains that during these meetings no one from the government mentioned that SMCV would have to pay royalties in the coming years and asserts that SMCV understood that this agreement would replace and put an end to any question of whether SMCV should pay royalties.<sup>381</sup> (Curiously, for these allegations, Claimant relies on Ms. Torreblanca's testimony, despite the fact that Ms. Torreblanca apparently did not attend most of these meetings—she was not listed as present for either the June 23 or July 10 meetings.<sup>382</sup>)

213. First, nothing in the Roundtable Agreement indicates that by agreeing to make the requested contributions, SMCV would be exempt from paying royalties or that the State would

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<sup>376</sup> See Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006.

<sup>377</sup> See Exhibit CE-537, Congress, Pro-Investment Commission, Minutes of the Session of June 23, 2006.

<sup>378</sup> See Exhibit RE-51, Proinversión Congressional Committee, Meeting Minutes, June 29, 2006; Exhibit CE-541, "Congressional Commission Envisions a Solution: Minera Cerro Verde Accepts Proposal to Pay S/ 13 Million," *El Heraldo*, July 10, 2006.

<sup>379</sup> See Exhibit CE-544, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV, August 2, 2006.

<sup>380</sup> See Claimant's Memorial at para. 145.

<sup>381</sup> See Exhibit CWS-11, Torreblanca Statement at paras. 52-55; Claimant's Memorial at paras. 147-48.

<sup>382</sup> See Exhibit CWS-11, Torreblanca Statement at paras. 52, 54.

waive its rights to collect any royalties from SMCV until 2013 (when the 1998 Stabilization Agreement was set to expire).<sup>383</sup> Had that been the *quid pro quo*, the parties to the agreement would doubtless have made sure that language to that effect was included in their agreement. They did not. Thus, to the extent SMCV held any such understanding at the time, that understanding was unilateral and was not as a result of any actions by the State.

214. Second, by mid-2006, SMCV (and Phelps Dodge, Freeport's predecessor) knew or should have known that the Concentrator Project was not covered by the 1998 Stabilization Agreement and that it would be subject to pay royalties related to that Project. As Respondent just explained above in Section II.D, MINEM's position was fully public, having been presented to Congress, and it was consistent, spanning multiple reports and statements long before June 2006.

215. All of the Congressional Committee meetings were accessible to the public, and SMCV would have had every incentive (indeed, duty) to monitor carefully such official discussions of the mining regime and of SMCV's own operations in particular. Thus, SMCV (and Phelps Dodge, Freeport's predecessor) knew or should have known of MINEM's position, and thus had to have understood that any voluntary contribution agreed with the Arequipa local leaders was entirely separate from its obligations to pay royalties with respect to the Concentrator Project.

216. Third, even if SMCV did not know before June 2006 that it would have to pay royalties in connection with the Concentrator Project, it surely became aware of that prospect during the roundtable discussions in which it participated during that month. Mr. Tovar testifies that during those meetings, MINEM officials made a presentation similar to the ones it had made to the Energy and Mines Congressional Committee in May 2006, reiterating its position that the

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<sup>383</sup> See Exhibit CE-544, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV, August 2, 2006.

Concentrator Project was not covered by the 1998 Stabilization Agreement.<sup>384</sup> In particular, during the presentation, the officials explained that (i) the fact that SMCV had received approval to use the profit reinvestment benefit (to reinvest profits resulting from the Leaching Project into the Concentrator Project, free of taxes), did not mean that the Concentrator Project was covered by the 1998 Stabilization Agreement; and (ii) because the 1998 Stabilization Agreement did not cover the Concentrator Project, it did not shield SMCV from having to pay royalties with respect to that project.<sup>385</sup>

217. Therefore, Claimant cannot credibly claim now that Perú withheld information or that SMCV agreed to pay voluntary contributions to Arequipa only because it believed it was entirely exempt from paying royalties in connection with all of its mining investment projects in Perú. If that were indeed SMCV's belief, that belief was unfounded and in error—and the error is SMCV's, not Perú's.

## **2. SMCV Agreed to Make Voluntary Contributions to the National Treasury**

218. In December 2006, in the wake of significant increases in the price of metals in international markets, and with the objective of providing a small percentage of the resulting profits to local communities impacted by mining activities, Perú created the *Programa Minero de Solidaridad con el Pueblo* (“Voluntary Contribution Program”).<sup>386</sup> The purpose of this Program was to promote welfare and social development, and improve living conditions in local communities where mining companies conducted mining activities.<sup>387</sup> In particular, according to the Program, the target was for each mining company to agree to pay 3% of its net profits for use

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<sup>384</sup> See Exhibit RWS-3, Tovar Statement at paras. 53, 65-68.

<sup>385</sup> See Exhibit RWS-3, Tovar Statement at paras. 67-68; Exhibit RE-107, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” June 2006, at slides 4, 8, 9, 15, 16.

<sup>386</sup> See Exhibit RWS-6, Camacho Statement at paras. 12-13.

<sup>387</sup> See Exhibit RE-30, MINEM, “Mining Solidarity Program,” available at <http://www.minem.gob.pe/descripcion.php?idSector=3&idTitular=9508>.

in improving local and regional infrastructure, as well as in social projects.<sup>388</sup> The contribution was voluntary.<sup>389</sup> Companies that decided to contribute to the Voluntary Contribution Program and were also required to pay mining royalties could pay a lesser amount to the Program.<sup>390</sup> Under this Program, contributions would be made for up to four years, starting in 2007.<sup>391</sup>

219. As with the contributions SMCV made as a result of the Roundtable Agreement, Claimant again alleges that between 2007 and 2010, SMCV agreed to contribute more than US \$140 million in revenue from the Leaching Project and Concentrator Project under the Voluntary Contribution Program, based on the (mis)understanding that it did not have to pay any royalties.<sup>392</sup>

220. In support of its allegations, Claimant submits the witness statement of Mr. Gianfranco Castagnola. Mr. Castagnola was president of a consulting company, APOYO, that was hired by the *Sociedad Nacional de Minería, Petróleo y Energía* (the “Mining Society,” a business association of companies involved in the extractive sector in Perú) to participate in the negotiations with the State to establish the Voluntary Contribution Program.<sup>393</sup> Importantly, the Mining Society acts on the industry’s behalf—it works to protect and promote the interests of most of the mining companies in Perú.<sup>394</sup>

221. According to Mr. Castagnola, APOYO also understood that SMCV was exempt from paying royalties. Mr. Castagnola’s only evidence, however, is that in the discussions that

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<sup>388</sup> See Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clauses 3.1.2 and 3.1.5 of the Draft Agreement.

<sup>389</sup> See Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Considerations.

<sup>390</sup> See Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 3.1.2 of the Draft Agreement.

<sup>391</sup> See Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Considerations.

<sup>392</sup> See Claimant’s Memorial at paras. 149-54.

<sup>393</sup> See Exhibit CWS-2, Witness Statement of Gianfranco Castagnola, October 19, 2021 (“Castagnola Statement”), at para. 9.

<sup>394</sup> See Exhibit RWS-6, Camacho Statement at para. 14.

led to the structuring of the Voluntary Contribution Program, the Mining Society listed SMCV as a stabilized company and the government never questioned that classification.<sup>395</sup> This is certainly not confirmation by the State that SMCV would be exempt from paying royalties with respect to all of its mining investment projects.

222. First, the fact that an entity was classified as a “stabilized company” by a private association of mining companies is irrelevant for the purposes of determining whether the company was, in fact, required by law to pay royalties. The Mining Society’s choice of how to list SMCV certainly does not show that the State understood that all of the company’s investment projects were “stabilized.” At best, it reflects the fact that the company did indeed have at least one stabilization agreement in place—but it says nothing about the scope of that agreement. As Mr. Marco Camacho, MEF’s Fiscal Policy Director, explains in his witness statement, it is not the case that a company is either “stabilized” or “not stabilized” as a whole. Stabilization agreements protect specific investment projects. A single company might have two stabilization agreements protecting two different investment projects and related activities, for example (as indeed SMCV did in 1994 and 1998). Or, again the case for SMCV, a company with a stabilization agreement in force prior to the enactment of the Mining Royalty Law could be exempt from paying royalties with respect to production from the investment project covered by the agreement, but could also be subject to paying royalties with respect to all of its other mining investment projects.<sup>396</sup> This is consistent with what Mr. Isasi had explained before Congress on June 8, 2005—more than a year before the State created the Voluntary Contribution Program.

223. Second, the Voluntary Contribution Program envisioned the possibility of companies having to pay royalties related to a portion of their mining activities, while making

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<sup>395</sup> See Claimant’s Memorial at para. 151; Exhibit CWS-2, Castagnola Statement at paras. 23, 43.

<sup>396</sup> See Exhibit RWS-6, Camacho Statement at para. 9.

contributions under the Voluntary Contribution Program for another portion of their mining activities. Clause 3.1.2 of the draft agreement attached to the Voluntary Contribution Program provided that companies could deduct a percentage of royalty payments made by a mining company from the amount to be contributed under the Voluntary Contribution Program by that same company.<sup>397</sup> If Claimant's theory were correct that stabilization agreements necessarily and automatically protected all of the activities of a given "stabilized company" (it is not), then the Voluntary Contribution Program would not have envisioned this possibility—under Claimant's incorrect theory, companies would have been required to either contribute under the Program or pay royalties, but never both. The Program envisioned the opposite.

224. Third, as Respondent already explained, at the latest by June 2006, SMCV (and Phelps Dodge, Freeport's predecessor) knew or should have known that SMCV's 1998 Stabilization Agreement did not cover the Concentrator Project and, thus, SMCV would be subject to paying royalties with respect to that Project.<sup>398</sup> It cannot now claim that because SMCV was listed by its own industry association as a "stabilized company," and because the State did not question that classification, SMCV reasonably understood that it was not obligated to pay royalties on ore produced through the Concentrator Project. That is not a reasonable basis on which to make business decisions.

### **3. SMCV Agreed to Pay GEM Contributions**

#### **a. In 2012, SMCV Agreed to Make GEM Payments Knowing that It Was Not Exempt from Paying Royalties**

225. In 2010, when the Voluntary Contribution Program was coming to an end, and with metal prices (and thus profits) still increasing in the international market, Perú adopted new

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<sup>397</sup> See Exhibit CA-131, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM, December 21, 2006, at Clause 3.1.2 of the Draft Agreement.

<sup>398</sup> See *supra* at Section II.D.

changes to its fiscal policy with respect to the mining sector.<sup>399</sup> In particular, in 2011, Perú created a Special Mining Tax (*Impuesto Especial a la Minería* or “IEM”) and a Special Mining Contribution (*Gravamen Especial a la Minería* or “GEM”).<sup>400</sup> The IEM is levied on operating profits resulting from the sale of ore. The IEM taxes only profits derived from mining activities that were not covered by mining stabilization agreements at the time the tax was created.<sup>401</sup> The GEM, in turn, is a voluntary contribution program for extractive companies that have signed mining stabilization agreements with the State.<sup>402</sup> Once the mining company agrees to make contributions under the GEM, it agrees to contribute at least 4% of its operating profits.<sup>403</sup> Similar to the Voluntary Contribution Program, companies were allowed to deduct any royalty payments in order to determine the amount that would be paid under the GEM.<sup>404</sup> And, companies were allowed to deduct any payments made under the GEM for purposes of determining their income tax liabilities.<sup>405</sup>

226. Claimant alleges that, similar to the Voluntary Contribution Program, SMCV agreed to become subject to the GEM program under the understanding that it was entirely exempt from paying royalties as well as from the newly created IEM because of its 1998 Stabilization Agreement.<sup>406</sup> Claimant relies on testimony from Mr. Hugo Santa María (another

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<sup>399</sup> See Exhibit RWS-6, Camacho Statement at para. 19.

<sup>400</sup> See Exhibit RWS-6, Camacho Statement at para. 19; Exhibit CA-180, Law Creating the Special Mining Tax, Law No. 29789, September 28, 2011 (“Special Mining Tax Law”); Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011.

<sup>401</sup> See Exhibit RWS-6, Camacho Statement at para. 21; Exhibit CA-180, Special Mining Tax Law, at Art. 1.

<sup>402</sup> See Exhibit RWS-6, Camacho Statement at para. 22; Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Arts. 1, 2, 7.

<sup>403</sup> See Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 2.2, Annex II.

<sup>404</sup> See Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 3.

<sup>405</sup> See Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 3.

<sup>406</sup> See Claimant’s Memorial at paras. 180-95.

APOYO employee), a report from MEF, and the language of the agreement it signed to make GEM payments. On review, however, none of these sources supports Claimant’s allegations.

227. First, Mr. Hugo Santa María testifies that in 2011, the Mining Society—which, again, represents the interests of mining companies—once again hired APOYO to participate in discussions with the government regarding the creation of the GEM and IEM programs.<sup>407</sup>

According to Mr. Santa María, APOYO always considered SMCV to be a company that did not have to pay any royalties, because it was a “stabilized mining company,” and the government did not contest that classification.<sup>408</sup> According to Claimant, this is evidence that Perú understood that SMCV was exempt from paying any royalties, including those related to the Concentrator Project.<sup>409</sup>

228. As Respondent explained above, however, the fact that a company is classified as a “stabilized company” by a private association has no legal significance, and certainly does not mean that it is exempt from paying any royalties. All it likely meant to Perú was that the listed companies had one or more stabilization agreements in force—which was indeed true for SMCV, so there would have been no reason to question the Mining Society’s label.

229. Second, Claimant’s reliance on an October 2011 MEF report as alleged confirmation that SMCV was not subject to paying any royalties and the newly created IEM is equally unavailing.<sup>410</sup> According to Claimant and Ms. Torreblanca, in October 2011—that is, at a moment when SUNAT had already issued at least three Royalty Assessments against SMCV for royalties owed in relation to the Concentrator Project<sup>411</sup>—SMCV sought confirmation of its

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<sup>407</sup> See Exhibit CWS-9, Witness Statement of Hugo Santa María, October 19, 2021 (“Santa María Statement”), at para. 10.

<sup>408</sup> See Exhibit CWS-9, Santa María Statement at paras. 19-23.

<sup>409</sup> See Claimant’s Memorial at paras. 180-83.

<sup>410</sup> See Claimant’s Memorial at paras. 187-195.

<sup>411</sup> See Claimant’s Memorial at Annex A.

understanding of the scope of its 1998 Stabilization Agreement when it planned to participate in the GEM.<sup>412</sup> As Claimant itself admits, SMCV never obtained the written confirmation that it sought.<sup>413</sup> Instead, Claimant relies on a MEF report that General Director of Mining, Mr. Guillermo Shinno, forwarded to SMCV in December 2011, Report No. 206-2011-EF/61.01 (“MEF 2011 Report”), signed by Mr. Marco Camacho.<sup>414</sup> Ms. Torreblanca concludes that MEF 2011 Report confirmed that “mining companies with stabilization agreements only had to pay the GEM.”<sup>415</sup> The Report said no such thing.

230. As Mr. Camacho explains in his witness statement, the MEF 2011 Report does not comment on the specific scope of the SMCV 1998 Stabilization Agreement. Instead, the report comments on the scope of mining stabilization agreements in general terms and on their relationship with the obligation to pay GEM, royalties, and the IEM. The MEF 2011 Report was prepared in response to a request from the then-Minister of Energy and Mines, Mr. Carlos Herrera Descalizi. In particular, Minister Herrera asked MEF to clarify whether “mining projects that benefit from a stabilized legal regime, in addition to being subject to the payment of the [GEM], can be bound to the tax regimes relative to the [IEM] and to the Mining Royalty . . . .”<sup>416</sup>

231. In response to this query, Mr. Camacho stated in the MEF 2011 Report, first, that the MEF did not have the legal competence to determine the scope and content of such

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<sup>412</sup> See Claimant’s Memorial at para. 188; Exhibit CWS-11, Torreblanca Statement at para. 85.

<sup>413</sup> See Claimant’s Memorial at paras. 188-91.

<sup>414</sup> See Claimant’s Memorial at para. 192.

<sup>415</sup> Exhibit CWS-11, Torreblanca Statement at para. 89.

<sup>416</sup> Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at Background (“*los proyectos mineros que gozan del régimen jurídico estabilizado, además de encontrarse sujetos al pago del [GEM] pueden estar obligados a los regímenes tributarios relativos al [IEM], y a la Regalía Minera . . . .*”) (emphasis added); Exhibit RWS-6, Camacho Statement at para. 34. Claimant has translated this sentence as “mining projects that enjoy the stabilized legal regime, in addition to being subject to the payment of the [GEM], can be bound to the tax regimes relative to the [IEM] and to the Mining Royalty . . . .” Respondent will provide a corrected translation of this section.

stabilization agreements. Therefore, contrary to what Claimant alleges in these proceedings, MEF did not take, nor could it have taken, a meaningful position on the scope of any company's stabilization agreement, including that of SMCV.

232. Second, and even more importantly, in relation to the obligation to pay the GEM, royalties, and IEM, Mr. Camacho explained that the GEM only applied to "mining projects" (not mining companies) that were stabilized, while royalties and the IEM applied to non-stabilized mining projects (not mining companies).<sup>417</sup> Specifically, Mr. Camacho explained in the Report:

In relation to the second query, it should be noted that, without prejudice to its concrete application according to the specificities of each case, the new tax scheme on the mining activity establishes a [GEM] applicable by virtue of an Agreement to those engaged in mining activity for that which is covered by the stability of [a mining stabilization agreement] and a general regime that considers a[n IEM] and a Mining Royalty on that which is not included in the aforementioned Agreements.<sup>418</sup>

233. It is, thus, clear from the Report's language that a given single company could have to pay GEM on some of its projects (the stabilized projects) and royalties and IEM on others (the non-stabilized projects). In other words, contrary to Claimant's assertions, the Report did not confirm that paying GEM meant that all of a company's activities must be fully covered by a stabilization agreement, or that SMCV, in particular, could and did pay GEM on the understanding that it was exempt from paying royalties with respect to all of its mining investment projects.

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<sup>417</sup> See Exhibit RWS-6, Camacho Statement at paras. 35-36.

<sup>418</sup> Exhibit CE-629, MEF, Report No. 206-2011-EF/61.01, October 14, 2011, at p. 2, numeral 3 ("*En relación con la segunda consulta, debe señalarse que, sin perjuicio de su forma de aplicación concreta según las especificidades de cada caso, el nuevo esquema fiscal sobre la actividad minera establece un Gravamen Especial a la Minería aplicable en mérito de un Convenio a los sujetos de la actividad minera por aquello que resulte comprendido dentro de la estabilidad de un Contrato de Garantías y Medidas de Promoción a la Inversión [Convenios de Estabilidad] de acuerdo al Texto Único Ordenado de la Ley General de Minería; y un régimen general que considera un Impuesto Especial a la Minería y una Regalía Minera sobre aquello que no resulte comprendido dentro de los referidos Contratos.*") (emphasis added).

234. Third, Claimant’s assertion that the language of the agreement SMCV signed with the State regarding the GEM payments supports its understanding of the scope of the 1998 Stabilization Agreement is equally unavailing. Claimant relies, in particular, on the fact that the agreement states that SMCV is to pay GEM based on profits from “the concessions” (as opposed to, for example, “projects”) included in the 1998 Stabilization Agreement.<sup>419</sup> Claimant appears to read into that language a proposition that GEM applied not only to profits from the Leaching Project but also to profits from the Concentrator Project, because the latter had been added to “the concession” (*i.e.*, the Beneficiation Concession) referenced in Annex 1 of the 1998 Stabilization Agreement.

235. While the GEM agreement does refer to the “concessions” included in the 1998 Stabilization Agreement (rather than, say, the “projects” or even the Leaching Project), this language cannot be read in isolation and in a manner that is contrary to Peruvian law.<sup>420</sup> The law that created the GEM (“GEM Law”) explicitly provided that GEM would apply with respect to “projects” covered by stabilization agreements. In particular, Article 2.1 states:

The [GEM] is an original public resource arising from the extraction of non-renewable natural resources that, in accordance with this Law, is applicable to entities engaging in a mining activity with regard to and based on the agreements entered into with the State with respect to the **projects** for which the [mining stabilization agreements] remain in force . . .<sup>421</sup>

236. Thus, even on the language of Article 2.1 of the GEM Law alone, Claimant should have understood that SMCV would pay the GEM only in relation to its Leaching Project

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<sup>419</sup> See Claimant’s Memorial at paras. 193-195.

<sup>420</sup> See Exhibit CE-64, GEM Agreement, Law No. 29790, February 28, 2012, at Clause 2.1.

<sup>421</sup> Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 2.1 (“*El Gravamen es un recurso público originario proveniente de la explotación de recursos naturales no renovables que, de conformidad con la presente Ley, se hace aplicable a los sujetos de la actividad minera en mérito y a partir de la suscripción de convenios con el Estado, respecto de **proyectos** por los que se mantienen vigentes Contratos de Garantías y Medidas de Promoción a la Inversión de conformidad con el Texto Único Ordenado de la Ley General de Minería, aprobado por el Decreto Supremo 014-92-EM y normas modificatorias.*”) (emphasis added). Respondent has provided a corrected translation of this Article above.

(the stabilized project) and not its Concentrator Project (the non-stabilized project). SMCV (and Claimant), however, chose to ignore this language.

237. In addition, the very structure of the program contemplated the possibility of companies having to pay royalties and IEM for a portion of their mining activities (the activities related to the non-stabilized projects) and GEM for the other portion of their mining activities (the activities related to the stabilized projects). This structure is simply incompatible with Claimant's notion that all stabilization agreements are all-encompassing. On Claimant's theory, there would never be a company that would pay both GEM and IEM/royalties at any given point in time (because it either would have a stabilization agreement covering everything and pay only GEM, or it would have no agreement and pay only IEM and royalties), and so no overlaps would ever occur. But that is not how the GEM program was structured; in particular, the State allowed companies to deduct any royalties paid from any contributions they would make under the GEM.<sup>422</sup>

b. SUNAT Is Not Obligated to Refund SMCV for Its GEM Payments

238. On February 28, 2012, SMCV signed an agreement with MEF to make GEM payments from the fourth quarter of 2011 until the end of 2013.<sup>423</sup>

239. In December 2017, after the Supreme Court confirmed that SMCV's 1998 Stabilization Agreement did not cover the Concentrator Project and, thus, SMCV was subject to royalties on the ore production of that Project, SMCV submitted a request to SUNAT for refunds of GEM payments that it had already made in relation to that Project. SMCV first requested refunds with respect to payments made in relation to profits made from Q4 2012 to Q4 2013. SUNAT approved those refunds.<sup>424</sup>

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<sup>422</sup> See Exhibit CA-181, Law Establishing GEM Legal Framework, Law No. 29790, September 28, 2011, at Art. 3.

<sup>423</sup> See Claimant's Memorial at paras. 193-94.

<sup>424</sup> See Claimant's Memorial at para. 264.

240. One year later, in December 2018, SMCV submitted a new request to obtain refunds for the remaining, earlier GEM payments that it had made in relation to the Concentrator Project, for profits made from Q4 2011 to Q3 2012.<sup>425</sup> SUNAT denied the requests, because the statute of limitations to submit those requests had expired.<sup>426</sup> Claimant alleges that this decision was arbitrary.<sup>427</sup> It was not.

241. According to Articles 43.3 and 44.5 of the Peruvian Tax Code, a taxpayer has four years to request a refund from SUNAT, counting from January 1st of the year after the payment was made.<sup>428</sup> SMCV made payments related to Q4 2011 to Q3 2012 in 2012. Thus, the statute of limitations to request any reimbursements started to run on January 1, 2013 and expired on January 1, 2017, almost two years before SMCV filed its requests for reimbursement with SUNAT.<sup>429</sup> SUNAT was required to reject SMCV's request. SMCV could have sought to stay the running of the statute of limitations on its GEM payments during the time it was contesting SUNAT's assessments against the Concentrator Project, which in turn implicated the GEM payments.<sup>430</sup> It chose not to do so.

242. Of course, SMCV could also have requested those refunds within the statute of limitations. Claimant tries to tie SMCV's belated request to the Supreme Court's decision in December 2017. But, in reality, by December 31, 2016 (the last date on which SMCV could have filed a request within the limitations period), SMCV already knew that it was being required to pay royalties. Before that date, SUNAT had already issued at least four Royalty

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<sup>425</sup> See Claimant's Memorial at para. 265.

<sup>426</sup> See Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019.

<sup>427</sup> See Claimant's Memorial at para. 265.

<sup>428</sup> See Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013 ("Tax Code"), at Arts. 43, 44.3.

<sup>429</sup> See Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019, at p. 4.

<sup>430</sup> See Exhibit RE-106, Single Unified Text of Law No. 27584, Law that Regulates the Contentious Administrative Proceeding, Approved by Supreme Decree No. 011-2019-JUS, May 3, 2019 at Arts. 37-39.

Assessments against SMCV, the Tax Tribunal had already confirmed two of those Assessments, and the Superior Court of Lima (appellate court) had also confirmed those two Assessments.<sup>431</sup> SMCV knowingly took a risk by waiting until the Supreme Court issued its decision; it could have requested the refunds earlier, based on SUNAT's own assessments or the Tax Tribunal's or the Superior Court's decisions. Moreover, SMCV does not offer any explanation for its failure to act promptly after receiving the Supreme Court's decision—it waited another entire year after receiving the decision to request the remaining GEM refunds. Perú cannot be held internationally liable for an investor's own assumption of risk or lack of due diligence.

**F. SUNAT'S ROYALTY ASSESSMENTS AGAINST ORE PROCESSED BY THE CONCENTRATOR PLANT WERE REASONABLE AND IN ACCORDANCE WITH PERUVIAN LAW**

243. In its Memorial, Claimant complains that, in April 2008, SUNAT arbitrarily initiated an audit against SMCV to investigate its obligations to pay royalties with respect to the ore that it processed in the Concentrator Project.<sup>432</sup> According to Claimant, due to political pressure at the time, SUNAT secretly adopted MINEM's supposedly novel June 2006 interpretation of the scope of the 1998 Stabilization Agreement and started a process to collect the unpaid royalties. SUNAT initiated tax collection proceedings for every fiscal year that SMCV failed to pay royalties with respect to the ore processed in the Concentrator Project between 2006 and 2013 (in 2013 the 1998 Stabilization Agreement expired). The facts of those assessments raise no grounds for complaint.

244. First, SUNAT did not secretly adopt an alleged novel interpretation of the scope of the 1998 Stabilization Agreement. As Respondent has established in Section II.D above, Perú has consistently taken the position that a mining stabilization agreement covers only the

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<sup>431</sup> SUNAT issued the 2006-2011 Royalty Assessments between August 2009 and April 2016; the Tax Tribunal confirmed the 2006-2007 and 2008 Royalty Assessments in May 2013 (notified SMCV in June 2013); the Superior Court of Lima (appellate court) confirmed the 2006-2007 and 2008 Royalty Assessments between January 2016 and July of 2017. *See infra* at Annex A.

<sup>432</sup> *See* Claimant's Memorial at paras. 358(a), 377(d).

activities and investments related to the investment project that was carefully outlined in the feasibility study that was the basis for entering into the agreement. For SMCV's purposes, that meant that the activities and investments related to the Concentrator Project—which was not part of the 1996 Feasibility Study and, thus, not part of the 1998 Stabilization Agreement—were not shielded from legislative or regulatory changes. In other words, SMCV was obliged to pay royalties derived from the extraction and processing of primary sulfides processed in the Concentrator Plant in accordance with the 2004 Royalty Law.

245. In addition, MINEM's interpretation of SMCV's 1998 Stabilization Agreement, specifically, was no secret. It was stated publicly and explicitly, on multiple occasions, to no less an authority than Perú's Congress. MINEM's Legal Director explained to the responsible Congressional Committee that the company would have to pay royalties for the ore that was processed in the Concentrator Plant.<sup>433</sup> SMCV (and Phelps Dodge, Freeport's predecessor) knew or should have known that royalties would be due, and had to expect that SUNAT would audit the company if it failed to pay royalties, in relation to the Concentrator Project.

246. Second, MINEM did not interpret the scope of the 1998 Stabilization Agreement as excluding ore processed in the Concentrator Plant, and SUNAT did not collect royalties based on the Concentrator Project as a result of political pressure. In accordance with the 2004 Royalty Law, SUNAT has the duty to ensure that mining companies are complying with their obligations to pay royalties and to enforce payment if they fail to do so.<sup>434</sup> By initiating the audits and issuing royalty assessments, SUNAT was simply acting pursuant to its administrative powers and responsibilities.<sup>435</sup>

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<sup>433</sup> See *supra* at Sections II.D.8 and II.D.11.

<sup>434</sup> See Exhibit CA-6, Mining Royalty Law, at Art. 7; see also Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 1.

<sup>435</sup> See Exhibit RER-3, Bravo and Picón Report at paras. 47-57; Exhibit CA-6, Mining Royalty Law, at Art. 7; see also Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 1; Exhibit CA-14, Tax Code, at Art. 61.

247. Third, SMCV was granted every opportunity provided by law to challenge SUNAT's non-application of the 1998 Stabilization Agreement before SUNAT, then before the Tax Tribunal, and then in Peruvian courts (up to and including Perú's Supreme Court). Ultimately, all of these institutions held that SUNAT had acted in accordance with Peruvian law.<sup>436</sup> The fact that Claimant does not agree with that conclusion does not mean that Perú breached its international obligations. It did not, and Claimant cannot be permitted to use this Tribunal as another appellate court to review—once again, in the hopes of a different decision—a question of Peruvian administrative and contract law that has already been discussed and decided by the Peruvian administrative bodies and courts.

248. In the following sections, Respondent, first, briefly describes the process that SUNAT undertakes to issue a final payment order to a taxpayer to show that SUNAT followed this procedure in each and every instance in which it issued a royalty assessment against SMCV (Section 1). Second, Respondent describes SUNAT's royalty assessments with respect to fiscal years 2006-2013 (Sections 2-6). As will be seen, SUNAT acted reasonably and in accordance with Peruvian law in issuing each of those royalty assessments applicable to SMCV.

**1. SUNAT's Procedure to Issue Royalty Assessments Allows Taxpayers Ample Opportunity to Challenge the Assessments and Submit Their Defenses**

249. The Peruvian Tax Code sets out the process that SUNAT must follow in order to require that a taxpayer pay unpaid taxes or other fees (*e.g.*, royalties).<sup>437</sup> According to the Peruvian Tax Code, there are three administrative stages through which a royalty or tax assessment may pass. Once the administrative stage is complete, the taxpayer has the option to challenge SUNAT's decision before Peruvian courts. Respondent describes below each of the three administrative stages.

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<sup>436</sup> See *infra* Sections II.F, II.G, II.G.

<sup>437</sup> See Exhibit CA-14, Tax Code, at Arts. 61, 75-76, 124, 135-43.

250. Stage 1 – Oversight (*Fiscalización* in Spanish): SUNAT is the entity in charge of overseeing compliance by taxpayers with their obligations to pay taxes or other fees (like royalties) to the State when appropriate.<sup>438</sup> In order to do this, SUNAT may initiate audits against taxpayers to investigate and ensure that they are complying with their fiscal obligations.<sup>439</sup> If it finds that a taxpayer owes any taxes or fees, SUNAT issues an Assessment Resolution (*Resolución de Determinación*), in which it identifies the amount that is owed by the taxpayer and the legal basis for its assessment.<sup>440</sup> When SUNAT issues an Assessment Resolution, it may also impose penalties and interest, depending on the facts of each case.<sup>441</sup> This oversight procedure is carried out by the Auditing Division (*División de Auditoría*) within SUNAT’s regional office where the taxpayer is located.<sup>442</sup>

251. If the taxpayer does not agree with the assessment, it has 20 business days to challenge the Assessment Resolution.<sup>443</sup> This administrative challenge is called a *recurso de reclamación* and is submitted before a separate division within SUNAT’s regional office where the taxpayer is located, the Claims Division (*División de Reclamaciones*). Importantly, at this stage, SMCV could have paid the amounts found in each assessment and challenged the assessment at the same time.<sup>444</sup> Had SMCV undertaken this approach, and had it been successful in its challenge, SUNAT would have reimbursed the amounts paid plus interest.<sup>445</sup> This would have mitigated SMCV’s (and Claimant’s) damages Claimant now claims in this arbitration. SMCV chose not to mitigate its damages, however.

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<sup>438</sup> See Exhibit CA-14, Tax Code, at Art. 61.

<sup>439</sup> See Exhibit CA-14, Tax Code, at Art. 62.

<sup>440</sup> See Exhibit CA-14, Tax Code, at Art. 62.

<sup>441</sup> See Exhibit CA-14, Tax Code, at Art. 82.

<sup>442</sup> See Exhibit RWS-4, Bedoya Statement at para. 8.

<sup>443</sup> See Exhibit CA-14, Tax Code, at Art. 137.

<sup>444</sup> See Exhibit RER-3, Bravo and Picón Report at para. 61.

<sup>445</sup> See Exhibit RER-3, Bravo and Picón Report at para. 61.

252. Moreover, it is at the beginning of the administrative stage (*i.e.*, when SUNAT first issued a royalty or tax assessment against SMCV) that SMCV knew or should have known that Perú had allegedly breached the 1998 Stabilization Agreement. As Dr. Morales explains in his expert report, it is at this stage that SMCV knows how SUNAT is interpreting and applying the Agreement.<sup>446</sup> The fact that SMCV can later challenge SUNAT’s assessments through an administrative procedure—and that SMCV (and only SMCV) can delay enforcement of the measure through that procedure—does not alter the date on which SMCV knew or should have known of an alleged breach of the 1998 Stabilization Agreement.

253. Stage 2 – Administrative Challenge (*Recurso de Reclamación*): Ms. Gabriela Bedoya explains in her witness statement that the SUNAT Claims Division for the region reviews the Assessment Resolution, its legal basis, and the taxpayer’s arguments, and also conducts an independent analysis of each case.<sup>447</sup> Based on the Claims Division analysis, the Regional Intendent may confirm or set aside the challenged Assessment Resolution.<sup>448</sup> Its decision is issued through an Intendency Resolution (*Resolución de Intendencia*).<sup>449</sup> A still-dissatisfied taxpayer may appeal that decision before the Tax Tribunal.

254. Stage 3 – Appeal before the Tax Tribunal (*Recurso de Apelación*): The Tax Tribunal is the body that decides the final stage of the administrative challenge procedure against SUNAT’s Assessment Resolution.<sup>450</sup> The Tax Tribunal is a politically independent body, composed of thirty-six members (*vocales*) who are reputable tax experts appointed through a

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<sup>446</sup> See Exhibit RER-2, Morales Report at paras. 96-98, 102-103.

<sup>447</sup> See Exhibit RWS-4, Bedoya Statement at paras. 9; see also *id.* at paras. 43-5, 68.

<sup>448</sup> See Exhibit RWS-4, Bedoya Statement at para. 9; Exhibit CA-4, Peruvian Tax Code, Supreme Decree No. 135-99-EF, August 19, 1999, at Art. 137.

<sup>449</sup> See Exhibit CER-3, Expert Report of Luis Hernández Berenguel, October 19, 2021 (“Hernández Report”), at para. 27.

<sup>450</sup> See Exhibit CA-14, Tax Code, at Art. 143.

merit-based selection process conducted by a Special Commission.<sup>451</sup> If the taxpayer still disagrees with the Tax Tribunal’s decision, the taxpayer may challenge the decision before Peruvian courts. Respondent further describes the Tax Tribunal’s authority and powers in Section II.G.1 below.

255. In this case, SMCV has been afforded ample due process and every reasonable opportunity to challenge SUNAT’s royalty assessments—both administratively and judicially—as Respondent describes in the following sections. The fact that SMCV lost each of these challenges is not a basis to criticize the system or its decisions; it is simply the inevitable consequence of the fact that SMCV’s interpretation of the 1998 Stabilization Agreement, the Mining Law, and the Royalty Law is untenable.

## **2. The 2006-2007 Royalty Assessment**

256. On June 2, 2008, SUNAT sent an audit letter to SMCV taking notice of the fact that SMCV had not filed required documents related to payment of royalties for sales of copper ore from the Concentrator for 2006 or 2007.<sup>452</sup> That audit letter explained to SMCV that it could submit a responsive brief if it did not agree that the filings were required.<sup>453</sup> On June 4, 2008, SMCV did submit a response to SUNAT’s audit notification.<sup>454</sup> In its response, SMCV made the very same arguments that Claimant is presenting in this arbitration, including that: (i) the 1998 Stabilization Agreement covered all of the investments made anywhere within the entirety of its Mining and Beneficiation Concessions; and (ii) because concessions grant the right to exploit minerals, and the 1998 Stabilization Agreement (allegedly) covered every investment and

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<sup>451</sup> See Exhibit RWS-5, Witness Statement of Zoraida Olano, April 18, 2021 (“Olano Statement”), at paras. 8, 15.

<sup>452</sup> See Exhibit CE-577, SUNAT, Inductive Letter No. 108052004279, May 30, 2008.

<sup>453</sup> See Exhibit CE-577, SUNAT, Inductive Letter No. 108052004279, May 30, 2008.

<sup>454</sup> See Exhibit CE-578, Letter from SMCV to SUNAT, Letter No. SMCV-AL-1346-2008, June 4, 2008.

activity within its concessions, then SMCV was not obliged to pay royalties on any of the ore it extracted from those concessions.<sup>455</sup>

257. Claimant alleges that Ms. Torreblanca met with SUNAT's Regional Intendent for Arequipa, who she says explained to her that SUNAT's hands were tied by MINEM's June 2006 Report, which Ms. Torreblanca claims never to have seen before.<sup>456</sup> Whether or not Ms. Torreblanca had ever seen the June 2006 Report is irrelevant. MINEM had no obligation to publicize or to share its internal report with SMCV. But in any event, by June 2008, Ms. Torreblanca, as legal representative for SMCV, surely knew and at the very least should have known of MINEM's position with respect to the scope of the 1998 Stabilization Agreement and SMCV's obligation to pay royalties on ore that was processed in the Concentrator Project, given MINEM's very public statements about it.<sup>457</sup>

258. Ms. Torreblanca also claims to have met with the Minister of Energy and Mines at the time, who allegedly encouraged her to meet with Mr. Isasi, formerly the MINEM Legal Director who wrote the June 2006 Report and by that time the Vice Minister of Mines.<sup>458</sup> Ms. Torreblanca testifies that she met with Mr. Isasi in July 2008 and that he said that he would not change the June 2006 Report and that it was politically better for SMCV to pay royalties.<sup>459</sup>

259. Mr. Isasi reports that meeting very differently: He was the one who asked for a meeting with Ms. Torreblanca, because otherwise she had the habit of reaching out directly to the Prime Minister and other high-level officials to try to get them to put downward pressure on Ministries and other bodies to change the State's position on SMCV-related matters.<sup>460</sup> In the

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<sup>455</sup> See Exhibit CE-578, Letter from SMCV to SUNAT, Letter No. SMCV-AL-1346-2008, June 4, 2008, at paras. 2, 4.

<sup>456</sup> See Claimant's Memorial at para. 164.

<sup>457</sup> See *supra* at Section II.D; Exhibit RWS-2, Isasi Statement at paras. 51, 59.

<sup>458</sup> See Claimant's Memorial at para. 165.

<sup>459</sup> See Claimant's Memorial at paras. 166, 169.

<sup>460</sup> See Exhibit RWS-2, Isasi Statement at para. 71.

meeting, he explained to Ms. Torreblanca MINEM's unchanged position based on the plain language of the Agreement and the Mining Law—that the 1998 Stabilization Agreement did not cover the investments and activities related to the Concentrator Project and that SMCV had to pay royalties on the ore processed in that Plant.<sup>461</sup> Mr. Isasi was a public servant at MINEM for five years, under four different Ministers and two different Presidents, serving as Legal Director and then as Vice Minister. His opinion has never been politically motivated, but, rather, was and is one based on Peruvian law.<sup>462</sup>

260. In light of SMCV's reluctance to pay the royalties that were due, and acting in accordance with its legal mandate, SUNAT initiated audit proceedings to investigate and assess the amount of royalties owed by SMCV. On August 17, 2009, SUNAT issued assessments against SMCV for royalties due on the minerals processed in the Concentrator from October 2006 (when it started operating) to December 2007 (the "2006-2007 Royalty Assessment").<sup>463</sup> SUNAT imposed penalties and interest on the amounts due, in accordance with its powers under Peruvian law. Notably, SMCV's challenge to this Assessment was unsuccessful both at the administrative and judicial level.<sup>464</sup>

261. On September 15, 2009, SMCV submitted an administrative challenge seeking reconsideration of SUNAT's 2006-2007 Royalty Assessment.<sup>465</sup> SMCV submitted the exact same arguments that Claimant submits before this Tribunal:<sup>466</sup>

- The 1998 Stabilization Agreement covered all of the investments made within its entire Mining and Beneficiation Concessions;

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<sup>461</sup> See Exhibit RWS-2, Isasi Statement at paras. 70-1.

<sup>462</sup> See Exhibit RWS-2, Isasi Statement at paras. 53, 73.

<sup>463</sup> See Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009.

<sup>464</sup> See *infra* at Section II.G and II.H.

<sup>465</sup> See Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009; Claimant's Memorial at para. 172.

<sup>466</sup> See Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at pp. 9-25.

- The 1998 Stabilization Agreement covered all of the minerals extracted from the Mining Concession;
- Because concessions grant the right to exploit minerals and the 1998 Stabilization Agreement allegedly covered every investment and activity made within its concessions, then SMCV was not obliged to pay royalties on any of the ore it extracted in accordance with those concessions.

262. While SMCV's administrative challenge was pending at SUNAT, Ms. Torreblanca allegedly met with officials from the MEF who she claims told her that SMCV had a strong case.<sup>467</sup> It is notable, though, that Ms. Torreblanca does not provide any documentary evidence of those meetings having taken place or (if they happened) what was said during them. She provides no meeting minutes, no email correspondence setting up the meetings, no follow-up emails or letters referring to the meetings, and not even any contemporaneous internal emails or notes reporting on what happened at the meetings. But, even if the meetings took place and even if the officials said what Ms. Torreblanca alleges they said, at best the officials would have been sharing personal opinions about the possible outcome of SMCV's administrative challenges against the assessments. Accordingly, their comments are essentially irrelevant and cannot be understood as official contradictions of MINEM's interpretation and SUNAT's application of the scope of the 1998 Stabilization Agreement.

263. On March 31, 2010, SUNAT rejected SMCV's administrative challenge. Claimant's only complaint about this decision is that SUNAT agreed with MINEM's interpretation of the 1998 Stabilization Agreement and the Mining Law instead of SMCV's interpretation.<sup>468</sup> According to Claimant, SUNAT "did not conceal MINEM's involvement," because it cited to MINEM's November 2005 Letter and June 2006 Report in its decision.<sup>469</sup>

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<sup>467</sup> See Exhibit CWS-11, Torreblanca Statement at para. 81; Claimant's Memorial at para. 174.

<sup>468</sup> See Claimant's Memorial at paras. 174-75.

<sup>469</sup> See Claimant's Memorial at para. 176 .

The suggestion seems to be that MINEM somehow inappropriately pressured SUNAT to reject SMCV's challenge. But there is no basis, much less any evidence, for such a suggestion.

264. First, MINEM did not intervene in SUNAT's decision-making process or its analysis of SMCV's case. The mere fact that SUNAT refers to MINEM's reports and letters, which were prepared years before SUNAT was deciding SMCV's case, does not prove that it was unduly influenced by MINEM. To the contrary, it shows only that SUNAT considered the views of the governmental entity that was properly empowered to interpret the meaning and legal scope of the 1998 Stabilization Agreement. Ms. Gabriela Bedoya, who was part of the team at SUNAT that issued the decision on the 2006-2007 Royalty Assessment, explains that SUNAT carefully reviewed all of the facts and legal issues related to the case before issuing a final decision.<sup>470</sup> In particular, SUNAT analyzed the relevant provisions of the 1998 Stabilization Agreement, the 1996 Feasibility Study, the Mining Law and applicable regulations, the Mining Royalty Law and applicable regulations, and MINEM's reports on the correct interpretation of the Agreement, among other things.<sup>471</sup> In light of the fact that MINEM was the government entity charged with determining which companies were obliged to pay royalties under the Mining Royalty Law, MINEM's reports on the correct interpretation of the Royalty Law and the 1998 Stabilization Agreement were of course relevant for SUNAT's review of the case.<sup>472</sup> In addition, MINEM was the entity that reviewed SMCV's request to enter into the Agreement, reviewed the Feasibility Study that served as a basis to enter into the Agreement, was a party to the Agreement, and was the entity in charge of ensuring that SMCV made the investment project described in the feasibility study. Thus, it was only logical and entirely appropriate for SUNAT to review and take into consideration MINEM's interpretation of the Agreement. The fact that

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<sup>470</sup> See Exhibit RWS-4, Bedoya Statement at para. 16.

<sup>471</sup> See Exhibit RWS-4, Bedoya Statement at paras. 16-7.

<sup>472</sup> See Exhibit RWS-4, Bedoya Statement at paras. 44-45.

SMCV (and Claimant) does not agree with MINEM's interpretation or SUNAT's analysis of it does not make SUNAT's decision unreasonable or unfounded.

265. Second, SUNAT did not rubber-stamp MINEM's position, either. Instead, SUNAT reviewed and considered every argument that SMCV submitted and, based on its assessment of the facts and the law, it confirmed the Royalty Assessment for the years 2006-2007. In particular, SUNAT found that:

- The Mining Law and its Regulations provide that stabilization agreements only cover the activities and investments related to the specific investment project for which the agreement was entered into. The effects of the agreement do not extend to all the activities and investments made within the concession in which the protected investment project was made.<sup>473</sup>
- The 1998 Stabilization Agreement covered only the Leaching Project that was described in the 1996 Feasibility Study and Clause 1 of the Agreement. The Leaching Project's purpose was to improve SMCV's leaching facilities to process secondary sulfides and increase its copper cathode production to 48,000 MT/year.<sup>474</sup>
- The Concentrator Project was a new investment project that was not related to the Leaching Project. The Concentrator Project's purpose was to build a concentrator plant to process primary sulfide ore (different from secondary sulfides, which cannot be economically processed through a leaching plant) to produce copper concentrate (which is different from copper cathodes). Thus, the Concentrator Project, and its related activities and investments, were not covered by the 1998 Stabilization Agreement.<sup>475</sup>
- In light of the fact that stabilization agreements cover only the activities and investments related to the investment project for which a particular agreement was signed, they do not cover all of the minerals that are extracted from the mining concession in which a particular company has developed an investment project. They only cover the minerals that are extracted in relation to the investment project for which a particular agreement was signed. As the 1998 Stabilization Agreement was signed in relation to the Leaching Project, not the

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<sup>473</sup> See *supra* at Section II.A; Exhibit CE-38, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 ("Resolution on Appeal of 2006–2007 Royalty Assessments"), at p. 33; Exhibit RWS-4, Bedoya Statement at paras. 19-22.

<sup>474</sup> See *supra* at Section II.B; Exhibit CE-38, Resolution on Appeal of 2006–2007 Royalty Assessments, at pp. 48-49; Exhibit RWS-4, Bedoya Statement at paras. 30-34.

<sup>475</sup> See *supra* at Section II.B; Exhibit CE-38, Resolution on Appeal of 2006–2007 Royalty Assessments, at pp. 38-39; Exhibit RWS-4, Bedoya Statement at para. 42.

Concentrator Project, primary sulfide ore extracted to be processed in the Concentrator Project was not covered by the 1998 Stabilization Agreement.<sup>476</sup>

266. Based on the foregoing, it is clear that SUNAT, in a legitimate exercise of its administrative powers, reasonably confirmed the 2006-2007 Royalty Assessment against SMCV's administrative challenge. SMCV appealed this decision to the Tax Tribunal. As Respondent will discuss in Section II.G below, the Tax Tribunal reasonably confirmed SUNAT's assessment.

### **3. The 2008 Royalty Assessment**

267. On June 1, 2010, SUNAT issued a royalty assessment for the fiscal year 2008 ("2008 Royalty Assessment").<sup>477</sup> SUNAT again imposed penalties and interest in accordance with its authority under Peruvian law. Notably, SMCV's challenge of this Assessment was not successful, either at the administrative or judicial level.<sup>478</sup> On July 15, 2010, SMCV filed an administrative challenge requesting that SUNAT reconsider its decision.<sup>479</sup> In its administrative challenge, SMCV essentially repeated the very same arguments it had submitted in relation to the 2006-2007 Royalty Assessment.<sup>480</sup> On January 31, 2011, SUNAT rejected SMCV's reconsideration request.<sup>481</sup> In light of the fact that the facts and legal basis of this case were similar to those of the 2006-2007 Royalty Assessment (changing only the fiscal year under review) and that SMCV had submitted essentially the same arguments, SUNAT—not surprisingly—concluded again that SMCV had to pay royalties with respect to the ore that was

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<sup>476</sup> See Exhibit CE-38, Resolution on Appeal of 2006–2007 Royalty Assessments, at pp. 38-39; Exhibit RWS-4, Bedoya Statement at paras. 58-61.

<sup>477</sup> See generally Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010.

<sup>478</sup> See *infra* at Sections II.G.2.a.iii and II.H.1.

<sup>479</sup> See generally Exhibit CE-600, SMCV, Request for Reconsideration (2008 Royalty Assessment), July 15, 2010.

<sup>480</sup> See Exhibit CE-600, SMCV, Request for Reconsideration (2008 Royalty Assessment), July 15, 2010, at pp. 2-23.

<sup>481</sup> See Exhibit CE-46, SUNAT, Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011 ("Resolution on Appeal of 2008 Royalty Assessments").

extracted and processed in relation to the Concentrator Project.<sup>482</sup> SMCV appealed this decision before the Tax Tribunal, as Respondent will discuss in Section II.G below.

268. In its Memorial, Claimant complains about the fact that SUNAT reached the same conclusion with respect to each and every fiscal year for which a royalty assessment was issued against SMCV. Claimant implies that SUNAT did not do a careful analysis each year in which it was deciding SMCV's administrative challenges.<sup>483</sup> That complaint is wrong.

269. As Ms. Bedoya explains in her witness statement, SUNAT has carefully reviewed each case before it. It is not at all surprising that it would reach the same conclusion with respect to cases that have the same parties, facts, and legal basis, with no underlying changes from year to year.<sup>484</sup> In enforcing taxpayers' obligations, SUNAT always strives to apply consistent criteria to each case, to ensure predictability and transparency.<sup>485</sup> Thus, it would make no sense for SUNAT to have decided SMCV's administrative challenges in different ways if the question before SUNAT was always the same: whether SMCV had to pay royalties related to the Concentrator Project given the limited scope the 1998 Stabilization Agreement. The fact that Claimant does not agree with SUNAT's conclusion does not mean that it was arbitrary. It was not.

#### **4. The 2009 Royalty Assessment**

270. On June 27, 2011, SUNAT issued the Royalty Assessment for the fiscal year 2009.<sup>486</sup> SUNAT again imposed penalties and interest in accordance with its authority under Peruvian law. On August 9, 2011, SMCV requested SUNAT to reconsider its decision.<sup>487</sup> In its

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<sup>482</sup> See Exhibit RWS-4, Bedoya Statement at paras. 45-46; Exhibit CE-46, Resolution on Appeal of 2008 Royalty Assessments, at paras. 28-29.

<sup>483</sup> See, e.g., Claimant's Memorial at paras. 178-79.

<sup>484</sup> See Exhibit RWS-4, Bedoya Statement at paras. 11, 17, 46.

<sup>485</sup> See Exhibit RWS-4, Bedoya Statement at para. 46.

<sup>486</sup> See Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011.

<sup>487</sup> See Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011.

administrative challenge, SMCV once again essentially repeated the same arguments it had submitted in relation to the 2006-2007 and 2008 Royalty Assessments.<sup>488</sup> On December 21, 2011, SUNAT rejected SMCV's reconsideration request.<sup>489</sup> In light of the fact that the facts and legal basis of this case were similar to those of the 2006-2007 and 2008 Royalty Assessments (changing only the fiscal year under review), SUNAT reasonably concluded again that SMCV had to pay royalties on the ore that was extracted and processed in relation to the Concentrator Project.<sup>490</sup> SMCV likewise appealed this decision before the Tax Tribunal, as Respondent discusses in Section II.G below.

## **5. The 2010-2011 Royalty Assessment**

271. On April 13, 2016, SUNAT issued a royalty assessment for 2010-2011.<sup>491</sup> On May 11, 2016, SMCV requested that SUNAT reconsider its decision.<sup>492</sup> On December 29, 2016, SUNAT rejected SMCV's reconsideration request.<sup>493</sup> SMCV appealed this decision before the Tax Tribunal, as Respondent discusses in Section II.G below.

272. Claimant complains that SUNAT failed to issue any assessments between 2011 and 2016.<sup>494</sup> Claimant asserts that this was due to the fact that SUNAT was waiting on the decisions from the Peruvian courts for the 2006-2007 and 2008 Royalty Assessments to decide if it would continue issuing Assessments against SMCV. Claimant's assertions are simply false. First, according to the Tax Code, SUNAT has discretion regarding when to start an audit, so long as it is within the statute of limitations, which for these cases was six years.<sup>495</sup> SUNAT acted

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<sup>488</sup> See Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 6-29.

<sup>489</sup> See Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011.

<sup>490</sup> See Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011, at pp. 21-57.

<sup>491</sup> See Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016.

<sup>492</sup> See Exhibit CE-146, SMCV Reconsideration Request of SUNAT, 2010/11 Royalty Assessments, May 11, 2016.

<sup>493</sup> See Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016.

<sup>494</sup> See Claimant's Memorial at para. 240.

<sup>495</sup> See Exhibit CA-14, Tax Code, at Art. 43.

within its powers. Second, SUNAT initiated its audit for fiscal years 2010-2011 in 2014.<sup>496</sup> Thus it is not correct that there was no activity from SUNAT between 2011 and 2016. Third, it is simply not correct that SUNAT did not issue any assessments against SMCV between 2011 and 2016. As shown in Annex A below, SUNAT issued assessments on income tax, general sales tax, and others against SMCV within those years.<sup>497</sup> Those assessments were also related to SMCV's (mis)interpretation of the 1998 Stabilization Agreement.<sup>498</sup>

273. In its administrative challenge, SMCV once again repeated essentially the same arguments it had submitted in relation to the 2006-2007, 2008, and 2009 Royalty Assessments.<sup>499</sup> However, in addition, it also requested that SUNAT waive penalties and interest on the basis that there was allegedly "reasonable doubt" about the interpretation the Mining Law. Article 170 of the Tax Code provides that SUNAT shall not impose interest or penalties on a taxpayer when the taxpayer has failed to comply with its obligations due to an incorrect interpretation of a rule that required further clarification from the relevant entities, and that a formal clarification has in fact been issued for the specific purposes of applying Article 170 to the tax payers.<sup>500</sup> SMCV, thus, argued that it had not made whatever royalty payments might be due because of the fact that there was "reasonable doubt" as to the correct interpretation of the Mining Law and the scope of stabilization agreements.<sup>501</sup>

274. SUNAT reached the same conclusion on the 2010-2011 Royalty Assessment as it had in the past, given that the facts and legal basis of this case were similar to those of the 2006-

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<sup>496</sup> See Exhibit RE-105, Audit Order for Fiscal Years 2010-2011, Order No. 140051407570-01, December 19, 2014.

<sup>497</sup> See *infra* at Annex A.

<sup>498</sup> See *infra* at Section II.I.

<sup>499</sup> See Exhibit CE-146, SMCV Reconsideration Request of SUNAT, 2010/11 Royalty Assessments, May 11, 2016, at pp. 17-85.

<sup>500</sup> See Exhibit CA-14, Tax Code, at Art. 170.

<sup>501</sup> See Exhibit CE-146, SMCV Reconsideration Request of SUNAT, 2010/11 Royalty Assessments, May 11, 2016, at pp. 37-39.

2007, 2008, and 2009 Royalty Assessments (changing only the fiscal year under review).<sup>502</sup>

Moreover, with respect to the “reasonable doubt” argument, SUNAT concluded that it did not apply. First, SUNAT explained that Article 170 of the Tax Code applies only when there has been an incorrect interpretation of a rule by SUNAT which then required a clarification. In this case, there had not been any incorrect interpretation of the Mining Law by SUNAT which subsequently required clarification.<sup>503</sup>

275. Moreover, Drs. Bravo and Picón, experts on behalf of Perú on Peruvian tax law, explain in their expert report that the concept of “reasonable doubt” is simply not applicable to SMCV’s case. They explain that the term “reasonable doubt” is used in Article 92 of the Tax Code (allowing tax payers to request a waiver of penalties and interest) to refer to the circumstances described in Article 170.1 of the Tax Code. Article 170.1 of the Tax Code provides that the tax administration shall waive interests and penalties if, and only if, there has been an incorrect interpretation of a norm and a formal “clarification” has been issued through a Law, SUNAT Resolution, or Plenary Chamber Resolution of the Tax Tribunal for the specific purpose of applying the waiver and that clarification has been published in *El Peruano* (Perú’s official gazette).<sup>504</sup> Without that clarification, there is no “reasonable doubt” in accordance with Article 170 of the Tax Code, and, thus, SUNAT does not have to waive penalties and interest.<sup>505</sup>

276. Second, SUNAT explained that it has consistently applied the same interpretation to the articles about stabilization agreements in the Mining Law—that is, that stabilization agreements apply only to the activities and investments related to the investment project for

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<sup>502</sup> See Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at pp. 44-75.

<sup>503</sup> See Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at pp. 125-26.

<sup>504</sup> See Exhibit CA-14, Tax Code, at Art. 170.1.

<sup>505</sup> See Exhibit RER-3, Bravo and Picón Report at paras. 70-74.

which the agreements were signed.<sup>506</sup> Notably, in its decision, SUNAT cited to two rulings that it had issued several years earlier, in 2002 and 2007, in which it concluded the same thing—*i.e.*, that mining stabilization agreements only apply to the “investment activities that are the subject matter of the agreements.”<sup>507</sup> These rulings had been issued in response to consultations from another taxpayer. As SUNAT explained in its decision, according to the Tax Code, conclusions reached in rulings issued by SUNAT in response to institutional inquiries are binding on SUNAT officials.<sup>508</sup> In other words, SUNAT could not have issued contradictory interpretations with respect to the Mining Law. Further, the decision emphasized that SUNAT “has not issued any other Report, Administrative Act or any other competent legal instrument that has evidenced a different or contrary meaning” to the legal position discussed in the two rulings.<sup>509</sup> Thus, SMCV should not have had any “reasonable doubt” with respect to the correct interpretation of the Mining Law or the scope of its 1998 Stabilization Agreement.

277. Importantly, Drs. Bravo and Picón, Respondent’s Peruvian tax experts, have reviewed SUNAT’s decision and concluded that it was reasonable and in accordance with Peruvian law. In addition, they explain that SUNAT’s 2002 and 2007 rulings regarding the correct interpretation of the Mining Law were available to the public. Thus, SMCV (and Claimant) knew or should have known that SMCV’s Concentrator Project would not be covered by the 1998 Stabilization Agreement.<sup>510</sup>

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<sup>506</sup> See Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at pp. 126-27.

<sup>507</sup> See Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at p. 126; Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, *available at* <https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm>; *see also* Exhibit RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007, *available at* <https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm>.

<sup>508</sup> See Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at p. 127.

<sup>509</sup> Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at p. 127.

<sup>510</sup> See Exhibit RER-3, Bravo and Picón Report at paras. 38-41, 113-14.

## 6. The 2011, 2012, and 2013 Royalty Assessments under the 2011 Royalty Law

278. SUNAT continued to issue Royalty Assessments for the years 2011, 2012, and 2013. Similar to the Royalty Assessments issued for prior fiscal years, SMCV challenged those assessments, which SUNAT then rejected:

- On December 29, 2017, SUNAT issued the Royalty Assessment for the fourth quarter of fiscal year 2011 (“Q4 2011 Royalty Assessment”).<sup>511</sup> On February 15, 2018, SMCV requested that SUNAT reconsider its decision.<sup>512</sup> On October 12, 2018, SUNAT rejected SMCV’s reconsideration request.<sup>513</sup>
- On March 28, 2018, SUNAT issued the Royalty Assessment for the fiscal year 2012.<sup>514</sup> On May 17, 2018, SMCV requested that SUNAT reconsider its decision.<sup>515</sup> On January 11, 2019, SUNAT rejected SMCV’s reconsideration request.<sup>516</sup>
- On September 28, 2018, SUNAT issued the royalty assessment for fiscal year 2013.<sup>517</sup> On November 7, 2018, SMCV requested that SUNAT reconsider its decision.<sup>518</sup> On May 28, 2019, SUNAT rejected SMCV’s reconsideration request.<sup>519</sup>

279. In each of these decisions, SUNAT analyzed SMCV’s arguments. SUNAT reached the same conclusion on these Royalty Assessments as it had in the past, which was eminently reasonable given that the facts and legal basis of these cases were extremely similar to those of the 2006-2007, 2008, 2009, and 2010-2011 Royalty Assessments (changing only the

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<sup>511</sup> See Claimant’s Memorial at paras. 258-60; Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017; Exhibit CE-701, SUNAT, Fine Resolution No. 012-002-0031073 (Q4 2011 Royalty Assessment), December 29, 2017; Exhibit CE-702, SUNAT, Fine Resolution No. 012-002-0031074 (Q4 2011 Royalty Assessment), December 29, 2017.

<sup>512</sup> See Exhibit CE-175, SMCV Request for Reconsideration, 4Q 2011 Royalty Assessments, February 15, 2018.

<sup>513</sup> See Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018.

<sup>514</sup> See Claimant’s Memorial at para. 262; Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018.

<sup>515</sup> See Exhibit CE-178, SMCV Request for Reconsideration, 2012 Royalty Assessments, May 17, 2018.

<sup>516</sup> See Exhibit CE-215, SUNAT Resolution No. 0150140014560, January 11, 2019.

<sup>517</sup> See Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018.

<sup>518</sup> See Exhibit CE-203, SMCV Request for Reconsideration, 2013 Royalty Assessments, November 7, 2018.

<sup>519</sup> See Exhibit CE-220, SUNAT Resolution No. 0150140014816, May 28, 2019.

fiscal year under review).<sup>520</sup> SMCV appealed these decisions before the Tax Tribunal, as

Respondent discusses in Section II.G below.

**G. THE TAX TRIBUNAL’S DECISIONS ON SUNAT’S ROYALTY ASSESSMENTS WERE REASONABLE AND IN ACCORDANCE WITH PERUVIAN LAW**

280. Claimant alleges that the Tax Tribunal violated SMCV’s due process rights when reviewing SUNAT’s royalty assessments on ore that was processed in the Concentrator Project. In particular, Claimant and its witness, Mr. Leonel Estrada, a former advisor (*asesor*, similar to a law clerk) to the Tax Tribunal, allege that (i) the President of the Tribunal, Ms. Zoraida Olano, inappropriately interfered in the Tax Tribunal’s review of SMCV’s 2006-2007 and 2008 Royalty Assessment cases; (ii) the Tax Tribunal inappropriately appointed a former employee of SUNAT as a *vocal ponente* (a sort of *rapporteur* of the elements of the case) for the review of SMCV’s challenge to the 2010-2011 Royalty Assessment; (iii) the Tax Tribunal inappropriately appointed a former assistant to the President of the Tax Tribunal as the *vocal ponente* for the review of SMCV’s challenge to the Q4 2011 Royalty Assessment; (iv) the Tax Tribunal adopted MINEM’s interpretation of the 1998 Stabilization Agreement without conducting an independent analysis of each case; and (v) the Tax Tribunal refused to waive penalties and interest assessments, contrary to SMCV’s claimed rights under Peruvian law.<sup>521</sup> Claimant’s allegations are without merit.

281. As discussed below, the Tax Tribunal reviewed and analyzed SMCV’s various appeals in accordance with applicable procedures, which provide all necessary due process. In the following sections, Respondent addresses and rebuts each of those allegations. In particular, Respondent (1) describes the structure and scope of authority of the Tax Tribunal and explains the general procedures applicable for appeals pending before the Tax Tribunal; and (2)

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<sup>520</sup> See Exhibit CE-220, SUNAT Resolution No. 0150140014816, May 28, 2019.

<sup>521</sup> See Claimant’s Memorial at paras. 190-216, 243-54, 260-63.

demonstrates that the Tax Tribunal acted reasonably and consistently with those procedures in analyzing and deciding: the 2006-2007 and the 2008 Royalty Assessment, the 2009, 2010-2011 Royalty Assessment, and the Q4 2011 Royalty Assessment.

**1. The Structure of the Tax Tribunal and the Procedures for Initiating and Processing an Appeal before the Tax Tribunal**

282. Any taxpayer who seeks to contest a tax assessment imposed by SUNAT may appeal the assessment to the Tax Tribunal after SUNAT has had an opportunity to reconsider the assessment at issue in the administrative challenge procedures just described in Section II.F above.<sup>522</sup> The Tax Tribunal is the final administrative body that reviews SUNAT's tax assessments before a taxpayer may resort to the judiciary.<sup>523</sup> Contrary to Claimant's allegations, the Tax Tribunal's handling of SMCV's royalty assessment appeals fully respected SMCV's due process rights. In order to respond to Claimant's assertions and provide context to the Tribunal, Respondent first describes the structure of the Tax Tribunal and the procedures that it follows when reviewing an appeal against a SUNAT assessment.

a. Structure of the Tax Tribunal

283. The Tax Tribunal falls under the purview of MEF, and is comprised of twelve specialized chambers referred to as "*Salas Especializadas*," the Plenary Chamber, referred to as "*la Sala Plena*," and the President of the Tax Tribunal.

284. Each chamber specializes in specific subject matters, and the President of the Tax Tribunal has the authority to designate the subject matter jurisdiction of each chamber.<sup>524</sup> Chamber Nos. 1, 3, 4, and 9 are assigned matters that arise from SUNAT Lima and the biggest

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<sup>522</sup> See Exhibit CA-14, Tax Code, Art. 101; Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at p. 6.

<sup>523</sup> See Exhibit CA-14, Tax Code, at Arts. 124, 157.

<sup>524</sup> See Exhibit CA-14, Tax Code, at Art. 98.

taxpayers.<sup>525</sup> Chamber Nos. 2, 5, 8, 10, and 11 are also assigned cases that arise from SUNAT Lima and regional offices of SUNAT as well as other miscellaneous tax issues.<sup>526</sup> Regardless of the assigned specialization, each chamber is charged with resolving disputes between SUNAT and other Tax Administrations and the taxpayer, preparing reports on issues before the Plenary Chamber, and carrying out any additional requests from the Presidency.<sup>527</sup>

285. Each chamber is comprised of three “*vocales*,” or administrative judges, who oversee each case assigned to their chamber.<sup>528</sup> MEF appoints each *vocal* from a list of recommended qualified candidates who are selected by a Special Commission.<sup>529</sup> The Special Commission conducts an open and merit-based selection process. Each *vocal* must be a professional with at least five years of tax and customs experience.<sup>530</sup> The President of the Tax Tribunal appoints one of the three *vocales* as president of each chamber, and that person should have at least ten years of tax and customs experience.<sup>531</sup> If the Tax Tribunal’s budget permits, the President of the Tax Tribunal assigns secretaries and advisors to each chamber, who assist with the preparation of that chamber’s resolutions.<sup>532</sup>

286. The Plenary Chamber convenes to resolve contradictory rulings among different chambers, and it advises on complicated, novel issues that arise from tax or customs law.<sup>533</sup> The

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<sup>525</sup> See Exhibit RWS-5, Olano Statement at para. 12. Chamber Nos. 2 and 8 specialize in controversies that arise from the regional offices of SUNAT. Chamber No. 6 is assigned cases that specialize in custom taxes. Chamber No. 7 is assigned municipal tax cases, and Chamber No. 12 specializes in municipal taxes and other categories of taxes. Exhibit RWS-5, Olano Statement at para. 12.

<sup>526</sup> See Exhibit RWS-5, Olano Statement at para. 12.

<sup>527</sup> See Exhibit RE-28, MEF, “Functions,” available at [https://www.mef.gob.pe/es/?option=com\\_content&language=es-ES&Itemid=101315&lang=es-ES&view=article&id=416](https://www.mef.gob.pe/es/?option=com_content&language=es-ES&Itemid=101315&lang=es-ES&view=article&id=416).

<sup>528</sup> See Exhibit CA-14, Tax Code, at Art. 98.

<sup>529</sup> See Exhibit RWS-5, Olano Statement at para. 15.

<sup>530</sup> See Exhibit CA-14, Tax Code, at Art. 98.

<sup>531</sup> See Exhibit CA-14, Tax Code, at Art. 98.

<sup>532</sup> See Exhibit RWS-5, Olano Statement at para. 14.

<sup>533</sup> See Exhibit RWS-5, Olano Statement at para. 10.

President may ask that the Plenary Chamber convene on a specific matter *sua sponte*, or any of the chambers may submit issues for the Plenary Chamber to resolve.<sup>534</sup> The Plenary Chamber also decides on cases in which a taxpayer requests the recusal of one of the *vocales* who is deciding its case. The Plenary Chamber can either be comprised of all of the *vocales*, or of select *vocales* who specialize in the particular issue presented to the Plenary Chamber.<sup>535</sup> The President of the Tax Tribunal oversees the proceedings and holds the deciding vote in the event of a tie.<sup>536</sup>

287. The Tax Tribunal’s President is appointed by the Minister of Economy and Finance and oversees three separate administrative offices and all twelve chambers.<sup>537</sup> The President of the Tax Tribunal is expected to “[d]irect regulatory proposals, issue reports on matters within the jurisdiction of the Tax Tribunal, and draft its general policy,” “[d]irect, coordinate, and supervise the technical and administrative work developed by Tax Tribunal agencies in accordance with the indicators and mechanisms that contribute to ensure the levels of transparency, efficiency, and quality,” “[e]valuate the efficiency of the operating processes as well as the operational conduct, suitability, and performance of *Vocales* and personnel providing services to the Tax Tribunal,” and, among other things, “[p]reside over Plenary Council meetings and issue, or not issue, the tie-breaking vote involving matters submitted for the consideration of that Chamber.”<sup>538</sup> The President is assigned a secretary and an advisor to assist with carrying out the various functions of the office of the President of the Tax Tribunal.<sup>539</sup>

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<sup>534</sup> See Exhibit CA-14, Tax Code, at Art. 98.

<sup>535</sup> See Exhibit RWS-5, Olano Statement at para. 10; Exhibit CA-14, Tax Code, at Art. 98.

<sup>536</sup> See Exhibit RWS-5, Olano Statement at para. 11; Exhibit CA-14, Tax Code, at Art. 98.

<sup>537</sup> See Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43, October 5, 2012 (“Manual of the Operation and Functions of the Tax Tribunal”), at p. 13.

<sup>538</sup> Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal, at Section II a, d, g, h (p. 12).

<sup>539</sup> See Exhibit RWS-5, Olano Statement at para. 9.

288. To assist the *vocales* with analyzing the various issues they are presented with, the Tax Tribunal has the following offices: (1) Accounting Matters Advisory Office, (2) the Office for Processing Complaints, and (3) the Technical Office.<sup>540</sup> Each office serves particular functions that support the twelve chambers and the office of the President.

b. Procedures for an Appeal Against an Assessment Issued by SUNAT

289. The procedures that the Tax Tribunal follows in reviewing and deciding appeals before it are governed by the Tax Code and by the Tax Tribunal Procedural Manual issued by MEF Ministerial Resolution No. 017-2012-EF/13 (“Tax Tribunal Manual”). According to those procedures, any appeal from SUNAT’s resolution of an administrative challenge must be filed by the taxpayer within fifteen business days from being served with SUNAT’s resolution.<sup>541</sup> Once the Tax Tribunal receives the appeal, the Technical Office classifies the case based on its subject matter and assigns it randomly to a vocal-rapporteur (*vocal ponente*) using an electronic system (the *Sistema Informático del Tribunal*).<sup>542</sup>

290. The *vocal ponente* marshals the arguments of the parties and presents his or her analysis to the other two *vocales* of the chamber.<sup>543</sup> The parties are allowed to submit written and oral arguments before the chamber.<sup>544</sup> The *vocal ponente* may use advisors to conduct the analysis of the case, including reviewing the record, applicable law, and case law.<sup>545</sup> But, as President Zoraida Olano, the President of the Tax Tribunal, explains in her witness statement, the *vocales* are the only ones who can decide the cases, not their advisors.<sup>546</sup>

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<sup>540</sup> See Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal, at p. 4.

<sup>541</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 3.2, at p. 6.

<sup>542</sup> See Exhibit RWS-5, Olano Statement at para. 16.

<sup>543</sup> See Exhibit RWS-5, Olano Statement at para. 17.

<sup>544</sup> See Exhibit CA-14, Tax Code, at Art. 150.

<sup>545</sup> See Exhibit RWS-5, Olano Statement at para. 16.

<sup>546</sup> See Exhibit RWS-5, Olano Statement at para. 16.

291. The *vocal ponente* may consider any document, expert evidence, inspection conducted by SUNAT, statements obtained during the audit conducted by SUNAT, additional evidence submitted by the parties, and any additional evidence ordered *ex officio* that it deems necessary to understand the issue to be resolved.<sup>547</sup>

292. The *vocal ponente* submits his analysis of the case to the other two *vocales* for deliberation.<sup>548</sup> The parties are not allowed to be present during those discussions. Cases are decided by a majority of votes from the *vocales*—two out of the three *vocales* need to agree on how the case should be decided.<sup>549</sup> Once the three *vocales* reach a decision, a final resolution is drafted, reviewed, and approved by the three *vocales* of the chamber.<sup>550</sup> The three *vocales* sign the final resolution.<sup>551</sup> The dissenting *vocal* may issue a dissenting opinion explaining his vote.<sup>552</sup>

293. Once the resolution is signed, it is entered into the system.<sup>553</sup> The Technical Office then reviews the case file and a quality control report is generated.<sup>554</sup> If no issues exist with the resolution, then the President of the Tax Tribunal orders the resolution to be dispatched to the taxpayer and SUNAT.<sup>555</sup>

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<sup>547</sup> See Exhibit CA-4, Peruvian Tax Code, Supreme Decree No. 135-99-EF, August 19, 1999, at Arts. 124-25.

<sup>548</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 11 (p. 13).

<sup>549</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 13 (p. 15).

<sup>550</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 17 (p. 15).

<sup>551</sup> See Exhibit RWS-5, Olano Statement at para. 17.

<sup>552</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 15 (p. 15).

<sup>553</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Sections 19-20 (p. 15).

<sup>554</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 21 (p. 16).

<sup>555</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 30 (p. 17).

294. If there are issues with the resolution, such as adopting a position that is contradictory to other positions adopted by the Tax Tribunal in previous cases with similar facts, the Technical Office submits the resolution to the Plenary Chamber.<sup>556</sup> As President Olano explains in her witness statement, “[T]he Plenary Chamber aims to standardize the decision criteria of the Tax Tribunal to provide predictability to the Tax Administrations and taxpayers.”<sup>557</sup> The Plenary Chamber carefully analyzes the issues before it and takes a vote.<sup>558</sup> A final report is submitted to the Office of the President for approval, and the President communicates the results of the vote to the *vocales* who participated in the Plenary Session as well as the Technical Office.<sup>559</sup> Minutes from the Plenary Session are also forwarded to the President for signature.<sup>560</sup> The President approves the final report and the Plenary Session Minutes by forwarding the Plenary Session Minutes to the *vocales* who participated.<sup>561</sup>

295. Once a resolution is finally adopted, it is served on the parties. The taxpayer may then challenge the Tax Tribunal’s decision before Peruvian courts.<sup>562</sup>

296. Notwithstanding Claimant’s assertions to the contrary, as discussed below, the actions of the Tax Tribunal with respect to the handling of SMCV’s Royalty Assessments were appropriate, consistent with Peruvian law, and fully consistent with SMCV’s due process rights.

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<sup>556</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 30 (p. 17).

<sup>557</sup> See Exhibit RWS-5, Olano Statement at para. 10 (“[L]a Sala Plena tiene como fin uniformizar los criterios de decisión del Tribunal Fiscal para brindar predictibilidad a las Administraciones Tributarias y a los contribuyentes.”).

<sup>558</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Sections 9-10 (p. 22).

<sup>559</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 20 (p. 24).

<sup>560</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 20 (p. 24).

<sup>561</sup> See Exhibit CA-196, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13, October 31, 2012, at Section 20 (p. 24).

<sup>562</sup> See Exhibit CA-14, Tax Code, at Art. 157

## 2. The Tax Tribunal's Decisions Regarding the 2006-2007 and 2008 Royalty Assessments Were Reasonable and Procedurally Sound

297. In its Memorial, Claimant alleges that the Tax Tribunal committed irregularities when deciding SMCV's appeals against the 2006-2007 and 2008 Royalty Assessments. In particular, Claimant asserts that Tax Tribunal President Olano unduly interfered to take control of the decision-making of the cases to favor SUNAT's position.<sup>563</sup> Claimant also alleges that the Tax Tribunal was required to, and failed to, waive penalties and interest against SMCV, whose non-payment of royalties arose from "reasonable doubt" on the correct interpretation of the law.<sup>564</sup> Claimant's allegations are without any merit. Respondent discusses each of these issues in the following sections.

### a. The Tax Tribunal's Decisions Regarding the 2006-2007 and 2008 Royalty Assessments Were Reasonable and Respected Due Process

298. On May 12, 2010, SMCV challenged the 2006-2007 Royalty Assessment before the Tax Tribunal.<sup>565</sup> This case was assigned to Chamber No. 10, and Luis Cayo Quispe was assigned as the *vocal ponente*. Approximately nine months later, on March 10, 2011, SMCV challenged the 2008 Royalty Assessment.<sup>566</sup> The 2008 Royalty Assessment case was assigned to a different chamber, Chamber No. 1, and to a different *vocal ponente*, Licette Zuniga Dulanto.<sup>567</sup> On April 5, 2013, Chamber No. 10 (which was reviewing the 2006-2007 Royalty Assessment) held an oral hearing on the matter.<sup>568</sup> Four days later, Chamber No. 1 (which was reviewing the 2008 Royalty Assessment) scheduled its oral hearing.<sup>569</sup> On May 21, 2013, Chamber No. 1

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<sup>563</sup> See Claimant's Memorial at paras. 386, 389.

<sup>564</sup> See Claimant's Memorial at paras. 409-11.

<sup>565</sup> See Exhibit CE-40, SMCV Appeal to Tax Tribunal, 2006/07 Royalty Assessments, May 12, 2010.

<sup>566</sup> See Exhibit CE-49, SMCV Appeal to Tax Tribunal, 2008 Royalty Assessments, March 10, 2011.

<sup>567</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013.

<sup>568</sup> See Exhibit CE-79, Constancia del Informe Oral No. 0286-2013-EF/TF, April 5, 2013.

<sup>569</sup> See Exhibit CE-80, Notification de Informe Oral No. 0411-2013-EF/TF, April 9, 2013.

issued its resolution on the 2008 Royalty Assessment matter, and on May 30, 2013, Chamber No. 10 issued its resolution on the 2006-2007 Royalty Assessment matter.<sup>570</sup> In the end, the Tax Tribunal upheld SUNAT's decisions regarding both the 2006-2007 and 2008 Royalty Assessments.<sup>571</sup>

299. In these proceedings, Claimant and its witness, Mr. Estrada, allege that, in upholding SUNAT's 2006-2007 and 2008 Royalty Assessments, the Tax Tribunal's resolutions were marred by grave procedural irregularities.<sup>572</sup> They were not.

(i) *The President of the Tax Tribunal Acted in Accordance with Her Duties in Managing the 2006-2007 and 2008 Royalty Assessment Cases*

300. Relying heavily on Mr. Estrada's witness statement, Claimant alleges that the President of the Tax Tribunal, Ms. Olano, inappropriately interfered in the resolution of the 2008 Royalty Assessment case.<sup>573</sup> In particular, Claimant alleges that the President improperly interfered with the resolution of the case by asking her own assistant, Ms. Villanueva, to draft the Tax Tribunal's decision in the 2008 Royalty Assessment case instead of leaving that work to the *vocales* and their advisors.<sup>574</sup> As discussed below, the allegations of Claimant and Mr. Estrada are without merit.

301. First, it is important to consider the witness on whom Claimant relies for its assertions. Mr. Estrada was an advisor for Chamber No. 10 during the period in which SMCV's Royalty Assessment cases were reviewed by the Tax Tribunal, but he appears not to have been

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<sup>570</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013; Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013.

<sup>571</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013; Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013.

<sup>572</sup> See Claimant's Memorial at paras. 196 *et seq.*

<sup>573</sup> See Claimant's Memorial at paras. 386, 389; Exhibit CWS-6, Witness Statement of Leonel Estrada Gonzales, October 19, 2021 ("Estrada Statement"), at para. 36.

<sup>574</sup> See Claimant's Memorial at para. 389; Exhibit CWS-6, Estrada Statement at para. 36.

directly involved in those cases.<sup>575</sup> Thus, his description of the facts is made without first-hand knowledge regarding what occurred and, therefore, is necessarily speculative. In addition, as the President of the Tax Tribunal, Ms. Olano, testifies in her witness statement that Mr. Estrada incorrectly describes some basic facts about the Tax Tribunal, calling into question his level of understanding of the Tax Tribunal's operations.<sup>576</sup> As just a small example, he asserts that the President has "various 'assistants'"; that is not correct.<sup>577</sup> The President of the Tax Tribunal has two assistants.<sup>578</sup> Further, the functions of the President are not "principally administrative," as Mr. Estrada asserts, but, rather, encompass a much broader range of responsibilities including managerial responsibilities in order to ensure the smooth functioning of the Tax Tribunal,<sup>579</sup> as discussed in greater detail in Section II.G.1 above.

302. Second, Claimant alleges that it was inappropriate for the President of the Tax Tribunal to ask her assistant, Ms. Villanueva, to assist Chamber No. 1 with the 2008 Royalty Assessment case. At the point in time when the appeal was filed with the Tax Tribunal, the Tax Tribunal was shorthanded. In fact, some of the chambers did not have secretaries or advisors assigned to their chambers specifically.<sup>580</sup> Instead, a chamber would request additional help, as needed, and President Olano would assign administrative secretaries or advisors to assist with that chamber's caseload, which is within the President's authority to do.<sup>581</sup>

303. That is exactly what happened in the 2008 Royalty Assessment case. In light of the lack of assistants available to help, Chamber No. 1 asked for someone with specialized

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<sup>575</sup> See Exhibit CWS-6, Estrada Statement at para. 36; see also Exhibit RWS-5, Olano Statement at para. 44.

<sup>576</sup> See Exhibit RWS-5, Olano Statement at para. 44.

<sup>577</sup> See Exhibit RWS-5, Olano Statement at para. 44.

<sup>578</sup> See Exhibit RWS-5, Olano Statement at para. 44.

<sup>579</sup> See Exhibit RWS-5, Olano Statement at para. 44.

<sup>580</sup> See Exhibit RWS-5, Olano Statement at para. 46.

<sup>581</sup> See Exhibit RWS-5, Olano Statement at para. 46; see also Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal, at p. 12.

knowledge of royalties to be assigned to assist the Chamber with the 2008 Royalty Assessment case.<sup>582</sup> The President's assistant, Ms. Villanueva, had served as a Chamber advisor, among other positions at the Tax Tribunal, before agreeing to serve as the President's assistant.<sup>583</sup> Thus, she had relevant experience to assist Chamber No. 1 with the case. In that role, moreover, Ms. Villanueva was not working as the assistant to the President; instead, Ms. Villanueva was working to assist the Chamber.<sup>584</sup>

304. The only evidence that Claimant and Mr. Estrada identify as the basis for Mr. Estrada's understanding of the alleged inappropriate actions of President Olano is an email dated March 22, 2013 from Ms. Villanueva to the President.<sup>585</sup> In the email, Ms. Villanueva forwards the arguments of the parties in the 2008 Royalty Assessment case to the President and states:

I am sending you the arguments of both sides, as well as the main clauses of the stability agreement. There are good arguments for both sides. I am more or less leaning to one side. Please read the arguments when you can and we can talk about it. I'll continue working on this.<sup>586</sup>

That same day, President Olano responded stating: "Ok, thank you."<sup>587</sup> As explained in more detail in the President's witness statement, the email from Ms. Villanueva was a result of a conversation President Olano had with Ms. Villanueva, in which President Olano advised Ms. Villanueva that, due to the contentious nature of this dispute, Chamber No. 1 should be exhaustive in its review of the case and conduct a completely independent review of the case,

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<sup>582</sup> See Exhibit RWS-5, Olano Statement at para 46.

<sup>583</sup> See Exhibit RWS-5, Olano Statement at para 46.

<sup>584</sup> See Exhibit RWS-5, Olano Statement at para. 46.

<sup>585</sup> See Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

<sup>586</sup> Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

<sup>587</sup> See Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

without deferring to any findings that SUNAT had made in its reconsideration decision.<sup>588</sup>

President Olano did not instruct Ms. Villanueva, or any other advisor, on what the outcome of this, or any case, should have been.<sup>589</sup>

(ii) *The Tax Tribunal Decided the 2006-2007 Royalty Assessment without Interference from the President of the Tax Tribunal and In Conformity with Applicable Norms*

305. It is also not the case that President Olano “imposed” the resolution in Chamber No. 1’s 2008 Royalty Assessment case on the *vocales* of Chamber No. 10, who were preparing their resolution with respect to the 2006-2007 Royalty Assessment case.<sup>590</sup> In support of its assertion, Claimant alleges, for example, that the fact that the decision for the 2008 Royalty Assessment case was issued before the 2006-2007 Royalty Assessment case (which had been filed with the Tax Tribunal earlier than the 2008 Royalty Assessment case) is evidence of impermissible pressure by Ms. Olano.<sup>591</sup> There is no basis for Claimant’s assertion.

306. As Ms. Olano explains in her witness statement, there is no requirement that the Tax Tribunal issue decisions in the order in which the appeals are received. Although there have been cases where issuing decisions in chronological order according to tax year has been important (for example, where a tax liability in year two is dependent on tax liability in year one), that was not the case with respect to the 2006-2007 and 2008 Royalty Assessments.<sup>592</sup> Thus, the fact that the 2008 Royalty Assessment decision was issued before the 2006-2007 Royalty Assessment decision does not show that there was undue influence in the outcome of the case by the President of the Tax Tribunal.

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<sup>588</sup> See Exhibit RWS-5, Olano Statement at para. 49.

<sup>589</sup> See Exhibit RWS-5, Olano Statement at para. 49.

<sup>590</sup> See, e.g., Claimant’s Memorial at para. 392.

<sup>591</sup> See, e.g., Claimant’s Memorial at para. 391.

<sup>592</sup> See Exhibit RWS-5, Olano Statement at para. 53.

307. Claimant also alleges that the fact that the decisions in the 2006-2007 and 2008 Royalty Assessments were similar is evidence that the President allegedly obligated Chamber No. 10 (which was deciding the 2006-2007 Royalty Assessment) to adopt wholesale or even copy, without any independent analysis whatsoever, the decision from the 2008 Royalty Assessment.<sup>593</sup> Claimant’s allegation is without merit. The fact that the decisions in the 2006-2007 and 2008 Royalty Assessment cases were similar is not evidence that SMCV was denied its due process rights.

308. Notably, in light of the fact that the dispute at issue in the two cases—that is, whether the 1998 Stabilization Agreement included or excluded the Concentrator Project—was essentially the same other than the change in tax year, the standards applied in both cases should have been the same. As President Olano explains in her witness statement, “[I]t would be illogical that two similar cases, with the same [underlying] facts, with the taxable year being the only difference, would be decided differently.”<sup>594</sup> In fact, had the two Chambers applied different standards to reach their decisions, the Plenary Chamber would have been called to decide which standard should be used consistently in both cases.<sup>595</sup>

309. Critically, each decision issued by a Chamber is signed by its three *vocales*.<sup>596</sup> As President Olano explains, none of the *vocales* would sign a decision if he or she were not in agreement with the content of that decision.<sup>597</sup> This is because the *vocales* selected to serve on the Tax Tribunal are known professionals in the tax community, and they would not risk their reputations in the field by signing a decision with which they did not agree.

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<sup>593</sup> See Claimant’s Memorial at para. 398.

<sup>594</sup> Exhibit RWS-5, Olano Statement at para. 56 (“[C]arecería de lógica que dos casos similares, con los mismos hechos, cuya única diferencia es el año gravable, se resolvieran de manera diferente.”).

<sup>595</sup> See Exhibit RWS-5, Olano Statement at para. 56.

<sup>596</sup> See, e.g., Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013, at p. 24.

<sup>597</sup> See Exhibit RWS-5, Olano Statement at para. 48.

310. Claimant further alleges that communications between Chamber Nos. 1 and 10, with the assistance of President Olano, around the time that the 2008 Royalty Assessment case was decided is evidence that President Olano unduly pressured Chamber No. 10 to adopt Ms. Villanueva’s analysis.<sup>598</sup> Claimant’s assertion is without merit. Claimant cites to a series of emails exchanged among Chamber No. 1, Chamber No. 10, and President Olano. In the first email, sent the morning of May 21, 2013, presiding *vocal* Carlos Moreano Valdivia from Chamber No. 10 wrote to President Olano stating that his Chamber was going to coordinate with Chamber No. 1, which had just circulated a draft decision in the 2008 Royalty Assessment case, in light of the fact that the two Chambers “ha[d] the same subject matter.”<sup>599</sup> President Olano responded by saying that she had spoken with the *vocal ponente* from Chamber No. 1, Licette Zúñiga Dulanto, who told the President that she had already coordinated with Chamber No. 10 *vocal ponente* Cayo.<sup>600</sup>

311. The next day, Chamber No. 10’s presiding *vocal* Moreano emailed President Olano, informing her that he would have preferred for the Chambers to have discussed Chamber No. 1’s resolution before Chamber No. 1 held a session voting on and adopting the resolution, so that Chamber No. 10 could ensure its resolution was consistent, given that the 2006-2007 Royalty Assessment case and the 2008 Royalty Assessment case had “the same issue and from the same taxpayer.”<sup>601</sup> The final email in the exchange was sent from *vocal ponente* Zúñiga of Chamber No. 1, who informed President Olano that she had spoken with *vocal ponente* Cayo and

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<sup>598</sup> See Claimant’s Memorial at paras. 392-93.

<sup>599</sup> Exhibit CE-650, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 21, 2013, 10:05 AM PET), at p. 1.

<sup>600</sup> See Exhibit CE-650, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 21, 2013, 10:05 AM PET), at p. 1.

<sup>601</sup> Exhibit CE-650, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 21, 2013, 10:05 AM PET), at p. 2.

that Chamber No. 10 was in agreement with the decision written in the 2008 Royalty Assessment case.<sup>602</sup>

312. Contrary to Claimant's assertions, the above-email exchange is not evidence of anything nefarious. It does not show undue pressure from the President of the Tax Tribunal to make sure that the decision in the 2006-2007 Royalty Assessment case was the same as that of the 2008 Royalty Assessment case. As discussed above, it is the role of the President of the Tax Tribunal to ensure that there is coordination among Chambers, such that cases with similar facts use similar standards to evaluate and decide the cases. As the facts in the 2006-2007 and 2008 Royalty Assessment cases were the same, such coordination was not only appropriate, but, rather, necessary, in order to ensure consistent application of the law.

313. Finally, Claimant also observes that the 2006-2007 Royalty Assessment decision does not include initials of any drafting advisor. According to Claimant, this confirms that the resolution was not drafted by an advisor, as would have been expected considering the complexity of the case and the amounts involved, suggesting that the acts of the Tax Tribunal with respect to the 2006-2007 Royalty Assessment decision were somehow irregular and inappropriate.<sup>603</sup> Claimant is imagining things. First, as discussed by President Olano in her witness statement, it is not always the case that every decision includes the initials of an advisor, and there is no regulation or rule that requires such initials.<sup>604</sup> Second, there is no regulation or rule that requires that *vocales* use advisors. *Vocales* may choose to use an advisor to assist them with their work or not.<sup>605</sup> Third, while it might be customary to put the initials of those who

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<sup>602</sup> See Exhibit CE-650, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 21, 2013, 10:05 AM PET), at p. 2.

<sup>603</sup> See Claimant's Memorial at paras. 393-94.

<sup>604</sup> See Exhibit RWS-5, Olano Statement at para. 64.

<sup>605</sup> See Exhibit RWS-5, Olano Statement at para. 64.

participate in making the decision, not every Chamber follows the same format.<sup>606</sup> And, in fact, according to President Olano, it is not unusual for a decision not to include initials.<sup>607</sup> In any case, failure to include the initials of an advisor on a decision is certainly not evidence that SMCV's right to due process was somehow violated as Claimant asserts.

(iii) *Chamber No. 1's Legal Reasoning When Reviewing and Deciding the 2008 Royalty Assessment Was Appropriate*

314. Claimant alleges that Chamber No. 1's legal reasoning when reviewing and deciding the 2008 Royalty Assessment was inappropriate. Claimant claims, in particular, that the Chamber did not conduct an independent legal analysis but, rather, relied instead on the same interpretation of the Mining Law and Regulations that Mr. Isasi set out in his June 2006 Report and in a November 2005 letter from Minister Sanchez to Congressman Diez Canseco.<sup>608</sup> To the contrary, as discussed below, in reaching its decision Chamber No. 1 conducted a thorough, independent analysis of all relevant sources of law applicable to its interpretation of the 1998 Stabilization Agreement. In addition, even though the Chamber did review and consider MINEM's June 2006 Report and the letter from Minister Sanchez to Congressman Diez Canseco when making its decision, doing so was entirely appropriate.

315. On May 21, 2013, Chamber No. 1 issued its decision upholding SUNAT's 2008 Royalty Assessment.<sup>609</sup> In reaching its decision, the Tax Tribunal considered many sources of law. In particular, it considered relevant provisions in the General Mining Law, applicable Regulations, and key clauses in the 1998 Stabilization Agreement.<sup>610</sup> For example:<sup>611</sup>

- It examined Articles 72, 82, 83, and 85 of the General Mining Law which discuss the purpose of stabilization agreements (e.g., to promote private investment in

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<sup>606</sup> See Exhibit RWS-5, Olano Statement at para. 64.

<sup>607</sup> See Exhibit RWS-5, Olano Statement at para. 64.

<sup>608</sup> See Claimant's Memorial at paras. 201-03.

<sup>609</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013.

<sup>610</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013, at pp. 7-15.

<sup>611</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013, at pp. 7-15.

mining) and what an investor must do to qualify to enter into such an agreement (e.g., submit a technical-economic feasibility study for the target investment project which must be approved by the Directorate General of Mining and a sworn, audited statement indicating that the investment project has been completed).

- It also analyzed key provisions in the Mining Regulation including Articles 18, 19, 20, 22, 24, 30, and 31 which discuss what, specifically needs to be included in the feasibility study (e.g., the works to be performed, the minimum volume of product expected to be produced, the projected sales and prices of the final products, and the profitability of the project), the number of times a feasibility study can be amended (e.g., one or two times) and the limited scope of any such amendment (e.g., the final objective of the feasibility study cannot be affected), and what the investor must do if it has more than one concession or Economic-Administrative Unit (e.g., keep independent accounts and separate earning statements for each).
- It examined the nature of stabilization agreements, including that they are a *contrato-ley* which have certain rights protected under the Peruvian Constitution (e.g., once the agreement is entered into the conditions provided in the agreement cannot be changed).
- It also evaluated the scope of the specific stabilization agreement at issue before it (i.e., the 1998 Stabilization Agreement), and the specific plans to build and install a Concentration Plant.

316. Based on the above, the Tax Tribunal found that the Concentrator Project was a new investment project that was not part of the original Cerro Verde Leaching Project, nor was it included in the 1998 Stabilization Agreement entered into with the State. This conclusion was confirmed by the fact that the products produced by each plant (e.g., the Leaching Plant and the Concentrator Plant) were completely different—that is, the Leaching Plant produced copper cathodes while the Concentrator Plant produced copper concentrates.<sup>612</sup>

317. In reaching its final conclusion, the Tax Tribunal did consider the November 8, 2005 letter and the June 16, 2006 memorandum issued by MINEM. It did so, however, after it had conducted an independent, comprehensive analysis of the key legal provisions and factual documents before it. Further, it reviewed the MINEM documents only to confirm that its

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<sup>612</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013, at p. 4.

findings were consistent with MINEM's position on the issue.<sup>613</sup> Thus, Claimant's assertion that the Tax Tribunal failed to conduct its own analysis of the issues before it and relied instead on the interpretation of the Mining Law and Regulations set out in MINEM's 2005 letter and 2006 memorandum is without merit. In any case, as the Attorney for SUNAT, Ms. Bedoya, testifies in these proceedings, no Peruvian law or regulation exists which prohibits an administrative decision-making body within MEF from using as a point of reference an opinion from MINEM, a government agency specializing in the substance of the dispute.<sup>614</sup>

b. The Tax Tribunal's Decisions to Dismiss SMCV's Request to Waive Penalties and Interest on the 2006-2007 and 2008 Royalty Assessments Were Reasonable and in Accordance with Peruvian Law

318. Following the Tax Tribunal's decisions upholding the 2006-2007 and 2008 Royalty Assessments, SMCV submitted a request asking the Tax Tribunal to waive the penalties and interest in both cases.<sup>615</sup> The request was based on Article 170 of the Peruvian Tax Code, which provides that penalties and interest should be waived where there is reasonable doubt about the interpretation of an applicable legal provision.<sup>616</sup> According to Claimant, the Tax Tribunal arbitrarily rejected both of SMCV's requests on procedural grounds, stating that SMCV had not "put forward" the argument in its initial challenge.<sup>617</sup> Claimant asserts that the reasoning of the Tax Tribunal was at odds with both the Tax Code and the Law on General Administrative Procedure, which allegedly requires the Tax Tribunal to consider the applicability of waiver due to reasonable doubt *sua sponte*.<sup>618</sup> Claimant's assertions are without merit.

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<sup>613</sup> See Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013, at pp. 20-21.

<sup>614</sup> See Exhibit RWS-4, Bedoya Statement at para. 46.

<sup>615</sup> See Claimant's Memorial at paras. 212-13.

<sup>616</sup> See Claimant's Memorial at paras. 212-13.

<sup>617</sup> See Claimant's Memorial at para. 215.

<sup>618</sup> See Claimant's Memorial at para. 215.

319. At the end of June 2013 and at the beginning of July 2013, SMCV filed a request before the Tax Tribunal asking that it waive penalties and interest applied with respect to the unpaid 2006-2007 and 2008 Royalty Assessments.<sup>619</sup> As Claimant readily admits in its Memorial, SMCV did not file that request with the Tax Tribunal until after the Tax Tribunal had already issued its decisions upholding SUNAT's decisions.<sup>620</sup> According to Article 147 of the Peruvian Tax Code, appellants must raise at the outset of their complaints all issues they wish the Tax Tribunal to consider.<sup>621</sup> Thus, SMCV was obliged to raise its objections regarding the application of penalties and interest before the Tax Tribunal when it filed its appeal. It did not. As such, SMCV waived its right to challenge SUNAT's application of penalties and interest for SMCV's failure to pay the royalties otherwise due.<sup>622</sup>

320. Contrary to Claimant's argument in its Memorial, it is not the case that the Tax Tribunal was required to consider SMCV's "reasonable doubt" argument *sua sponte* even though SMCV failed to timely raise it on appeal. According to Article 127 of the Peruvian Tax Code, the Tax Tribunal is "empowered" to conduct a full re-examination of the issues of the disputed case even if the appellant has failed to raise a particular issue.<sup>623</sup> Accordingly, the Tax Tribunal has the authority to review issues *sua sponte*, but it is not required to do so. Therefore, it was entirely within the Tax Tribunal's authority to deny SMCV's request.

### **3. The Tax Tribunal's Decisions Regarding the 2009 and 2010-2011 Royalty Assessments Were Reasonable and Procedurally Sound**

321. Claimant asserts that President Olano's allegedly inappropriate interventions continued in the Tax Tribunal's review of the 2009 and 2010-2011 Royalty Assessments.

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<sup>619</sup> See Exhibit CE-656, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07), June 26, 2013; Exhibit CE-90, SUNAT Letter to the Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013, June 26, 2013.

<sup>620</sup> See Claimant's Memorial at para. 212.

<sup>621</sup> See Exhibit CA-14, Tax Code, at Art. 147.

<sup>622</sup> See Exhibit RER-3, Bravo and Picón Report at para. 120.

<sup>623</sup> See Exhibit CA-14, Tax Code, at Art. 127.

Specifically, Claimant complains that the Tax Tribunal appointed and then refused to recuse a conflicted *vocal*, and again copied portions of the 2008 Royalty Assessment decision.<sup>624</sup>

Claimant also alleges that, given that the Tax Tribunal's delays in resolving the appeals on the 2009 and 2010-2011 Royalty Assessments, the Tax Tribunal should have recalculated the interest charged against SMCV.<sup>625</sup> Claimant's allegations do not hold up to scrutiny, as explained next.

a. The Tax Tribunal's Decisions Regarding the 2009 and 2010-2011 Royalty Assessments Were Reasonable and Procedurally Sound

322. As it did with the Tax Tribunal's review of the 2006-2007 and the 2008 Royalty Assessments, Claimant asserts various alleged procedural irregularities with respect to the Tax Tribunal's review of the 2009 and the 2010-2011 Royalty Assessments. None of them has any merit. As Respondent discusses in the following sections, the Tax Tribunal's decisions were reasonable and procedurally sound.

(i) *The 2009 Royalty Assessment Resolution*

323. On January 16, 2012, SMCV challenged SUNAT's 2009 Royalty Assessment before the Tax Tribunal.<sup>626</sup> In August 2018, shortly after a hearing was held on the issue, the Tax Tribunal issued its decision affirming SUNAT's 2009 Royalty Assessment.<sup>627</sup> Claimant asserts that there were three key procedural irregularities that infected the Tax Tribunal's decision in the 2009 Royalty Assessment. First, Claimant complains that the Tax Tribunal took more than five years to decide the case, which it says was reassigned to several different Chambers before being assigned to Chamber No. 2.<sup>628</sup> Second, Claimant complains that the Tax Tribunal again inappropriately adopted the interpretation from MINEM's June 2006 Report. In

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<sup>624</sup> See Claimant's Memorial at para. 395.

<sup>625</sup> See Claimant's Memorial at para. 255.

<sup>626</sup> See Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012.

<sup>627</sup> See Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018.

<sup>628</sup> See Claimant's Memorial at paras. 243, 205.

particular, Claimant objects that Chamber No. 2 copied the section of the scope of the 1998 Stabilization Agreement from the original Chamber No. 1 resolution confirming the 2008 Royalty Assessment.<sup>629</sup> Third, Claimant complains that the Tribunal unjustifiably rejected SMCV's request that the Tribunal waive penalties and interest with respect to the unpaid 2009 Royalty Assessment on the basis that there was reasonable doubt that the royalties were owed.<sup>630</sup> As discussed below, there is no merit to Claimant's allegations.

324. First, there was nothing untoward or inappropriate with respect to the time it took the Tax Tribunal to issue its decision in the 2009 Royalty Assessment case. As Tax Tribunal President Olano explains, over the past several years, there has been a very high volume of cases before the Tax Tribunal.<sup>631</sup> This was true, in particular, for 2012, the year in which SMCV filed its appeal regarding the 2009 Royalty Assessment case. That year, the total number of cases submitted to the Tribunal was close to 20,000, one of the highest number of cases in the last twenty years.<sup>632</sup> As Ms. Olano explains, it was the sheer volume of cases along with the level of difficulty for each case that caused the delay, not anything nefarious about the processing of SMCV's cases. According to Ms. Olano, "If certain SMCV cases took longer than others, it was due to generalized matters, as well as the particularities of each case, not because of any intrigue [or bias] against SMCV."<sup>633</sup> In addition, Ms. Olano stressed that "[t]he delays in the SMCV cases are not unique to the company, but rather it is similar to the situations faced by hundreds of files, out of the tens of thousands of cases that the [Tax] Tribunal receives each year."<sup>634</sup>

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<sup>629</sup> See Claimant's Memorial at para. 250.

<sup>630</sup> See Claimant's Memorial at para. 251.

<sup>631</sup> See Exhibit RWS-5, Olano Statement at paras. 25-27 and Annex B.

<sup>632</sup> See Exhibit RWS-5, Olano Statement at Annex B.

<sup>633</sup> Exhibit RWS-5, Olano Statement at para. 27 ("*Si algunos casos de SMCV se tardaron más que otros, fue a causa de asuntos generalizados, así como de las particularidades de cada caso, y no de alguna intriga en contra de SMCV.*").

<sup>634</sup> Exhibit RWS-5, Olano Statement at para. 27 ("*Las demoras en los casos de SMCV no son situaciones únicas a la empresa, sino que es similar a las situaciones que enfrentan cientos de expedientes, de las decenas de miles de expedientes que recibe año a año el Tribunal.*").

325. Second, as occurred in the Tax Tribunal’s decision regarding the 2008 Royalty Assessment, the Tax Tribunal in the 2009 Royalty Assessment case independently reviewed and considered all applicable laws and regulations related to whether SMCV was obligated to pay royalties on copper produced from the Concentrator Project for the 2009 fiscal year. As in the case of the 2008 Royalty Assessment, the Tax Tribunal reviewed relevant provisions in the General Mining Act, such as Articles 72, 82, and 83; relevant provisions in the Regulation, such as Articles 18, 19, 20, 22 and 24; and specific provisions in the 1998 Stabilization Agreement itself.<sup>635</sup> Nowhere in those sections of the decision did the Tax Tribunal discuss the MINEM’s June 2006 Report. Thus, it is not the case that Chamber No. 2, which was assigned to consider the case, somehow relied inappropriately on the interpretation of the applicable laws that was discussed in the MINEM’s June 2006 Report, as Claimant asserts. In fact, although the Tax Tribunal references the June 2006 Report, it is not a critical part of the Tax Tribunal’s analysis. It is only referenced in two paragraphs,<sup>636</sup> out of a 34-page decision.

326. Nor is it at all problematic that the decision is similar in nature to the 2008 Royalty Assessment decision, in light of the fact that the two cases are dealing with the same underlying facts. As President Olano explains in her witness statement: “[I]t is important for the good operation of the [Tax] Tribunal that identical controversies be decided uniformly with respect to the standard used. As a result, there is coordination between the Chambers and that is why the Plenary Chamber exists—to ensure predictability and certainty in the jurisprudence and decisions of the Tribunal in analogous cases. That does not mean that there is not a careful and independent analysis of each case.”<sup>637</sup>

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<sup>635</sup> See Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018, at pp. 15-18.

<sup>636</sup> See Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018, at p. 26.

<sup>637</sup> Exhibit RWS-5, Olano Statement at para. 80 (“*[E]s importante para el buen funcionamiento del Tribunal que idénticas controversias sean resueltas con uniformidad con respecto al criterio utilizado. Por eso, hay coordinación entre Salas y por eso existe la Sala Plena—para asegurar predictibilidad y certeza en la*”).

327. Third, there was nothing inappropriate about the Tribunal's decision to reject SMCV's request to waive penalties and interest on the unpaid 2009 Royalty Assessment. According to Claimant, the basis for the Tax Tribunal's decision was that Article 170 of the Tax Code was limited to situations of reasonable doubt about a rule and that this dispute did not originate based on doubt arising from the interpretation of a rule (*e.g.*, the scope of Article 83 of the General Mining Law or Article 22 of its Regulation), but, rather, regarding the scope of the 1998 Stabilization Agreement.<sup>638</sup> According to Claimant, the Tax Tribunal's findings were at odds with its own analysis, which interpreted the scope of the 1998 Stabilization Agreement based on the provisions of Article 83 of the General Mining Law and Articles 22 and 24 of the Regulations, which state that the feasibility study will serve as a basis for determining which investment projects are the subject of the contract.<sup>639</sup>

328. There is nothing inconsistent or contradictory about the Tax Tribunal's finding. The key issue in dispute in the 2009 Royalty Assessment case was the scope of the 1998 Stabilization Agreement and whether it included the Concentrator Project or not. Although the Tax Tribunal looked to the relevant laws and regulations to inform its determination, the key issue the Tax Tribunal had to decide was the scope of the 1998 Stabilization Agreement. Thus, the Tax Tribunal's finding that the reasonable doubt argument did not apply to this case was appropriate. Fatal to Claimant's allegations, however, is the fact that the Tax Tribunal clarified that, even if the interpretation of the Mining Law or its Regulations were at issue in the case, "the aforementioned rules are clear when establishing the scope of the agreements executed under their protection."<sup>640</sup> Thus, even if Claimant were right that the Tax Tribunal's decision was

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*jurisprudencia y decisiones del Tribunal en casos parecidos. Eso no significa que no haya un análisis cuidadoso e independiente sobre cada caso.*" (footnote omitted)).

<sup>638</sup> See Claimant's Memorial at para. 251.

<sup>639</sup> See Claimant's Memorial at para. 252.

<sup>640</sup> Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018, at p. 32.

based on legal rules and not on the scope of the 1998 Stabilization Agreement, the Tax Tribunal's finding that the applicable legal rules were clear demonstrates that the Tax Tribunal's rejection of SMCV's reasonable doubt argument was entirely appropriate.

(ii) *The 2010-2011 Royalty Assessment*

329. On March 22, 2017, SMCV challenged SUNAT's 2010-2011 Royalty Assessment before the Tax Tribunal.<sup>641</sup> In May 2018, the Tax Tribunal assigned the 2010-2011 Royalty Assessment case to Victor Mejía Ninacondor as the *vocal ponente*.<sup>642</sup> According to Claimant, Mr. Mejía had been involved in SMCV's Royalty Assessment cases before: he had worked in the department of SUNAT that initially confirmed the 2010-2011 Royalty Assessment and had represented SUNAT in SMCV's appeal of the 2006-2007 Royalty Assessment before the Superior Court.<sup>643</sup> SMCV claims that the Tax Tribunal deprived it of due process by denying SMCV's request that *vocal* Mejía abstain from presiding over the 2010-2011 Royalty Assessment appeal.<sup>644</sup> Indeed, Claimant alleges that the Tribunal deliberately reassigned the case so that *vocal* Mejía could preside over the case.<sup>645</sup> Claimant also alleges that the Plenary Chamber of the Tribunal that heard SMCV's recusal request ignored its own rules in denying the application.<sup>646</sup> Claimant's allegations are unfounded.

330. First, the Tax Tribunal did not go out of its way to assign the 2010-2011 Royalty Assessment case to *vocal* Mejía Ninacondor. Rather, he was assigned the case through the normal course of case assignment at the time. Tax Tribunal President Ms. Olano explains that, while usually *vocales* are assigned to cases through an automated system of assignment, when

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<sup>641</sup> See Exhibit CE-151, SMCV Appeal of SUNAT, 2010/11 Royalty Assessments, March 22, 2017.

<sup>642</sup> See Exhibit CE-177, Supreme Resolution No. 013-2018-EF, May 3, 2018, Art. 1.

<sup>643</sup> See Claimant's Memorial at para. 244.

<sup>644</sup> See Claimant's Memorial at para. 243-48.

<sup>645</sup> See Claimant's Memorial at para. 396.

<sup>646</sup> See Claimant's Memorial at para. 397.

new *vocales* join the Tax Tribunal, “the assignment and reassignment process is different, in order to equitably distribute the work of each *vocal*.”<sup>647</sup> This is what occurred when *vocal* Mejía joined the Tax Tribunal. According to Ms. Olano, “the assignment of the case to this *vocal* responded solely and exclusively to the fact that the files were redistributed to the *vocales* who had a below-average workload [and] until an equitable distribution of work [among all *vocales*] was achieved.”<sup>648</sup> Based on the above, it is clear that the Tax Tribunal did not seek out to assign the 2010-2011 Royalty Assessment case to *vocal* Mejía as Claimant alleges.

331. Second, the Plenary Chamber that heard SMCV’s request did not ignore its own rules in denying the application. Claimant complains, in particular, that (i) the President of the Tax Tribunal acted inconsistently with the rules of the Tribunal by asking her staff to prepare a draft decision analyzing the question of recusal before deliberations had taken place and sharing that draft with the Plenary Chamber;<sup>649</sup> (ii) the President asked the *vocales*’ opinion of the analysis and conclusion before the Plenary Session was held;<sup>650</sup> (iii) the Plenary Chamber denied the request for recusal only two days after it had been presented;<sup>651</sup> and (iv) the final recusal decision was very similar to the draft that was initially circulated to the *vocales*.<sup>652</sup>

332. As the President of the Tax Tribunal has testified, requests for recusal are considered by all members of the Tax Tribunal (except, of course, the *vocal* in question). The *vocal* affected by the request submits a report to the President of the Tax Tribunal discussing the reasons why or why not the *vocal* should abstain. Following review of the report, the President

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<sup>647</sup> Exhibit RWS-5, Olano Statement at para. 66 (“*el proceso de asignación y reasignación es diferente, con el fin de distribuir equitativamente el trabajo de cada vocal*”).

<sup>648</sup> Exhibit RWS-5, Olano Statement at para. 67 (“*[L]a asignación del caso a este vocal respondió única y exclusivamente al hecho de que se redistribuyeron los expedientes a los vocales que tenían una carga por debajo del promedio hasta que se alcanzó una distribución equitativa de trabajo.*”).

<sup>649</sup> See Claimant’s Memorial at para. 397(a).

<sup>650</sup> See Claimant’s Memorial at para. 397(b).

<sup>651</sup> See Claimant’s Memorial at para. 397(c).

<sup>652</sup> See Claimant’s Memorial at para. 397(c).

and the Technical Office submit to the Plenary Chamber a draft report in which they express a position to be considered on the day of the Plenary Session. At the Plenary Session, the Plenary Chamber decides, by majority vote, whether to grant or deny the request for recusal. Requests for recusal must be decided quickly—according to the General Administrative Procedures Law, within just three days of the request.<sup>653</sup>

333. SMCV moved to recuse *vocal* Mejía based on Articles 97(5) and (6) of the General Administrative Procedures Law.<sup>654</sup> Article 97(5) identifies when someone should be removed: “[w]hen you have or may have had in the last twelve (12) months, a relationship of service or subordination with any of the administered or third parties directly interested in the matter, or if you have a plan to have a business arrangement with any of the parties, even if it is not materialized.”<sup>655</sup> Article 97(6) provides that “[w]hen circumstances arise that disrupt the operation of the authority, it, for reasons of decorum, may recuse themselves via a duly substantiated resolution.”<sup>656</sup> As discussed below, the actions taken by the Tax Tribunal with respect to *vocal* Mejía’s recusal were reasonable and consistent with Peruvian law.

334. First, as explained by the President, it is normal for decisions to be circulated ahead of plenary sessions so that the *vocales* can have a productive discourse ahead of the

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<sup>653</sup> See Exhibit RWS-5, Olano Statement at para. 69; see also Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Chapter IV, Art. 141.

<sup>654</sup> See Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017.

<sup>655</sup> Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Art. 97(5) (“*Cuando tuviere o hubiese tenido en los últimos doce (12) meses, relación de servicio o de subordinación con cualquiera de los administrados o terceros directamente interesados en el asunto, o si tuviera en proyecto una concertación de negocios con alguna de las partes, aun cuando no se concrete posteriormente.*”).

<sup>656</sup> Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Art. 97 (6) (“*Cuando se presenten motivos que perturben la función de la autoridad, esta, por decoro, puede abstenerse mediante resolución debidamente fundamentada.*”).

plenary session.<sup>657</sup> Second, doing so does not violate any applicable norm.<sup>658</sup> That is, there is no legal provision that prevents the circulation of a draft decision in advance of the plenary session. And, in fact, circulating a draft decision in advance of the plenary session allows all *vocales* involved in the plenary session to be well prepared for the meeting.<sup>659</sup> Third, the fact that the final decision was issued shortly after the Plenary Session does not mean that the process was inadequate. As discussed above, the Plenary Chamber is required by law to issue a decision within three days of the filing of the request for recusal. Thus, the speed with which the Plenary Chamber decided the request only means that the Tax Tribunal met its legal obligations. Finally, the mere fact that the final decision is similar to the draft decision is of no consequence. It only shows that the majority of the members of the Plenary Chamber were in agreement with the draft.

335. Not only was the Plenary Chamber’s recusal decision free from procedural irregularities, the substance of the decision was sound as well. In its request for recusal, SMCV alleged that *vocal* Mejía Ninacondor had to be recused from reviewing the 2010-2011 Royalty Assessment because (i) he had worked at SUNAT and, according to SMCV, SUNAT was a “citizen or a third party directly interested in the outcome of the matter” under Article 97(5)<sup>660</sup>; and (ii) when he worked at SUNAT, he was allegedly involved in the 2010-2011 Royalty Assessment case.<sup>661</sup> The majority of the *vocales* in the Plenary Chamber rejected both arguments.

336. First, the Plenary Chamber found that SUNAT could not be considered a “citizen or third party” interested in the outcome of the case. This was because according to Article 97(5)

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<sup>657</sup> See Exhibit RWS-5, Olano Statement at para. 71.

<sup>658</sup> See Exhibit RWS-5, Olano Statement at para. 72.

<sup>659</sup> See Exhibit RWS-5, Olano Statement at para. 72.

<sup>660</sup> See Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018, at p. 8.

<sup>661</sup> See Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018, at p. 7.

of the General Administrative Procedure Law, public entities can only be considered to be a “citizen or third party” when the public entity is not acting in its public capacity. As SUNAT participated in the proceedings regarding the 2010-2011 Royalty Assessment in its public capacity, it was not a “citizen or third party” under Article 97(5).<sup>662</sup>

337. Second, the Plenary Chamber concluded that *vocal* Mejía had not participated in the 2010-2011 Royalty Assessment case.<sup>663</sup> The Plenary’s finding was based on the fact that *vocal* Mejía’s signature was not on the decision nor did the case file reflect his involvement. As summarized by the Tax Tribunal:

[A]ccording to the petitioner [SMCV] itself, the *vocal* Mejía Ninacondor has not participated in the case that will be resolved in Case File No. 4689-2017; indeed, neither did he sign the appealed resolution, nor is his participation in said case evidenced, so that the petitioner is basing its request solely on assumptions . . . . [T]he petitioner is relying on the assumption that the Vocal, by having previously worked for the Tax Administration, could have a certain inclination to rule in its favor, and on the assumption that by the mere fact of having belonged to a working group, he could have participated in the elaboration of the support of the appealed resolution.<sup>664</sup>

338. Claimant alleges that the fact that Perú later amended the Tax Code to require *vocales* to abstain from participating in proceedings if they had worked at SUNAT within the last twelve months and had “directly and actively” participated in the SUNAT proceedings at issue before the Tax Tribunal confirmed *vocal* Mejía’s conflict of interest.<sup>665</sup> Claimant’s assertion is not correct. As previously discussed, *vocal* Mejía Ninacondor did not have a conflict of interest, because he was not involved in the SMCV cases either directly or indirectly. Thus, even if the

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<sup>662</sup> See Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018, at pp. 5-6; see also Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Art. 97; Exhibit RWS-5, Olano Statement at para. 76.

<sup>663</sup> See Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018, at p. 7.

<sup>664</sup> Exhibit CE-714, Acta de Sala Plena – Abstención vs MN Cerro Verde, attached to email from Gina Castro Arana to Zoraida Alicia Olano Silva (June 20, 2018, 8:32 PM PET), at p. 5.

<sup>665</sup> Claimant’s Memorial at para. 249.

law had changed before he became a *vocal*, there would still have been no basis to require his recusal from the 2010-2011 Royalty Assessment case. Moreover, as President Olano explains in her witness statement, there is no evidence that *vocal* Mejía had actually represented SUNAT in the judicial proceedings for the 2006-2007 Royalty Assessment before the Superior Court.<sup>666</sup>

339. On August 28, 2018, Chamber No. 1 issued its resolution confirming SUNAT's 2010-2011 Royalty Assessment.<sup>667</sup> Claimant complains that this decision (i) again adopted the same interpretation of the laws as MINEM's 2006 memorandum and allegedly copied the section on the scope of the 1998 Stabilization Agreement from the decisions in the 2008 and 2009 Royalty Assessment cases; and (ii) failed to waive penalties and interest, stating that there was no reasonable doubt with respect to the scope of the Mining Law or Regulations and any uncertainty related to the scope of the 1998 Stabilization Agreement could not trigger entitlement to a waiver under Article 170. For the same reasons discussed in Section II.G.3.a.i above regarding the Tax Tribunal's rejection of SMCV's request for reconsideration of the 2009 Royalty Assessments, Claimant's complaints regarding the Tax Tribunal's decision regarding the 2010-2011 Royalty Assessment are without merit.

b. SUNAT Was Not Obligated to Recalculate Interest and Penalties on the 2009 and 2010-2011 Royalty Assessments

340. On October 10 and 18, 2018, SUNAT issued writs of execution for the 2010-2011 and 2009 Royalty Assessments, respectively.<sup>668</sup> Claimant alleges that SMCV requested that SUNAT suspend execution proceedings and recalculate the interest owed on the 2009 and 2010-2011 Royalty Assessments, given that the Tax Tribunal had taken six years to resolve the 2009 Royalty Assessment case and had taken eighteen months to resolve the 2010-2011 Royalty

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<sup>666</sup> See Exhibit RWS-5, Olano Statement at para. 78.

<sup>667</sup> See Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018, August 28, 2018.

<sup>668</sup> See Exhibit CE-727, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056517 (2010/11 Royalty Assessments), October 10, 2018; Exhibit CE-729, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535 (2009 Royalty Assessments), October 18, 2018.

Assessment case. According to Claimant, SMCV was entitled to an interest rate based on the consumer price index rather than the statutory default interest rate applied by SUNAT because of the delays.<sup>669</sup>

341. At the end of December 2018 and beginning of January 2019, SMCV requested that the Tax Tribunal order SUNAT to recalculate the interest owed by SMCV on the 2009 and 2010-2011 Royalty Assessments. According to Claimant, the Tax Tribunal quickly and unjustifiably dismissed both requests on the grounds that SMCV had already entered into a deferral and installment agreement with SUNAT to pay the outstanding royalties assessed.<sup>670</sup> Claimant alleges that the Tax Tribunal provided no support for its dismissal of SMCV's requests, contending that the Tax Tribunal's decision amounted to SMCV having waived its right to receive the more favorable Consumer Price Index ("CPI") rate upon entering into the deferral and installment agreement.<sup>671</sup> Claimant's assertions are without merit.

342. First, contrary to Claimant's assertions, the Tax Tribunal did provide a reasoned basis for its decision to dismiss SMCV's requests that the Tax Tribunal order SUNAT to recalculate penalties and interest using the CPI rather than statutory interest rate. Specifically, the Tax Tribunal stated that it was obligated to follow precedent set forth in a Tax Tribunal resolution issued March 2006 which held that, in accordance with Peruvian law, a claim regarding the validity of resolutions issued by the administration concerning outstanding fiscal payments due must be made when the tax debt at issue is under forced collection. At the time the Tax Tribunal was considering SMCV's requests, the forced collection proceedings had

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<sup>669</sup> See Claimant's Memorial at para. 255.

<sup>670</sup> See Claimant's Memorial at para. 257.

<sup>671</sup> See Claimant's Memorial at para. 257.

ceased on account of the deferral and installment agreement entered into between SMCV and SUNAT.<sup>672</sup> Thus, by law, the Tax Tribunal could no longer consider SMCV's requests.

343. Second, even if the Tax Tribunal had ruled on the merits of SMCV's requests, it would have reached the same conclusion. As Respondent's Peruvian tax experts explain in their expert report, SUNAT can only act where authorized to do so under Peruvian law.<sup>673</sup> Law No. 28969 governs SUNAT's ability to assess royalties in the mining sector, and Article 3 of that law lists the articles of the Tax Code that apply to the assessment of royalties. Article 3 lists several articles from the Tax Code that are applicable but, notably, it does not mention Article 33, which was the basis for SMCV to assert that SUNAT should have applied the CPI rather than statutory interest.<sup>674</sup> Thus, SUNAT could not have applied the CPI as Claimant's assert in these proceedings.

#### **4. The Tax Tribunal's Decision Regarding the Q4 2011 Royalty Assessments Was Reasonable and Procedurally Sound**

344. On November 21, 2018, SMCV challenged SUNAT's Q4 2011 Royalty Assessment before the Tax Tribunal (the "Q4 2011 Royalty Case").<sup>675</sup> Claimant complains that the Tax Tribunal infringed on SMCV's due process rights when the Technical Office assigned the Q4 2011 Royalty Assessment case to the Tax Tribunal President's former advisor, Ms. Villanueva, who was now a *vocal* in Chamber No. 9.<sup>676</sup> Claimant alleges that Chamber No. 9, like Chamber No. 1 in the 2008 Royalty Assessment case, adopted the reasoning from the MINEM's 2006 memorandum and again unjustifiably rejected SMCV's request for waiver of

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<sup>672</sup> See Exhibit CE-213, Tax Tribunal Decision No. 00019-Q-2019, January 4, 2019 (the 2009 Royalty Assessment); Exhibit CE-214, Tax Tribunal Decision No. 00036-Q-2019, January 7, 2019 (the 2010/11 Royalty Assessment).

<sup>673</sup> See Exhibit RER-3, Bravo and Picón Report at paras. 67, 130.

<sup>674</sup> See Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 3.

<sup>675</sup> See Exhibit CE-740, SMCV, Appeal to Tax Tribunal (Q4 2011 Royalty Assessments), November 21, 2018.

<sup>676</sup> See Claimant's Memorial at paras. 260-61.

penalties and interest on the basis of “reasonable doubt” under Article 170 of the Tax Code.<sup>677</sup>

Claimant’s assertions are without merit.

345. First, with respect to the assignment of the case to Ms. Villanueva, the mere fact that she worked as an assistant on the 2008 Royalty Assessment case did not create a conflict of interest with respect to the Q4 2011 Royalty Assessment case. Notably, Claimant does not contest Ms. Villanueva’s capabilities as *vocal* and does not allege any deficiencies in Ms. Villanueva’s assessment of the case (other than to assert that the resolution of the Q4 2011 Royalty Assessment case is consistent with that of the 2008 Royalty Assessment case, which is discussed below). Critically, SMCV did not seek recusal of Ms. Villanueva as *vocal*,<sup>678</sup> which SMCV could have done if it truly thought Ms. Villanueva’s presence presented a conflict of interest. Thus, there is no merit to Claimant raising a due process issue with respect to the assignment of Ms. Villanueva to the Q4 2011 Royalty Assessment case in these proceedings.

346. Second, there is no basis to Claimant’s allegation that Chamber No. 9 relied on the reasoning of MINEM’s 2006 memorandum in upholding SUNAT’s royalty assessment for Q4 2011. In fact, MINEM’s memorandum is not even mentioned in the resolution. In addition, the mere fact that reasoning may have been similar to the 2008 Royalty Assessment case does not mean that SMCV was not afforded due process, nor that the Tax Tribunal did not consider SMCV’s arguments before the Tax Tribunal carefully. As in past royalty assessment cases for SMCV, the Tax Tribunal carefully reviewed relevant provisions in the Mining Law and its Regulations and carefully assessed specific articles in the 1998 Stabilization Agreement before reaching its conclusion.<sup>679</sup> As discussed in Section II.G.3 above, given that the issues before the

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<sup>677</sup> See Claimant’s Memorial at para. 261.

<sup>678</sup> See Exhibit RWS-5, Olano Statement at para. 82.

<sup>679</sup> See Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019, November 18, 2019.

Tax Tribunal were similar to the issues raised in the other SMCV Royalty Assessment cases, it is not surprising that similar norms were taken into consideration.

347. Finally, it is not surprising that the Tax Tribunal also rejected SMCV's request for waiver of applicable penalties and interest in a manner similar to what it had done in other SMCV Royalty Assessment cases in light of the fact that SMCV cited the same legal provision—*i.e.*, Article 170 of the Tax Code—as the basis for its claim.<sup>680</sup>

#### **H. PERÚ'S SUPREME COURT HAS CONFIRMED THAT CERRO VERDE'S 1998 STABILIZATION AGREEMENT ONLY COVERS THE LEACHING PROJECT**

348. After receiving the Tax Tribunal's resolutions confirming the 2006-2007 and 2008 Royalty Assessments, SMCV challenged them before Perú's judiciary (Contentious Administrative Courts), which provides a forum for judicial review of administrative resolutions.<sup>681</sup> Ultimately, the Supreme Court—Perú's highest court—dismissed SMCV's case.<sup>682</sup> Perú's Supreme Court ruling should have been the end of the road for SMCV (and Claimant)—it put an end to an 8-year battle whereby SMCV sought to expand the scope of its 1998 Stabilization Agreement through an untenable interpretation of the Mining Law, its Regulation, and the Agreement itself. But Claimant has insisted on pressing further. Claimant has brought this arbitration to take still another bite at the apple and (improperly) use this Tribunal as a court of last resort.

349. Before initiating this arbitration, SMCV received the following judgments in the course of its judicial challenges against the Tax Tribunal's resolutions on the 2006-2007 and 2008 Royalty Assessments:

##### *2008 Royalty Assessment*

- On December 17, 2014, the 18th Contentious Administrative Court (a first instance court) decided in favor of SMCV, annulling the 2008 Royalty

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<sup>680</sup> See Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019, November 18, 2019.

<sup>681</sup> See Exhibit CA-14, Tax Code, at Art. 157.

<sup>682</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017.

Assessment (“2008 First Instance Judgment”). This is the only decision that has been issued in favor of SMCV, and it was overturned by higher courts.<sup>683</sup>

- On January 29, 2016, the Sixth Chamber of the Superior Court of Lima (appellate court), revoked the 2008 First Instance Judgment and confirmed that the 1998 Stabilization Agreement’s scope was limited to the Leaching Project and that SMCV had to pay royalties with respect to the Concentrator Project, as assessed under the 2008 Royalty Assessment (“2008 Superior Court Judgment”).<sup>684</sup>
- On August 18, 2017, Perú’s Supreme Court confirmed the 2008 Superior Court Judgment.<sup>685</sup>

#### *2006-2007 Royalty Assessment*

- On April 14, 2016, the 20th Contentious Administrative Court (a first instance court) decided against SMCV, confirming the 2006-2007 Royalty Assessment (“2006-2007 First Instance Judgment”).<sup>686</sup>
- On July 12, 2017, the Seventh Chamber of the Superior Court of Lima (appellate court), confirmed the 2006-2007 First Instance Judgment and confirmed that the 1998 Stabilization Agreement’s scope was limited to the Leaching Project and that SMCV had to pay royalties with respect to the Concentrator Project, as assessed under the 2006-2007 Royalty Assessment (“2006-2007 Superior Court Judgment”).<sup>687</sup>
- SMCV challenged this decision before the Supreme Court, but then withdrew its challenge before the Supreme Court could issue a final decision, in order to seek to resolve the dispute through international arbitration. Thus, the 2006-2007 Superior Court Judgment became the final judgment on the matter.

350. In sum, Perú’s judiciary (save for one first instance court, whose decision was later overturned), including Perú’s Supreme Court, has confirmed that mining stabilization agreements’ scopes are limited and that they grant stability benefits exclusively to the activities

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<sup>683</sup> See Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014; Exhibit RER-1, Eguiguren Report at paras. 98-99.

<sup>684</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016; Exhibit RER-1, Eguiguren Report at para. 99.

<sup>685</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017; Exhibit RER-1, Eguiguren Report at para. 99.

<sup>686</sup> See Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016; Exhibit RER-1, Eguiguren Report at para. 100.

<sup>687</sup> See Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017; Exhibit RER-1, Eguiguren Report at para. 100.

related to the investment project for which the agreement was signed (*i.e.*, the investment project described in the underlying feasibility study). Accordingly, these courts found that SMCV's 1998 Stabilization Agreement did not provide any stability benefits to the Concentrator Project and its related activities.

351. Critically, in its Memorial, Claimant does not present any claims alleging that Perú's judiciary violated SMCV's due process rights. Claimant disagrees with these decisions on the merits and asserts that the courts in the 2008 Appellate Judgment, the 2006-2007 First Instance Judgment, and the 2006-2007 Appellate Judgment improperly failed to consider SMCV's arguments related to the waiver of penalties and interest based on the "reasonable doubt" rule.<sup>688</sup> When it comes to the Supreme Court's ruling, Claimant simply disagrees with the decision on the merits and contends that it is not "precedential on any subsequent cases."<sup>689</sup> But, Perú should not be held internationally liable simply because an investor disagrees with the content of a decision from the highest court in the land. Unless the Tribunal finds denial of justice (it should not—Claimant has not raised any claims of denial of justice with respect to the Courts' decisions in this case) or that there is something fundamentally wrong with Peruvian law (there is not), local court decisions decided by Peruvian courts based on Peruvian law cannot properly be submitted before this Tribunal. In any case, Perú's courts' judgments were reasonable, afforded due process (as even Claimant seems to admit), and were consistent with Peruvian law. Respondent addresses Claimant's complaints with respect to each judgment in the following sections.

### **1. The 2008 Royalty Assessment**

352. Although the first-instance 18th Contentious Administrative Court annulled the 2008 Royalty Assessment, the appellate Sixth Chamber of the Superior Court of Lima reversed

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<sup>688</sup> See Claimant's Memorial at para. 411.

<sup>689</sup> See Claimant's Memorial at para. 340.

the lower court's judgment and upheld the 2008 Royalty Assessment on essentially the same grounds as SUNAT and Tax Tribunal.<sup>690</sup> The Supreme Court of Justice of Perú then affirmed the Superior Court's ruling.

353. As a preliminary point, in addition to asserting that these courts reached the wrong conclusion by finding in favor of Perú (they did not), Claimant also complains that these courts failed to address the “judiciary’s own power and obligation to grant an Article 170 waiver in cases of reasonable doubt.”<sup>691</sup> Claimant’s complaints are without merit. As Respondent explained in Section II.F.5 above, interest and penalties shall only be waived if there has been an incorrect interpretation and a “clarification” via law, resolution, or Plenary Chamber decision of the Tax Tribunal that has been issued for the specific purpose of applying Article 170 of the Tax Code.<sup>692</sup> Claimant’s own tax expert, Dr. Hernández, admits that in this case that “clarification” has not been issued.<sup>693</sup> Thus, (i) Peruvian courts did not have the general power to waive interest and penalties; and (ii) short of a “clarification,” Peruvian courts had no obligation to waive any of SMCV’s interest and penalties. As Drs. Bravo and Picón explain, Peruvian courts acted reasonably and in accordance with Peruvian law.<sup>694</sup>

a. The First Instance Contentious Administrative Court Annulled the 2008 Royalty Assessment

354. On September 19, 2013, SMCV challenged the Tax Tribunal’s resolution upholding the 2008 Royalty Assessment before Peruvian Courts.<sup>695</sup> On December 17, 2014, the 18th Contentious Administrative Court issued the 2008 First Instance Judgment, annulling the

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<sup>690</sup> See *supra* at Sections II.F, II. G; see *infra* at Section II.H.b.

<sup>691</sup> Claimant’s Memorial at para. 411(a).

<sup>692</sup> See Exhibit CA-14, Tax Code, at Art. 170.1.

<sup>693</sup> See Exhibit CER-3, Hernández Report at para. 125.

<sup>694</sup> See Exhibit RER-3, Bravo and Picón Report at paras. 80, 82, 122-23.

<sup>695</sup> See Exhibit CE-97, SMCV Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments, September 18, 2013.

2008 Royalty Assessment.<sup>696</sup> As Respondent describes in the next section, this decision was revoked by higher courts in Perú.

355. The Court held that, under the Mining Law and its Regulation, mining stabilization agreements should be understood to provide stability benefits to a mining company for all of the activities it conducts within the named mining concession(s).<sup>697</sup> Therefore, it held that SUNAT and the Tax Tribunal erred in interpreting the 1998 Stabilization Agreement to be limited to the investment project named “Cerro Verde Leaching Project.”<sup>698</sup>

356. Notably, in its interpretation of the relevant provisions, the court ignored key language that limits the scope of stabilization agreements. The court concluded that stability is “given to the mining titleholder for the activities it carries out in the concessions or economic-administrative units.”<sup>699</sup> In saying so, however, the court ignored language in Article 83 of the Mining Law 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,”<sup>700</sup> language in Article 22 of the Regulation stating that “[t]he contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units,”<sup>701</sup> and language in Article 24 of the Regulation stating that the feasibility study “serve[s]

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<sup>696</sup> See Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014.

<sup>697</sup> See Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014, at p. 23.

<sup>698</sup> See Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014, at p. 23.

<sup>699</sup> Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014, at p. 23 (emphasis omitted).

<sup>700</sup> Exhibit CA-1, General Mining Law at Art. 83 (“*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión.*”) (emphasis added).

<sup>701</sup> Exhibit CA-2, Mining Regulations at Art. 22 (“*Las garantías contractuales, beneficiarán al titular de la actividad minera exclusivamente por las inversiones que realice en las concesiones o Unidades Económico-Administrativas.*”) (emphasis added).

as the basis to determine the investments that are the subject matter of the agreement . . .”<sup>702</sup>

Had the Court considered the underlined language, its conclusion might have been different and consistent with the interpretation provided by all other courts that reviewed this same issue.

357. Moreover, the court noted that amendments to Article 83 of the Mining Law adopted in 2014, through Law No. 30230, suggested that up until that amendment, the Mining Law granted benefits to all the activities conducted by mining companies within their concessions.<sup>703</sup> Claimant replicates this argument in its Memorial.<sup>704</sup> Claimant, however, is misreading the amendment to Article 83. As Dr. Eguiguren explains in his expert report, this amendment actually demonstrates the opposite.<sup>705</sup>

358. To explain: Article 83 of the Mining Law, as amended by Law No. 30230 in 2014, provides that:

[t]he effect of the contractual benefit will inure exclusively to the activities of the mining company for which the investment is made, whether or not they are expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the stabilization agreement; or, the additional activities that are accomplished subsequently to the Investment Program, provided that such activities are carried out within the same concession where the investment project contemplated in the agreement signed with the State is developed; that they are linked to the purpose of the Investment Project; that the amount of the additional investment is not less than the equivalent in national currency to US\$ 25[0],000,000.00; and that they are previously approved by the

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<sup>702</sup> Exhibit CA-2, Mining Regulations at Art. 24 (emphasis added) (“The Directorate General of Mining shall submit to the Office of the Vice-Minister of Mines the record and the Directorial Resolution approving the Feasibility Study or Investment Program, as the case may be, which will serve as the basis to determine the investments that are the subject matter of the agreement, in order to proceed with signing the original prepared in accordance with the model approved pursuant to Article 86 of the Single Unified Text of the General Mining Law.”) (“*La Dirección General de Minería deberá elevar al Despacho del Viceministro de Minas, los actuados y la Resolución Directorial por la que se aprueba el Estudio de Factibilidad o Programa de Inversión, según sea el caso, la misma que servirá de base para determinar las inversiones materia del contrato, a efecto de que se proceda a la suscripción de la minuta preparada de acuerdo al modelo aprobado de conformidad con el artículo 86. del Texto Único Ordenado de la Ley General de Minería.*”). Respondent is providing a correct translation of this Article.

<sup>703</sup> See Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014, at pp. 24-25.

<sup>704</sup> See Claimant’s Memorial at para. 218.

<sup>705</sup> See Exhibit RER-1, Eguiguren Report at paras. 91-95.

Ministry of Energy and Mines, without prejudice to a subsequent audit by the aforementioned Sector.<sup>706</sup>

359. Therefore, according to the new law, stabilization agreements cover investments and activities related to the investment project, regardless of whether they are specifically outlined in the feasibility study or not, provided they comply with certain requirements, including having relation with the original investment project. This new law actually expanded the previous Article 83 of the Mining Law. Congress, in its draft bill, made clear that the issue it was trying to fix was that under the preexisting legal framework (which governs SMCV's stabilization agreement), "it would not be possible to stabilize pre-existing assets or investments, nor those investments that do not appear in the Feasibility Study that is attached to the [stabilization agreements]."<sup>707</sup> Congress proposed the new law so that "the effect of the contractual benefit rests exclusively on the activities of the mining company in favor of which the investment is made, whether those are expressly mentioned in the Investments Program contained in the Feasibility Study that is part of the [stabilization agreements]; or, additional activities that are carried out after the execution of the Investments Program."<sup>708</sup>

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<sup>706</sup> Exhibit CA-209, Law Establishing Tax Measures, Simplification of Procedures, and Permits for Promoting and Revitalizing Investment in the Country, Law No. 30230, July 12, 2014, at Art. 5 (emphasis added) ("*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera a favor de la cual se efectúe la inversión, sea que aquellas estén expresamente mencionadas en el Programa de Inversiones contenido en el Estudio de Factibilidad que forma parte del Contrato de Estabilidad; o, las actividades adicionales que se realicen posteriormente a la ejecución del Programa de Inversiones, siempre que tales actividades se realicen dentro de la misma concesión donde se desarrolle el Proyecto de inversión materia del contrato suscrito con el Estado; que se encuentren vinculadas al objeto del Proyecto de inversión; que el importe de la inversión adicional sea no menor al equivalente en moneda nacional a US\$ 250'000,000.00; y sean aprobadas previamente por el Ministerio de Energía y Minas, sin perjuicio de una posterior fiscalización del citado Sector.*").

<sup>707</sup> Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at p. 9 ("*1. Considerando que la estabilidad tributaria en el sector minero tiene por finalidad promover la inversión y facilitar el financiamiento de los proyectos mineros, o de ampliaciones de proyectos referentes a una o más Unidades Económicas Administrativas (UEA), así como incentivar la ejecución de programas de inversión, solo cabe estabilizar las inversiones detalladas expresamente en el estudio de factibilidad técnico-económico que se adjunta como anexo formando parte de tales contratos. 2. En la misma línea algunos autores que comentan la LGM han señalado que 'Los beneficios conferidos mediante los contratos recaen en el titular de la actividad minera pero únicamente respecto del Proyecto a que se contrae el respectivo contrato. . . . 3. Por lo que de acuerdo al marco legal vigente no cabría estabilizar . . . aquellas inversiones que no constan en el Estudio de Factibilidad que se adjunta a los [contratos de estabilidad] . . .' (emphasis added; footnotes omitted).*")

<sup>708</sup> Exhibit RE-50, Executive Power, Statement of Reasons for Bill No. 3627/2013-PE, 2014, at p. 10.

360. Therefore, both Law No. 30230 and the draft bill support the exact opposite conclusion that Claimant attempts to argue: Article 83 of the General Mining Law originally (*i.e.*, at the time of SMCV's 1998 Stabilization Agreement) imposed a limited scope on stabilization agreements, allowing only those activities listed in the Investment Plan attached to the Feasibility Study to enjoy the benefits and guarantees afforded by the stabilization agreement. That, of course, is consistent with SUNAT's and the Tax Tribunal's often-repeated reading of the 1998 Stabilization Agreement as covering only the identified investment project (the Leaching Project).

b. The Superior Court Reversed the First Instance Contentious Administrative Court's Decision and Upheld the 2008 Royalty Assessment

361. SUNAT and the Tax Tribunal appealed the 2008 First Instance Judgment nullifying the 2008 Royalty Assessment, taking the case to the Superior Court of Lima.<sup>709</sup> The Superior Court ultimately reversed the 2008 First Instance Judgment, holding:

On the other hand, as laid down by Article 83 of the TUO of the General Mining Law, specifically the fourth paragraph and the provisions of Article 22 of the Regulations of Title Nine of the General Mining Law, it is precise that the contractual benefits arising from the Stability Agreements lie solely with the title holder of the mining [activity] and cover exclusively and inclusively the investment made in a specific mining concession, which allows to establish by logical inference that a future investment subsequent to the date of conclusion of the contract, will not be covered by the benefits of the Stability Agreement signed before this latest investment; therefore, the benefits of legal Stability Agreements should not be applied broadly to the other activities of the title holders of mining activities; consequently, the so-called Primary Sulfide Project is not covered by the guarantees granted by such contract for promotion and guarantee of investment, since the project was implemented after having concluded the Stability Agreement with the State in 1998.<sup>710</sup>

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<sup>709</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016.

<sup>710</sup> Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 11 ("*De otro lado, conforme a lo dispuesto por el Artículo 83° del TUO de la Ley General de Minería, específicamente el cuarto párrafo, así como*

362. In its appeal, SUNAT raised the following issues related to the first-instance court’s ruling: (1) the court’s failure to apply Article 83 of the General Mining Law and Article 22 of the Regulations; (2) whether the stabilization agreement affords contractual benefits only to a specific investment project and not the concession generally; (3) whether the court’s ruling modified the law and the terms of the stabilization agreement; (4) whether the court erred in holding that the benefits of legal stabilization agreements should be applied broadly; and (5) whether the Primary Sulfide Project is not covered by the guarantees.<sup>711</sup>

363. The Tax Tribunal, one of the respondents in the case, in its submission before the Superior Court, also noted the change wrought—after SMCV’s 1998 Stabilization Agreement—by Law No. 30230, which broadened the scope of Article 83 of the General Mining Law by expressly stating that the stability covers not only the activities related to the investment project, but also additional investments, provided they are carried out within the same concession.<sup>712</sup> Therefore, according to the Tax Tribunal, it interpreted the prior text of Article 83 correctly when it determined that the scope of stabilization agreements are narrowly applied.<sup>713</sup>

364. In its Memorial, Claimant complains that the Superior Court merely “echo[ed] the novel interpretation first concocted by Mr. Isasi, and then adopted by SUNAT and the Tax Tribunal” in making its decision. In doing so, Claimant suggests that the Superior Court failed to

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*lo establecido en el Artículo 22° del Reglamento del Título Noveno de la referida ley, resulta preciso que los beneficios contractuales proveniente de la celebración de un contrato de estabilidad recaen únicamente en el titular de la actividad minera y exclusiva y excluyentemente sobre la inversión ejecutada en determinada concesión minera, lo cual permite establecer mediante inferencia lógica, que una inversión futura, posterior a la fecha de celebración del contrato no estará cubierta con los beneficios del contrato de estabilidad firmado antes de esta última inversión; por lo que, los beneficios de los contratos de estabilidad jurídica no deben ser aplicados de manera amplia a las demás actividades de los titulares mineros; en consecuencia el denominado proyecto de sulfuros primarios, no está cubierto con las garantías que otorga el referido contrato de garantía y promoción de la inversión, toda vez que el proyecto fue implementado con posterioridad a la celebración del contrato de estabilidad suscrito con el Estado en el año 1998.”).*

<sup>711</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at pp. 1-2.

<sup>712</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 3.

<sup>713</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at pp. 11-12.

conduct an independent analysis of the issues before it.<sup>714</sup> Claimant’s allegations are without merit. The Superior Court carefully reviewed SMCV’s arguments before the court.<sup>715</sup>

365. In particular, the Superior Court considered the relevant provisions in the General Mining Law and its Regulation and the express language of the 1998 Stabilization Agreement.<sup>716</sup> The Superior Court’s analysis started with the Agreement because, based on the *pacta sunt servanda* principle, the Agreement is “law between the parties that have agreed to it.”<sup>717</sup> The Superior Court went on to hold that the express language of Clause One of the Agreement limits the contractual benefits and guarantees only to the investment project of the Cerro Verde Leaching Project.<sup>718</sup> The Superior Court went on to hold that Clauses Two, Three, and Four of the Agreement further support an understanding that its scope relates only to the Cerro Verde Leaching Project.<sup>719</sup> The Superior Court noted that Clauses Five and Seven both impose obligations triggered by the information contained in the investment plan attached to the feasibility study, which served as the basis for Perú’s approval of the 1998 Stabilization Agreement.<sup>720</sup> The Superior Court then analyzed Article 83 of the Mining Law and Article 22 of its Regulation and concluded that, as Respondent explained in Section II.A.2 and II.A.3 above, these limit the scope of the Agreement to the activities related to the investment project for which the Agreement was signed (*i.e.*, the Leaching Project).<sup>721</sup>

366. Claimant also complains that the Superior Court, without any consideration of the merits, dismissed SMCV’s arguments related to its request that the interest and penalties

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<sup>714</sup> See Claimant’s Memorial at paras. 223-24.

<sup>715</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at pp. 3-4.

<sup>716</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at pp. 5-12.

<sup>717</sup> Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 7.

<sup>718</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at pp. 7-8.

<sup>719</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 8-9.

<sup>720</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 9-10.

<sup>721</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 12.

assessed on the 2008 Royalty Assessment be waived.<sup>722</sup> In its analysis, the Superior Court observed that SMCV had failed to raise the waiver argument during its administrative appeal before the Tax Tribunal, which had been the basis for the Tax Tribunal's dismissal of the claim. The Superior Court thus found that SMCV's waiver claim was inadmissible before the Superior Court.<sup>723</sup> Thus, no further analysis was required.<sup>724</sup>

c. Perú's Supreme Court Upheld the Superior Court's Decision and Confirmed that SMCV's 1998 Stabilization Agreement Does Not Cover the Concentrator Project

367. On February 23, 2016, SMCV submitted its appeal of the 2008 Appellate Judgment to the Supreme Court of Perú, seeking to annul the appellate decision and to uphold the 2008 First Instance Judgment.<sup>725</sup> On August 18, 2017, the Supreme Court issued its decision to instead uphold the 2008 Appellate Judgment and the underlying 2008 Royalty Assessment on the basis that the 1998 Stabilization Agreement is limited to the Leaching Project, and does not include the Concentrator Project.<sup>726</sup> Claimant summarily dismisses the Supreme Court's eighty-page decision. Claimant complains that the "Supreme Court endorsed Mr. Isasi's novel interpretation of the scope of the stability guarantees," suggesting, as Claimant did with respect to the Superior Court's decision, that the Supreme Court failed to conduct an independent analysis of the issues before it.<sup>727</sup> Contrary to Claimant's assertions, the Supreme Court made a thorough analysis of the case and of the parties' arguments submitted to it.

368. In its appeal to the Supreme Court, among other arguments, SMCV claimed that the Superior Court's analysis was insufficient and jumped to the conclusion that the 1998

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<sup>722</sup> See Claimant's Memorial at paras. 24, 224, 411.

<sup>723</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 14-15.

<sup>724</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 14-15.

<sup>725</sup> See Exhibit CE-138, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment, February 23, 2016.

<sup>726</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017.

<sup>727</sup> See Claimant's Memorial at para. 226; see also generally *id.* at paras. 225-30.

Stabilization Agreement applied only to the “Leaching Project.”<sup>728</sup> SMCV also contended that due process was not afforded to it because the Superior Court summarily dismissed its request to waive the interest and penalties pursuant to Article 170 of the Tax Code.<sup>729</sup>

369. The Supreme Court determined that the Superior Court’s decision was appropriately derived from a “systematic interpretation of the clauses of the Stabilization Agreement attributing to the dubious clauses the sense that results from all the clauses put together.”<sup>730</sup> The Supreme Court noted that the Superior Court “follow[ed] in its reasoning a criterion of interpretation of the contracts in general, as it is established in article 169 of the Civil Code in the interpretation of legal transactions.”<sup>731</sup>

370. The Supreme Court went on to corroborate the Superior Court’s findings that the clauses in the 1998 Stabilization Agreement expressly limit the scope of the stability regime to the “Cerro Verde Leaching Project” by citing to specific provisions contained in the 1998 Stabilization Agreement.<sup>732</sup> The Supreme Court cited to at least eight different clauses in the 1998 Stabilization Agreement that support the Superior Court’s ruling that the plain language of the 1998 Stabilization Agreement limits the scope of the contractual benefits and guarantees to the “Cerro Verde Leaching Project.”<sup>733</sup> The Supreme Court also went on to interpret the language of the Feasibility Study and Investment Program, both of which supported the Superior

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<sup>728</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 17.

<sup>729</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 18.

<sup>730</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 20 (“*Advirtiéndose que la inferencia se extrajo a partir de una interpretación sistémica de las cláusulas del Convenio de Estabilidad, atribuyéndole a las dudosas el sentido que resulte del conjunto de todas.*”).

<sup>731</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 20 (“*Esto es, siguiendo en su razonamiento un criterio de interpretación de los contratos en general, tal como lo estatuye el artículo 169° del Código Civil en la interpretación de los actos jurídicos.*”).

<sup>732</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at pp. 21-24.

<sup>733</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at pp. 21-24.

Court’s reasoning that the investment project in its concession of the “Cerro Verde Leaching Project” did not contain the infrastructure work called the “Primary Sulfide Plant.”<sup>734</sup>

371. The Supreme Court then turned to the issue of whether the Superior Court had appropriately interpreted and applied the General Mining Law and the corresponding Regulations.<sup>735</sup> Specifically, the Supreme Court focused on the legal nature of stabilization agreements in the mining industry, which are governed by Articles 78 through 90 of the General Mining Law.<sup>736</sup> The Supreme Court concluded that the General Mining Law limits the scope of stabilization agreements to the activities listed in the investment plans that were approved.<sup>737</sup>

372. Notably, the Supreme Court emphasized:

how important approval of the Investment Program is throughout the configuration of the Stability Agreement in the mining industry, since said approval is the basis not only of the calculation of the term to sign and formalize the Stability Agreement...but also to establish ‘contractual effects’, since they shall be subject to a termination condition, and it will occur if the mining activity owner does not comply with execution of the ‘approved Investment Program’ by the established deadline.<sup>738</sup>

373. It found that:

taking into consideration the grammatical context in which the wording was given for paragraph four of Article 83 of the TUO of the General Mining Law, this Supreme Court finds that this rule was not violated from a regulatory standpoint, because it was the legislator who provided that the effect of the contractual benefit would fall [“solely” or “excluding any other”] on “the mining

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<sup>734</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 26.

<sup>735</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 40.

<sup>736</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 54.

<sup>737</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 62.

<sup>738</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 58 (“*es oportuno resaltar la trascendencia que tiene en toda la configuración del Convenio de Estabilidad Jurídica en la industria minera la aprobación del Programa de Inversión, pues tal aprobación es base no solo para el cómputo del plazo para suscribir y elevar a escritura pública el Convenio de Estabilidad Jurídica, . . . sino también para establecer ‘los efectos del contrato’, pues estos estarán sujetos a condición resolutoria y esta se producirá si el titular de la actividad minera no cumple con la ejecución del ‘Programa de Inversión aprobado’, dentro del plazo establecido. . . .*”) (emphasis in the original).

company activities for which the investment has been made” and, thus, not on any activities of the mining company. In sum, the scope of the contractual benefit extends “solely” to those activities related to the investment according to what was set forth in the Feasibility Study. Furthermore, that is why the contractual design requires the submission of the Technical-Economic Feasibility Study with the information required in Article 19 of the rules approved by D .S . N. 024-93-EM, which requires a list of all of the works to be performed (with their specifications), as well as machinery and equipment to be acquired that will be used in the project, the deadline, execution schedule and detailed investments, including expenses with engineering and inspection, labor capital, general expenses applicable to the project, financial expenses during the building period, among others.<sup>739</sup>

374. Thus, the Supreme Court held that the Mining Law’s language was unequivocal in providing that mining stabilization agreements are limited to the activities related to the investment project for which the agreement was entered into.

375. The Supreme Court considered as well SMCV’s argument that the Superior Court failed to provide SMCV due process in connection with its request for waiver of the interest and penalties assessed on the 2008 Royalty Assessment.<sup>740</sup> The Supreme Court found that the Superior Court was not required to respond to complaints that SMCV failed to raise in its appeal before the Tax Tribunal.<sup>741</sup> The Supreme Court went on to hold that “the fact that the Superior

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<sup>739</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 73 (“[T]eniendo en cuenta el contexto gramatical en que se redactó el cuarto párrafo del artículo 83° del TUO de la Ley General de Minería, este Supremo Tribunal considera que no se infringió normativamente tal dispositivo, toda vez que es el propio legislador quien previno que el efecto del beneficio contractual recaería [“únicamente” o “excluyendo a cualquier otra”] a “las actividades de la empresa minera a favor de la cual se efectúe la inversión” y no así para cualquiera de las actividades de la empresa minera. En definitiva, los alcances del beneficio contractual se extienden “únicamente” a aquellas actividades relacionadas con la inversión en función de lo previsto por el Estudio de Factibilidad. Por ello, además, es que el diseño contractual exige la presentación del Estudio de Factibilidad Técnico-Económico con la información requerida en el artículo 19 ° del reglamento aprobado por D.S. N° 024-93-EM, en el que se exige la relación de todas las obras a llevarse a cabo (con sus especificaciones), la adquisición de maquinaria y equipo que se utilizará en el proyecto, el plazo, cronograma de ejecución, y monto de inversión desagregado, incluyendo gastos en ingeniería e inspección, capital de trabajo, gastos generales aplicables al proyecto, gastos financieros durante el periodo de construcción, entre otros.”) (emphasis omitted). Respondent has provided a corrected translation of this paragraph above.

<sup>740</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 37.

<sup>741</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 37.

Court succinctly explained the essential determining grounds for not examining those arguments [of SMCV] during the judicial proceeding is a sign that it took said allegations into account, but that they did not merit being analyzed to the extent that they were not reviewed by the tax authorities, which is the body before which one should really pose them. . . .”<sup>742</sup> Therefore, SMCV was afforded due process on the claims properly before the Superior Court.

376. Ultimately, the Supreme Court affirmed the Superior Court’s decision to uphold the 2008 Royalty Assessment on the grounds that the 1998 Stabilization Agreement, the feasibility study, and the investment plan submitted and executed by SMCV all relate exclusively to the “Cerro Verde Leaching Project.”<sup>743</sup> SMCV did not (because it could not) cite in its appeal the existence of any administrative act that approved the inclusion of the “Primary Sulfides Project” in the investment plan for the “Cerro Verde Leaching Project” that might support an understanding that the benefits of the 1998 Stabilization Agreement would extend to it.<sup>744</sup>

377. Claimant attempts to downplay or even dismiss the Peruvian Supreme Court’s ruling by claiming that it does not set precedent.<sup>745</sup> Claimant’s argument is inconsequential. As Drs. Eguiguren and Morales explain in their expert reports, the Supreme Court’s ruling is *res judicata* and is binding on the parties.<sup>746</sup> More importantly, it is a final judgment from the highest court in Perú on the exact same facts that are before this Tribunal.<sup>747</sup>

## **2. The 2006-2007 Royalty Assessment**

378. SMCV also appealed the Tax Tribunal’s resolution regarding the 2006-2007 Royalty Assessment all the way to the Supreme Court. Both the first-instance court and the

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<sup>742</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 38.

<sup>743</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 76-8.

<sup>744</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at p. 76.

<sup>745</sup> See Claimant’s Memorial at para. 340.

<sup>746</sup> See Exhibit RER-1, Eguiguren Report at para. 101; Exhibit RER-2, Morales Report at paras. 86-89.

<sup>747</sup> See Exhibit RER-1, Eguiguren Report at para. 101; Exhibit RER-2, Morales Report at para. 86-89.

Superior Court upheld the Tax Tribunal’s resolution and the 2006-2007 Royalty Assessment.<sup>748</sup> SMCV appealed the Superior Court’s decision to the Supreme Court, but then withdrew its appeal before the Supreme Court could render its decision.<sup>749</sup> Respondent addresses Claimant’s assertions regarding the two lower court decisions concerning the 2006-2007 Royalty Assessment below.

379. On September 27, 2013, SMCV appealed the Tax Tribunal’s resolution upholding the 2006-2007 Royalty Assessment to the Contentious Administrative Court (first instance court).<sup>750</sup> On April 14, 2016, the first-instance court affirmed the Tax Tribunal’s decision.<sup>751</sup> In its Memorial, Claimant again invokes Mr. Isasi’s 2006 memorandum and alleges that the Contentious Administrative Court merely “[e]cho[ed] Mr. Isasi’s interpretation of the scope of the stability guarantees” in reaching its conclusion, suggesting that the court failed to independently consider the issues before it.<sup>752</sup> Claimant’s assertion is without merit.

380. The Contentious Administrative Court carefully reviewed SMCV’s arguments before it. In analyzing the dispute, the Court considered relevant provisions in the General Mining Law, its Regulation, the legal nature of stabilization agreements, and specific provisions in the 1998 Stabilization Agreement.<sup>753</sup> Following its review of applicable legal sources, the Contentious Administrative Court held:

[T]hat, in this regard, although the benefits conferred by the stability agreements accrue to the operator of the mining enterprise in order to promote the investment that is made in a concession or Economic-Administrative Unit, said benefits only apply to the activities related

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<sup>748</sup> See Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016.

<sup>749</sup> See Claimant’s Memorial at paras. 234-35

<sup>750</sup> See Exhibit CE-98, SMCV Administrative Court Appeal of the Tax Tribunal’s Decision, 2006/07 Royalty Assessment, September 27, 2013.

<sup>751</sup> See Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016.

<sup>752</sup> Claimant’s Memorial at para. 232.

<sup>753</sup> See generally Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016.

to the aforesaid investment, the purpose of which is defined in the Feasibility Study, while in this case the stability arrangement does not cover the Primary Sulfides Project.<sup>754</sup>

In effect, the Contentious Administrative Court adopted the same rationale as the Supreme Court when it issued the August 18, 2017, decision upholding the 2008 Royalty Assessment.<sup>755</sup>

381. On May 2, 2016, SMCV appealed the Contentious Administrative Court's decision to the Superior Court.<sup>756</sup> On July 12, 2017, the Superior Court affirmed the Contentious Administrative Court's decision and upheld the 2006-2007 Royalty Assessment.<sup>757</sup> The Superior Court found that:

[Contratos-ley] are intended to attract private investments in accordance with the second paragraph of article 62 of the Political Constitution, to which end the State—which has the exclusive right to use and enjoy natural resources under article 66 of the Political Constitution—establishes guarantees and grants assurances to the investor, which guarantees and assurances are to be limited to the investments that appear in the respective [contratos-ley], due to the fact that it is an exceptional circumstance (constitutional shielding) in relation to the immediate application of the rules, vis-à-vis the rest of the investors who do not enjoy those guarantees and assurances and who, consequently, are subject to any changes subsequently introduced into legislation. Thus, the above guarantees and assurances cannot be made extensive to investments other than those indicated in the respective [contratos-ley], since the aforementioned constitutional 'shielding' would be excessive and entail a violation of the principle of equal treatment under the law as recognized under number 2 of article 2 of the Political Constitution.<sup>758</sup>

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<sup>754</sup> Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016, Section 8.9, at p. 25 (“ . . . si bien los beneficios conferidos mediante los contratos de estabilidad recaen en el titular de la actividad minera con el fin de promover la inversión que se desarrolla en una concesión o unidad Económica Administrativa, dichos beneficios solo se aplican sobre las actividades vinculadas a la citada inversión, cuyo objeto se encuentra delimitado en el Estudio de Factibilidad, siendo que en el presente caso tal régimen de estabilidad no alcanza al Proyecto de Sulfuros Primarios.”).

<sup>755</sup> See Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017.

<sup>756</sup> See Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016, May 2, 2016.

<sup>757</sup> See Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017.

<sup>758</sup> Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017, Considerando Décimo Primero, at pp. 17-18 (“[L]os contratos-ley persiguen atraer inversiones privadas de acuerdo con el segundo párrafo del artículo 62 de la Constitución Política, para lo cual el Estado, que tiene el derecho exclusivo de

382. Similar to the Contentious Administrative Court, the Superior Court analyzed the relevant law and language contained in the 1998 Stabilization Agreement before reaching its conclusion.<sup>759</sup> Like the Contentious Administrative Court decision, the Superior Court's decision was well-founded and reasonable. Indeed, Claimant does not suggest otherwise in its Memorial. Claimant's primary complaint in this arbitration with respect to the judicial rulings on the 2006-2007 Royalty Assessment case is that neither the first instance court nor the Superior Court addressed SMCV's argument regarding the waiver to impose penalties and interests based on Article 170 of the Tax Code.<sup>760</sup> Claimant's allegation is without merit, however.

383. Both, the First Instance Court and the Superior Court observed that SMCV had failed to raise the waiver argument during its administrative appeal before the Tax Tribunal, which had been the basis for the Tax Tribunal's dismissal of the claim. The courts thus found that SMCV's waiver claim was inadmissible.<sup>761</sup> Therefore, no further analysis was required.<sup>762</sup>

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*uso y disfrute de recursos naturales de acuerdo con el artículo 66 de la Constitución Política, establece garantías y otorga seguridades al inversionista, las mismas que deben circunscribirse a las inversiones que figuren en los respectivos contratos-ley, en razón que se trata de una situación excepcional (blindaje constitucional) respecto a la aplicación inmediata de las normas, en relación al resto de inversionistas que no gozan de dichas garantías y seguridades, y por ende, se encuentran sujetos a los cambios legislativos que pudieran darse posteriormente. De esta manera, las referidas garantías y seguridades no pueden extenderse a inversiones diferentes a las establecidas en los respectivos contratos-ley pues el mencionado blindaje constitucional resultaría excesivo, lo que conllevaría a la vulneración del principio de igualdad ante la ley previsto en el numeral 2 del artículo 2 de la Constitución Política.*" (emphasis added).

<sup>759</sup> See Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017.

<sup>760</sup> See Claimant's Memorial at para. 411.

<sup>761</sup> See Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016, at p. 12; see also Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017, at pp. 27-28.

<sup>762</sup> See Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016, at p. 12; Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017, at p. 28.

**I. PERÚ'S TAX ASSESSMENTS AND RELATED PENALTIES AND INTEREST DID NOT VIOLATE THE 1998 STABILIZATION AGREEMENT**

384. In its Memorial, Claimant alleges that, in addition to the Royalty Assessments, starting in December 2009, SUNAT also improperly assessed other taxes against SMCV that were not part of the stabilized regime, along with penalties and interest for SMCV's non-payment of those taxes.<sup>763</sup> In particular, Claimant refers to SUNAT's assessments in relation to the following taxes: General Sales Tax ("GST"), Income Tax, Additional Income Tax, Temporary Tax on Net Assets, and the IEM (Special Mining Tax) discussed in Section II.E.3 above. Claimant complains that SUNAT made these assessments based on MINEM's alleged novel interpretation of the scope of the 1998 Stabilization Agreement that Claimant says appeared in the June 2006 Report.<sup>764</sup> According to Claimant, SUNAT applied these taxes in an incorrect and inconsistent manner.<sup>765</sup>

385. The reality is different. As a general matter, SUNAT issued these assessments in accordance with Peruvian law and with the correct interpretation of the scope of the 1998 Stabilization Agreement. As already discussed extensively, SMCV's 1998 Stabilization Agreement did not extend to SMCV's activities and investments that were not related to the Leaching Project (the stabilized project), including the Concentrator Project. Instead, as discussed in Section II.D, the government's position with respect to the scope of stabilization agreements generally and with respect to SMCV's 1998 Stabilization Agreement, in particular, was consistent over time—and, notably, it was public. It was not a position that was newly developed in MINEM's June 2006 Report, as Claimant alleges.

386. In the following sections, Respondent addresses Claimant's specific assertions regarding alleged inconsistencies in SUNAT's decisions concerning other taxes.

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<sup>763</sup> See Claimant's Memorial at para. 266.

<sup>764</sup> See Claimant's Memorial at para. 266.

<sup>765</sup> See Claimant's Memorial at para. 266.

## 1. General Sales Tax

387. Between 2009 and 2017, SUNAT issued tax assessments against SMCV with respect to its obligation to pay GST at higher rates for fiscal years 2005-2011.<sup>766</sup> In 2003, the GST rate had increased from 16% to 17%.<sup>767</sup> Thus, SMCV was obligated to pay GST at the new, higher rate with respect to the sale of any goods and services that were not related to the Leaching Project (the stabilized project). (GST on sales related to the Leaching Project were to be assessed at the old 16% rate, due to the 1998 Stabilization Agreement.) Claimant asserts that SUNAT imposed taxes on SMCV in an improper and inconsistent manner following the regulatory change in the GST rate. In particular, Claimant complains that: (i) SUNAT applied the new rate to sales of scrap metal that were related to the Leaching Project;<sup>768</sup> (ii) SUNAT applied the new rate to services provided by non-resident suppliers;<sup>769</sup> and (iii) for some of those years, SUNAT imposed penalties for alleged accounting violations.<sup>770</sup> Contrary to Claimant's assertions, SUNAT's actions were consistent with Peruvian law. Respondent's Peruvian tax experts, Drs. Bravo and Picón, explain in their expert report that SUNAT acted consistently with Peruvian law in each of these matters.<sup>771</sup>

388. First, with respect to the tax applied on scrap metal sales, SMCV failed to prove to SUNAT that those sales were in fact related to the Leaching Project and thus taxable at the lower rate. When SUNAT confirmed the 2005 GST Assessment against SMCV, it explained that "the stability benefits are not awarded in a general manner to an individual or legal entity

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<sup>766</sup> See *infra* at Annex A.

<sup>767</sup> See Exhibit CA-101, Amendment to the General Sales Tax and Selective Consumption Tax Law, Law No. 28033, July 19, 2003, at Art. 1; Exhibit CA-89, Law of General Sales Tax and Selective Consumption Tax, Legislative Decree No. 821, April 22, 1996, at Art. 17.

<sup>768</sup> See Claimant's Memorial at paras. 269-70.

<sup>769</sup> See Claimant's Memorial at paras. 269-70.

<sup>770</sup> See Claimant's Memorial at para. 270.

<sup>771</sup> See Exhibit RER-3, Bravo and Picón Report at Section IX.A and C.1.

nor to a determined mining concession, but rather the benefits shall exclusively fall upon the activities done by the mining company in favor of which the investment is done in a determined project.<sup>772</sup> SUNAT stated that, in accordance with the Mining Law, those related activities would consist of “mining search, surveying, exploration, exploitation, general labor, benefit, marketing, and transportation.”<sup>773</sup> SUNAT then analyzed whether or not the sale of scrap metal was an activity sufficiently related to the stabilized project.<sup>774</sup> SUNAT determined it was not. SUNAT reasoned that the stabilized project covers the marketing of the copper cathodes that result from the Leaching Project, but does not cover the marketing activity of other, unrelated products (such as scrap metal).<sup>775</sup> Importantly, when the Tax Tribunal reviewed SMCV’s claims against the GST Assessment, it confirmed SUNAT’s analysis and held that SMCV had failed to prove that the sale of the scrap metal was in fact an activity related to the stabilized project.<sup>776</sup> SUNAT’s decision was reasonable and consistent with Peruvian law.

389. Second, SUNAT also acted reasonably in applying the GST to services provided by third-party non-residents. In its decisions, SUNAT explained that the 1998 Stabilization Agreement benefits only the activities conducted by the company or individual who signs the agreement (in this case, SMCV).<sup>777</sup> For example, if SMCV sells services to a third party, those services benefit from the stabilized regime; but, if a third party provides services to SMCV, those services do not benefit from the stabilized regime.<sup>778</sup> Thus, any services rendered by a third

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<sup>772</sup> Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at pp. 214-15 (emphasis in the original).

<sup>773</sup> Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at p. 214 (emphasis in the original).

<sup>774</sup> See Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at pp. 214-16.

<sup>775</sup> See Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at pp. 215-16; see also Exhibit RWS-4, Bedoya Statement at paras. 64-65.

<sup>776</sup> See Exhibit RE-173, Tax Tribunal Resolution No. 06365-2-2018, August 22, 2018 (notified to SMCV on November 16, 2018), at p. 50.

<sup>777</sup> See Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011, at p. 48.

<sup>778</sup> See Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011, at p. 48.

party—resident or non-resident in Perú—to SMCV do not benefit from the stabilized regime. In its decisions, SUNAT explained that it would be illegal to extend the benefits of a mining stabilization agreement to a third party.<sup>779</sup>

390. Third, SUNAT’s findings on accounting violations were entirely reasonable and within its discretion. SUNAT found that SMCV had failed to keep an accounting of its activities related to the Concentrator Project in Peruvian soles, as required by law. SUNAT explained that, in accordance with the 1998 Stabilization Agreement, SMCV was allowed to keep its accounts in U.S. Dollars only with respect to the Leaching Project (the stabilized project) but not with respect to the Concentrator Project (the non-stabilized project).<sup>780</sup>

391. Moreover, SUNAT explained that, because SMCV had both a stabilized project and a non-stabilized project, it had to keep its accounts separate per Peruvian law.<sup>781</sup> SUNAT cited to Article 83 of the Mining Law and Article 22 of the 1993 Mining Regulations. According to Article 22 of the 1993 Regulations, which confirm Mining Law Article 83’s rule that mining stabilization agreements benefit only the activities related to the stabilized investment project,<sup>782</sup> to determine the profits of its stabilized and non-stabilized operations, the mining company must keep its accounts separate.<sup>783</sup> SMCV failed to do so, and then failed to correct its errors when given the opportunity by SUNAT.<sup>784</sup> Thus, SUNAT reasonably imposed a corresponding fine on SMCV.

392. Claimant also complains about the fact that when SMCV challenged SUNAT’s decisions before the Tax Tribunal, the Tax Tribunal took some eight years to resolve some of the

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<sup>779</sup> See Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011, at p. 48.

<sup>780</sup> See Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015, at p. 155.

<sup>781</sup> See Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015, at p. 155.

<sup>782</sup> See Exhibit CA-1, General Mining Law at Art. 83; Exhibit RER-3, Bravo and Picón Report at para. 171.

<sup>783</sup> See Exhibit CA-2, Mining Regulations at Art 22; Exhibit RER-3, Bravo and Picón Report at paras. 171-72.

<sup>784</sup> See Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015, at p. 155.

cases.<sup>785</sup> Those delays, however, were simply the result of the heavy caseload being handled by the Tax Tribunal.<sup>786</sup> SMCV's case was not unique, nor has Claimant proven that the Tax Tribunal deliberately delayed SMCV's case over others. Tax Tribunal President Olano explains that the Tax Tribunal struggled in this period with tens of thousands of cases each year. In the past decade, the Tax Tribunal has implemented measures to reduce its delays in resolving cases, which have been met with some success.<sup>787</sup>

## 2. Income Tax

393. Between 2011 and 2020, SUNAT issued tax assessments against SMCV with respect to its obligation to pay Income Tax for fiscal years 2006-2013.<sup>788</sup> According to Claimant, under the stabilized regime, SMCV was entitled to depreciate buildings and fixed assets at a rate of up to 20% and to deduct projected (but not yet paid) payments for an employee profit-sharing obligation from its income tax base, both of which reduced its income tax obligations.<sup>789</sup> The non-stabilized regime, however, dictated a depreciation rate of 3% until 2009 and 5% starting in 2010, and required the taxpayer to have actually paid its employee profit-sharing obligations before it could deduct them from its income tax base.<sup>790</sup> Claimant asserts that SUNAT assessed income taxes owed by SMCV based on the following incorrect or inconsistent premises:

- (i) As with GST, SUNAT imposed penalties because SMCV did not keep separate accounts for the Leaching Project and the Concentrator Project;<sup>791</sup>

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<sup>785</sup> See Claimant's Memorial at para. 271.

<sup>786</sup> See Exhibit RWS-5, Olano Statement at para. 27.

<sup>787</sup> See Exhibit RWS-5, Olano Statement at para. 27.

<sup>788</sup> See *infra* at Annex A.

<sup>789</sup> See Claimant's Memorial at para. 272.

<sup>790</sup> See Claimant's Memorial at para. 272.

<sup>791</sup> See Claimant's Memorial at para. 274.

- (ii) SUNAT imposed penalties for SMCV's accounting in U.S. Dollars, instead of in local currency with respect to the Concentrator Project;<sup>792</sup>
- (iii) For the 2006-2011 Income Tax Assessments, SUNAT applied the non-stabilized depreciation regime to the assets it identified as being related to the Concentrator Project, but for the 2012 and 2013 Income Tax Assessments, it applied the non-stabilized depreciation regime to all of SMCV's assets;<sup>793</sup>
- (iv) For the 2007, 2008, 2012, and 2013 Income Tax Assessments, SUNAT imposed the non-stabilized regime to the employee profit-sharing obligation deduction;<sup>794</sup>
- (v) SUNAT rejected SMCV's request to deduct SMCV's GEM overpayments for Q4 2011 to Q3 2012.<sup>795</sup>

394. Contrary to Claimant's allegations, SUNAT was not inconsistent or incorrect with respect to these income tax assessments. Instead, as Drs. Bravo and Picón explain in their expert report, SUNAT acted in accordance with Peruvian law in each of these matters.<sup>796</sup>

395. Separate Accounting and Accounting in U.S. Dollars: As explained above, Peruvian law required SMCV to account separately for its operations corresponding to its stabilized and non-stabilized projects.<sup>797</sup> SMCV failed to do so. In addition, SMCV was allowed to keep its accounts in U.S. Dollars only with respect to the operations of the stabilized Leaching Project, but not with respect to the Concentrator Project. Accounting in U.S. Dollars was one of the benefits granted under the stabilized regime; thus, it only applied to the Leaching Project. SMCV therefore failed to comply with Peruvian law by keeping all of its accounts in

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<sup>792</sup> See Claimant's Memorial at para. 274.

<sup>793</sup> See Claimant's Memorial at para. 275.

<sup>794</sup> See Claimant's Memorial at para. 277.

<sup>795</sup> See Claimant's Memorial at para. 274.

<sup>796</sup> See Exhibit RER-3, Bravo and Picón Report at Section IX C. 2.

<sup>797</sup> See *supra* at Section III.1.1; see also Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400, March 30, 2012, at pp. 122-26; Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014, at pp. 172-76; Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015, at pp. 374-77; Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015, at pp. 323-28.

U.S. Dollars.<sup>798</sup> Accordingly, SUNAT reasonably imposed corresponding penalties on the company.

396. Depreciation Rate: SUNAT's application of the non-stabilized regime in fiscal years 2006-2011 differed from its application in fiscal years 2012-2013 as a result of SMCV's own actions. As Claimant's witness Mr. Pedro Choque explains, between 2006 and 2011, SMCV provided to SUNAT a list of its fixed assets, which allowed SUNAT to determine which assets corresponded to the Leaching Project or to the Concentrator Project.<sup>799</sup> Based on that determination, SUNAT was then able to distinguish and apply the stabilized regime to the assets related to the Leaching Project, while applying the non-stabilized regime to the assets related to the Concentrator Project. For fiscal years 2012 and 2013, however, SMCV changed the way in which it provided the list of assets to SUNAT, changing the codes for each asset.<sup>800</sup> With that change, SUNAT was no longer able to differentiate the assets. SUNAT could not look at SMCV accounts as an alternative way to differentiate the assets, either, because (as just discussed) SMCV did not keep separate accounts for its stabilized and non-stabilized projects. Without a reliable means to differentiate the assets, SUNAT had to apply the non-stabilized depreciation regime to all of its assets.<sup>801</sup> SUNAT gave SMCV the opportunity to provide information that would allow SUNAT to determine which assets corresponded to which project.<sup>802</sup> When SMCV did not do so, SUNAT acted reasonably and in accordance with Peruvian law in defaulting to applying the non-stabilized regime rates to all assets.

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<sup>798</sup> See *supra* Section III.I.1; see also Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400, March 30, 2012, at pp. 122-26; Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014, at pp. 172-77; Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015, at pp. 374-77; Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015, at pp. 323-28.

<sup>799</sup> See Exhibit CWS-4, Witness Statement of Pedro Choque Ticona, October 19, 2021 ("Choque Statement"), at para. 22.

<sup>800</sup> See Exhibit CWS-4, Choque Statement at para. 23.

<sup>801</sup> See, e.g., Exhibit CE-228, Requirement Result No. 0122190001430, November 4, 2019, at p. 24.

<sup>802</sup> See, e.g., Exhibit CE-228, Requirement Result No. 0122190001430, November 4, 2019, at p. 24

397. Employee Profit-Sharing Deduction: SUNAT's application of the non-stabilized regime for the years 2007, 2008, 2012, and 2013 with respect to the employee profit-sharing deduction again arises out of SMCV's failure to keep separate accounting for the Leaching Project and Concentrator Project. Claimant's witness Mr. Choque admits that, for those years, even though SUNAT gave SMCV opportunities to correct its actions, SMCV did not provide SUNAT with any tools to distinguish the payments it had booked in relation to each of the projects, which could have permitted SUNAT to determine which amounts could or could not be deducted from the income tax base.<sup>803</sup> Lacking that information, SUNAT acted reasonably and in accordance with Peruvian law when it defaulted to applying the non-stabilized regime for the years 2007, 2008, 2012, and 2013 with respect to SMCV's employee profit-sharing deductions.

398. GEM Deductions: The GEM Law provides that companies may deduct payments made under the GEM for purposes of determining their income tax liabilities. However, as SUNAT explained in a report it issued in May 2018 (in response to a taxpayer's inquiry), the GEM does not provide any basis for a company to deduct GEM overpayments (*i.e.*, payments that were not actually owed under the GEM law) from its income tax liabilities.<sup>804</sup> If a company has made those overpayments, it may request a refund within the four-year statute of limitations.<sup>805</sup> In SMCV's case, however, SMCV failed to timely request a refund for the GEM payments related to Q4 2011 to Q3 2012.<sup>806</sup> The fact that SMCV failed to submit its request on time does not grant it the right to deduct those payments for purposes of determining their income tax liabilities.

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<sup>803</sup> See Exhibit CWS-4, Choque Statement at para. 28; see also, *e.g.*, Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013, at p. 139.

<sup>804</sup> See Exhibit RE-39, SUNAT, Report No. 055-2018-SUNAT/7T0000, May 29, 2018, at pp. 4-5.

<sup>805</sup> See Exhibit CA-14, Tax Code at Art. 43.

<sup>806</sup> See *supra* at Section II.E.3.b.

399. Claimant also complains about the fact that, when SMCV challenged SUNAT's decisions before the Tax Tribunal, the Tax Tribunal took some five years or more to resolve some of the cases.<sup>807</sup> Respondent has explained that such delays were the unfortunate result of the heavy caseload handled by the Tax Tribunal; Claimant has not shown that SMCV's appeals were somehow singled out for slower resolutions.

### **3. Additional Income Tax**

400. In 2003, Perú imposed a new tax called Additional Income Tax, which taxes at a 4.1% rate any expense that is deemed to be an indirect profit distribution, such as management fees paid to parent companies.<sup>808</sup> Claimant objects that SUNAT issued assessments against SMCV for this tax for fiscal years 2007-2013, on the grounds that such a tax could not apply to SMCV by virtue of the 1998 Stabilization Agreement.<sup>809</sup> According to Claimant, SUNAT unreasonably disregarded the 1998 Stabilization Agreement and applied the tax, and moreover did so on all of SMCV's expenses (not just those unrelated to the Leaching Project). Here again, SUNAT did so because SMCV had failed to keep separate accounts for the Leaching Project and the Concentrator Project.<sup>810</sup> Contrary to Claimant's allegations, SUNAT's actions in the face of SMCV's self-inflicted information gap were entirely reasonable.

401. When it was trying to determine how much Additional Income Tax SMCV owed to SUNAT, SUNAT asked SMCV to provide it with information that would allow it to distinguish between expenses related to the Leaching Project and those related to the Concentrator Project. As SUNAT explained in its resolution assessing the Additional Income Tax, SMCV failed to provide the necessary information.<sup>811</sup> Thus, SUNAT was left with no other

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<sup>807</sup> See Claimant's Memorial at para. 278.

<sup>808</sup> See Exhibit CA-90, Law Amending the Income Tax Law, Law No. 27804, August 2, 2002, at Art. 17.

<sup>809</sup> See Claimant's Memorial at para. 280; *infra* at Annex A.

<sup>810</sup> See Claimant's Memorial at para. 280.

<sup>811</sup> See, e.g., Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018, August 22, 2018, at pp. 24- 25.

choice but to default to applying the Additional Income Tax to all of the potentially taxable expenses. Drs. Bravo and Picón confirm in their expert report that SUNAT acted in accordance with Peruvian law in each of those assessments.<sup>812</sup>

402. Claimant again complains that when it challenged SUNAT's decisions before the Tax Tribunal, the Tax Tribunal was too slow to act and did not resolve the cases before SMCV withdrew its appeals in order to file this arbitration.<sup>813</sup> As Respondent explained above, these delays, however, were result of the heavy caseload handled by the Tax Tribunal. As such, the Tax Tribunal did not act inappropriately or arbitrarily in processing SMCV's appeals.

#### **4. Temporary Tax on Net Assets**

403. In December 2004, Perú created a new Temporary Tax on Net Assets.<sup>814</sup> This tax is calculated by applying a 0.4% tax on any net assets (minus depreciation) exceeding one million soles. SUNAT issued tax assessments for this tax against SMCV for fiscal years 2009, 2010, 2011, and 2013.<sup>815</sup> According to Claimant, SUNAT wrongfully disregarded the 1998 Stabilization Agreement when it did so, because it applied the tax to all of SMCV's net assets.<sup>816</sup> Claimant also alleges that SUNAT treated all of SMCV's fixed assets as non-stabilized for the Temporary Tax on Net Assets, while treating only fixed assets related to the Concentrator Project as non-stabilized for purposes of the Income Tax.<sup>817</sup>

404. Consistent with its other assessments, SUNAT maintained the position that the 1998 Stabilization Agreement applied only to that which was related to the Leaching Project, not the Concentrator Project.<sup>818</sup> SUNAT asked SMCV to provide information that would allow it to

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<sup>812</sup> See Exhibit RER-3, Bravo and Picón Report at Section IX.C.3.

<sup>813</sup> See Claimant's Memorial at para. 281.

<sup>814</sup> See Exhibit CA-112, Temporary Tax on Net Assets Law, Law No. 28424, December 21, 2004, at Arts. 1 and 11.

<sup>815</sup> See Claimant's Memorial at para. 282; *infra* at Annex A.

<sup>816</sup> See Claimant's Memorial at para. 282.

<sup>817</sup> See Claimant's Memorial at para. 348(a).

<sup>818</sup> See, e.g., Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014, at p. 79.

distinguish between the assets that were related to the Leaching Project and those that were not. SMCV, however, failed to provide that information—apparently because SMCV did not comply with its statutory obligation to keep separate accounting of stabilized and non-stabilized projects. Without that information, SUNAT could not reliably determine which assets could benefit from the 1998 Stabilization Agreement with respect to this tax.<sup>819</sup> Thus, SUNAT was left with no other choice but to apply Temporary Tax on Net Assets to all of SMCV’s assets. Moreover, there was no inconsistency between how SUNAT treated assets for purposes of the Temporary Tax on Net Assets and how it treated assets for the purposes of the Income Tax. This difference results from the tax base applicable to each tax (the Temporary Tax on Net Assets is based on net assets, the Income tax is based on income, expenses, costs, deductions, etc.). In light of SMCV’s failure to provide adequate information, SUNAT was able to make a differentiation for one tax but not for the other. As Drs. Bravo and Picón explain in their expert report, SUNAT acted in accordance with Peruvian law in each of these matters.<sup>820</sup>

405. Once again, Claimant objects to the fact that the Tax Tribunal took some five years to issue a decision for some of the cases.<sup>821</sup> As Respondent explained above, there was nothing inappropriate about such delays, which, however regrettable, simply resulted from the heavy caseload handled by the Tax Tribunal. Notably, SMCV withdrew its appeals before they were resolved by the Tribunal, in order to pursue arbitration.

## **5. Special Mining Tax and Complementary Mining Pension Fund**

406. As discussed above in Section II.E, Perú created the IEM (Special Mining Tax) in 2011.<sup>822</sup> Claimant complains that in December 2017, SUNAT started to issue assessments against SMCV with respect to this tax for fiscal years 2011-2013 even though (according to

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<sup>819</sup> See, e.g., Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014, at pp. 80-82.

<sup>820</sup> See Exhibit RER-3, Bravo and Picón Report at Section IX.C.4.

<sup>821</sup> See Claimant’s Memorial at para. 283.

<sup>822</sup> See *supra* at Section II.E.

Claimant) SMCV was not obliged to pay such a tax until after the end of 2013 due to the 1998 Stabilization Agreement.<sup>823</sup> Contrary to Claimant's assertions, SUNAT's assessments were entirely consistent with the fact that the 1998 Stabilization Agreement only covered the Leaching Project. As Claimant itself admits, SUNAT assessed this tax based on the operating profit that it attributed to the Concentrator only (not to the Leaching Project), and it imposed penalties on SMCV for failing to file IEM declarations on time.<sup>824</sup>

407. Claimant also complains that, in December 2019, SUNAT issued an assessment against SMCV for fiscal year 2013 in relation to the Complementary Mining Pension Fund.<sup>825</sup> This fund is a social security fund that is funded by 0.5% of all of the company's employees' monthly gross salaries and 0.5% of the company's annual earnings, before taxes. Claimant objects that SUNAT calculated the Complementary Mining Pension Fund Assessment for 2013 over SMCV's entire gross income, instead of over only the income related to the Concentrator Project (the non-stabilized project).<sup>826</sup> As occurred with respect to other taxes, SUNAT had no choice but to assess SMCV's tax debt on its full income, because SMCV failed to comply with its statutory obligation to keep separate accounts as between its stabilized and non-stabilized projects.<sup>827</sup> As Drs. Bravo and Picón explain in their expert report, SUNAT acted reasonably and in accordance with Peruvian law in assessing the IEM and Complementary Mining Pension Fund on SMCV.<sup>828</sup>

408. Claimant also complains that SUNAT acted inconsistently, because it did differentiate profits for the purposes of assessing the IEM, but failed to do so for purposes of the

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<sup>823</sup> See Claimant's Memorial at para. 284; *infra* at Annex A.

<sup>824</sup> See Claimant's Memorial at para. 284.

<sup>825</sup> See Claimant's Memorial at para. 285.

<sup>826</sup> See Claimant's Memorial at para. 285.

<sup>827</sup> See Claimant's Memorial at para. 285.

<sup>828</sup> See Exhibit RER-3, Bravo and Picón Report at Section IX.C.5.

Complementary Mining Pension Fund.<sup>829</sup> Claimant's argument is misleading. The IEM's tax base is the company's operating profits. SUNAT was able to differentiate the Leaching Project's operating profits from the Concentrator Project's operating profits based on SMCV's financial statements. The Complementary Mining Pension Fund's tax base, however, is the company's net income, before taxes plus the company's employees' monthly gross salaries. To determine the SMCV's tax base to pay the Complementary Mining Pension Fund, SUNAT required much more accounting information than that included in the company's financial statements. Because SMCV failed to keep separate accounting for the Leaching Project and the Concentrator Project, it was impossible for SUNAT to differentiate between SMCV's obligations to pay the Complementary Mining Pension Fund with respect to each project.

409. In sum, SUNAT consistently acted on the basis that the Concentrator Project was not covered by the 1998 Stabilization Agreement and, when it had the information necessary to do so, it assessed taxes owed by SMCV based on this understanding. Where SMCV failed to maintain and/or supply the necessary information to establish SMCV's entitlement to stabilized tax treatment (*e.g.*, for specific assets, expenses, or income) in relation to the Leaching Project, that omission by SMCV left SUNAT to assess taxes against the whole of SMCV's operations. SUNAT's decisions were wholly reasonable and in accordance with Peruvian law.

### **III. JURISDICTIONAL OBJECTIONS**

410. The Tribunal need not even reach the factual or legal merits of Claimant's claims, because the Tribunal lacks jurisdiction to hear almost all of those claims. The Tribunal lacks jurisdiction on four grounds: *First*, Claimant has failed to file its claims based on SUNAT's Royalty and Tax Assessments within the limitations period under Article 10.18.1 of the TPA. *Second*, Claimant's claims arising from the Royalty and Tax Assessments are based on acts or

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<sup>829</sup> See Claimant's Memorial at para. 285.

facts that occurred before the TPA entered into force, and thus, the claims fall outside of the Tribunal's jurisdiction in accordance with Article 10.1.3 of the TPA. *Third*, because SMCV elected to submit most of the claims that Claimant presses in these proceedings (*i.e.*, those challenging the Royalty and Tax Assessments against SMCV) before SUNAT's appeal body (*i.e.*, Claims Division) and, in some cases, also before the Tax Tribunal, Claimant is precluded from submitting (on behalf of SMCV) those claims to this Tribunal in accordance with Article 10.18.4 of the TPA. *Fourth*, because Claimant failed to demonstrate that it relied on the 1998 Stabilization Agreement when it established or acquired its covered investments, Claimant may not submit (on behalf of SMCV) claims of breach of the 1998 Stabilization Agreement pursuant to Article 10.16.1(b).

411. This Section details how Claimant's claims fall outside of the Tribunal's jurisdiction. Section III.A demonstrates that Claimant (and SMCV) first knew or should have known of the alleged breaches related to the Royalty and Tax Assessments, and that it incurred loss or damage related to those alleged breaches, more than three years before it submitted its Notice of Arbitration to ICSID on February 28, 2020. Section III.B establishes that Claimant's claims related to the Royalty and Tax Assessments are based on acts or facts that occurred before the TPA entered into force on February 1, 2009, and, thus, Claimant's claims based on those measures fall outside of the Tribunal's jurisdiction. Section III.C explains that SMCV's claims of breach of the 1998 Stabilization Agreement submitted (through Claimant) in this arbitration, and its claims before SUNAT and the Tax Tribunal, share the same fundamental basis, and, thus, Claimant is precluded from re-submitting those claims (on behalf of SMCV) in these arbitral proceedings. Section III.D demonstrates that Claimant has failed to prove that it relied on the 1998 Stabilization Agreement when it acquired its covered investments on March 19, 2007 and, thus, Claimant may not in these arbitral proceedings submit (on behalf of SMCV) claims of breach of that Agreement.

**A. CLAIMANT’S CLAIMS OF ALLEGED BREACHES BASED ON THE ROYALTY AND TAX ASSESSMENTS ARE OUTSIDE OF THE TRIBUNAL’S JURISDICTION, BECAUSE CLAIMANT FIRST KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED BREACHES, AND THAT IT INCURRED LOSS OR DAMAGE, MORE THAN THREE YEARS BEFORE IT FILED ITS NOTICE OF ARBITRATION**

412. The Tribunal lacks jurisdiction over Claimant’s claims based on the Royalty and Tax Assessments in this arbitration, because Claimant (and SMCV) first knew about the measures that it now challenges more than three years before it submitted its Notice of Arbitration to ICSID. The TPA prohibits the submission of claims to arbitration if more than three years have passed from the date on which a claimant first knew or should have known of the alleged breaches, and that it incurred related loss or damage. Claimant submitted its Notice of Arbitration on February 28, 2020. Yet Claimant (and SMCV) was well aware more than three years before that date—that is, before February 28, 2017—of the Royalty and Tax Assessments, and related measures such as SUNAT’s imposition of penalties and interest, that it now alleges constitute breaches of Perú’s obligations under the 1998 Stabilization Agreement and the TPA. Thus, Claimant’s claims based on those alleged breaches fall outside of the TPA’s explicit limitations period, and, therefore, the Tribunal lacks jurisdiction to hear those claims.

413. Article 10.18.1 of the TPA sets a time limit for claims to be brought to investor-state arbitration under Articles 10.16.1(a) and 10.16.1(b). Article 10.18.1 states:

No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.<sup>830</sup>

414. Article 10.16.1(a) of the TPA pertains to claims submitted by a claimant on its own behalf; Article 10.16.1(b) pertains to claims submitted by a claimant “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly

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<sup>830</sup> Exhibit CA-10, United States-Perú Trade Promotion Agreement, signed April 12, 2006, entered into force February 1, 2009 (“US-Perú TPA”), at Art. 10.18(1) (emphasis added).

or indirectly . . . .”<sup>831</sup> Both Articles apply to Claimant’s claims in this case, because Claimant has submitted claims on its own behalf (for alleged breaches of the TPA) and on behalf of SMCV, which Claimant claims it owns or controls indirectly through its 53.56% ownership interest<sup>832</sup> (for alleged breaches of the 1998 Stabilization Agreement).

415. To determine whether a claimant’s claims satisfy the limitations period such as the one set out in Article 10.18.1, tribunals have followed these three steps: “(i) first, [the tribunal] must identify the cut-off date for the three-year limitations period; (ii) second, [the tribunal] must determine whether the [c]laimant knew or should have known of the alleged breach or breaches before that cut-off date; and (iii) third, [the tribunal] must determine whether the [c]laimant knew or should have known that it had incurred loss or damage before that date.”<sup>833</sup>

416. Notably, Article 10.18.1 inquires when a claimant “first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . or [the enterprise it owns or controls] has incurred loss or damage.”<sup>834</sup> According to the *Corona Materials v. Dominican Republic* tribunal, “The [t]ribunal’s first task is thus to determine the earliest possible date on which the [c]laimant would have obtained knowledge of the alleged breach of the [t]reaty and of the incurred loss or damage . . . .”<sup>835</sup> Thus, for this Tribunal to have jurisdiction over Claimant’s claims, the claims must have been submitted to arbitration within three years of

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<sup>831</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

<sup>832</sup> See Claimant’s Memorial at para. 28; Claimant’s Notice of Arbitration at para. 21.

<sup>833</sup> Exhibit RA-1, *Infito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, June 3, 2021 (“*Infito v. Costa Rica*, Award”), at para. 217; see also Exhibit RA-2, *Spence International Investments LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, October 25, 2016 (“*Spence v. Costa Rica*, Interim Award”), at paras. 208-13; Exhibit RA-3, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections In Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 (“*Corona Materials v. Dominican Republic*, Award on Preliminary Objections”), at paras. 193, 198, 217.

<sup>834</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.1 (emphasis added).

<sup>835</sup> Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 198 (emphasis added); see also Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at n. 139 (citing Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections).

“the earliest possible date” when Claimant first knew or should have first known of the alleged breaches and loss or damage. Otherwise, the claims are time-barred.

417. Tribunals have held that a treaty’s limitations period should be interpreted strictly to bar untimely claims.<sup>836</sup> For example, the *Corona Materials* tribunal, interpreting the limitations provision under CAFTA-DR (which is identical to the provision in the TPA<sup>837</sup>), held that “the three-year period is a strict one, . . . .”<sup>838</sup> Similarly, the *Resolute Forest Products v. Canada* tribunal, when interpreting the limitations provision of NAFTA (which is similar to the provision in the TPA<sup>839</sup>), held that “this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period, . . . .”<sup>840</sup> Accordingly, if the Tribunal finds that Claimant first knew or should have known of the alleged breaches based on the Royalty and Tax Assessments, and that loss or damage resulted, more than three years before Claimant filed its Notice of Arbitration, Claimant’s claims with respect to those measures will be time-barred.

418. To recall, Claimant filed its Notice of Arbitration on February 28, 2020. The three-year limitations period cut-off date is thus February 28, 2017. As explained below, Claimant first knew or should have known of the alleged breaches of the 1998 Stabilization

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<sup>836</sup> See Exhibit RA-4, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 (“*Grand River v. USA*, Decision on Jurisdiction”), at para. 29; Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 199; Exhibit RA-5, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018 (“*Resolute Forest Products v. Canada*, Decision on Jurisdiction”), at para. 153.

<sup>837</sup> See Exhibit RE-112, The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), Chapter Ten, signed on August 5, 2004, entered into force on January 1, 2009, at Art. 10.18.1 (“No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.”).

<sup>838</sup> Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 199.

<sup>839</sup> See Exhibit RE-113, North American Free Trade Agreement (NAFTA), signed on December 8, 1993, entered into force on January 1, 1994, at Art. 1116(2) (“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”).

<sup>840</sup> Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 153; see also Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 29 (noting, when interpreting the limitations provisions under NAFTA, that they “introduce[] a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification . . . .”).

Agreement and the TPA based on the Royalty and Tax Assessments, and that it had incurred corresponding loss or damage, before February 28, 2017. Sections III.A.1 and III.A.2 set out Claimant's pre-February 28, 2017 knowledge of the alleged breaches of the 1998 Stabilization Agreement and the TPA, in turn.

### **1. Alleged Breaches of the 1998 Stabilization Agreement**

419. Claimant (on behalf of SMCV) alleges that Perú breached the 1998 Stabilization Agreement when SUNAT denied SMCV the stability benefits that, in Claimant's view, were guaranteed under that Agreement with respect to SMCV's activities related to the Concentrator Project. According to Claimant and its expert, Mr. Alfredo Bullard, the alleged breaches occurred "each time SUNAT's Royalty and Tax Assessments became binding and enforceable against SMCV,"<sup>841</sup> and for each of those times, Perú committed a separate breach of the 1998 Stabilization Agreement.<sup>842</sup> Although Perú maintains that Claimant's allegations are unfounded and that there has been no breach of any obligation under the 1998 Stabilization Agreement, as explained in detail in Section IV.A below, Claimant's contract claims (on behalf of SMCV) based on the Royalty and Tax Assessments fall outside of the TPA's limitations period, and, thus, fall outside of the Tribunal's jurisdiction to hear such claims. Claimant's attempt to characterize the alleged breaches as occurring only when each individual assessment (or each individual penalty or interest related to such assessment) became "binding and enforceable" is without merit and, thus, does not cure the fact that SMCV's claims of breach of the 1998 Stabilization Agreement, brought here by Claimant, fall outside of the limitations period.

420. The date when Claimant first knew or should have known of the alleged breaches and alleged loss or damage must be traced to a government action (or actions) that (i) forms the

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<sup>841</sup> Claimant's Memorial at para. 351; *see also* Exhibit CER-2, Bullard Report at para. 88.

<sup>842</sup> *See* Claimant's Memorial at para. 352; Exhibit CER-2, Bullard Report at para. 88.

basis of the claimant's claim;<sup>843</sup> and (ii) gives rise to an independent cause of action.<sup>844</sup>

According to the *Spence v. Costa Rica* tribunal, if the government action constituting the alleged breach gives rise to a "self-standing cause of action,"<sup>845</sup> the limitations period starts to run on the date the alleged government action occurred. As the *Infinito Gold v. Costa Rica* tribunal held, "[F]or the statute of limitations to start running, the claimant must be legally in a position to bring a claim."<sup>846</sup>

421. Importantly, government actions do not give rise to separate breaches and the limitations period does not renew each time an alleged government action occurs if the action being challenged is part of a "series of similar or related actions by a respondent state."<sup>847</sup> In *Grand River v. USA*, for example, the claimants argued that there was "not one limitations period, but many" because the limitations period, according to the claimants, renewed upon the occurrence of each government act.<sup>848</sup> In that case, the government act in question purportedly took place when each individual state of the United States implemented the 1998 Master Settlement Agreement that had been concluded to settle litigation by several U.S. states against certain U.S. cigarette manufacturers.<sup>849</sup> The *Grand River* tribunal rejected the claimants'

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<sup>843</sup> See, e.g., Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 227 ("it is important, for purposes of its jurisdictional assessment, that the Tribunal identifies what it understands to be the essence of the Claimants' case.").

<sup>844</sup> See Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 210; Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 247; Exhibit RA-6, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002 ("*Mondev v. USA*, Award"), at para. 70; Exhibit RA-7, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013 ("*Apotex v. USA*, Award on Jurisdiction"), at paras. 317, 330.

<sup>845</sup> Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 210; see also Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 247; Exhibit RA-6, *Mondev v. USA*, Award at para. 70, Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 317, 330.

<sup>846</sup> Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 247; see also Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 210; Exhibit RA-6, *Mondev v. USA*, Award at para. 70; Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction, at para. 330.

<sup>847</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; see also Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>848</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81.

<sup>849</sup> See Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at paras. 1, 81.

argument, finding that the claimants' analysis would "render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."<sup>850</sup> Likewise, the *Corona Materials* tribunal held that "[w]here a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series.'"<sup>851</sup>

422. Importantly here, the limitations period for an alleged breach claimed under a treaty is not tolled by subsequent litigation related to that alleged breach.<sup>852</sup> This makes sense, because the purpose of a limitations period is to ensure "diligent prosecution of known claims"<sup>853</sup> and to provide legal certainty and finality to potential disputing parties.<sup>854</sup> According to the *Apotex v. USA* tribunal (which reviewed a similar limitations provision in NAFTA<sup>855</sup>), "[T]he FDA measure in question is an '*administrative decision*' . . . any challenge to the FDA decision itself had to be brought within three years, and could not be delayed by resort to court action."<sup>856</sup>

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<sup>850</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; see also Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 ("Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty.").

<sup>851</sup> Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>852</sup> See Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208.

<sup>853</sup> Exhibit RA-8, *Vannessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, August 22, 2008 ("*Vannessa Ventures v. Venezuela*, Decision on Jurisdiction"), at p. 31.

<sup>854</sup> See Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 247 ("This conclusion is consistent with the *raison d'être* of a statute of limitations, which is to promote legal certainty by avoiding that claimants delay bringing their claims."); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 ("[T]he Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims."); Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 332 ("[T]his provides the certainty and finality intended by NAFTA Article 1116(2), and forces parties to initiate proceedings with respect to (as here) administrative decisions, . . .").

<sup>855</sup> Exhibit RE-113, North American Free Trade Agreement (NAFTA), signed on December 8, 1993, entered into force on January 1, 1994, at Art. 1116(2) ("An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.").

<sup>856</sup> Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 330-31 (emphasis in original).

The tribunal emphasized that “[a]ny conclusion otherwise would provide a very easy means to evade the clear rule in NAFTA Article 1116(2) in most cases (i.e., by filing any court action, however hopeless).”<sup>857</sup>

423. In this case, the essence of Claimant’s claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement is SUNAT’s purported failure to apply the stability benefits that Claimant asserts were guaranteed under that Agreement to SMCV’s Concentrator Project. According to Claimant, by issuing the Royalty and Tax Assessments against SMCV (and penalties and interest related thereto), SUNAT acted in contravention of the 1998 Stabilization Agreement, which, in Claimant’s view, guarantees stability benefits to SMCV’s Concentrator Project. We discuss below the point in time when Claimant first knew or should have known of the alleged breaches caused by the Royalty and Tax Assessments and that it incurred loss or damages related thereto.

424. *Knowledge of alleged breaches and loss as of August 18, 2009.* The first date on which Claimant first knew or should have known of SUNAT’s alleged breaches of the 1998 Stabilization Agreement was when SMCV was notified of the first assessment from SUNAT on August 18, 2009, indicating that SMCV owed royalty payments for its activities related to the Concentrator Project for the years 2006-2007.<sup>858</sup> At that moment, SMCV (and thus Claimant) knew how SUNAT interpreted the 1998 Stabilization Agreement (*i.e.*, as not including any products produced from the Concentrator Project) and that SMCV had incurred (or would incur) loss or damages on the basis of that interpretation. That is, Claimant (and SMCV) knew at that

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<sup>857</sup> Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 331.

<sup>858</sup> See Claimant’s Memorial at Annex A, p. 1 (“SUNAT Assessment Notified to SMCV: 18/08/09”); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 1 of PDF (“[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT (“*Recibido 18 AGO. 2009*”)); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at p. 1 (“On August 18, 2009, we were served with the following assessment and fine resolutions linked to the assumed imposition of the mining royalty for the period running from October 2006 to December 2007.”); see *infra* at Annex A, p. 1.

time that SMCV would have to pay royalties, and that SMCV would have to pay taxes at an unstabilized rate, for activities related to the Concentrator Project.

425. Recognizing that Claimant first had knowledge of the alleged breaches based on the date on which SMCV was given notice of the complained-of government measure is consistent with the *Corona Materials* tribunal's holding. The *Corona Materials* tribunal, interpreting the limitations provision under CAFTA-DR (which is identical to that of the TPA<sup>859</sup>), held that the date when claimant first received notice of the alleged breach about which it was complaining in the arbitration (*i.e.*, the date it received notice that the Environmental Ministry was not going to grant the environmental license) was when claimant "knew that its license application was formally rejected . . . ."<sup>860</sup> The tribunal further emphasized that "there is no doubt that the day on which [claimant] received that [August 18, 2010] letter [notifying claimant of the rejection] must be considered to be the date on which the Claimant first gained actual knowledge of the non-issuance of the license."<sup>861</sup>

426. According to Claimant, SMCV was notified of the 2006-2007 Royalty Assessment on August 18, 2009.<sup>862</sup> The Assessment (which was issued one day earlier on August 17, 2009) provided that:

the [stability] benefits granted under the contract only relate to the "**Cerro Verde Leaching Project**". Therefore, as to the exploitation

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<sup>859</sup> See Exhibit RE-112, The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), Chapter Ten, signed on August 5, 2004, entered into force on January 1, 2009, at Art. 10.18.1 ("No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.").

<sup>860</sup> Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 219.

<sup>861</sup> Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at paras. 220-21.

<sup>862</sup> Claimant's Memorial at Annex A, p. 1 ("SUNAT Assessment Notified to SMCV: 18/08/09"); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 1 of PDF ("[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT ("*Recibido 18 AGO. 2009*")"); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at p. 1 ("On August 18, 2009, we were served with the following assessment and fine resolutions linked to the assumed imposition of the mining royalty for the period running from October 2006 to December 2007."); *see also infra* at Annex A, p. 1.

of mining resources for the “**Primary Sulfide Project**”, because it is not subject to the contract’s protective scope, the payment of the mining royalties is required in accordance with the provisions of Law No. 28256 and its amending provisions.<sup>863</sup>

Thus, the Assessment expressly stated the support and legal basis for the assessment and indicated that SMCV was required to pay royalties on that basis.

427. Additionally, at that moment, Claimant (and SMCV) knew or should have known of the alleged loss or damage, because the Assessment (on the second and fourth pages) explicitly states the amount of royalties that SMCV was required to pay for every month it owed royalties for the Concentrator Project (*see* Table 1 below).<sup>864</sup> In addition, the Assessment also stated the penalties and interest that SMCV owed for failing to timely pay the royalties for its Concentrator Project, as well as additional penalties.<sup>865</sup> As a matter of Peruvian law, the amounts stated in the Assessment were immediately due and owing to SUNAT, and therefore were liabilities of SMCV.<sup>866</sup> SMCV experienced financial harm (in the form of increased liabilities) at that moment, even if its cash outlay came at a later time.

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<sup>863</sup> *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 3 of PDF(emphasis in original); *see also id.* at Annex No. 1.

<sup>864</sup> *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at pp. 2, 4 of PDF; *see also* Claimant’s Memorial at Annex A, p. 1.

<sup>865</sup> *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at pp. 5-28, 31 of PDF; Claimant’s Memorial at Annex A, p. 1.

<sup>866</sup> Exhibit RER-3, Bravo and Picón Report at para. 61; *see also* Exhibit RER-2, Morales Report at paras. 106-07.

Table 1: Claimant First Knew Or Should Have Known of the Alleged Loss Or Damage When SMCV Was Notified of the First Assessment, i.e., 2006-2007 Royalty Assessment<sup>867</sup>

III. DETERMINACION DE LA REGALIA MINERA				
<b>I. Producto con Cotización Internacional - Concentrado de Cobre</b>				
DESCRIPCIÓN	MONEDA	Oct-2006	Nov-2006	Dic-2006
Valor Bruto de Venta	US\$	0.00	0.00	15 904 507.88
(-) Deducciones	US\$	0.00	0.00	(2 016 562.84)
Base de Referencia del Mes	US\$	0.00	0.00	13 887 945.04
<b>II. Producto con Cotización Internacional - Concentrado de Molibdeno</b>				
DESCRIPCIÓN	MONEDA	Oct-2006	Nov-2006	Dic-2006
Valor Bruto de Venta	US\$	0.00	0.00	0.00
(-) Deducciones	US\$	0.00	0.00	0.00
Base de Referencia del Mes	US\$	0.00	0.00	0.00
Total Base de Referencia Acumulada	US\$	0.00	0.00	13,887,945.04
1% hasta US\$ 60,000,000.00	US\$	0.00	0.00	138,879.45
2% más de US\$ 60,000,000.00 a US\$ 120,000,000.00	US\$	0.00	0.00	0.00
3% más de US\$ 120,000,000.00	US\$	0.00	0.00	0.00
Total Regalía Calculada	US\$	0.00	0.00	138,879.45
Total Regalía Acumulada	US\$	0.00	0.00	138,879.45
Regalía Acumulada al Mes Anterior	US\$	Oct-2006	Nov-2006	Dic-2006
Regalía Calculada del Mes	US\$	0.00	0.00	138,879.45
Total Regalía Calculada del Mes	US\$	0.00	0.00	138,879.45
Tipo de Cambio Promedio Compra				3.205
Total Regalía Calculada del Mes	SI.	0.00	0.00	445,108.64

III. DETERMINACION DE LA REGALIA MINERA													
<b>I. Producto con Cotización Internacional - Concentrado de Cobre</b>													
DESCRIPCIÓN	MONEDA	Ene-2007	Feb-2007	Mar-2007	Abr-2007	May-2007	Jun-2007	Jul-2007	Ago-2007	Sep-2007	Oct-2007	Nov-2007	Dic-2007
Valor Bruto de Venta	US\$	32,883,103.31	63,646,615.57	39,854,211.95	70,196,095.13	28,199,807.42	78,345,353.21	152,361,716.81	6,373,871.97	180,218,864.69	332,975,327.78	123,944,825.58	103,172,932.62
(-) Deducciones	US\$	-4,509,623.76	-11,213,931.51	-4,925,908.24	-12,936,229.43	-6,775,058.89	-12,907,068.80	-20,954,944.20	-7,578,659.75	-24,177,125.11	-9,370,123.46	-14,913,282.41	-12,397,860.86
Base de Referencia del Mes	US\$	28,373,279.55	52,432,684.06	34,928,303.71	57,259,865.70	21,424,748.53	65,438,284.41	131,406,772.61	1,202,787.78	156,041,739.58	323,605,204.30	109,031,543.17	90,775,071.76
<b>II. Producto con Cotización Internacional - Concentrado de Molibdeno</b>													
DESCRIPCIÓN	MONEDA	Ene-2007	Feb-2007	Mar-2007	Abr-2007	May-2007	Jun-2007	Jul-2007	Ago-2007	Sep-2007	Oct-2007	Nov-2007	Dic-2007
Valor Bruto de Venta	US\$	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	4,620,158.27	6,757,200.08	4,423,650.83	6,340,933.58
(-) Deducciones	US\$	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Base de Referencia del Mes	US\$	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	4,620,158.27	6,757,200.08	4,423,650.83	6,340,933.58
Total Base de Referencia Acumulada	US\$	28,373,279.55	80,865,963.59	115,736,268.90	172,966,105.60	194,390,854.13	259,829,138.74	391,285,911.35	360,063,123.57	550,725,051.42	881,087,455.80	994,542,869.80	1,001,656,675.14
1% hasta US\$ 60,000,000	US\$	283,732.80	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00	600,000.00
2% más de US\$ 60,000,000.00 a US\$ 120,000,000.00	US\$	0.00	416,119.27	1,114,725.38	1,200,000.00	1,200,000.00	1,200,000.00	1,200,000.00	1,200,000.00	1,200,000.00	1,200,000.00	1,200,000.00	1,200,000.00
3% más de US\$ 120,000,000.00	US\$	0.00	0.00	0.00	1,588,983.17	2,231,725.62	4,194,874.16	6,137,977.34	8,101,893.71	12,921,751.54	22,832,623.67	26,236,280.09	29,146,760.25
Total Regalía Calculada	US\$	283,732.80	1,016,119.27	1,714,725.38	3,388,983.17	4,031,725.62	5,964,874.16	9,937,977.34	9,901,893.71	14,721,751.54	24,632,623.67	28,036,280.09	30,946,760.25
Total Regalía Acumulada	US\$	283,732.80	1,016,119.27	1,714,725.38	3,388,983.17	4,031,725.62	5,964,874.16	9,937,977.34	9,901,893.71	14,721,751.54	24,632,623.67	28,036,280.09	30,946,760.25
Regalía Acumulada al Mes Anterior	US\$	0.00	-283,732.80	-1,016,119.27	-1,714,725.38	-3,388,983.17	-4,031,725.62	-5,964,874.16	-9,937,977.34	-9,937,977.34	-14,721,751.54	-24,632,623.67	-28,036,280.09
Regalía Calculada del Mes	US\$	283,732.80	732,386.47	698,606.11	1,674,257.79	642,742.45	1,963,148.54	3,943,103.18	4,763,774.20	9,918,872.13	3,463,696.42	2,913,480.16	
Total Regalía Calculada del Mes	US\$	283,732.80	732,386.47	698,606.11	1,674,257.79	642,742.45	1,963,148.54	3,943,103.18	0.00	4,763,774.20	9,918,872.13	3,463,696.42	2,913,480.16
Tipo de Cambio Promedio Compra		3.182	3.199	3.185	3.179	3.167	3.170	3.160	3.169	3.136	3.019	3.000	2.980
Total Regalía Calculada del Mes	SI.	908,675.10	2,336,312.84	2,225,860.46	5,326,781.26	2,035,886.34	6,221,180.87	12,460,266.06	0.00	16,009,916.89	29,920,922.96	10,210,949.26	8,692,170.88

428. Furthermore, when SMCV was notified of the 2006-2007 Royalty Assessment on August 18, 2009, Claimant had the right to bring a claim to challenge the Assessment.

<sup>867</sup> Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at pp. 2, 4 of PDF (emphasis added).

According to Respondent's expert in Peruvian contract law, Dr. Morales, SMCV had a legal cause of action at the moment it was notified of the Royalty Assessment by SUNAT.<sup>868</sup> Dr. Morales further explains in his expert report that, it is at this moment that SMCV knew how SUNAT was interpreting and applying the 1998 Stabilization Agreement.<sup>869</sup>

429. SUNAT subsequently issued Royalty Assessments against SMCV for subsequent tax periods 2008, 2009, 2010-2011, Q4 2011, 2012, and 2013, as well as Tax Assessments for the periods of 2005 through 2013. There is no question that SUNAT's assessments are, in the words of the *Grand River* tribunal, "a series of similar and related actions by a respondent state,"<sup>870</sup> because the assessments are all based on SUNAT's consistent interpretation of the scope of the very same contract—the 1998 Stabilization Agreement—in light of the same applicable provisions of the Mining Law and Regulations. Thus, Claimant's attempt to characterize the subsequent assessments as separate acts and, therefore, separate alleged breaches of the 1998 Stabilization Agreement<sup>871</sup> is without merit. As the *Grand River* tribunal recognized, allowing a claimant to focus on "the most recent transgression" in a "series of similar and related actions by a respondent state" would allow an investor to "render the limitations provisions ineffective."<sup>872</sup> This Tribunal should not countenance that outcome.

430. Claimant itself excludes from its claims (on behalf of SMCV) the 2006-2007 and 2008 Royalty Assessments, because it acknowledges that the claims are outside of the limitations

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<sup>868</sup> Exhibit RER-2, Morales Report at paras. 106, 108.

<sup>869</sup> See Exhibit RER-2, Morales Report at paras. 96-98, 102-103.

<sup>870</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; see also RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>871</sup> See Claimant's Memorial at para. 352.

<sup>872</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; see also Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208 (finding that a continuing course of conduct, without more, cannot renew the limitation period as doing so "would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims.").

period.<sup>873</sup> But Claimant’s self-editing of its claims of breach does nothing to change the state of its actual knowledge about the alleged breach, which dates back to the 2006-2007 Royalty Assessment. It is the knowledge of an alleged breach and loss that is key for purposes of a limitations period. As the *Resolute Forest Products* tribunal held, “[T]he triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.”<sup>874</sup> This conclusion is consistent with the purpose of a limitations period, which is to discourage claimants from sitting on known claims.<sup>875</sup> In any case, even if the Tribunal were to decide to exclude from its consideration the 2006-2007 and 2008 Royalty Assessments (it should not), SMCV was notified of the 2009 Royalty Assessment (which is included in Claimant’s claims of breach (on behalf of SMCV)) on July 8, 2011,<sup>876</sup> years before the limitations cut-off date of February 28, 2017, and thus Claimant’s claims based on SUNAT’s assessments are still outside of the limitations period.

431. Claimant contends that it knew of the alleged breaches and loss only when SUNAT’s assessments become “final, definitive, and enforceable” against SMCV.<sup>877</sup> In particular, Claimant asserts that SUNAT’s assessments only become final and binding on three dates: (i) for assessments that were challenged before the Tax Tribunal, on the next business day after SMCV was served with the Tax Tribunal’s decision; (ii) for assessments that were not challenged before SUNAT or the Tax Tribunal, on the next business day after the appeal deadline expired; or (iii) for assessments as to which SMCV submitted a withdrawal request of

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<sup>873</sup> Claimant’s Memorial at para. 355.

<sup>874</sup> Exhibit RA-5, *Resolute Forrest Products v. Canada*, Decision on Jurisdiction at para. 153 (“The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result.”).

<sup>875</sup> Exhibit RA-1, *Infinito v. Costa Rica*, Award at para. 247; *see also* Exhibit RA-8, *Vannessa Ventures v. Venezuela*, Decision on Jurisdiction at p. 31; Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 208.

<sup>876</sup> *See* Claimant’s Memorial at para. 353; Claimant’s Memorial at Annex A, p. 1; *see infra* at Annex A, p. 1.

<sup>877</sup> Claimant’s Memorial at para. 352; Exhibit CER-2, Bullard Report at paras. 81-82, 86.

its challenges, on the next business day after the Tax Tribunal or SUNAT served its acceptance of withdrawal (or when SMCV submitted its withdrawal request).<sup>878</sup>

432. It is obvious that by making such an assertion, Claimant is trying to bring its untimely claims within the limitations period, because its experienced counsel team knows full well that its claims are otherwise clearly outside of the TPA's limitations period. The most obvious example of Claimant's calculated efforts comes in the third category above, when it relies on the date that SMCV requested withdrawal of its challenges for certain Tax Assessments. It is worth noting that for many of the Tax Assessments (and related penalties) against SMCV (at least 26),<sup>879</sup> SMCV requested withdrawal of its challenge the day before it filed its Notice of Arbitration here.<sup>880</sup> By Claimant's logic, any claimant with genuinely untimely claims could overcome the limitations period by filing a challenge before a local administrative body or court and then waiting until the very last minute before filing its Notice of Arbitration to withdraw that challenge. That cannot be the result intended by a limitations period because "[that] would provide a very easy means to evade the clear rule [under a treaty's limitations provision]."<sup>881</sup>

433. Thus, Claimant's artificial attempts to overcome the TPA's limitations period are futile, and worse, they are illustrations of exactly the types of conduct that the limitations period is designed to deter. As explained earlier, tribunals have consistently held that a treaty's limitations period must be interpreted strictly in order to bar stale claims. More significantly, tribunals agree that a claimant cannot use a court decision (in this case, SUNAT's and the Tax Tribunal's decisions on SMCV's challenges of the assessments) or subsequent court proceedings (in this case, proceedings before SUNAT's Claims Division or the Tax Tribunal) to toll the

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<sup>878</sup> Claimant's Memorial at para. 353.

<sup>879</sup> See *infra* at Annex A, pp. 2-10.

<sup>880</sup> Claimant's Memorial at Annex A.

<sup>881</sup> Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 331.

limitations period,<sup>882</sup> because if that were allowed, the limitations period would be wholly ineffective to bar stale and outdated claims.<sup>883</sup> In *Apotex*, the claimant challenged an administrative decision issued by the Food and Drug Administration before U.S. courts, and argued that those later court proceedings brought its claim within the limitations period. The tribunal disagreed, holding that “the limitation period applicable to a discrete government or administrative measure . . . is not tolled by litigation, or court decisions relating to the measure.”<sup>884</sup> It further held that because “the FDA measure in question is an ‘*administrative decision*’, . . . the FDA measure could have been the subject of a separate complaint under the NAFTA; [] NAFTA does not require claimants to exhaust all available remedies before challenging non-judicial decisions. The position, therefore, is that any challenge to the FDA decision itself had to be brought within three years, and could not be delayed by resort to court action.”<sup>885</sup>

434. Similar to *Apotex*, SUNAT’s assessments in this case are administrative decisions, and Claimant could have brought a claim (on behalf of SMCV, as it is doing now in this arbitration) under the TPA challenging those assessments without waiting for the Tax Tribunal to render its decisions. As with NAFTA at issue in the *Apotex* arbitration, the TPA in this case does not require claimants to exhaust all available remedies before challenging such administrative decisions. Thus, any resort to the TPA’s investor-state arbitration forum to challenge SUNAT’s assessments must have been filed within the TPA’s three-year limitations period. That limitations period cannot be tolled through subsequent domestic law challenges to SUNAT’s assessments, as Claimant attempts to argue in this case.

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<sup>882</sup> Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 328, 330-32; see also Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-6, *Mondev v. USA*, Award at para. 87.

<sup>883</sup> Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>884</sup> Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at para. 328.

<sup>885</sup> Exhibit RA-7, *Apotex v. USA*, Award on Jurisdiction at paras. 330-31 (emphasis in original).

435. In sum, because Claimant (and SMCV) first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement and that SMCV suffered loss or damage resulting therefrom on August 18, 2009<sup>886</sup> (when SMCV was first notified of the first Royalty Assessment against it), the limitations period for that alleged breach started to run from that date. As discussed above, all subsequent assessments (with respect to both royalties and taxes) are a “series of similar and related actions by a respondent state.” Thus, the subsequent assessments are not separate breaches as Claimant alleges, but acts that are inextricably tied to SUNAT’s consistent interpretation of the 1998 Stabilization Agreement, as explicitly set out in the first Royalty Assessment (and repeated in each assessment thereafter).<sup>887</sup> Given that SMCV was notified of the first assessment on August 18, 2009, more than 10 years before Claimant filed its Notice of Arbitration here, that assessment and all of the assessments (both royalty and tax) that followed on the same basis necessarily fall outside of the Tribunal’s jurisdiction. Claimant’s knowledge of the breaches and damage about which it complains in this arbitration with respect to the 1998 Stabilization Agreement dates back to that notice.

436. *Knowledge of alleged breaches and loss as of September 15, 2009.* Even if the Tribunal were not to accept Respondent’s proposition that Claimant first knew or should have known of the alleged breaches on August 18, 2009 (it should), the Tribunal should, at a

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<sup>886</sup> Claimant’s Memorial at Annex A, p. 1 (“SUNAT Assessment Notified to SMCV: 18/08/09”); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 1 of PDF (“[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT (“*Recibido 18 AGO. 2009*”); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at p. 1 (“On August 18, 2009, we were served with the following assessment and fine resolutions linked to the assumed imposition of the mining royalty for the period running from October 2006 to December 2007.”); *see also infra* at Annex A, p. 1.

<sup>887</sup> *See, e.g.*, Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010, at p. 31 of PDF; Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011, at p. 37; Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016, at p. 13 of CE-142A PDF and p. 10 of CE-142B PDF; Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017, at pp. 42-65; Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018, at pp. 42-67 of CE-176 PDF, pp. 43-68 of CE-176A PDF, pp. 43-68 of CE-176B PDF, and pp. 43-68 of CE-176C PDF; Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018, at pp. 58-82 of PDF; Exhibit CE-51, SUNAT Assessment No. 052-003-0007147, May 27, 2011, at p. 3 of PDF; Exhibit CE-66, SUNAT Assessment No. 052-003-0008345, March 28, 2012, at p. 3 of PDF.

minimum, find that Claimant knew or should have known of the alleged breaches and loss no later than September 15, 2009, when SMCV requested SUNAT to reconsider the 2006-2007 Royalty Assessment.<sup>888</sup>

437. When SMCV exercised its right to challenge the first assessment issued against it (*i.e.*, the 2006-2007 Royalty Assessment) through SUNAT’s Claims Division, SMCV was undoubtedly in a position to (and did, of course) bring a legal claim challenging the measure—the point in time identified by the *Spence* tribunal as surely establishing the investor’s knowledge of the breach. When SMCV appealed the 2006-2007 Royalty Assessment before SUNAT’s Claims Division by requesting reconsideration of that Assessment, it formally disputed the legal basis upon which SUNAT issued the Assessment (*i.e.*, the applicability or not of the 1998 Stabilization Agreement). Indeed, the *Spence* tribunal considered the date on which a claimant challenged the respondent’s regulatory conduct as the date on which claimant knew or should have known of the alleged breach, as it held that “this conduct . . . in-and-of-itself indicates knowledge by that Claimant of a core breach that is now alleged . . . .”<sup>889</sup> Here, SMCV, through its Request for Reconsideration, challenged SUNAT’s legal basis for issuing the 2006-2007 Royalty Assessment, and in particular, it claimed that SUNAT’s basis for the Assessment was “wrongly maintain[ed]”<sup>890</sup> and contrary to the provisions of the 1998 Stabilization Agreement:

[I]t is legally and contractually clear that the Stabili[zation] Agreement covers all investments made in the aforementioned mining concession and in the “Cerro Verde Beneficiation Plant” beneficiation . . . , without restricting its scope solely to the investment presented in the initial Feasibility Study.

[T]he provisions that regulate the Stabili[zation] Agreements do not limit the benefit to a specific investment (and much less to that

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<sup>888</sup> Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009; *see also* Claimant’s Memorial at para. 172 (“On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments.”); *see infra* at Annex A, p. 1.

<sup>889</sup> Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 250.

<sup>890</sup> Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at p. 18.

contemplated in the original Feasibility Study, which is but a minimum investment commitment), as SUNAT wrongly maintains. On the contrary, it is clear that, according to these legal provisions, stability covers all the activities and investments made within the mining concessions or Economic-Administrative Units that were set out in the Agreement.<sup>891</sup>

438. Further, Claimant (and SMCV) knew or should have known that SMCV had incurred loss by the time SMCV challenged the 2006-2007 Royalty Assessment through SUNAT's Claims Division. As previously stated, SMCV incurred the loss or damage at the moment that it was required to pay the Assessment, which under Peruvian law was immediately as of the date of issuance of the Assessment.<sup>892</sup> Necessarily, Claimant (and SMCV) obtained knowledge of that loss or damage at the latest when SMCV received the 2006-2007 Royalty Assessment informing it of that liability. Indeed, the Assessment expressly states the amount of royalties, penalties, and interest that SMCV owed.<sup>893</sup> Moreover, SMCV also knew or should have known that it would continue to accrue interest on the outstanding royalties, penalties, and interest until those amounts were paid. The 2006-2007 Royalty Assessment expressly states that interest will accrue and the amount of interest owed will be updated over time while payment is outstanding.<sup>894</sup> According to the *Grand River* tribunal, “[O]ne incurs a loss when liability accrues; a person may ‘incur’ expenses before he or she actually dispenses of any funds . . . . A party is said to incur losses . . . even if there is no immediate outlay of funds or if the obligations are to be met through future conduct.”<sup>895</sup> Thus, by the time SMCV challenged the Assessment before SUNAT, even before it made the payment demanded by the 2006-2007 Royalty

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<sup>891</sup> Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at pp. 15, 18 (emphasis added).

<sup>892</sup> Exhibit RER-3, Bravo and Picón Report at para. 61; *see also* Exhibit RER-2, Morales Report at paras. 106-07.

<sup>893</sup> *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at pp. 2, 4, 30 of PDF.

<sup>894</sup> *See, e.g.*, Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 5 of PDF (stating that “the debt has been calculated until 17/08/2009. After that date it will be updated pursuant to article 7 of D.S. 157-2004-EF”).

<sup>895</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 77; *see also* Exhibit RA-6, *Mondev v. USA*, Award at para. 87.

Assessment, Claimant knew of SMCV's loss or damage based on the royalties assessed and the penalties and interest related thereto that SMCV was required to pay.

439. Therefore, even if for some reason the Tribunal were not to find that Claimant first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement when SMCV was notified of the 2006-2007 Royalty Assessment, Claimant's claims (on behalf of SMCV) of breach of the 1998 Stabilization Agreement are still outside of the limitations period. This is because, at minimum, SMCV (and thus Claimant) necessarily knew of the alleged breaches of the Agreement by the time it challenged the 2006-2007 Royalty Assessment before SUNAT on September 15, 2009. At this point, SMCV was inescapably aware of its core claim of breach of the 1998 Stabilization Agreement about which it (through Claimant) complains in these proceedings—because that same argument about the 1998 Stabilization Agreement was the very basis for its legal challenge to the Royalty Assessment. As that date also occurred years outside of the limitations period, Claimant's claims (on behalf of SMCV) that SUNAT's assessments (both royalty and tax) breached the 1998 Stabilization Agreement fall outside of the Tribunal's jurisdiction on this basis as well.

440. *Knowledge of alleged breaches and loss when SUNAT first notified SMCV of each category of assessments (i.e., royalties and taxes):* As explained in paragraphs 424 through 439 above, Claimant's (and SMCV's) knowledge of the alleged breaches of the 1998 Stabilization Agreement and loss related thereto based on SUNAT's assessments against SMCV should be grounded on the first assessment in the series of SUNAT's Royalty and Tax Assessments, *i.e.*, the 2006-2007 Royalty Assessment, and should equally apply to every other assessment or action of Respondent taken on the same legal basis thereafter. Claimant contends that Respondent's breaches are separate acts, and that its knowledge (and thus the limitations period) must be

applied separately.<sup>896</sup> However, even if the Tribunal were to find that Claimant's (and SMCV's) knowledge of the alleged breaches of the 1998 Stabilization Agreement as applied to Tax Assessments cannot be imputed from Claimant's earlier knowledge of the alleged breaches of that Agreement arising from SUNAT's Royalty Assessments (it should not), Claimant's claims (on behalf of SMCV) of breach of the 1998 Stabilization Agreement based on the Royalty and Tax Assessments would still fall outside of the limitations period.

441. With respect to Royalty Assessments, as discussed in paragraphs 424 through 439 above, the limitations period began to run from the first time Claimant (and SMCV) knew or should have known that SUNAT interpreted the 1998 Stabilization Agreement as not applying to SMCV's Concentrator Project and, thus, that SMCV was obligated to pay royalties to Perú with respect to products from that Plant. As noted above, SMCV (and thus Claimant) acquired this knowledge when it was notified of the first assessment on August 18, 2009,<sup>897</sup> and SMCV challenged it on September 15, 2009.<sup>898</sup> As all of SUNAT's subsequent Royalty Assessments, which were made on the same legal basis, constitute a "series of similar and related actions,"<sup>899</sup> all claims of breach of the 1998 Stabilization Agreement arising from the Royalty Assessments must fall outside of the limitations period and, thus, fall outside of the Tribunal's jurisdiction.

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<sup>896</sup> See Claimant's Memorial at paras. 355, 367.

<sup>897</sup> See Claimant's Memorial at Annex A, p. 1 ("SUNAT Assessment Notified to SMCV: 18/08/09"); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 1 of PDF ("[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT" ("*Recibido 18 AGO. 2009*")); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at p. 1 ("On August 18, 2009, we were served with the following assessment and fine resolutions linked to the assumed imposition of the mining royalty for the period running from October 2006 to December 2007."); see also *infra* at Annex A, p. 1.

<sup>898</sup> See Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009; Claimant's Memorial at para. 172 ("On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments."); see *infra* at Annex A, p. 1.

<sup>899</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; see also Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

442. With respect to Tax Assessments, the date when Claimant first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement was on the date SMCV was notified of the first Tax Assessment issued by SUNAT or, alternatively, on the date when SMCV challenged that Tax Assessment before SUNAT's Claims Division. SMCV (and thus Claimant) knew no later than December 30, 2009 that SMCV was required to pay taxes for activities related to the Concentrator Project on the basis of SUNAT's interpretation of the 1998 Stabilization Agreement. On that date, SMCV received notice from SUNAT that SMCV owed GST related to the copper products produced through the Concentrator Project.<sup>900</sup> SMCV challenged that Tax Assessment before SUNAT on January 28, 2010.<sup>901</sup> Both dates occurred long before the cut-off date of February 28, 2017 and, thus, Claimant's claims (on behalf of SMCV) based on that Assessment fall outside of the Tribunal's jurisdiction. Because all of SUNAT's subsequent Tax Assessments constitute a "series of similar and related actions"<sup>902</sup> in that they all rely on the same construction of the 1998 Stabilization Agreement, all of SMCV's breach of contract claims (brought here by Claimant) based on any of the subsequent Tax Assessments also fall outside of the limitations period, and, thus, outside of the Tribunal's jurisdiction.

443. The Table below summarizes the dates on which Claimant and SMCV first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement based on various of SUNAT's Royalty and Tax Assessments, and of the corresponding loss or damage

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<sup>900</sup> See Claimant's Memorial at Annex A, p. 2 ("SUNAT Assessment Notified to SMCV: 30/12/09"); see also *infra* at Annex A, p. 2; Exhibit CE-35, SUNAT Assessments No. 052-003-0005626 to No. 052-003-0005637, December 28, 2009; Exhibit RE-123, Acknowledgement of Notifications of SUNAT Assessment Resolutions Nos. 052-003-0005626 to 052-003-0005637 to SMCV, December 30, 2009; Exhibit RE-124, Acknowledgement of Notifications of SUNAT Fine Resolutions Nos. 052-002-0003816 to 052-002-0003827 to SMCV, December 30, 2009

<sup>901</sup> See Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010, at p. 1 ("CONSIDERING Claim File No. 0550340003016 dated January 28, 2010 interposed by SOCIEDAD MINERA CERRO VERDE S.A.A. . . ."); see also *infra* at Annex A, p. 2.

<sup>902</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; see also Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

resulting from those Assessments. In sum, because all of the dates on which Claimant (and SMCV) first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement—namely, the dates on which SMCV was notified of the first assessment against it (either royalty or tax), or at the latest, on which SMCV challenged the first such assessment—occurred long before the cut-off date of February 28, 2017, Claimant’s claims (on behalf of SMCV) based on alleged breaches of the 1998 Stabilization Agreement fall outside of the TPA’s limitations period. Thus, the Tribunal has no jurisdiction to hear those claims.

444. Even if the Tribunal were to take the approach of considering separately the categories of SUNAT’s assessments—that is, considering when SMCV first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement based on assessments of royalties versus taxes—all of the dates when Claimant and SMCV first knew or should have known of the alleged breaches of the 1998 Stabilization Agreement occurred before the cut-off date and, thus, fall outside of the limitations period. Consequently, the Tribunal lacks jurisdiction to hear claims based on those assessments.

**Table 2: Claimant (and SMCV) Knew or Should Have Known of the Alleged Breaches of the 1998 Stabilization Agreement and Loss or Damage Related Thereto before February 28, 2017<sup>903</sup>**

<b>Assessment</b>	<b>SMCV Notified of Assessment</b>	<b>SMCV Challenged Assessment before SUNAT</b>
<b>Royalties</b>		
2006-2007	August 18, 2009	September 15, 2009
2009 ( <i>i.e.</i> , first Royalty Assessment included in Claimant’s claims)	July 8, 2011	August 9, 2011
<b>Taxes</b>		
2005 General Sales Tax Assessment	December 30, 2009	January 28, 2010

<sup>903</sup> See *infra* at Annex A, pp. 1-2; see also Claimant’s Memorial at Annex A, pp. 1-2.

## 2. Alleged Breaches of Article 10.5 of the TPA

445. Claimant also alleges (on its own behalf) that Perú has breached its obligations under Article 10.5 of the TPA based on (1) acts relating to the Royalty Assessments; (2) refusal to waive penalties and interest on the Royalty and Tax Assessments; and (3) refusal to refund GEM payments. Although Perú maintains that Claimant's allegations are entirely baseless and that there has been no breach of any obligation under the TPA, Claimant's claims fall outside of the limitations period, and therefore, as explained in detail below, should be dismissed by the Tribunal for lack of jurisdiction without any need to reach their merits. Moreover, Claimant's attempts to characterize the alleged breaches as occurring only when SUNAT's Royalty Assessments became "binding and enforceable," or as separate breaches that occurred each time SUNAT declined to waive penalties and interest assessed against SMCV, do not cure the fact that these claims fall outside of the limitations period and, thus, the Tribunal lacks jurisdiction to hear them.

446. *(1)(a) Legitimate Expectations, Arbitrary Actions, and Inconsistent and Non-Transparent Action.* Claimant makes several claims under TPA Article 10.5 based on SUNAT's Royalty Assessments against SMCV. (Correctly recognizing that the taxation measures carve-out of the TPA Article 22.3.1 precludes any such claims, Claimant does not try to claim that SUNAT's Tax Assessments gave rise to the same Treaty breaches.)<sup>904</sup> *First*, Claimant claims that Perú frustrated Freeport's and SMCV's legitimate expectations when SUNAT issued Royalty Assessments against SMCV. That is because, Claimant alleges, SMCV and Freeport's "predecessor," Phelps Dodge, had understood that the stability guarantees in the 1998

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<sup>904</sup> Although Claimant does not allege breach of the TPA based on Tax Assessments (except under its "failure to waive" penalties and interest claims, which, as explained at paragraphs 456-58 below, are barred under the taxation-measure carve out under TPA Article 22.3.1), Claimant seemingly attempts to claim damages based on Tax Assessments in its "Alternative Claim" (*see* Claimant's Memorial at para. 458(c)). As the taxation-measure carve out under TPA Article 22.3.1 expressly bars claims of breach of the TPA based on taxation measures, and as noted at paragraphs 457-58 below that tax assessments are taxation measures within the meaning of the TPA, to the extent that Claimant's claims for breach of the TPA or related damages are based on Tax Assessments, they fall entirely outside of the Tribunal's jurisdiction.

Stabilization Agreement would apply to SMCV's Concentrator Project, based on the purported "existing legal framework and specific assurances given by Peruvian officials" when SMCV and Phelps Dodge invested in the Concentrator.<sup>905</sup> *Second*, Claimant claims that Perú acted as a result of political pressure and not for legitimate reasons when it upheld and enforced each of the Royalty Assessments.<sup>906</sup> *Third*, Claimant claims that Perú upheld and enforced each of the Royalty Assessments pursuant to a novel interpretation of the 1998 Stabilization Agreement and after acting inconsistently and non-transparently with respect to its intentions regarding that Agreement. In Claimant's view, MINEM officials changed their position regarding whether royalties would apply to SMCV's Concentrator notwithstanding protections provided under the 1998 Stabilization Agreement.<sup>907</sup>

447. Article 10.18.1 of the TPA prohibits claims from being submitted to arbitration under the Treaty if more than three years have elapsed from the date on which the claimant first knew or should have known of the alleged breach and that it has incurred loss or damage as a result of that action. As discussed in Section III.A.1 (paragraph 420) above, the key date for determining when an act constitutes an alleged breach is the date when the government act that gives rise to a legal cause of action that is the basis for the arbitration is first known or should be known. For the same reasons discussed in Section III.A.1 above related to alleged breaches of the 1998 Stabilization Agreement, Claimant first knew or should have known of the alleged breaches of the TPA based on SUNAT's Royalty Assessments against SMCV on August 18, 2009 (when SMCV was notified of the first Royalty Assessment against it for the years 2006-

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<sup>905</sup> Claimant's Memorial at paras. 367-69.

<sup>906</sup> See Claimant's Memorial at paras. 367, 373-77.

<sup>907</sup> See Claimant's Memorial at paras. 367, 378-83.

2007)<sup>908</sup> or, at the latest, by September 15, 2009 (when SMCV challenged SUNAT’s decision regarding the 2006-2007 Royalty Assessment through an administrative proceeding).<sup>909</sup>

448. On both of those dates, Claimant knew or should have known that SUNAT interpreted the 1998 Stabilization Agreement as not including activities related to the Concentrator Project. Thus, at that moment, Claimant first knew or should have known of the alleged breaches of the TPA about which Claimant complains in this arbitration. SUNAT’s stated interpretation of the 1998 Stabilization Agreement in that 2006-2007 Royalty Assessment was the same legal basis for all of the royalty, tax, penalty, and interest assessments that followed. Because both of those dates for the 2006-2007 Royalty Assessment long predate the cut-off date of February 28, 2017, Claimant’s allegations of breaches of the TPA based on the Royalty Assessments fall outside of the limitations period in Article 10.18.1. Therefore, the Tribunal lacks jurisdiction over those claims.

449. As Claimant did similarly with respect to SMCV’s breach of contract claims under the 1998 Stabilization Agreement, Claimant argues that a breach of the TPA occurred separately each and every time a Royalty Assessment became enforceable against SMCV.<sup>910</sup> Claimant’s contentions are without merit for the same reasons set out in Section III.A.1 above. As explained in that Section, where the alleged government action is part of a “series of similar

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<sup>908</sup> See Claimant’s Memorial at Annex A, p. 1 (“SUNAT Assessment Notified to SMCV: 18/08/09”); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009, at p. 1 of PDF (“[Stamps:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED August 18 [illegible] ACCOUNTING DEPARTMENT” (“*Recibido 18 AGO. 2009*”)); Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at p. 1 (“On August 18, 2009, we were served with the following assessment and fine resolutions linked to the assumed imposition of the mining royalty for the period running from October 2006 to December 2007.”); *see also infra* at Annex A, p. 1.

<sup>909</sup> See Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009; Claimant’s Memorial at para. 172 (“On 15 September 2009, SMCV requested that SUNAT reconsider the 2006-2007 Royalty Assessments.”); *see also infra* at Annex A, p. 1.

<sup>910</sup> See Claimant’s Memorial at paras. 367, 400.

or related actions by a respondent state,”<sup>911</sup> the alleged actions do not give rise to separate breaches, and the limitations period does not renew each time the alleged action recurs.<sup>912</sup> As the basis for the subsequent Royalty Assessments issued against SMCV was the same as for the 2006-2007 Royalty Assessment (namely, SUNAT’s construction of the scope of the 1998 Stabilization Agreement to exclude the Concentrator Project), such assessments constitute a “series of similar and related actions.”<sup>913</sup> Thus, the actions do not give rise to separate breaches nor does the limitations period renew for each of those assessments. Accordingly, all of Claimant’s claims of breach of the TPA regarding the Royalty Assessments fall outside of the limitations period and, therefore, the jurisdiction of the Tribunal.

450. *(1)(b) Due Process Violations.* Claimant claims that Perú violated Claimant’s due process rights when the Tax Tribunal allegedly committed procedural irregularities in the handling of certain Royalty Assessments that SMCV had challenged.<sup>914</sup> First, Claimant alleges that the Tax Tribunal’s President, Ms. Zoraida Olano, and her assistant, Ms. Ursula Villanueva, interfered with cases related to the Royalty Assessments (“Royalty Cases”), specifically the 2006-2007 and 2008 Royalty Cases. In particular, Claimant alleges that (i) Ms. Olano “instructed” her assistant Ms. Villanueva to draft the resolution of the 2008 Royalty Case,<sup>915</sup> (ii) Ms. Villanueva drafted the 2008 Royalty Case decision, even though she was not assigned to the

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<sup>911</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>912</sup> *See* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>913</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>914</sup> *See* Claimant’s Memorial at para. 386.

<sup>915</sup> Claimant’s Memorial at paras. 384, 390.

chamber that dealt with that case,<sup>916</sup> and (iii) the 2006-2007 Royalty Case “copy-pasted almost verbatim the resolution drafted by Ms. Villanueva . . . .”<sup>917</sup>

451. Claimant admits that SMCV was notified of both the 2006-2007 and 2008 Royalty Case decisions on June 20, 2013.<sup>918</sup> In fact, Claimant points to the decisions themselves in an attempt to show the alleged procedural irregularities—meaning that Claimant necessarily had knowledge of those alleged due process violations upon SMCV’s receipt of those decisions. Claimant first points to Ms. Villanueva’s initials that appear on the signature block in the 2008 Royalty Case decision, which Claimant contends “leaves no doubt” and “confirm[ed]” that Ms. Villanueva drafted the decision.<sup>919</sup> According to Claimant, the “work route” on the signature page of the decision “designates the initials of the drafting law clerk after those of the *vocal ponente* and the secretary-rapporteur.”<sup>920</sup> At paragraph 200 (Figure 3) of its Memorial, Claimant provides a visual snippet of the signature page of the 2008 Royalty Case decision showing Ms. Villanueva’s initials appearing third in the work route, which Claimant claims “confirm[ed] that she drafted the resolution.”<sup>921</sup>

452. Then, Claimant complains that the 2006-2007 Royalty Case decision “copy-pasted almost verbatim” the 2008 Royalty Case decision.<sup>922</sup> At paragraph 209 (Figure 4) of its Memorial, Claimant also provides a visual snippet of the signature page of the 2006-2007

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<sup>916</sup> See Claimant’s Memorial at paras. 205, 384.

<sup>917</sup> Claimant’s Memorial at para. 209.

<sup>918</sup> Claimant’s Memorial at Annex A, p. 1 (“Tax Tribunal Resolution Notified to SMCV: 20/06/13” (2006-2007 Royalty Case); “Tax Tribunal Resolution Notified to SMCV: 20/06/13” (2008 Royalty Case)); Exhibit CE-89, Receipt notice of the Resolutions 08252-1-2013 and 08997-10-2013, June 20, 2013, at p. 2 (“[Stamp:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED June 20 2013 ACCOUNTING DEPARTMENT” (2006-2007 Royalty Case); p. 1 (“[Stamp:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED June 20 2013 ACCOUNTING DEPARTMENT” (2008 Royalty Case)); Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013; Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013; see also *infra* at Annex A, p. 1.

<sup>919</sup> Claimant’s Memorial at para. 200.

<sup>920</sup> Claimant’s Memorial at para. 200.

<sup>921</sup> Claimant’s Memorial at para. 200.

<sup>922</sup> See Claimant’s Memorial at para. 209.

Royalty Case decision to show that it “does not include initials of any law clerk.”<sup>923</sup> Claimant contends that the omission of a law clerk’s initials in the work route “confirms that Chamber No. 10 did not prepare its own resolution.”<sup>924</sup>

453. Because the evidence on which Claimant relies in making its assertions regarding procedural irregularities appear on the faces of the 2006-2007 and 2008 Royalty Case decisions themselves, there can be no question that Claimant first knew or should have known of the alleged TPA breach based on supposed procedural irregularities when SMCV first received the decisions. By Claimant’s own admission, SMCV received both decisions on the same day, on June 20, 2013.<sup>925</sup> As that date occurred more than three years before the cut-off date of February 28, 2017, Claimant’s claims of due process violations related to the 2006-2007 and 2008 Royalty Cases fall outside of the limitations period. Accordingly, the Tribunal lacks jurisdiction to hear those claims, according to Article 10.18.1 of the TPA.

454. Claimant’s only due process claims that could remain before this Tribunal in the face of the limitations period are limited to its allegations that the Tax Tribunal (i) failed to recuse a “conflicted decision-maker,”<sup>926</sup> (ii) copy-pasted portions of the 2008 Royalty Case decision into the 2009 Royalty Case decision,<sup>927</sup> and (iii) improperly assigned the 2010-2011 Royalty Case to Ms. Villanueva,<sup>928</sup> because those events occurred after the cut-off date of February 28, 2017.<sup>929</sup> Of course, for the reasons explained in Section IV.B below, Respondent

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<sup>923</sup> Claimant’s Memorial at para. 210.

<sup>924</sup> Claimant’s Memorial at para. 210.

<sup>925</sup> Claimant’s Memorial at Annex A, p. 1 (“Tax Tribunal Resolution Notified to SMCV: 20/06/13” (2006-2007 Royalty Case); “Tax Tribunal Resolution Notified to SMCV: 20/06/13” (2008 Royalty Case)).

<sup>926</sup> Claimant’s Memorial at paras. 395-96.

<sup>927</sup> Claimant’s Memorial at paras. 384, 395.

<sup>928</sup> Claimant’s Memorial at para. 399.

<sup>929</sup> *See, e.g.*, Claimant’s Memorial at para. 244. The Tax Tribunal rejected SMCV’s request to recuse Mr. Ninacondor on June 22, 2018 (*see* Exhibit CE-181, Minutes of Plenary Council Meeting No. 2018-20, June 21, 2018). SMCV was notified of the Tax Tribunal’s decision on the 2009 Royalty Case on October 1, 2018 (*see* Claimant’s Memorial at Annex A, p. 1; Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018,

maintains that no due process-based breach of TPA Article 10.5 occurred with respect to any of these events, including these few, circumscribed allegations that happen to remain in light of the limitations period.

455. (2) *Refusal to Waive Penalties and Interest on Royalty and Tax Assessments.*

Claimant claims that Perú breached Article 10.5 of the TPA when it allegedly arbitrarily failed to waive the penalties and interest assessed against SMCV for “the Royalty and Tax Assessments listed in Annex A [of its Memorial].”<sup>930</sup> Specifically, Claimant alleges that the penalty and interest charges were unfair and inequitable because, in its view, SMCV’s position that it was not required to pay royalties and taxes was reasonable given the provisions in the Mining Law and Regulations, the government’s (purported) previous position regarding the scope of stability guarantees, and the need for mining companies to make continuous investments.<sup>931</sup> Claimant also alleges that the penalties and interest were unfair and inequitable because, in Claimant’s view, they were disproportionate to the principal assessed.<sup>932</sup> For the reasons discussed below, all of Claimant’s claims concerning SUNAT’s refusal to waive penalties and interest on its Royalty and Tax Assessments issued against SMCV fall outside of the Tribunal’s jurisdiction.

456. First, all of Claimant’s claims based on SUNAT’s decision not to waive penalties and interest arising from SUNAT’s Tax Assessments against SMCV should be dismissed outright. Article 22.3.1 of the TPA expressly excludes taxation measures from the scope of protection under Chapter Ten of the TPA.<sup>933</sup> Article 22.3.1 provides: “Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.”

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August 15, 2018). SMCV was notified of the Tax Tribunal’s decision on the Q4 2011 Royalty Assessment on December 5, 2019 (*see* Claimant’s Memorial at Annex A, p. 1; Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019, November 18, 2019). All these events occurred after the cut-off date of February 28, 2017.

<sup>930</sup> Claimant’s Memorial at para. 400.

<sup>931</sup> Claimant’s Memorial at para. 401.

<sup>932</sup> Claimant’s Memorial at para. 401.

<sup>933</sup> Exhibit CA-10, US-Perú TPA at Art. 22.3.1.

457. The term “taxation measures” is not directly defined in the TPA (the TPA only indicates what “taxation measures” exclude (*i.e.*, “a customs duty” or “measures listed in exceptions (b) and (c) of the definition of customs duty,” which include antidumping or countervailing duties or fees or other charges in connection with importation, not applicable here)).<sup>934</sup> However, the TPA defines “measure” as “any law, regulation, procedure, requirement, or practice.”<sup>935</sup> Consistent with the TPA’s definition of “measure,” the *Canfor v. USA* tribunal, interpreting “taxation measures” in NAFTA’s Article 2103.1 (which is identical to Article 22.3.1 of the TPA<sup>936</sup>), held that “‘measure’ is . . . broader than ‘law.’”<sup>937</sup>

458. The measures at issue here are SUNAT’s decisions not to waive penalties and interest assessed against SMCV due to unpaid Tax Assessments. Those measures constitute “requirements”—that is, SUNAT obligated SMCV to pay penalties and interest on the Tax Assessments, and its subsequent denials of SMCV’s waiver requests left those same requirements in place. Thus, SUNAT’s decisions not to waive penalties and interest that had accrued on its Tax Assessments are “taxation measures” within the meaning of the TPA. Because taxation measures are excluded from the scope of protection under Chapter Ten of the TPA, Claimant’s claims of breach of the TPA based on SUNAT’s maintenance of penalties and interest on taxes imposed on SMCV fall outside of the Tribunal’s jurisdiction.<sup>938</sup>

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<sup>934</sup> Exhibit CA-10, US-Perú TPA at Art. 22.5. The measures listed in (b) and (c) are “(b) antidumping or countervailing duty that is applied pursuant to a Party’s domestic law; or (c) fee or other charge in connection with importation commensurate with the cost of services rendered.” (Exhibit CA-10, US-Perú TPA at Art. 1.3).

<sup>935</sup> Exhibit CA-10, US-Perú TPA at Art. 1.3.

<sup>936</sup> Exhibit RE-113, North American Free Trade Agreement (NAFTA), signed on December 8, 1993, entered into force on January 1, 1994, at Art. 2103.1 (“Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.”).

<sup>937</sup> Exhibit RA-9, *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question, June 6, 2006, at para. 258.

<sup>938</sup> Respondent notes that Article 22.3.6 of the TPA provides that “taxation measure[s] alleged to be . . . a breach of an investment agreement or investment authorization” brought under Article 10.16 of the TPA are not excluded from the scope of the TPA. Thus, to the extent Claimant’s claims of breach of the Stabilization Agreement are not otherwise excluded from the Tribunal’s jurisdiction, Claimant would be able to raise breaches of the Stabilization Agreement on the basis of tax measures.

459. Second, with respect to the penalties and interest that SUNAT maintained on its Royalty Assessments against SMCV, Claimant's claims under the TPA are time-barred in accordance with Article 10.18.1's limitations provision.<sup>939</sup> Claimant first knew or should have known of the alleged TPA Article 10.5 breaches based on SUNAT's maintenance of the penalties and interest imposed on the 2006-2007 Royalty Assessments no later than April 22, 2010, when SUNAT notified SMCV that it confirmed its Royalty Assessment as well as the corresponding penalties and interest arising therefrom.<sup>940</sup> (The penalties and interest were later again confirmed by the Tax Tribunal, and notified to SMCV on June 20, 2013<sup>941</sup> and July 23, 2013.<sup>942</sup>) Thus, Claimant first knew or should have known of the alleged breaches as of April 22, 2010, which is many years before the cut-off date of February 28, 2017.

460. With respect to Claimant's claims based on the penalties and interest on the Royalty Assessments, Claimant argues that a separate breach of the TPA occurred each time SUNAT declined to waive the penalties and interest that it had assessed against SMCV.<sup>943</sup> Claimant's approach is once again artificial and unsuccessful. First of all, the Tribunal should see through Claimant's framing of the claim as based on SUNAT's "failure to waive" the penalties and interest, which Claimant prefers because the decision on the waiver requests came

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<sup>939</sup> This objection would be equally fatal to Claimant's claims based on SUNAT's penalty and interest decisions for the Tax Assessments, if for any reason the Tribunal were not to find that those claims are barred by the TPA's Article 22.3.1 carve-out for taxation measures. Because Article 22.3.1 does clearly bar those tax-related claims, however, Respondent for convenience focuses here on the penalty and interest claims arising out of the Royalty Assessments.

<sup>940</sup> See Claimant's Memorial at Annex A, p. 1 ("SUNAT Confirmation of Assessment Notified to SMCV: 22/04/10"); Exhibit CE-38, Resolution on Appeal of 2006–2007 Royalty Assessments, at p. 1 ("[Stamp:] SOCIEDAD MINERA CERRO VERDE S.A.A. LEGAL MANAGEMENT 22 APR 2010 RECEIVED."); see *infra* at Annex A, p. 1.

<sup>941</sup> See Claimant's Memorial at Annex A, p. 1 ("Tax Tribunal Resolution Notified to SMCV: 20/06/13"); Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013; Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013; see *infra* at Annex A, p. 1.

<sup>942</sup> See Claimant's Memorial at Annex A, p. 1 ("Tax Tribunal Denial of Request for Expansion or Clarification Notified to SMCV: 23/07/13"); Exhibit CE-91, Tax Tribunal Decision No. 11667-10-2013, July 15, 2013; see *infra* at Annex A, p. 1.

<sup>943</sup> See Claimant's Memorial at para. 400.

later in time than the imposition of the penalties and interest. At its core, of course, Claimant’s true complaint is about the fact that SMCV was required to pay penalties and interest, period. SUNAT indeed maintained its decision in the face of SMCV’s waiver requests, but it is the imposition of the penalties and interest as such that caused losses to SMCV in the first place. Claimant is evidently using the “failure to waive” framing in the hopes of claiming that Respondent omitted to act on multiple, subsequent occasions (including occasions within the limitations period). The practical reality, however, is that there was a single act—the imposition of penalties and interest—which the State (in an appropriate exercise of its discretion) then did not reverse. The original act, of course, is well outside the limitations period.

461. Even if the Tribunal were to adopt Claimant’s “failure to waive” framework, however, the claims still would fail the temporal test of Article 10.18.1, because they cannot be separated into distinct breaches, each with its own limitations period. Claimant’s effort to do so is without merit for the same reasons explained in Section III.A.1 above: Where the alleged government action is part of a “series of similar or related actions by a respondent state,”<sup>944</sup> the alleged actions do not give rise to separate breaches, and the limitations period does not renew each time the alleged action occurs.<sup>945</sup> Indeed, as the *Grand River* tribunal found, a claimant cannot evade the limitations period, which should be strictly construed, by basing its claims on “the most recent transgression”<sup>946</sup> in that series, as doing so would “render the limitations provisions ineffective in any situation [(like the one in this case)] involving a series of similar and related actions by a respondent state.”<sup>947</sup>

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<sup>944</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; *see also* Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>945</sup> *See* Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; Exhibit RA-3, *Corona Materials v. Dominican Republic*, Award on Preliminary Objections at para. 215 (citing the U.S. Submission at para. 5 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81)).

<sup>946</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81.

<sup>947</sup> Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81.

462. As SUNAT’s rejections of SMCV’s requests for waivers of the penalties and interest for all subsequent Royalty Assessments were all based on the same provisions of the Mining Law and Regulations and on the same interpretation of the 1998 Stabilization Agreement, it follows that SUNAT’s rejections of SMCV’s requests were all part of a “series of similar or related actions” by SUNAT. Thus, they do not give rise to separate breaches and the limitations period did not renew upon each denial. As such, Claimant’s claims under the TPA regarding SUNAT’s maintenance of the penalties and interest on the Royalty Assessments fall outside of the limitations period and, accordingly, the Tribunal has no jurisdiction to hear those claims.

463. In sum, the Tribunal lacks jurisdiction over Claimant’s TPA breach claims that are based on SUNAT’s decisions not to reverse its imposition of penalties and interest on the Royalty and Tax Assessments. Both are outside Article 10.18.1’s limitations period, and the claims based on the Tax Assessments are further barred by TPA Article 22.3.1’s carve-out for taxation measures.

464. (3) *Refusal to Refund GEM Payments.* Claimant also claims breach of Article 10.5 of the TPA, because, according to Claimant, SUNAT arbitrarily and unreasonably refused to refund the GEM payments that SMCV made for Q4 2011 through Q3 2012.<sup>948</sup> Respondent does not dispute that these limited claims have been filed within the applicable limitations period, given that SMCV was notified of SUNAT’s decision rejecting SMCV’s refund request on March 22, 2019.<sup>949</sup> Of course, Respondent does reject those claims on their merits, for the reasons explained in Section IV.B below.

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<sup>948</sup> Claimant’s Memorial at paras. 421-22.

<sup>949</sup> Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019, at p. 1 (“[Stamp:] SOCIEDAD MINERA CERRO VERDE S.A.A. RECEIVED 22 MAR 2019 LEGAL MANAGEMENT”); *see also infra* at Annex A, p. 10.

465. In sum, the Tribunal lacks jurisdiction over all of Claimant's claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement, and almost all of Claimant's claims of alleged breaches of the TPA, because these claims fall outside of the TPA's three-year limitations period under Article 10.18.1. Claimant filed its Notice of Arbitration on February 28, 2020, and, thus, the cut-off date under Article 10.18.1 is February 28, 2017—and Claimant knew or should have known of the breaches and that loss or damage was incurred many years before that, for almost every claim.

466. With respect to Claimant's claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement, all of the dates on which Claimant and SMCV first knew or should have known of the alleged breaches and the related loss were before February 28, 2017. That is true regardless of which set of dates the Tribunal considers, be it:

- the date when SMCV was notified of the first assessment (*i.e.*, August 18, 2009), or
- the date when SMCV challenged the first assessment before SUNAT's Claims Division (*i.e.*, September 15, 2009), or
- the dates based on each category of assessments (*i.e.*, royalties and taxes):
  - the dates when SMCV was notified of the first assessments (*i.e.*, August 18, 2009 (royalties), and December 30, 2009 (taxes)), or
  - the dates when SMCV challenged the first assessments before SUNAT's Claims Division (*i.e.*, September 15, 2009 (royalties), and January 28, 2010 (taxes)).

467. Because all of these dates occurred long before February 28, 2017, these claims fall outside of the limitations period, and also outside the Tribunal's jurisdiction.

468. With respect to most of Claimant's claims of alleged breaches of the TPA, the dates on which Claimant first knew or should have known of the alleged breaches and related loss were also before February 28, 2017. *First*, Claimant's claims based on frustration of legitimate expectations, arbitrary actions, and inconsistent and non-transparent action were all related to the Royalty Assessments. Hence, the dates on which Claimant first knew or should

have known of the alleged breaches and the related loss are (i) the date when SMCV was notified of the first Royalty Assessment (*i.e.*, August 18, 2009), or (ii) at the latest, the date when SMCV challenged the first Royalty Assessment before SUNAT's Claims Division (*i.e.*, September 15, 2009). *Second*, regarding Claimant's claims based on SUNAT's refusal to waive penalties and interest on Royalty and Tax Assessments: (a) its claims based on Tax Assessments are barred under Article 22.3.1 of the TPA; and (b) its claims based on Royalty Assessments<sup>950</sup> are time-barred because the date on which SMCV first knew or should have known of the alleged breach and related loss was April 22, 2010, nearly seven years before February 28, 2017. As such, Claimant's claims based on SUNAT's refusal to waive penalties and interest on Royalty and Tax Assessments are outside the Tribunal's jurisdiction. Only a handful of Claimant's TPA breach claims survive in the face of the TPA's three-year limitations period (and they fail on the merits in any event, as will be discussed in Section IV.B below).

**B. CLAIMANT'S CLAIMS OF ALLEGED BREACHES ARE OUTSIDE OF THE TRIBUNAL'S JURISDICTION, BECAUSE THEY ARE BASED ON ACTS OR FACTS THAT OCCURRED BEFORE THE TPA ENTERED INTO FORCE**

469. Even if the Tribunal were to find that almost all of Claimant's claims of alleged breaches are not time-barred under the TPA's three-year limitations period (they are), almost all of Claimant's claims are nevertheless outside of the Tribunal's jurisdiction *ratione temporis* for a second reason—namely, because they are based on acts or facts that took place before the TPA entered into force on February 1, 2009. Perú assumed obligations to Claimant as a U.S. investor under the TPA only starting on February 1, 2009, the date that the TPA between Perú and the United States entered into force. Under Article 10.16.1 of the TPA, this Tribunal's jurisdiction extends only to claims of breaches of (i) an obligation under Section A of Chapter Ten; (ii) an investment authorization; or (iii) an investment agreement. Claimant's claims all pertain to the

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<sup>950</sup> As noted, the same is true for the penalties and interest imposed and maintained on the Tax Assessments as well.

first and last categories: claims of breaches of an obligation under Section A of Chapter Ten (specifically, Claimant’s claims of breaches of Article 10.5), and claims of breaches of an investment agreement (specifically, Claimant’s claims (on behalf of SMCV) that the 1998 Stabilization Agreement was breached). Neither cause of action existed prior to the date the TPA entered into force. Because Claimant could not bring claims of breach of provisions found in Section A of Chapter Ten of the TPA or of investment agreements as defined in the TPA prior to the TPA’s entry into force, and because the acts or facts underlying Claimant’s alleged breaches occurred prior to February 1, 2009, all of Claimant’s claims (with the sole exception of its due process-based claims) are outside of the Tribunal’s jurisdiction.

**1. The TPA Does Not Apply Retroactively to Acts or Omissions that Took Place Before It Entered into Force**

470. The TPA entered into force between Perú and the United States on February 1, 2009.<sup>951</sup> Prior to that date, Perú did not have any obligations to U.S. investors under the TPA. According to Article 28 of the Vienna Convention on the Law of Treaties, absent evidence of a contrary intention of the States parties, a treaty will not apply retroactively:

[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party.<sup>952</sup>

Nothing in the TPA provides for, or indicates any intent to permit, the retroactive application of the investment protections nor the dispute resolution mechanisms in its Chapter Ten.

471. Further, Article 13 of the International Law Commission’s Articles on State Responsibility (“ILC Articles”) provides that “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the

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<sup>951</sup> See Exhibit CA-19, United Nations Conference on Trade and Development - Division of Investment and Enterprise, Table of Peru – Treaties with Investment Provisions, February 28, 2020.

<sup>952</sup> Exhibit CA-49, Vienna Convention on the Law of Treaties, May 23, 1969, at Art. 28.

act occurs.”<sup>953</sup> The commentary to the ILC Articles explains that “for responsibility to exist, the breach must occur at a time when the State is bound by the obligation.”<sup>954</sup> Accordingly, Perú cannot have breached any obligations under the TPA at a time when it had no such obligations, *i.e.*, before the TPA entered into force.

472. The TPA itself confirms the applicability of this rule, so as to leave no doubt. Article 10.1.3 provides: “For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.”<sup>955</sup> The *Spence* tribunal, interpreting identical language in CAFTA,<sup>956</sup> held that where the alleged conduct on which a claimant has founded a claim is “deeply and inseparably rooted” in a respondent’s “pre-CAFTA entry into force conduct,” the tribunal has no jurisdiction to hear that claim.<sup>957</sup> As discussed in Section III.B.2 below, the dispute at issue in this case is “deeply and inseparably rooted” in conduct undertaken by Perú that pre-dates the TPA’s entry into force.

473. There is no question that before February 1, 2009, Perú had no obligation to comply with Article 10.5 of the TPA. And, although Perú may have been bound by the 1998 Stabilization Agreement with SMCV before that date, Claimant had no right to bring a claim against Perú on SMCV’s behalf for breaches of that Agreement based on conduct undertaken by Perú before that date. Thus, in order for any alleged breaches of Perú’s obligations under the 1998 Stabilization Agreement or Article 10.5 of the TPA to fall within the scope of the

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<sup>953</sup> See Exhibit RA-26, James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002) (excerpts), at p. 131 (Art. 13).

<sup>954</sup> Exhibit RA-26, James Crawford, *The International Law Commission’s Articles on State Responsibility* (2002) (excerpts), at p. 131 (Art. 13, cmt. 1).

<sup>955</sup> Exhibit CA-10, US-Perú TPA at Art. 10.1.3 (emphasis added).

<sup>956</sup> Exhibit RE-112, The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), Chapter Ten, signed on August 5, 2004, entered into force on January 1, 2009, at Art. 10.1.3 (“For greater certainty, this Chapter does not bind any party in relation to any act or fact that took place or any situation that ceased to exist before the date of the entry into force of this Agreement.”).

<sup>957</sup> Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 298; *see also, e.g., id.* at paras. 246, 252, 269, 271.

Tribunal's jurisdiction, the act(s) or fact(s) underlying the alleged breaches must have occurred after the TPA entered into force, *i.e.*, after February 1, 2009.

**2. The Acts about which Claimant Complains Constitute Breaches of the 1998 Stabilization Agreement and Article 10.5 of the TPA Are Deeply and Inseparably Rooted in Acts or Facts that Occurred before February 1, 2009, and Thus, Claimant's Claims Fall Outside of the Tribunal's Jurisdiction**

474. That is not the case here. The acts or facts underlying the breaches that Claimant alleges with respect to the 1998 Stabilization Agreement and Article 10.5 of the TPA occurred before the TPA entered into force. At the heart of Claimant's claims are SUNAT's Royalty and Tax Assessments, which Claimant alleges to have violated certain provisions of the 1998 Stabilization Agreement and to have been unfair, inequitable, and arbitrary in violation of Perú's obligations under Article 10.5 of the TPA. The bases for SUNAT's Assessments, however, are rooted in the Peruvian government's interpretation of the Mining Law and Regulations and the scope of the 1998 Stabilization Agreement which, according to Perú, mean that that Agreement does not apply to activities related to the Concentrator Project. The State's interpretation of the Mining Law and Regulations and the scope of the 1998 Stabilization Agreement—on which every single royalty, tax, penalty, and interest assessment at issue in this case relied—clearly pre-dates the TPA's entry into force and, thus, falls outside the Tribunal's jurisdiction, along with every claim against Respondent's acts that were based on that standing interpretation. We discuss each of the acts relevant to Claimant's claims of breach of the 1998 Stabilization Agreement and Article 10.5 of the TPA below.

a. Alleged Breaches of the 1998 Stabilization Agreement

475. Claimant alleges (on behalf of SMCV) that Perú breached the 1998 Stabilization Agreement "each time SUNAT's Royalty and Tax Assessments became binding and enforceable against SMCV."<sup>958</sup> According to Claimant, the 1998 Stabilization Agreement applied to the

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<sup>958</sup> Claimant's Memorial at para. 351.

entire so-called “Cerro Verde Mining Unit”<sup>959</sup> or “mining unit,”<sup>960</sup> and because the Concentrator Project is part of that “mining unit,” activities related to that Project enjoyed tax and administrative stability and, thus, were exempt from any new laws or regulations that did not honor the guarantees provided in the 1998 Stabilization Agreement.<sup>961</sup>

476. By Claimant’s own repeated assertions in its Memorial and Notice of Arbitration, the alleged breaches of the 1998 Stabilization Agreement all stem from acts or facts that took place before the TPA entered into force on February 1, 2009. In particular, Claimant alleges that the basis for SUNAT’s Royalty and Tax Assessments can be traced to June 16, 2006 when MINEM issued its June 2006 Report.<sup>962</sup> According to Claimant’s own telling, it was MINEM’s interpretation of the Mining Law and Regulations and the 1998 Stabilization Agreement, reflected in the June 2006 Report (which Claimant incorrectly characterizes as an “about face”), that led SUNAT to issue the Royalty and Tax Assessments against SMCV:

- “[O]n 16 June 2006, Mr. Isasi [of MINEM] sent Minister Sánchez Mejía [a] non-binding legal report regarding the scope of SMCV’s Stability Agreement . . . .”<sup>963</sup>
- “[On 29] January 2008, . . . MINEM provided SUNAT with, among others, Minister Sánchez Mejía’s November 2005 letter and Mr. Isasi’s June 2006 Report setting out his novel and restrictive interpretation of the Stability Agreement. As soon as SUNAT had received these documents, SUNAT initiated an audit of SMCV and issued its first Assessments only months later, explicitly acknowledging that it had relied on MINEM’s designation that SMCV owed royalties for the Concentrator.”<sup>964</sup>
- “Around the same time [after the communication of January 29, 2008], SUNAT commenced an audit of SMCV.”<sup>965</sup>

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<sup>959</sup> See, e.g., Claimant’s Memorial at paras. 6, 9, 64, 83, 84, 86, 91, 94 *et seq.*

<sup>960</sup> See, e.g., Claimant’s Memorial at paras. 64, 72, 86, 93, 107 *et seq.*

<sup>961</sup> See Claimant’s Memorial at para. 351.

<sup>962</sup> See, e.g., Claimant’s Memorial at paras. 13, 171, 175, 176, 280, 314, 382(c).

<sup>963</sup> Claimant’s Memorial at para. 142; Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006.

<sup>964</sup> Claimant’s Memorial at para. 377(d); *see also* Claimant’s Memorial at para. 162; Exhibit CE-573, MINEM, Report No. 077-2008-MEM-DGM, January 29, 2008.

<sup>965</sup> Claimant’s Memorial at para. 162; Exhibit CE-582, “SUNAT: Cerro Verde Does Have to Pay Royalties,” *El Correo de Arequipa*, December 12, 2008.

- “On 2 June 2008, SMCV received an audit letter from SUNAT Arequipa asserting that SMCV had not filed documents related to the payment of royalties for the sales of copper ore from the Concentrator for 2006 and 2007.”<sup>966</sup>
- “[O]n 17 August 2009, SUNAT issued assessments against SMCV for royalties on the minerals processed in the Concentrator from October 2006 to December 2007.”<sup>967</sup>
- “On 28 December 2009, . . . SUNAT issued its first Tax Assessment against SMCV, charging SMCV with underpayment of the General Sales Tax (“GST”) for fiscal year 2005.”<sup>968</sup>

477. Claimant repeatedly insists that SUNAT issued (and subsequently confirmed) all of the Royalty and Tax Assessments against SMCV at issue here on the basis of MINEM’s interpretation of the Mining Law and Regulations and the 1998 Stabilization Agreement reflected in the June 2006 Report.<sup>969</sup> While Respondent denies that SUNAT solely relied on the June 2006 Report in determining that the Assessments were due (to recall, as discussed in Sections II.F.2 through II.F.6 above, SUNAT conducted its own analysis which was confirmed by the June 2006 Report), the heart of Claimant’s case is that the June 2006 Report was key to SUNAT’s determinations. Claimant’s assertions to that effect are pervasive throughout its Memorial and Notice of Arbitration:

- “Relying on MINEM’s novel interpretation, SUNAT then began to issue assessments against SMCV for royalties that it had allegedly failed to pay on the minerals processed in the Concentrator, . . . .”<sup>970</sup>
- “SUNAT also did not conceal MINEM’s involvement, expressly noting that both Minister Sánchez Mejía’s 8 November 2005 letter and Mr. Isasi’s June 2006 Report had concluded that ‘the Primary Sulfide Project does not enjoy the protection of tax, administrative and exchange-rate stability under any guarantee or stability agreement.’ SUNAT also acknowledged that it had relied on

<sup>966</sup> Claimant’s Memorial at para. 163; Exhibit CE-577, SUNAT, Inductive Letter No. 108052004279, May 30, 2008.

<sup>967</sup> Claimant’s Memorial at para. 170; Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009.

<sup>968</sup> Claimant’s Memorial at para. 267; Exhibit CE-35, SUNAT Assessments No. 052-003-0005626 to No. 052-003-0005637, December 28, 2009; Exhibit CE-36, SUNAT Assessments No. 052-003-0005642 to 052-003-0005653, December 28, 2009.

<sup>969</sup> See, e.g., Claimant’s Memorial at paras. 13, 171, 175, 176, 280, 314, 382(c).

<sup>970</sup> Claimant’s Memorial at para. 13 (emphasis added).

information MINEM provided to SUNAT designating SMCV as a company ‘obliged to pay the mining royalty.’<sup>971</sup>

- “On 31 March 2010, SUNAT rejected SMCV’s reconsideration request for the 2006-2007 Royalty Assessments. In its decision, SUNAT again relied on Mr. Isasi’s novel and restrictive interpretation of the Mining Law, . . .”<sup>972</sup>
- “The AIT [(Additional Income Tax)] Assessments for 2009-2013 were issued at the same time as the Income Tax Assessments, and also relied on Mr. Isasi’s interpretation that stability benefits are limited to the investments set forth in the 1996 Feasibility Study.”<sup>973</sup>
- “Mr. Isasi, who in June 2006 authored the novel interpretation that formed the basis for SUNAT’s Assessments, . . .”<sup>974</sup>
- “SUNAT’s 2006/07 Royalty Assessments . . . were based on an entirely novel and restrictive interpretation of the Mining Law and Regulations.”<sup>975</sup>
- “After the initial 2006/07 Royalty Assessments, SUNAT continued to issue further Royalty Assessments against SMCV, which were also premised on its novel and restrictive interpretation of the scope of stabilization benefits.”<sup>976</sup>
- “Under SUNAT’s novel and restrictive interpretation, the scope of the Stability Agreement was therefore allegedly limited to the investments set forth in the 1996 Feasibility Study.”<sup>977</sup>
- “In addition to the Royalty Assessments, the Government imposed on SMCV several Tax Assessments . . . , which it also based on its novel and restrictive interpretation of the scope of stabilization benefits.”<sup>978</sup>
- “[T]he Government based its Royalty Assessments on a completely novel and restrictive interpretation of the scope of stabilization benefits . . . .”<sup>979</sup>

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<sup>971</sup> Claimant’s Memorial at para. 176 (emphasis added); *see also* Exhibit CE-38, Resolution on Appeal of 2006–2007 Royalty Assessments.

<sup>972</sup> Claimant’s Memorial at para. 175 (emphasis added).

<sup>973</sup> Claimant’s Memorial at para. 280 (emphasis added).

<sup>974</sup> Claimant’s Memorial at para. 314 (emphasis added).

<sup>975</sup> Claimant’s Notice of Arbitration at para. 52 (emphasis added).

<sup>976</sup> Claimant’s Notice of Arbitration at para. 57 (emphasis added).

<sup>977</sup> Claimant’s Notice of Arbitration at para. 53 (emphasis added).

<sup>978</sup> Claimant’s Notice of Arbitration at para. 58 (emphasis added).

<sup>979</sup> Claimant’s Notice of Arbitration at para. 71 (emphasis added).

478. Claimant likewise alleges that the decisions of the Tax Tribunal, the Contentious Administrative Court, and the Supreme Court were based on MINEM’s June 2006 interpretation limiting stability benefits to the investment project set forth in a stabilization agreement’s feasibility study.<sup>980</sup> For example:

- “[T]he Tax Tribunal’s resolutions upholding the 2006-2007 and 2008 Royalty Assessments on the basis of Mr. Isasi’s novel and restrictive interpretation . . . .”<sup>981</sup>
- “[T]he Tax Tribunal’s resolutions were based on a completely novel interpretation of the Mining Law and Regulations—in particular, the interpretation set forth in Mr. Isasi’s June 2006 Report— . . . .”<sup>982</sup>
- “Chamber No. 1 issued Ms. Villanueva’s resolution in the 2008 Royalty Case—which rejected SMCV’s challenge based on the novel interpretation . . . .”<sup>983</sup>
- “[In the Q4 2011 Royalty Case] . . . Ms. Villanueva again adopted the novel interpretation . . . .”<sup>984</sup>
- “Echoing the novel interpretation first concocted by Mr. Isasi, and then adopted by SUNAT and the Tax Tribunal, the Appellate Court concluded that: . . . ‘a future investment will not be covered by the benefits of the Stability Agreement . . . .’”<sup>985</sup>
- “[T]he Supreme Court endorsed Mr. Isasi’s novel interpretation of the scope of the stability guarantees, . . . .”<sup>986</sup>

479. Claimant’s own words make the case: there can be no question that Claimant’s claims of alleged breaches of the 1998 Stabilization Agreement are, in the words of the *Spence* tribunal, “deeply and inseparably rooted” in SUNAT’s and MINEM’s interpretation of the

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<sup>980</sup> Claimant’s Memorial at para. 381(b).

<sup>981</sup> Claimant’s Memorial at para. 212 (emphasis added).

<sup>982</sup> Claimant’s Memorial at para. 213 (emphasis added).

<sup>983</sup> Claimant’s Memorial at para. 391(c) (emphasis added).

<sup>984</sup> Claimant’s Memorial at para. 399 (emphasis added).

<sup>985</sup> Claimant’s Memorial at para. 223 (emphasis added).

<sup>986</sup> Claimant’s Memorial at para. 226 (emphasis added).

Agreement and the underlying laws and regulations, expressed *inter alia* in the June 2006 Report, which was issued years before the TPA entered into force.

480. Indeed, although Claimant (mistakenly) alleges that MINEM did an “abrupt about-face” and changed its interpretation of the Mining Law and Regulations and the 1998 Stabilization Agreement in June 2006,<sup>987</sup> the record shows to the contrary that MINEM’s position taken in the June 2006 Report reflects the State’s position on the scope of the Mining Law and Regulations and stabilization agreements in general (including the 1998 Stabilization Agreement) as held for many years before the issuance of that Report. For example, Perú’s interpretation can be traced to as early as September 2002, when SUNAT issued a report in which it explained the scope of mining stabilization agreements: stability benefits are granted exclusively to the activities related to the investment project that was the subject of the agreements, *i.e.*, the investment project set forth in the feasibility study.<sup>988</sup> Later, in September 8, 2003, MINEM issued a report in which it concluded that the stability benefits under the 1998 Stabilization Agreement applied only to SMCV’s Leaching Project.<sup>989</sup> Additionally, in April 2005, MINEM issued a report in which it concluded that stability benefits under mining stability agreements apply only to the investment projects referred to in those agreements.<sup>990</sup> In May

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<sup>987</sup> Claimant’s Memorial at para. 142.

<sup>988</sup> See *supra* at paras. 138-41; Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, available at <https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm> (“*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa*”) (emphasis added).

<sup>989</sup> See *supra* at paras. 165-67; Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, p. 1 (“*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8 del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado está otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato*”) (emphasis added).

<sup>990</sup> See *supra* at paras. 174-81; Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (“*Debe ponerse énfasis en este último aspecto: La estabilidad que otorgan los contratos de Garantías y Medidas de Promoción a la Inversión garantizan el régimen jurídico referido a materia tributaria, cambiaria y administrativa, del proyecto de inversión, al cual están referidos. Si un titular minero tuviera unidades económicas administrativas, o concesiones mineras, que no forman parte del proyecto objeto de la estabilidad, la norma establece que dicho titular deberá mantener la contabilidad del proyecto en forma separada. En consecuencia, no*”) (emphasis added).

2006, MINEM also explained the scope of SMCV’s 1998 Stabilization Agreement specifically, in a presentation to the Energy and Mines Congressional Committee and the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee, stating that SMCV’s Concentrator Project was not part of the Leaching Project included in the 1996 Feasibility Study, and thus the 1998 Stabilization Agreement did not apply to the Concentrator Project.<sup>991</sup>

481. The Table below lists multiple occasions prior to the TPA’s entry into force on which Perú’s agencies and representatives stated the position that the scope of mining stabilization agreements, and SMCV’s 1998 Stabilization Agreement in particular, is limited to only the specific investment project or projects for which the stabilization agreements were signed—which is the foundation and legal basis of all of SUNAT’s Royalty and Tax Assessments.

**Table 3: Perú’s Interpretations of the Scope of Stabilization Agreements (and SMCV’s 1998 Stabilization Agreement in Particular) before the TPA Entered into Force**

Description of Event	Relevant Date
SUNAT issued a report in which it explained the scope of mining stabilization agreements: “Tax Stability Contracts entered into pursuant to Title Nine of the TUO of the General Mining Law <u>only stabilize</u> the applicable tax regime <u>with respect to the investment activities that are the subject matter of the agreements</u> , for their execution in a	September 2002

*es el titular minero (persona natural o jurídica) el que estará exento o no del pago de regalías, integralmente como empresa, sino que lo serán las concesiones mineras de las que es titular, dependiendo si estas integran o no un proyecto materia de contrato de estabilidad suscrito, antes de la vigencia de la Ley No. 28258. Así pues, únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía.”* (emphasis added).

<sup>991</sup> See *supra* at paras. 197-200; Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slides 8 (“La estabilidad se otorga al proyecto de inversión claramente delimitado por el Estudio de Factibilidad y pactado en el Contrato. No se otorga a la empresa de modo general ni a la Concesión . . .”) and 12 (“El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaría ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción.”).

Description of Event	Relevant Date
determined concession or an Administrative-Economic Unit.” <sup>992</sup>	
MINEM issued Report No. 509-2003-MEM-DGM-TNC, which “points out that the <u>application of the Stabilized Regime is granted to the Cerro Verde Leaching Project and not to the company . . .</u> ” <sup>993</sup>	September 8, 2003
In MINEM’s April 2005 Report, Mr. Isasi concluded that companies with stabilization agreements would not have to pay royalties with respect to the projects that were subject to those agreements: <u>“Emphasis should be placed on this last aspect: The stability granted by the Agreements on Guarantees and Measures to Promote Investment guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer. . . . Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.”</u> <sup>994</sup>	April 2005
MINEM’s September 2005 Report explains <u>the scope of the 1998 Stabilization Agreement as being limited to the</u>	September 2005

<sup>992</sup> Exhibit RE-26, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, available at <https://www.sunat.gob.pe/legislacion/oficios/2002/oficios/i2632002.htm> (“*Los Contratos de Estabilidad Tributaria suscritos al amparo del Título Noveno del TUO de la Ley General de Minería estabilizan únicamente el régimen tributario aplicable respecto de las actividades de inversión que son materia de los contratos, para su ejecución en determinada concesión o Unidad Económica Administrativa*”) (emphasis added); see also *supra* at paras. 138-41, 276-77.

<sup>993</sup> Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, p. 1 (“*A la pregunta que si el régimen estabilizado resultaría aplicable a la empresa, la prohibición recogida en el artículo 8 del Decreto Supremo No. 027-98-EF, se precisa que, la aplicación del Régimen Estabilizado está otorgado al Proyecto de Lixiviación de Cerro Verde y no a la empresa y el Régimen es el que se describe en dicho contrato*”) (emphasis added); see also *supra* at paras. 165-67.

<sup>994</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (“*Debe ponerse énfasis en este último aspecto: La estabilidad que otorgan los contratos de Garantías y Medidas de Promoción a la Inversión garantizan el régimen jurídico referido a materia tributaria, cambiaria y administrativa, del proyecto de inversión, al cual están referidos. Si un titular minero tuviera unidades económicas administrativas, o concesiones mineras, que no forman parte del proyecto objeto de la estabilidad, la norma establece que dicho titular deberá mantener la contabilidad del proyecto en forma separada. En consecuencia, no es el titular minero (persona natural o jurídica) el que estará exento o no del pago de regalías, integralmente como empresa, sino que lo serán las concesiones mineras de las que es titular, dependiendo si estas integran o no un proyecto materia de contrato de estabilidad suscrito, antes de la vigencia de la Ley No. 28258. Así pues, únicamente los proyectos mineros a que se refieren estos contratos, serán excluidos de la base de cálculo de la regalía.*”) (emphasis added); see also *supra* at paras. 174-81.

Description of Event	Relevant Date
<u>Leaching Project</u> that was described in the 1996 Feasibility Study to increase production of copper cathodes. <sup>995</sup>	
MINEM’s September 2005 Report (described above) was forwarded to Congress (the “October 2005 Letter”). The October 2005 Letter states that <u>the Concentrator Project</u> (the new investment project in which the profits would be invested) “ <u>will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of [the 1998 Stabilization Agreement] has not been applied for.</u> ” <sup>996</sup>	October 3, 2005
“. . . Minister Sánchez Mejía’s 8 November 2005 letter . . . had concluded that ‘ <u>the Primary Sulfide Project does not enjoy the protection of tax, administrative and exchange-rate stability under any guarantee or stability agreement.</u> ’” <sup>997</sup>	November 8, 2005
In May 2006, MINEM explained, before the Energy and Mines Congressional Committee and the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee, the scope of mining stabilization agreements and, in particular, the scope of SMCV’s 1998 Stabilization Agreement. The presentation stated that: (i) “ <u>stability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract.</u> It is not granted to the company generally or to the Concession . . . ”; <sup>998</sup> and (ii) “ <u>Cerro Verde’s primary sulfide project is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract.</u> It is a new project that does not benefit from tax, exchange rate and administrative stability. In consequence, the	May 2006

<sup>995</sup> See Exhibit RWS-2, Isasi Statement at paras. 27-28; Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, at para. 2.2.2; see also *supra* at paras. 188-90.

<sup>996</sup> Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005 (“. . . no gozará del régimen de estabilidad tributaria, cambiaria y administrativa, toda vez que para dicho Proyecto no se ha solicitado la suscripción de un [Convenio de Estabilidad]”); see also *supra* at paras. 191-92.

<sup>997</sup> Claimant’s Memorial at para. 176; see also Claimant’s Memorial at paras. 162, 381(a); Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005.

<sup>998</sup> Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 8 (“La estabilidad se otorga al proyecto de inversión claramente delimitado por el Estudio de Factibilidad y pactado en el Contrato. No se otorga a la empresa de modo general ni a la Concesión . . . ”); see also *supra* at paras. 197-200.

Description of Event	Relevant Date
sulfides project will pay royalties when it enters into production.” <sup>999</sup>	
“In an internal memo written in June 2006, MINEM took the position that under the Mining Law, <u>stability guarantees were limited only to the initial investment program set forth in the feasibility study submitted to secure those guarantees.</u> MINEM’s memo asserted that, as a result, SMCV was not entitled to apply the stabilized regime to the Concentrator operations even though it was within SMCV’s stabilized Mining Unit.” <sup>1000</sup>	June 16, 2006
SUNAT issued Report No. 166-2007-SUNAT/2B0000 in which it concluded that <u>mining stabilization agreements only apply to the “investment activities that are the subject matter of the agreements.”</u> <sup>1001</sup>	September 20, 2007
The TPA entered into force. <sup>1002</sup>	February 1, 2009

482. Claimant’s claims based on SUNAT’s Royalty and Tax Assessments against SMCV are “deeply and inseparably rooted” in Perú’s interpretation of the 1998 Stabilization Agreement, which on Claimant’s own account was definitively stated no later than in MINEM’s June 2006 Report (and, in fact, was articulated by the State much earlier than that since 2002). That interpretation was stated in all of SUNAT’s Assessments, and was the *sine qua non* of all of the State acts that Claimant says breached the 1998 Stabilization Agreement. Claimant’s own

<sup>999</sup> Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 12 (“*El proyecto de sulfuros primarios de Cerro Verde no forma parte del PROYECTO DE LIXIVIACIÓN, razón por la que no goza del régimen estabilizado materia del contrato de 13 de Febrero de 1998. Se trata de un nuevo proyecto que no goza de la estabilidad tributaria, cambiaria ni administrativa. En consecuencia, el proyecto de sulfuros sí pagará regalías cuando entre en producción.*”); see also *supra* at paras. 197-200.

<sup>1000</sup> Claimant’s Memorial at para. 11; see also *supra* at paras. 201-05; Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006.

<sup>1001</sup> Exhibit RE-27, SUNAT, Report No. 166-2007-SUNAT/2B0000, September 20, 2007, available at <https://www.sunat.gob.pe/legislacion/oficios/2007/oficios/i1662007.htm>, at p. 1 (“*. . . las inversiones realizadas que se encontraban previstas en el Estudio de Factibilidad, . . .*”); see also *supra* at paras. 276-77.

<sup>1002</sup> Exhibit CA-19, United Nations Conference on Trade and Development - Division of Investment and Enterprise, Table of Peru – Treaties with Investment Provisions, February 28, 2020.

words repeatedly linking those acts to the June 2006 Report make the case for Respondent’s jurisdictional objection that Claimant’s claims are inseparably linked to acts or facts that occurred before the TPA entered into force—with the inevitable consequence that Claimant’s claims (on behalf of SMCV) of breaches of the 1998 Stabilization Agreement fall outside of the Tribunal’s jurisdiction *ratione temporis*.

b. Alleged Breaches of Article 10.5 of the TPA

483. Almost all of Claimant’s claims of breach of Article 10.5 of the TPA are based on SUNAT’s Royalty and Tax Assessments against SMCV—and, as a consequence, just like the claims of breach of the 1998 Stabilization Agreement, as explained in Section III.B.2.a above, they are also “deeply and inseparably rooted” in the same acts or facts that took place before the TPA entered into force. Thus, most of Claimant’s claims of breaches of the TPA also fall outside of the Tribunal’s jurisdiction (with the sole exception of Claimant’s TPA Article 10.5 claims based on alleged due process violations).

484. Claimant alleges that Perú has breached Article 10.5 of the TPA based on (1) SUNAT’s Royalty (but not Tax) Assessments; (2) SUNAT’s imposition of penalties and interest on its Royalty and Tax Assessments; and (3) SUNAT’s refusal to refund GEM payments.<sup>1003</sup> Within the first category of alleged breaches of Article 10.5 of the TPA based on the Royalty Assessments, Claimant’s claims can be further divided two sub-groups of claims based on: (1)(a) frustration of legitimate expectations, arbitrary action, and inconsistent and non-transparent action; and (1)(b) due process violations.<sup>1004</sup> As explained below, all of Claimant’s TPA breach claims, save for those in sub-group (1)(b), are inextricably tied to and based on acts or facts that took place before the TPA entered into force on February 1, 2009.

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<sup>1003</sup> Claimant’s Memorial at paras. 358, 367, 400, 421, 425-29. As noted above, Claimant evidently understands that it may not bring claims alleging that SUNAT’s Tax Assessments violate the TPA, given the carve-out of TPA Article 22.3.1.

<sup>1004</sup> Claimant’s Memorial at paras. 358(a), 367.

485. (1)(a) *Legitimate Expectations, Arbitrary Actions, and Inconsistent and Non-Transparent Actions*. First, Claimant contends that Perú breached Article 10.5 of the TPA every time one of the Royalty Assessments issued by SUNAT became enforceable against SMCV, because those Assessments frustrated Claimant's alleged legitimate expectations that the 1998 Stabilization Agreement would apply to activities related to the Concentrator Project, and because Perú's government, including MINEM and SUNAT, allegedly acted arbitrarily by supposedly giving in to political pressure to apply the royalties, and by allegedly acting inconsistently and non-transparently regarding whether it would impose the royalties.<sup>1005</sup> To be clear, it does not matter to this analysis precisely when the supposed breaches occurred. (Claimant artificially tries to frame the breaches of Article 10.5 as having occurred when SUNAT's Royalty Assessments became enforceable against SMCV, and Respondent rejects that framing, with the effect that the claims fall outside the TPA's limitations period as discussed in Section III.A.2 above.) The dispositive point here is that, by Claimant's own account, the acts or facts that formed the basis of Claimant's frustrated expectations and its allegations of arbitrary or inconsistent action occurred well before the TPA's entry into force, regardless of when, *e.g.*, SUNAT's Royalty Assessments became enforceable.

486. It is Claimant's own position that the issuance of MINEM's June 2006 Report gave rise to the Royalty Assessments, and thus the alleged breaches of TPA Article 10.5.<sup>1006</sup> It was at that moment (or, at the latest, when SMCV purportedly received a copy of the Report in 2008<sup>1007</sup>) when Claimant (or its predecessor, Phelps Dodge) understood that its expectations had been frustrated, because it was at that moment that Claimant (or its predecessor, Phelps Dodge) understood that Perú interpreted the 1998 Stabilization Agreement as not applying to SMCV's

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<sup>1005</sup> Claimant's Memorial at paras. 358(a), 367.

<sup>1006</sup> *See, e.g.*, Claimant's Memorial at paras. 358(a), 367, 377, 380, 381(b), 382(c), 384, 391(c), 398, 399.

<sup>1007</sup> *See* Claimant's Memorial at paras. 164-66; Exhibit CWS-11, Torreblanca Statement at paras. 70-71.

activities related to the Concentrator Project.<sup>1008</sup> It was also at that moment (or, at the latest, when SMCV purportedly received a copy of the Report in 2008<sup>1009</sup>) that Claimant (or its predecessor, Phelps Dodge) would have been aware that Perú's government, including SUNAT, had allegedly given in to political pressure to apply the royalties to SMCV's activities related to the Concentrator Project and had allegedly acted in an inconsistent and non-transparent manner regarding whether SMCV had to pay such royalties. In fact, as discussed in Section III.B.2.a above, the reality was that Claimant (or SMCV) was or should have been aware of Perú's position regarding stabilization agreements and, in particular, the scope of the 1998 Stabilization Agreement even earlier than that (as early as 2002, even).

487. Whether it manifested in the June 2006 Report or even earlier, there is no question that Perú's interpretation of the 1998 Stabilization Agreement and the related Peruvian laws and regulations is the basis—the *sine qua non*—of all of the breaches of Article 10.5 Claimant alleges with respect to legitimate expectations, arbitrary actions, and inconsistency and non-transparency. Claimant itself has established that that interpretation arose well before the TPA entered into force on February 1, 2009. And, as Claimant's claims are "deeply and inseparably rooted" in that pre-entry into force conduct, Claimant's claims based on that conduct necessarily fall outside of the Tribunal's jurisdiction.

488. (1)(b) *Due Process Violations*. Claimant's only TPA breach claims that do not pre-date the entry into force of the TPA are those complaining of due process issues in SUNAT's and the Tax Tribunal's handling of SMCV's challenges to the Royalty Assessments, because the acts about which Claimant complains occurred on various dates starting in May 2010 (*i.e.*, after the TPA entered into force).<sup>1010</sup>

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<sup>1008</sup> See Claimant's Memorial at paras. 164-66; Exhibit CWS-11, Torreblanca Statement at paras. 70-71.

<sup>1009</sup> See Claimant's Memorial at paras. 164-66; Exhibit CWS-11, Torreblanca Statement at paras. 70-71.

<sup>1010</sup> Exhibit CE-40, SMCV Appeal to Tax Tribunal, 2006/07 Royalty Assessments, May 12, 2010.

489. (2) *Refusal To Waive Penalties and Interest on Royalty and Tax Assessments.*

Second, Claimant also claims breaches of Article 10.5 of the TPA based on SUNAT's decision to maintain penalties and interest imposed on the Royalty and Tax Assessments against SMCV. Specifically, Claimant claims that Perú's decision not to waive the penalties and interest constitutes a breach of Article 10.5 of the TPA, because the charges allegedly were unfair, inequitable, and disproportionate, given that (according to Claimant) "SMCV's position that it was not required to pay royalties and taxes was eminently reasonable . . . ,"<sup>1011</sup> and that "the penalties and interest that SMCV ultimately paid significantly *exceeded* the amount of principal assessed."<sup>1012</sup> Like Claimant's claims based on imposition of the Royalty and Tax Assessments themselves, however, these claims are also rooted in acts or facts (indeed, the same acts and facts) that occurred before the TPA entered into force. Moreover, those of the claims that are based on the Tax Assessments are entirely barred for an additional reason—the carve-out for taxation measures established in Chapter Twenty-Two of the TPA.

490. To briefly recall with respect to the latter issue: As explained in Section III.A.2 above, Claimant's claims of alleged breaches of Article 10.5 of the TPA based on Perú's decision not to waive penalties and interest related to SUNAT's Tax Assessments against SMCV must be excluded from the outset, because the TPA bars claims of alleged breaches of the TPA based on taxation measures under Article 22.3.1.<sup>1013</sup> SUNAT's imposition of penalties and interest related to Tax Assessments is a "taxation measure" under the TPA, and so is its proper exercise of its discretion to maintain (not waive) those penalties and interest upon SMCV's request.<sup>1014</sup> As such, pursuant to Article 22.3.1 of the TPA, those acts are outside the scope of

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<sup>1011</sup> Claimant's Memorial at para. 401.

<sup>1012</sup> Claimant's Memorial at para. 401 (emphasis in original).

<sup>1013</sup> Exhibit CA-10, US-Perú TPA at Art. 22.3.1 ("Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."); *see also supra* Section III.A.2 at paras. 456-58.

<sup>1014</sup> *See supra* Section III.A.2 at paras. 456-58.

the investment protections of TPA Chapter Ten, and Claimant’s claims based on them are outside of the Tribunal’s jurisdiction.

491. As to jurisdiction *ratione temporis*, Claimant’s claims of alleged breach of TPA Article 10.5 based on the penalties and interest imposed in conjunction with SUNAT’s Royalty Assessments should also be excluded, because they are based on acts or facts which occurred before the TPA entered into force.<sup>1015</sup> As with Claimant’s claims regarding the Royalty Assessments themselves, Claimant’s claims related to Perú’s refusal to waive the penalties and interest that were imposed on the Royalty Assessments, by Claimant’s own account, are also rooted in MINEM’s June 2006 Report (containing MINEM’s interpretation of the Mining Law and Regulations and the scope of the 1998 Stabilization Agreement as it applies to SMCV’s Concentrator Project)<sup>1016</sup> which was taken into consideration when SUNAT issued the initial Royalty Assessments. And, because MINEM’s June 2006 Report (much less Perú’s even earlier articulations of that same interpretation) pre-dates the TPA’s entry into force, acts like Perú’s decisions to maintain those penalties and interest—which were “deeply and inseparably rooted” in that same standing interpretation of the 1998 Stabilization Agreement—fall outside the temporal scope of the TPA.

492. (3) *Refusal To Refund GEM Payments*. Third, Claimant’s claims of alleged breach of the TPA based on Perú’s refusal to refund GEM payments is also rooted in acts or facts that occurred before the TPA entered into force. In particular, Claimant claims that Perú’s refusal to refund SMCV’s GEM payments amounts to a breach of Article 10.5 of the TPA because (according to Claimant) “SMCV’s GEM payments were clearly premised on the fact

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<sup>1015</sup> Of course, this argument would apply with equal force to the penalty and interest claims based on the Tax Assessments, were those claims not already barred by TPA Article 22.3.1 as just discussed. For convenience, given the Article 22.3.1 carve-out, the analysis here focuses on the penalties and interest claims based on the Royalty Assessments, but logically it also reaches the penalties and interest claims based on the Tax Assessments, were there to be any need to do so.

<sup>1016</sup> See, e.g., Claimant’s Memorial at paras. 414(a), 415(b).

that, . . . SMCV was not obligated to make royalty or SMT [(Special Mining Tax)] payments.”<sup>1017</sup> Once again, however, this claim is based on SUNAT’s Royalty and Tax Assessments against SMCV, which were issued (according to Claimant) based on MINEM’s June 2006 Report, and (according to Respondent) consistent with Perú’s even earlier interpretation of the Mining Law and Regulations and the scope of the 1998 Stabilization Agreement (*see* Table 3 above). On Claimant’s own telling, it is SUNAT’s interpretation of the 1998 Stabilization Agreement and resulting Royalty and Tax Assessments that render Perú’s retention of the GEM payments a Treaty breach—they are deeply intertwined with the GEM claim. As such, therefore, the GEM refund claim is rooted in acts or facts that occurred before the TPA entered into force, and is outside this Tribunal’s jurisdiction.

493. In sum, the Tribunal lacks jurisdiction over almost all of Claimant’s claims in this arbitration, because they are based on acts or facts that occurred before the TPA entered into force on February 1, 2009 (save for the due process-related claims of breach of the TPA). Respondent has held and stated the interpretation of the 1998 Stabilization Agreement that undergirds all of those claims since as early as September 2002, or at a minimum since June 16, 2006 because—by Claimant’s own telling of events—SUNAT issued Assessments against SMCV as a consequence and on the basis of MINEM’s interpretation contained in its June 2006 Report. According to Claimant, that Report formed the basis of SUNAT’s Assessments against SMCV—and therefore also of the penalties and interest on those Assessments as well as the refusal to refund the GEM payments. Because Claimant’s claims are based on acts or facts that occurred before the TPA entered into force (except the TPA claims based on alleged due process violations), the Tribunal lacks jurisdiction to hear these claims.

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<sup>1017</sup> Claimant’s Memorial at para. 422.

**C. CLAIMANT’S CLAIMS OF ALLEGED BREACHES OF THE STABILIZATION AGREEMENT ARE OUTSIDE OF THE TRIBUNAL’S JURISDICTION, BECAUSE THEY HAVE ALREADY BEEN SUBMITTED TO DISPUTE SETTLEMENT PROCEDURES IN PERÚ**

494. The Tribunal also lacks jurisdiction over Claimant’s claims (on behalf of SMCV) of alleged breaches of the 1998 Stabilization Agreement, because they have already been submitted for resolution before administrative tribunals of Respondent and binding dispute settlement procedures (*i.e.*, SUNAT’s appeal body (Claims Division),<sup>1018</sup> and the Tax Tribunal). According to Article 10.18.4(a) of the TPA, “No claim may be submitted to arbitration” “for breach of an investment agreement” if the claimant or “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,” has previously submitted “the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.”<sup>1019</sup> Article 10.18.4(b) makes clear that the election to submit a claim to any of the aforementioned dispute resolution fora is “definitive.”<sup>1020</sup> In particular, Article 10.18.4(b) provides: “For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) [*i.e.*, for breach of an investment authorization or of an investment agreement] to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, that election shall be definitive, and the claimant may not thereafter submit the claim to arbitration under Section B.”<sup>1021</sup> Thus, once SMCV elected to submit claims of alleged breaches of the 1998 Stabilization Agreement (assuming *arguendo* for this analysis only that it constitutes an investment agreement within the scope of

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<sup>1018</sup> As explained above in Section II.F.1, if the taxpayer does not agree with an assessment, it has 20 business days to challenge the Assessment Resolution. This administrative challenge is called a *Recurso de Reclamación* and is submitted before a separate division within SUNAT’s regional office where the taxpayer is located, the Claims Division (*División de Reclamaciones*). Based on the Claims Division’s analysis, the Regional Intendent may confirm or set aside the challenged Assessment Resolution. Its decision is issued through an Intendency Resolution (*Resolución de Intendencia*). A still-dissatisfied taxpayer may appeal that decision before the Tax Tribunal. *See supra* at Section II.F.1.

<sup>1019</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(a) (incorporating Art. 10.16.1(b)).

<sup>1020</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(b).

<sup>1021</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(b) (emphasis added).

TPA Article 10.28, as that is contested by Respondent in Section III.D below) to “an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure,” those claims were definitively and irrevocably precluded from submission to arbitration before this Tribunal.

495. Tribunals have emphasized the irrevocability of a claimant’s dispute settlement choice when interpreting a fork-in-the-road provision. For example, the *M.C.I. Power Group* tribunal explains:

[T]he “fork-in-the-road” rule . . . refers to an option, expressed as a right to choose irrevocably between different jurisdictional systems. Once the choice has been made there is no possibility of resorting to any other option. The right to choose once is the essence of the “fork-in-the-road” rule.<sup>1022</sup>

The *Supervisión y Control* tribunal similarly held that “through an irrevocable option clause, usually called ‘fork in the road’, . . . once one of the routes is selected, the possibility of choosing the other is excluded.”<sup>1023</sup> The *Pantechniki* tribunal is in accord: “Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID.”<sup>1024</sup>

496. In this case, SMCV has definitively (and irrevocably) elected to challenge, on numerous occasions, before SUNAT’s Claims Division and the Tax Tribunal the same SUNAT Royalty and Tax Assessments (and related measures, such as the penalties and interest assessed thereon) that Claimant now alleges, on SMCV’s behalf, constitute breaches of the 1998

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<sup>1022</sup> Exhibit RA-11, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007 (“*M.C.I. v. Ecuador*, Award”), at para. 181; *see also* Exhibit CA-228, *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017 (“*Supervisión y Control v. Costa Rica*, Award”), at para. 294; Exhibit RA-12, *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009 (“*Pantechniki v. Albania*, Award”), at para. 67; Exhibit RA-13, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, May 6, 2014 (excerpts) (“*H&H Enterprises v. Egypt*, Award”), at para. 370 (citing Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67).

<sup>1023</sup> Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 294.

<sup>1024</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67; *see also* Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 370 (citing Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67).

Stabilization Agreement.<sup>1025</sup> Importantly, SMCV not only challenged the same State measures that give rise to the contractual claims that Claimant raises here (on behalf of SMCV), but it challenged those measures on the very same legal basis as is asserted here—that is, SMCV challenged the measures on the basis that they violated SMCV’s (alleged) rights and Perú’s (alleged) obligations under the 1998 Stabilization Agreement.

497. It is undisputed that SMCV challenged almost all of SUNAT’s Royalty and Tax Assessments against it before SUNAT’s Claims Division, which is the first phase of the administrative dispute settlement proceeding for resolving disputes related to royalty and tax assessments.<sup>1026</sup> In all of the challenges that it decided, SUNAT’s Claims Division (specifically SUNAT’s Regional Intendent for Arequipa)<sup>1027</sup> confirmed the Assessments against SMCV. (SMCV withdrew several pending *Recursos de Reclamación* (administrative challenges) upon the filing of this arbitration, before SUNAT could rule on them.<sup>1028</sup>) Furthermore, SMCV then proceeded to appeal most of SUNAT’s decisions confirming those Assessments to the Tax Tribunal. The only possible claims left standing would be those based on the 2013 Income Tax and Additional Income Tax Assessments, and the 2012 Temporary Tax on Net Assets Assessment, because SMCV did not challenge them before SUNAT’s Claims Division or the Tax Tribunal. Nonetheless, these claims still fall outside the Tribunal’s jurisdiction for the reasons explained in Sections III.A and III.B above.

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<sup>1025</sup> See *infra* at Annex A, pp. 1-10.

<sup>1026</sup> See Exhibit CA-14, Tax Code, at Art. 124; Exhibit RWS-4, Bedoya Statement at para. 10 (“*La reclamación ante la Intendencia Regional de la SUNAT y la apelación ante el Tribunal Fiscal constituyen las etapas de apelación dentro de la etapa administrativa de un procedimiento contencioso tributario.*”).

<sup>1027</sup> See *infra* Section II.F.1; Exhibit RWS-4, Bedoya Statement at paras. 10-11.

<sup>1028</sup> Exhibit CE-252, Partial Withdrawal, Income Tax 2012, Docket No. 0150340017563, February 27, 2020; Exhibit CE-259, Withdrawal, Additional Income Tax 2012, Docket No. 0150340017566, February 27, 2020; Exhibit CE-254, Withdrawal, Complementary Mining Pension Fund Tax 2013, Docket No. 0150340017649, February 27, 2020.

498. The Table below shows SUNAT’s Royalty and Tax Assessments which were the subject of numerous appeals filed by SMCV before SUNAT’s Claims Division and the Tax Tribunal:

**Table 4: SMCV Elected to Complain about SUNAT’s Royalty and Tax Assessments to SUNAT’s Claims Division and the Tax Tribunal<sup>1029</sup>**

<b>Assessment</b>	<b>SUNAT’s Claims Division</b>	<b>Tax Tribunal</b>
<b>Royalties</b>		
2006-2007	Decision rendered on March 31, 2010	Decision rendered on May 30, 2013
2008	Decision rendered on January 31, 2011	Decision rendered on May 21, 2013
2009	Decision rendered on December 21, 2011	Decision rendered on August 15, 2018
2010-2011	Decision rendered on December 29, 2016	Decision rendered on August 28, 2018
Q4 2011	Decision rendered on October 12, 2018	Decision rendered on November 18, 2019
2012	Decision rendered on January 11, 2019	--
2013	Decision rendered on May 28, 2019	--
<b>Tax Assessments</b>		
<b>General Sales Tax (GST)</b>		
2005	Decision rendered on October 25, 2010	Decision rendered on August 22, 2018
2005 (Non-Residents)	Decision rendered on September 30, 2010	Appeal submitted (withdrawn)
2006	Decision rendered on July 27, 2011	Decision rendered on August 22, 2018
2006 (Non-Residents)	Decision rendered on September 30, 2011	Appeal submitted (withdrawn)
2007	Decision rendered on September 27, 2012	Decision rendered on October 30, 2018
2008	Decision rendered on October 24, 2013	Appeal submitted (withdrawn)
2009	Decision rendered on October 27, 2014	Appeal submitted (withdrawn)

<sup>1029</sup> See *infra* at Annex A, pp. 1-10.

<b>Assessment</b>	<b>SUNAT's Claims Division</b>	<b>Tax Tribunal</b>
2010	Decision rendered on April 27, 2015	Appeal submitted (withdrawn)
2011	Decision rendered on June 27, 2018	Appeal submitted (withdrawn)
<b>Income Tax</b>		
2006	Decision rendered on March 30, 2012	Decision rendered on August 22, 2018
2007	Decision rendered on January 25, 2013	Decision rendered on August 22, 2018
2008	Decision rendered on May 30, 2014	Appeal submitted (withdrawn)
2009	Decision rendered on June 23, 2015	Appeal submitted (withdrawn)
2010	Decision rendered on November 4, 2015	Appeal submitted (withdrawn)
2011	Decision rendered on August 10, 2018	Appeal submitted (withdrawn)
2012	<i>Recurso de Reclamación</i> submitted (withdrawn)	--
2013	--	--
<b>Additional Income Tax</b>		
2007	Decision rendered on September 27, 2012	Decision rendered on October 30, 2018
2008	Decision rendered on October 24, 2013	Appeal submitted (withdrawn)
2009	Decision rendered on June 23, 2015	Appeal submitted (withdrawn)
2010	Decision rendered on November 4, 2015	Appeal submitted (withdrawn)
2011	Decision rendered on August 10, 2018	Appeal submitted (withdrawn)
2012	<i>Recurso de Reclamación</i> submitted (withdrawn)	--
2013	--	--
<b>Temporary Tax on Net Assets (TTNA)</b>		
2009	Decision rendered on August 27, 2014	Appeal submitted (withdrawn)
2010	Decision rendered on February 29, 2016	Appeal submitted (withdrawn)
2011	<i>Recurso de Reclamación</i> submitted	Appeal submitted (withdrawn)

Assessment	SUNAT's Claims Division	Tax Tribunal
2012	--	--
2013	Decision rendered on May 13, 2020	Appeal submitted (withdrawn)
<b>Special Mining Tax (SMT) and Complementary Mining Pension Fund (CMPF)</b>		
Q4 2011-2012 SMT	Decision rendered on October 12, 2018	Decision rendered on June 20, 2019
2013 SMT	Decision rendered on May 28, 2019	--
2013 CMPF	<i>Recurso de Reclamación</i> submitted (withdrawn)	--

499. Despite this uncontroverted record of SMCV's numerous appeals filed before SUNAT's Claims Division and the Tax Tribunal, in which SMCV challenged the exact same measures that Claimant is now alleging (on behalf SMCV) constitute a breach of the 1998 Stabilization Agreement in this arbitration—and based its challenges on the exact same legal grounds of alleged violations of the Agreement that Claimant raises here—Claimant contends that the breach of contract claims it is submitting in this arbitration nevertheless fall within Perú's scope of consent to arbitrate.<sup>1030</sup> Claimant makes two arguments. *First*, Claimant rests on the fact that none of the administrative challenges that SMCV initiated in Perú were further appealed to Perú's Contentious Administrative Courts (except the 2006-2007 and 2008 Royalty Assessments, which Claimant excludes from its claims in this arbitration). According to Claimant, only those courts are the "competent 'administrative tribunal' under Peruvian law" that could trigger Article 10.18.4's bar.<sup>1031</sup> Claimant also insists that the challenges were not submissions to "any other binding dispute settlement procedure" for purposes of Article 10.18.4.<sup>1032</sup> In making this assertion, Claimant suggests (although it is not entirely clear from

<sup>1030</sup> See Claimant's Memorial at para. 357.

<sup>1031</sup> Claimant's Memorial at para. 357.

<sup>1032</sup> Claimant's Memorial at para. 357.

Claimant’s Memorial) that SUNAT’s Claims Division and/or the Tax Tribunal is neither a “competent ‘administrative tribunal’ under Peruvian law” nor a binding dispute settlement procedure. *Second*, Claimant argues that SMCV’s challenges to the Royalty and Tax Assessments were not contractual claims but, rather, were “administrative challenges to the validity of SUNAT’s Assessments under the Mining Laws and Regulations”<sup>1033</sup> and therefore did not present “the same alleged breach”<sup>1034</sup> in the Peruvian fora. Claimant’s contentions do not withstand scrutiny.<sup>1035</sup>

500. Claimant’s first argument can be easily disposed of. SMCV’s claims before SUNAT’s Claims Division, and subsequently before the Tax Tribunal, are all part of the same administrative dispute settlement proceedings that resolve disputes over royalty and tax assessments: (i) SUNAT’s Claims Division is the first phase of the proceedings (where a taxpayer can appeal the initial assessment), and (ii) the Tax Tribunal is the second phase of the proceedings (where a taxpayer can subsequently appeal SUNAT’s decisions confirming the assessment).<sup>1036</sup> The decisions rendered during each phase of these proceedings are binding on the challenging party, in this case, SMCV.<sup>1037</sup> Thus, both SUNAT’s Claims Division and the Tax Tribunal constitute “binding dispute settlement procedure[s]” and Claimant cannot bring the same claims that were submitted to either body to this Tribunal.

501. According to the Cambridge English Dictionary, an “administrative tribunal” is “a legal organization that makes decisions in disagreements between two people or between a

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<sup>1033</sup> Claimant’s Memorial at para. 357.

<sup>1034</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(a).

<sup>1035</sup> See Claimant’s Memorial at para. 357.

<sup>1036</sup> See Claimant’s Memorial at para. 15 (“SMCV promptly challenged the Assessments, first before SUNAT and then before the Tax Tribunal, the body within Peru’s Ministry of Economy and Finance (“MEF”) that serves as the final administrative appeal for royalty and tax matters.”); see also *infra* at Section II.F.1; Exhibit CA-14, Tax Code, at Art. 124; Exhibit RWS-4, Bedoya Statement at para. 10 (“*La reclamación ante la Intendencia Regional de la SUNAT y la apelación ante el Tribunal Fiscal constituyen las etapas de apelación dentro de la etapa administrativa de un procedimiento contencioso tributario.*”).

<sup>1037</sup> See *infra* at Section II.F.1.

person and a government department, but which is not part of the court system.”<sup>1038</sup> There is no question that the Tax Tribunal, at the least, is an administrative tribunal. The Tax Tribunal is a statutorily empowered decision-making body within the MEF that is mandated to hear and resolve disputes filed by taxpayers (like SMCV in this case) challenging tax and royalty assessments by SUNAT.<sup>1039</sup> Contrary to Claimant’s assertions, the Tax Tribunal is an “administrative tribunal” under Peruvian law, charged with the competence and authority to resolve all such challenges against SUNAT’s assessments.<sup>1040</sup> As demonstrated below, Claimant itself has put on the record ample evidence that contradicts its own assertions in its Memorial about the Tax Tribunal’s status. More specifically, all of the sources below confirm that the Tax Tribunal is an administrative tribunal whose decisions are final and binding under Peruvian law:

- Law No. 28969, Article 5 (item 1):  
[The duties of the Tax Tribunal include] [t]o hear in the last administrative instance appeals filed against resolutions issued by SUNAT in case files related to mining royalties.<sup>1041</sup>
- MEF’s Internal Regulations, Ministerial Resolution 213-2020/EF/4, Article 16:  
The Tax Tribunal is the Ministry’s decision-making body that constitutes the highest administrative body in tax and customs matters on the national level.<sup>1042</sup>
- Tax Code, Supreme Decree No. 135-99-EF (August 19, 1999), Article 101(1):  
The Tax Tribunal has the following powers:

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<sup>1038</sup> Exhibit RE-167, “Administrative Tribunal,” *Cambridge English Dictionary*, available at <https://dictionary.cambridge.org/us/dictionary/english/administrative-tribunal>.

<sup>1039</sup> See Exhibit RWS-5, Olano Statement at para. 6; Exhibit RE-6, Integrated Text of the Regulation for the Organization and Functions of the Ministry of Economy and Finance, July 23, 2020, at Art. 16.

<sup>1040</sup> See Exhibit CA-250, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/41, February 27, 2020, at Art. 16 (“The Tax Tribunal is the Ministry’s decision-making body that constitutes the highest administrative body in tax and customs matters on the national level.”) (emphasis added); Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013.

<sup>1041</sup> Exhibit CA-8, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties, Law No. 28969, January 25, 2007, at Art. 5(1).

<sup>1042</sup> Exhibit CA-250, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/41, February 27, 2020, at Art. 16.

1. Hear and resolve in the last administrative instance appeals against Resolutions of the Administration resolving claims filed against . . . Assessment Resolutions, Fine Resolutions or other administrative acts directly related to the determination of tax liability; . . .<sup>1043</sup>

- Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Articles 101(1), 127, and 157:

The powers of the Tax Tribunal are:

1. Hear and rule in the last resort administratively on appeals against Tax Administration Resolutions that resolve claims filed against . . . Assessment Resolutions, Penalty Resolutions or other administrative acts directly related to the assessment of the tax obligation, . . .<sup>1044</sup>

The decision-making body is empowered to conduct a full re-examination of the issues of the disputed case, . . .<sup>1045</sup>

The resolution of the Tax Tribunal exhausts the administrative channel.<sup>1046</sup>

- Manual of the Operation and Functions of the Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 (October 5, 2012):

The Tax Tribunal is the administrative last resort for tax and customs matters within the framework of the measures designed to improve the resolution of tax procedures.”<sup>1047</sup>

502. Furthermore, as if this Peruvian law evidence were not more than sufficient to refute Claimant’s contentions, Claimant’s own words confirm its understanding that the Tax Tribunal is an administrative tribunal whose decisions are final and binding. In particular, in paragraph 15 of its Memorial, Claimant explains that “SMCV promptly challenged the Assessments, first before SUNAT and then before the Tax Tribunal, the body within Peru’s

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<sup>1043</sup> Exhibit CA-4, Peruvian Tax Code, Supreme Decree No. 135-99-EF, August 19, 1999, at Art. 101(c).

<sup>1044</sup> Exhibit CA-14, Tax Code, at Art. 101(1).

<sup>1045</sup> Exhibit CA-14, Tax Code, at Art. 127.

<sup>1046</sup> Exhibit CA-14, Tax Code, at Art. 157.

<sup>1047</sup> Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal at p. 1 of PDF.

Ministry of Economy and Finance (‘MEF’) that serves as the final administrative appeal for royalty and tax matters.”<sup>1048</sup>

503. Thus, there is no serious question that the Tax Tribunal is an administrative tribunal or a binding dispute resolution procedure under Peruvian law. The same is true of SUNAT’s Claims Division—it is an administrative body before which SUNAT’s decisions can be challenged, and the resulting decisions are binding on the taxpayer and SUNAT (unless successfully appealed to the Tax Tribunal). Although it constitutes the first step in the administrative procedure, and so it is not described as the “final” administrative body as is the Tax Tribunal in the Peruvian law sources quoted above, SUNAT’s Claims Division is part of the same administrative process—and a choice to resort to it is a choice to resort to Perú’s administrative procedures instead of to Treaty claims, even when, for whatever reason, the taxpayer does not pursue a further appeal from the Claims Division to the Tax Tribunal. Even if the Tribunal were not to consider SUNAT’s Claims Division to be an administrative “tribunal” as such, the Claims Division’s administrative process to challenge SUNAT actions surely constitutes a “binding dispute settlement procedure” for purposes of the TPA’s fork-in-the-road provision.

504. Because SMCV elected to complain to the Tax Tribunal and, before that, to SUNAT’s Claims Division about the measures that Claimant now alleges (on behalf of SMCV) constitute breaches of the 1998 Stabilization Agreement, Claimant is definitively and irrevocably barred by Article 10.18.4 of the TPA from complaining about those same measures (again, on behalf of SMCV) in an investor-state arbitration. As the *M.C.I. Power Group* tribunal held, “[o]nce the choice has been made there is no possibility of resorting to any other option.”<sup>1049</sup>

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<sup>1048</sup> Claimant’s Memorial at para. 15.

<sup>1049</sup> Exhibit RA-11, *M.C.I. v. Ecuador*, Award at para. 181.

505. Claimant’s second argument is equally unavailing. Although SMCV’s claims before SUNAT’s Claims Division and the Tax Tribunal were indeed administrative challenges to the validity of SUNAT’s assessments under the Mining Law and Regulations, they rest on the same fundamental basis—indeed, more than that, on the exact same legal argument and the exact same claimed legal rights—as SMCV’s claims before this Tribunal of alleged breaches of the 1998 Stabilization Agreement.

506. The appropriate test to determine whether claims submitted to other dispute resolution fora and investor-state arbitration are the same, and are therefore precluded from submission to arbitration pursuant to a fork-in-the-road provision such as Article 10.18.4 of the TPA, is known as the fundamental-basis test.<sup>1050</sup> It is a pragmatic approach that has increasingly replaced the formalistic “triple-identity” test that was initially adopted by the first tribunals to consider how fork-in-the road provisions should be applied.<sup>1051</sup> Under the fundamental-basis test, claims are considered the same if the bases of the claims are the same, in the sense that, for example, deciding the claim that is submitted to arbitration would require the tribunal to reach and resolve the same underlying dispute that was at issue in the claim previously submitted to the other dispute resolution forum.<sup>1052</sup>

507. Under the triple-identity test, claims are considered the same if the cause of action, the object or relief sought, and the parties, are the same.<sup>1053</sup> To be clear, Respondent

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<sup>1050</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67; Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 378; Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at paras. 308-10.

<sup>1051</sup> See, e.g., Exhibit RA-14, *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo*, ICSID Case No. ARB/77/2, Award, August 8, 1980, at para. 1.14; Exhibit RA-15, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009 (“*Toto v. Lebanon*, Decision on Jurisdiction”), at para. 211; see also Exhibit RA-16, Markus A. Petsche, “The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches,” 18 *Wash. U. Global Stud. L. Rev.* 391 (2019), at pp. 393-94.

<sup>1052</sup> Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 310; see also Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 61. Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 367; Exhibit RA-16, Markus A. Petsche, “The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches,” 18 *Wash. U. Global Stud. L. Rev.* 391 (2019), at 412-19.

<sup>1053</sup> See, e.g., Exhibit RA-15, *Toto v. Lebanon*, Decision on Jurisdiction at para. 211.

maintains that the triple-identity test would also be met here, because Claimant is proceeding on behalf of SMCV (the same party to the Peruvian proceedings), the relief sought—in effect, relief from the assessed royalties and taxes (*i.e.*, non-application of the Royalty and Tax Assessments on SMCV’s activities relating to the Concentrator Project)—is the same, and SMCV’s claimed rights under the 1998 Stabilization Agreement are the same source of SMCV’s causes of action in both cases. But it is in any event more appropriate for the Tribunal to apply the fundamental-basis test, under which there is no question that Claimant is impermissibly attempting to present here claims for which a different, binding fork-in-the-road was already chosen in Perú.

508. Investor-state tribunals have increasingly rejected the triple-identity test in favor of the more pragmatic fundamental-basis test.<sup>1054</sup> As the *Pantechniki* tribunal explained:

It is common ground that the relevant test is the one expressed by the America-Venezuela Mixed Commission in the *Woodruff* case (1903): whether or not ‘the fundamental basis of a claim’ sought to be brought before the international forum, is autonomous of claims to be heard elsewhere. . . . It has been confirmed and applied in many subsequent cases. The key is to assess whether the same dispute has been submitted to both national and international fora.<sup>1055</sup>

509. The *H&H* tribunal confirmed that the fundamental-basis test is the appropriate test to be applied when determining whether a fork-in-the-road provision is triggered, noting that it is “the subject matter of the dispute” that is at the heart of the fork-in-the-road provision.<sup>1056</sup> Furthermore, the *H&H* tribunal indicated that the triple-identity test would be appropriate only if it is expressly required by the fork-in-the-road provision in a given treaty.<sup>1057</sup> According to the tribunal:

[T]he triple identity test is not the relevant test . . . , the language of Article VII [of the applicable investment treaty] does not require

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<sup>1054</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67; Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 364; Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 310.

<sup>1055</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 61 (emphasis added).

<sup>1056</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 367.

<sup>1057</sup> See Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at paras. 363-64.

specifically that the parties be the same, but rather that the dispute at hand not be submitted to other dispute resolution procedures; what matters therefore is the subject matter of the dispute . . . .

Accordingly, in order to decide whether the Claimant's Treaty claims in the present case are barred by the fork-in-the-road clause, the Tribunal must determine whether the Treaty claims have the same fundamental basis as the claims submitted before the local fora.<sup>1058</sup>

510. More recently, the *Supervisión y Control* tribunal likewise embraced the fundamental-basis test:

In order to determine whether the proceedings before the local tribunals relate to the same dispute submitted to arbitration, the Tribunal will apply the *fundamental basis of a claim* test . . . .<sup>1059</sup>

511. The fork-in-the-road provision under Article 10.18.4(a) of the TPA does not require application of the triple-identity test. Notably, the language of Article 10.18.4(a) does not require the party bringing the claims to the other dispute resolution forum and investor-state arbitration to be the same (that is, unlike other treaties, the Article reads: “the claimant or the enterprise . . . has previously submitted . . .”<sup>1060</sup>). Nor does it require that the object or relief sought be the same. In fact, Article 10.18.4(a) does not even mention the relief sought. Instead, similar to the provision at issue in the *H&H* case, the language of Article 10.18.4(a) focuses on the subject matter of the dispute (“the same alleged breach”<sup>1061</sup>). Like in *H&H*, given that the treaty in question does not constrain the Tribunal to use a triple identity test, the appropriate test to apply in this case is the fundamental-basis test.

512. Under the fundamental-basis test, two claims are considered the same if both claims are grounded in the same dispute, such that a finding on the merits of one claim depends on resolving the same dispute that also underlay the other claim. In *Pantechniki*, the claimant

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<sup>1058</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at paras. 364, 369 (emphasis added).

<sup>1059</sup> Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 308.

<sup>1060</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(a).

<sup>1061</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(a).

initiated proceedings before the Albanian courts in order to claim losses it was owed under an alleged settlement agreement entered into with the Albanian government.<sup>1062</sup> The claimant in that case later submitted a claim to arbitration alleging a treaty violation based on, among other acts, Albania's failure to compensate the claimant under the alleged agreement.<sup>1063</sup> The *Pantehniki* tribunal held that it lacked jurisdiction over the claimant's treaty claim, because the claimant had "the same fundamental basis"<sup>1064</sup> as the claim that had been submitted to the Albanian courts. In particular, the tribunal held that "[t]he [c]laimant's grievance thus arises out of the same purported entitlement that it invoked in the contractual debate it began with the General Roads Directorate. The [c]laimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of the [t]reaty claim. Having made the election to seise the national jurisdiction[,] the [c]laimant is no longer permitted to raise the same contention before ICSID."<sup>1065</sup> Put another way, for a claim to be eligible to be submitted to arbitration where a fork-in-the-road provision exists, the claim must be autonomous from the claim previously submitted to the other dispute resolution forum. As the *Pantehniki* tribunal explained, "The Tribunal must determine whether the claim truly does have an autonomous existence outside the contract. Otherwise the [c]laimant must live with the consequences of having elected to take its grievances to the national courts."<sup>1066</sup>

513. Similarly, in *H&H*, the claimant submitted claims to domestic courts in Egypt and participated in a domestic arbitration where it filed a counterclaim against an entity owned by the Egyptian government called "GHE."<sup>1067</sup> The tribunal found that the domestic claims and the

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<sup>1062</sup> Exhibit RA-12, *Pantehniki v. Albania*, Award at para. 21.

<sup>1063</sup> Exhibit RA-12, *Pantehniki v. Albania*, Award at paras. 26, 28.

<sup>1064</sup> Exhibit RA-12, *Pantehniki v. Albania*, Award at para. 67.

<sup>1065</sup> Exhibit RA-12, *Pantehniki v. Albania*, Award at para. 67.

<sup>1066</sup> Exhibit RA-12, *Pantehniki v. Albania*, Award at para. 64 (emphasis added).

<sup>1067</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 2.

claims submitted to investor-state arbitration “share[d] the same fundamental basis,” because the basis of the claimant’s claims brought to investor-state arbitration were the same measures that were complained-of by claimant in the domestic proceedings, namely GHE’s alleged interference with the claimant’s rights under a management-and-operation contract (“MOC”) and the Ministry of Tourism’s failure to intervene.<sup>1068</sup> The tribunal held that it lacked jurisdiction over the expropriation and fair and equitable treatment claims that were submitted to arbitration based on GHE’s and the Ministry’s actions, because “[t]he Tribunal cannot accept claims which are fundamentally based on the very same facts and, . . . , on the very same contract relied upon by the Claimant in support of the claims submitted before the Cairo Arbitral Tribunal and Egyptian local courts. Accepting the Claimant’s argument would deprive Article VII 3(a) [(the applicable fork-in-the-road provision)] of the Treaty of any meaning and effect.”<sup>1069</sup> In particular, the tribunal held that “[c]laimant’s expropriation claim does not have an autonomous existence outside the contract. The [c]laimant’s expropriation claim is in reality based on an alleged violation . . . of the MOC.”<sup>1070</sup>

514. The parallels between *Pantechniki* and *H&H* and Claimant’s claims here are inescapable, and the outcomes should be the same as well. As in *Pantechniki* and *H&H*,<sup>1071</sup> Claimant’s claims (on behalf of SMCV) in this arbitration and SMCV’s claims before SUNAT’s Claims Division and the Tax Tribunal challenge exactly the same government measures—Perú’s alleged failure to apply the stability benefits to which SMCV claims it is legally entitled under the 1998 Stabilization Agreement. Moreover, the legal bases for SMCV’s complaints before SUNAT’s Claims Division and the Tax Tribunal, and now through Claimant before this

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<sup>1068</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at paras. 376-78.

<sup>1069</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 382 (emphasis added).

<sup>1070</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 377 (emphasis added).

<sup>1071</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at paras. 64, 67; Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at paras. 381-82; see also Exhibit CA-228, *Supervisión y Control v. Costa Rica*, Award at para. 315.

Tribunal, are the same—in both cases, the claim is that the Royalty and Tax Assessments that SUNAT issued against SMCV violated SMCV’s rights and Perú’s (and thus SUNAT’s) obligations under the 1998 Stabilization Agreement.

515. The Table below shows how SMCV’s complaints and the legal questions raised are the same in the claims submitted to SUNAT’s Claims Division, the Tax Tribunal, and this Tribunal. For purposes of illustration, and to avoid repetition, the Table below analyzes select complaints before SUNAT’s Claims Division, the Tax Tribunal, and this arbitration (*i.e.*, 2009 Royalty Assessment and the 2006 GST Assessment). In addition, to show that SUNAT’s and the Tax Tribunal’s resolutions of those complaints addressed the same claims that Claimant raises in these proceedings, we also include in the Table below a summary of SUNAT’s and the Tax Tribunal’s decisions in each of the below-listed cases.

**Table 5: SMCV’s Claims before SUNAT’s Claims Division, the Tax Tribunal, and this Arbitral Tribunal Share the Same Fundamental Basis**

	SUNAT’s Claims Division	Tax Tribunal	ICSID Arbitration
<b>Complaints Raised by Claimant/SMCV</b>			
2009 Royalty Assessment	<p><u>SMCV’s Recurso de Reclamación</u>:<sup>1072</sup></p> <p>“SUNAT intends to apply the mining royalties . . . on a portion of the minerals that CERRO VERDE extracts at its ‘Cerro Verde Nos. 1, 2 and 3’ mining concession, despite the fact that said concession – together with the ‘Cerro Verde Beneficiation Plant’ beneficiation concession – enjoys tax, administrative and exchange stability under the Agreement on Guarantees and Measures for the Promotion of</p>	<p><u>SMCV’s Appeal</u>:<sup>1073</sup></p> <p>“Considering that said Intendancy Resolution does not comply with the applicable legal provisions and that it expressly violates a Contract Law entered into by our company with the Peruvian State [(1998 Stabilization Agreement)] within the term established by article 146 of the Tax Code, we APPEAL against it, . . . .” (p. 1)</p> <p>“The Stability Agreements seek to guarantee the application of a</p>	<p><u>Claimant’s Memorial</u>:<sup>1074</sup></p> <p>“The Stability Agreement required Peru to apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator; and Peru’s novel interpretation limiting stability guarantees only to the investment program included in the Feasibility Study is entirely unsupported by the plain terms of the Mining Law and Regulations and the Stability Agreement itself, . . . .” (para. 300(ii)-(iii))</p>

<sup>1072</sup> Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011, at pp. 4, 29 (emphasis added).

<sup>1073</sup> Exhibit CE-62, SMCV Appeal of SUNAT 2009 Royalty Assessments, January 12, 2012, at p. 1, paras. 7.4, 7.9 (emphasis added).

<sup>1074</sup> Claimant’s Memorial at paras. 173, 300(ii)-(iii), 301, 302, 338(b) (emphasis added); *see also* Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments, September 15, 2009, at pp. 14-15

	SUNAT's Claims Division	Tax Tribunal	ICSID Arbitration
	<p>Investments entered into with the Peruvian State in 1998 . . . .” (p. 4)</p> <p>“<u>The only argument by the Administration to support this collection consists of the feasibility study submitted by CERRO VERDE for entering into the Stability Agreement only contemplated the investment in the Leaching Plant</u> and that, now, a portion of the minerals extracted from the ‘Cerro Verde Nos. 1, 2 and 3’ mining concession are ‘treated’ (after their extraction) at another plant (the Primary Sulfides Plant).” (p. 4)</p> <p>“Given the rules of the General Mining Law (previously analyzed), there remains no doubt that <u>all investments made in mining concessions or Economic Administrative Units included in Stability Agreements enjoy the contractual benefits.</u>” (p. 29)</p>	<p><u>given tax, administrative and exchange regime to a specific ‘mining project’, understood as a Production Unit (UEA).</u> It is not possible to grant stability to an independent ‘investment project’. This lacks logical, economic and legal support.” (para. 7.4)</p> <p>“<u>[T]he Feasibility Study submitted by CERRO VERDE to enter into the Stability Agreement (referring to the investment in the Leaching Project) is only a requirement to enter into the Stability Agreement, which does not limit the application of the agreement to that initial investment project, but covers all activities carried out in that production unit during the term of the Agreement.</u>” (para. 7.9)</p>	<p>“. . . <u>stability guarantees must apply to the entire mining unit</u> or concession to encourage significant and continuing mining investments.” (para. 301)</p> <p>“<u>[T]he Government granted stability to investors for the entire mining unit or concession(s)</u> in which the qualifying minimum investment was made, <u>without distinguishing whether the investments were included in the investment program in the feasibility study,</u> different processing methods were used within the mining unit, or otherwise.” (para. 302)</p> <p>“<u>[T]he 1996 Feasibility Study did not limit the scope of the Stability Agreement,</u> but rather established the “minimum investment” SMCV had to meet to apply for stability benefits. (para. 173)</p> <p>“Ms. Vega similarly explains that feasibility studies ‘demonstrated that the mining company’s investment program met the initial minimum investment requirement to receive stability guarantees, . . . . By contrast, Ms. Vega confirms that <u>the Mining Law and Regulations . . . [did not] provide[] any basis to limit the scope of stability guarantees to the investment program foreseen in the feasibility study.</u>” (para. 338(b))</p>
2006 GST Assessment	<p><u>SUNAT’s decision:</u><sup>1075</sup></p> <p>“<u>[T]he appellant believes that the Guarantees and Measures for the Promotion of Investments Agreement covers all investments executed in the aforementioned beneficiation concession, as well as in the Cerro Verde No. 1, 2, and 3 mining concession during the term of the agreement, . . . .”</u> (p. 62)</p>	<p><u>Tax Tribunal’s decision:</u><sup>1076</sup></p> <p>“<u>The appellant sustains that the benefits awarded by the Agreement on Guarantees and Measures for the Promotion of Investments, pertain to all those activities or investments that were made in the Cerro Verde Production Unit,</u> comprised of the mining concession “Cerro Verde No. 1, 2, and 3 and the concession of benefits of the ‘Ben[e]fic[i]ation Plant Cerro Verde’, comprising the leaching and concentration processes.” (p. 8)</p>	

<sup>1075</sup> Exhibit CE-604, Resolution on Appeal of 2006 GST, at p. 62 (emphasis added).

<sup>1076</sup> Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018, August 22, 2018, at p. 8 (emphasis added).

	SUNAT's Claims Division	Tax Tribunal	ICSID Arbitration
<b>Legal Question According to SUNAT or the Tax Tribunal</b>			
2009 Royalty Assessment	<p>SUNAT's decision:<sup>1077</sup></p> <p>“In the instant case, the disputed matter is limited to establishing <u>whether the activities related to the Primary Sulfide Project fall within the scope of the stability guarantee granted by the stability agreement and, consequently, whether the appellant is obliged to pay the mining royalty for the extraction of ore from the ‘Cerro Verde Nos. 1, 2 and 3’ mining concession destined to the Primary Sulfide Project in the periods of January to December 2009.</u>” (p. 25)</p>	<p>Tax Tribunal's decision:<sup>1078</sup></p> <p>“[I]n this case, it is appropriate to determine <u>the scope of the stability agreement</u> entered into between the Peruvian Government and the appellant, in order to establish <u>whether the extraction of minerals destined to the ‘Primary Sulfides Project’ is protected by the stability, and therefore, whether it is subject to the payment of mining royalties.</u>” (p. 10)</p>	<p>Claimant's Memorial:<sup>1079</sup></p> <p>“The subject matter of Freeport's claims is Peru's breaches of the Stability Agreement arising from its novel interpretation <u>restricting stability guarantees to the Feasibility Study's investment program instead of granting them to SMCV for all investments in the Cerro Verde Mining Unit.</u>” (para. 299)</p> <p>“Peru repeatedly breached its obligations under the Stability Agreement to <u>grant stability guarantees to the entire Cerro Verde Mining Unit</u> because:</p>
2006 GST Assessment	<p>SUNAT's decision:<sup>1080</sup></p> <p>“With the purpose of establishing which are the activities that enjoy contractual benefits, regarding those not included within the bounds of the aforesaid benefit and must be governed by the common legal framework, <u>it is necessary to determine the applicability of the stability guarantee granted.</u>” (p. 53)</p>	<p>Tax Tribunal's decision:<sup>1081</sup></p> <p>“As aforementioned it is maintained that <u>the matter of contention is centered on establishing whether the benefits of the Agreement on Guarantees and Measures for the Promotion of Investments signed by the State of Peru and the appellant, covers only the Leaching Project</u> as maintained by the Administration, or to the contrary covers all those activities of the Cerro Verde Production Unit, as alleged by the appellant.” (p. 8)</p> <p>“[I]n order to <u>establish the scope of the guarantees</u> granted to the appellant, the scope of the agreement signed with it has been analyzed, . . . .” (p. 10)</p>	<p>(i) Under the Mining Law and Regulations, <u>stability guarantees applied to the entire mining unit or concessions</u> in which the investor made its qualifying minimum investment;</p> <p>(ii) The Stability Agreement required Peru to <u>apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator;</u> and</p> <p>(iii) Peru's novel interpretation <u>limiting stability guarantees only to the investment program included in the Feasibility Study is entirely unsupported . . . .</u>” (para. 300)</p> <p>“Under the version of the Mining Law and Regulations in force until 2014, the Government <u>granted stability to investors for the entire mining unit or</u></p>

<sup>1077</sup> Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011, at p. 25 (emphasis added).

<sup>1078</sup> Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018, at p. 10 (emphasis added).

<sup>1079</sup> Claimant's Memorial at paras. 299, 300, 302 (emphasis added).

<sup>1080</sup> Exhibit CE-604, Resolution on Appeal of 2006 GST, at p. 53.

<sup>1081</sup> Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018, August 22, 2018, at pp. 8, 10 (emphasis added).

	SUNAT's Claims Division	Tax Tribunal	ICSID Arbitration
			<u>concession(s) in which the qualifying minimum investment was made, without distinguishing whether the investments were included in the investment program in the feasibility study, . . . .</u> " (para. 302)
<b>Decision Rendered on Claims Presented</b>			
2009 Royalty Assessment	<p><u>SUNAT's decision:</u><sup>1082</sup></p> <p>"Thus, . . . the stability guarantee granted by the Agreement on Guarantees and Measures to Promote Investment inures <u>only to the activities related to the investment project contemplated by the agreement referred to in the Technical-Economic Feasibility Study, . . . .</u>" (p. 32)</p> <p>"In this vein, the investment made in the <u>Primary Sulfide Project is a new investment completely distinct from the one contained in the Feasibility Study</u> submitted by the appellant in order to obtain the tax, administrative and exchange-rate stability guarantee, . . . ." (p. 47)</p> <p>"[I]n the instant case, the stability guarantee granted by the Agreement on Guarantees and Measures to Promote Investment inures <u>only to the activities related to the 'Cerro Verde Leaching Project' contemplated by the stability agreement</u>, so that the investments carried out after the signing of the agreement that are not linked to said project, as is the case of the '<u>Primary Sulfide Project</u>', <u>do not enjoy said contractual benefit, and must be governed by the</u></p>	<p><u>Tax Tribunal's decision:</u><sup>1083</sup></p> <p>"Scope of the stability contract signed between the Peruvian State and the appellant . . . both the appellant and the Peruvian State delimited the scope and purpose of the signed stability agreement and agreed to perform a series of services to be fulfilled by both parties. In that connection, the <u>documents issued before the signing of the agreement (Feasibility Study) were intended to clearly define the subject matter of the agreement entered into, i.e., delimit the project for which the investment would be intended: the "Cerro Verde Leaching Project", whose objective is the production of copper cathodes.</u>" (p. 22)</p> <p>". . . said <u>benefits apply only to the activities connected with the investment in question, the object of which is delimited in the Feasibility Study, which, in the present case, is in reference to the "Cerro Verde Leaching Project."</u>" (p. 22)</p>	--

<sup>1082</sup> Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011, at pp. 32, 47, 50 (emphasis added).

<sup>1083</sup> Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018, at p. 22 (emphasis added).

	SUNAT's Claims Division	Tax Tribunal	ICSID Arbitration
	ordinary legal framework.” (p. 50)		
2006 GST Assessment	<p><u>SUNAT's decision:</u><sup>1084</sup></p> <p>“It is made clear in the <u>forementioned provisions that these confine the benefit to the investment executed within the Feasibility Study</u>, which previously was approved by the administrative authority to delineate the benefit, which is the subject of the agreement.” (p. 53)</p> <p>“Thus, by virtue of the aforesaid provisions, in fact the stability guarantee granted by the <u>Guarantees and Measures for the Promotion of Investments Agreement solely affect the activities related to the investment project, which are the subject of the agreement referred to in the Technical Economic Feasibility Study</u>, given that the purpose of the agreement is that the investor understands beforehand the rules that will be applied to its investment during the term of the agreement.” (p. 55)</p> <p>“[W]ith the terms of the Guarantees and Measures for the Promotion of Investments Agreement entered into with the Peruvian State in mind, <u>the scope of the stability guarantee, in fact, only protects the activities and results obtained from the Cerro Verde Leaching Project. . . . the Primary Sulfide Project is not covered by the contractual benefit granted by the stability agreement</u>, due to the fact that the investment project has not been considered part of the agreement.” (p. 62)</p> <p>“It is important to note that although the concentrator and</p>	<p><u>Tax Tribunal's decision:</u><sup>1085</sup></p> <p>“In accordance to what has already been expressed by this Court in Resolutions No. 08252-1-2013, No. 08997-10-2013 and No. 06141-2-2018, <u>legally stabilized benefits are not generally awarded in favor of the owner of the mining activity nor any specific mining concession, but rather with relation to a specific project investment, clearly defined in the Feasibility Study</u>, which has been approved by the Ministry of Energy and Mines. . . . In the case under analysis, <u>the investment subject of the stability agreement is referred to as ‘Cerro Verde Leaching Project’</u>. (p. 8)</p> <p>“. . . , said <u>benefits only apply to activities connected to the cited investment, whose objective is defined in the Feasibility Study</u>, which in the present case is referred to as the <u>activities connected to the ‘Cerro Verde Leaching Project’</u>, therefore what is argued by the appellant to the contrary, is not worthy of consideration.” (p. 8)</p> <p>“. . . the Administration observed various activities, such as: i) Sale of unused burnt oil, . . . considering that <u>these things were not connected to the Leaching Project and as such did not fall under the benefits established in the Agreement on Guarantees and Measures for the Promotion of Investments.</u>” (p. 8)</p> <p>“Taking into account that <u>the appellant only stabilized the tax regime on the activities</u></p>	

<sup>1084</sup> Exhibit CE-604, Resolution on Appeal of 2006 GST, at pp. 53, 55, 62 (emphasis added).

<sup>1085</sup> Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018, August 22, 2018, at pp. 8, 9, 11 (emphasis added).

	SUNAT's Claims Division	Tax Tribunal	ICSID Arbitration
	<p>the leaching plant are developed within the Cerro Verde Beneficiation Plant beneficiation concession itself, this does not imply that we should suppose that the Primary Sulfide Project enjoys the guarantee granted by the stability agreement, . . . : <u>the benefits have not been granted to the so-called mining project or Economic Administrative Unit</u>, which consists of the Cerro Verde No. 1, 2, and 3 mining concession as well as the Cerro Verde Beneficiation Plant beneficiation concession, <u>but rather they have been granted to the appellant regarding the Cerro Verde Leaching Project, which is the subject of the stability agreement, and that did not include the primary sulfide ore concentration process using a concentrator to obtain copper and molybdenum concentrates and silver in any clause or in the Economic Administrative Feasibility Study.</u>" (p. 62)</p> <p>"For this reason, in this instance, in fact, <u>the stability guarantee granted by the Guarantees and Measures for the Promotion of Investments Agreement covers only to those activities relating to the Cerro Verde Leaching Project</u>, which is the subject of the stability agreement; as a result of which, <u>the operations not linked with that project, . . . , as well as those associated with the Primary Sulfide Concentrator, do not enjoy this contractual benefit, and must be governed by the common legal framework.</u>" (p. 62)</p>	<p>connected to the '<u>Cerro Verde Leaching Project</u>', the activities <u>unrelated to said project fell under the regulations in force on the date they took place.</u> In that sense, given that during the audit and the contentious tax proceedings [the appellant] has not been proven that the activities seen in sales, services . . . , were connected to the activities of the said project, it had been agreed that the Administration apply the General Sales Tax at the 19% tax rate, . . ." (p. 9)</p> <p>"[A]ccording to what has been stated, it was the first clause of the stability agreement that indicated that the appellant '<i>filed the relevant request with the Ministry of Energy and Mines so that, by means of an agreement, it would be guaranteed the benefits ( . . . ), in relation to the investment in its Cerro Verde Nos. 1, 2 and 3 concession, hereinafter the Cerro Verde Leaching Project</i>', where the <u>scope of the guarantees granted contractually, limited to a certain investment</u> that is made in a concession and not to the concession itself, is stated. By virtue of the foregoing, what is argued by the appellant, to the effect that said rule is applicable, is groundless." (p. 11)</p>	

516. As can be seen from the Table above, SMCV's claims before SUNAT's Claims Division, the Tax Tribunal, and this ICSID Tribunal have the same fundamental basis. First, the claims are both derived from the same factual bases—they are complaints about SUNAT's

Royalty and Tax Assessments against SMCV. They rest on the same legal basis as well: SMCV complained before SUNAT's Claims Division and the Tax Tribunal, and now SMCV, through Claimant, complains before this Tribunal that the Assessments were contrary to SMCV's rights and Peru's obligations in the 1998 Stabilization Agreement.<sup>1086</sup> Second, a finding on the merits of SMCV's arbitration claims depends on resolving the scope of the 1998 Stabilization Agreement, which is the same dispute and the same legal question that underlay SMCV's claims before SUNAT's Claims Division and the Tax Tribunal. In the *Pantechniki* tribunal's words, "The [c]laimant's grievances thus arises out of the same purported entitlement that it invoked in the contractual debate it began with [SUNAT's Claims Division and the Tax Tribunal]."<sup>1087</sup> Because SMCV's claims (through Claimant) in this arbitration do not have an "autonomous existence outside the contract"<sup>1088</sup> and "cannot be considered separable"<sup>1089</sup> from the claims it previously elected to submit to SUNAT's Claims Division and the Tax Tribunal, the claims must be deemed the same under the fundamental-basis test.

517. Not only are the claims the same under the fundamental-basis test, but, as explained in paragraphs 497 and 498 above, the scope of the 1998 Stabilization Agreement has already been definitively established, on multiple occasions, through proceedings before SUNAT's Claims Division and the Tax Tribunal—and further confirmed by the Peruvian courts, including Perú's Supreme Court. Thus, by submitting its claims (through Claimant) to this

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<sup>1086</sup> See Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at paras. 381-82 ("[T]he Tribunal observes that these treaty claims have the same fundamental basis and share the same factual components as the claims filed before the Cairo Arbitral Tribunal and the Egyptian local courts. . . . The Tribunal cannot accept claims which are fundamentally based on the very same facts.").

<sup>1087</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 67.

<sup>1088</sup> Exhibit RA-12, *Pantechniki v. Albania*, Award at para. 64; see also Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 382 ("The Tribunal cannot accept claims which are fundamentally based on the very same facts and, contrary to what the Claimant alleges, on the very same contract relied upon by the Claimant in support of the claims submitted before the Cairo Arbitral Tribunal and Egyptian local courts.").

<sup>1089</sup> Exhibit RA-13, *H&H Enterprises v. Egypt*, Award at para. 378 ("These allegations share fundamentally the same factual basis as, and therefore cannot be considered separable from, the Claimant's claims against GHE and EGOH [before the Cairo Arbitral Tribunal and Egyptian local courts].").

Tribunal even after SUNAT’s Claims Division and the Tax Tribunal have repeatedly confirmed the Assessments on the basis that the 1998 Stabilization Agreement does not include activities related to the Concentrator Project, SMCV is obviously attempting to relitigate its claims in all those domestic Peruvian proceedings in the hopes of obtaining a different outcome. Just because SMCV is not satisfied with the outcome it obtained from SUNAT’s Claims Division or the Tax Tribunal, SMCV is not thereby entitled to relitigate its complaint in this arbitration. This is especially true when there is a fork-in-the-road provision, such as that provided under Article 10.18.4(b), which expressly states “[f]or greater certainty,” the election to submit a claim to local proceedings is “definitive.”<sup>1090</sup> Indeed, the unquestioned purpose of the fork-in-the-road provision is to prevent litigants from “taking a second bite at the apple.” As the *Hassan Awdi* tribunal explained:

The [fork-in-the-road] provision is meant to avoid that by resorting initially to the State courts and then to arbitration under the BIT, the investor tries its case a second time should it be not satisfied with the outcome of the first attempt before the local courts.<sup>1091</sup>

518. This Tribunal must deny Claimant and SMCV a second, third, or even fourth or fifth bite at that apple. SMCV definitively elected to submit its claims to SUNAT’s Claims Division and the Tax Tribunal (that is, to administrative tribunals and binding dispute resolution procedures under Peruvian law) to challenge SUNAT’s Royalty and Tax Assessments under the 1998 Stabilization Agreement. Once SMCV did so, Article 10.18.4 of the TPA prohibits SMCV from submitting those same claims (through Claimant) to this Tribunal. Claimant may not submit, on behalf of SMCV, claims that SUNAT’s Assessments breached the 1998 Stabilization Agreement. The Tribunal lacks jurisdiction over these claims.

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<sup>1090</sup> Exhibit CA-10, US-Perú TPA at Art. 10.18.4(b).

<sup>1091</sup> Exhibit RA-17, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, March 2, 2015, at para. 203.

**D. CLAIMANT’S CLAIMS OF ALLEGED BREACHES OF THE STABILIZATION AGREEMENT ARE OUTSIDE OF THE TRIBUNAL’S JURISDICTION, BECAUSE CLAIMANT HAS NOT PROVEN THAT IT RELIED ON THE STABILIZATION AGREEMENT WHEN IT ESTABLISHED OR ACQUIRED ITS COVERED INVESTMENTS**

519. The Tribunal also lacks jurisdiction over Claimant’s claims (submitted on behalf of SMCV) for breaches of the 1998 Stabilization Agreement because Claimant has not shown that it relied on the 1998 Stabilization Agreement when it acquired its covered investments. Pursuant to Article 10.16.1(b) of the TPA, a claimant may submit, “on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,”<sup>1092</sup> a claim for breach of an “investment agreement” only if two requirements are met. First, the subject matter of the claim and the claimed damages must directly relate to the covered investment.<sup>1093</sup> Second, and fatally for Claimant’s claims here, the claimant must have relied on the investment agreement when it established or acquired the covered investment.<sup>1094</sup> This mirrors the TPA’s definition, which specifies that, in order for an agreement to be considered an “investment agreement” in the first place within the meaning of the TPA, the investor must have relied on that agreement in establishing or acquiring a covered investment.<sup>1095</sup> Because Claimant has not proven that it relied on the 1998 Stabilization Agreement when it acquired its covered investments (*i.e.*, SMCV, the so-called “Cerro Verde production unit,” and the “Mining and Beneficiation Concessions”<sup>1096</sup>), the 1998 Stabilization Agreement is not an “investment agreement” under the TPA nor may Claimant submit, on behalf of SMCV, a claim for breaches of that Agreement in accordance with Article 10.16.1(b) of the TPA.

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<sup>1092</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

<sup>1093</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

<sup>1094</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

<sup>1095</sup> Exhibit CA-10, US-Perú TPA at Art. 10.28.

<sup>1096</sup> Claimant’s Notice of Arbitration at para. 93.

520. Article 10.16.1(b) provides:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

...

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) on obligation under Section A [(“Investment”)],

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.<sup>1097</sup>

521. To be clear, the TPA expressly requires a claimant’s reliance on the investment agreement in a situation where a claimant is submitting a claim, on its own behalf or on behalf of an enterprise it owns or controls, specifically for breach of an investment agreement.<sup>1098</sup> In contrast, the TPA does not require such reliance in a situation where a claimant is submitting a claim, on its own behalf or on behalf of an enterprise it owns or controls, either of breach of an obligation under Section A of Chapter Ten of the TPA or of breach of an investment authorization.<sup>1099</sup>

522. Such a clear contrast in Article 10.16.1 between claims submitted for breach of an investment agreement, and for breach of a Chapter Ten obligation or an investment

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<sup>1097</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

<sup>1098</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

<sup>1099</sup> Exhibit CA-10, US-Perú TPA at Art. 10.16.1(b).

authorization, confirms the very deliberate intent of the Contracting States, *i.e.*, Perú and the United States, to require a claimant’s reliance specifically if a claimant is submitting a claim for breach of an investment agreement (as Claimant is doing in this case). This is a clear jurisdictional prerequisite—and it is Claimant’s burden to prove that it meets the requirement. If Claimant fails to prove that it relied on an investment agreement when it established or acquired its covered investment, Claimant is barred from submitting a claim for breach of that investment agreement.

523. Article 10.28 has a similar requirement in the very definition of “investment agreement” under the TPA. According to Article 10.28, an “investment agreement” is:

a written agreement<sup>1100</sup> between a national authority<sup>1101</sup> of a Party and a covered investment or an investor of another Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment . . .<sup>1102</sup>

Accordingly, in order for the 1998 Stabilization Agreement to be considered an “investment agreement” under the TPA in the first place, Claimant must show that it relied on that Agreement in establishing or acquiring a covered investment.

524. Thus, both for the purpose of demonstrating that the 1998 Stabilization Agreement is an “investment agreement” under the TPA and for the purpose of bringing a claim for breach of that Agreement in these arbitral proceedings, Claimant must show that it relied on the 1998 Stabilization Agreement when establishing or acquiring a covered investment. This, Claimant has not shown.

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<sup>1100</sup> Exhibit CA-10, US-Perú TPA at Art. 10.28, n. 16 (defining “written agreement” as “an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 10.22.2. For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.”).

<sup>1101</sup> Exhibit CA-10, US-Perú TPA at Art. 10.28, n. 17 (defining “national authority” as “an authority at the central level of government.”).

<sup>1102</sup> Exhibit CA-10, US-Perú TPA at Art. 10.28 (emphasis added).

525. Claimant asserts in its Notice of Arbitration that the covered investments at issue in these proceedings are: “SMCV, an ‘enterprise’ constituted under the laws of Peru,” the so-called “Cerro Verde production unit,” and the “Mining and Beneficiation Concessions.”<sup>1103</sup> What Claimant has failed to prove—and which is fatal to its claims of breach of the 1998 Stabilization Agreement—is that it relied on the 1998 Stabilization Agreement when it acquired those investments, which Claimant asserts occurred when it acquired Phelps Dodge on March 19, 2007.<sup>1104</sup>

526. Claimant tries to meet this requirement merely by declaring its reliance, but it does so without evidence. For example, in paragraph 4 of its Notice of Arbitration, Claimant asserts without providing any evidence that “Freeport and SMCV relied on the Stability Agreement and invested hundreds of millions of dollars to develop the Cerro Verde mine, . . . .”<sup>1105</sup> Then, in paragraph 106 of the same document, when discussing its right to submit a claim for breaches of the 1998 Stabilization Agreement under Article 10.16.1(b), Claimant, again, makes an assertion, without providing any evidence, that:

Freeport and SMCV relied on the Stability Agreement “in establishing or acquiring a covered investment.” Freeport relied on the Stability Agreement in acquiring SMCV’s shares and Freeport and SMCV relied on the Stability Agreement in making their investments in the Cerro Verde mine including, among other investments, the Leaching and the Flotation Plant.<sup>1106</sup>

527. Similarly, in its Memorial, Claimant failed to present any evidence to demonstrate its reliance on the 1998 Stabilization Agreement when it acquired its investments in SMCV, the so-called “Cerro Verde production unit,” and the Mining and Beneficiation Concessions. At several points in its Memorial, Claimant alleges reliance on the 1998 Stabilization Agreement by

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<sup>1103</sup> Claimant’s Notice of Arbitration at para. 93.

<sup>1104</sup> See, e.g., Claimant’s Notice of Arbitration at paras. 44, 106; Claimant’s Memorial at para. 297.

<sup>1105</sup> Claimant’s Notice of Arbitration at para. 4.

<sup>1106</sup> Claimant’s Notice of Arbitration at para. 106.

other parties—namely, Phelps Dodge, Cyprus, and SMCV—but not on its own. For example, in paragraph 297 of its Memorial, Claimant states that:<sup>1107</sup>

- “Freeport, through its predecessors in interest, ‘relied’ on the Stability Agreement when ‘establishing or acquiring’ its covered investment in SMCV and its covered investments in the Cerro Verde Mining Unit, . . . .”
- “Cyprus initially acquired SMCV in reliance on Peru’s guarantees of stability, . . . .”
- “Mr. Morán testifies that when Phelps Dodge assessed SMCV in connection with its acquisition of Cyprus, Phelps Dodge ‘believed that SMCV’s stability regime was critically important.’ . . . . Mr. Morán also explains that ‘[f]or this reason, the technical team reviewed the stability agreements that SMCV had signed—in particular, the [Stability Agreement]—and assigned great importance to that Agreement in determining the company’s future plans.’”
- “Mr. Morán also testifies that Phelps Dodge’s Board ultimately ‘based its approval’ to invest in the Concentrator ‘on the Finance Committee’s recommendation, as well as the 2004 Feasibility Study and its update which . . . reflected our understanding that the Stability Agreement’s guarantees would apply to the Concentrator.’”
- “Mr. Davenport testifies that ‘[g]uarantees of tax and administrative stability were a prerequisite for Phelps Dodge to invest in large-scale mining investment in developing economies such as Peru.’ . . . . He further testifies that ‘[i]n approving the investment, Phelps Dodge’s and SMCV’s Boards of Directors relied on financial projections that assumed the Stability Agreement’s guarantees would apply to the concentrator, . . . .”
- “Ms. Torreblanca testifies that SMCV’s Board conditionally approved the Concentrator on the understanding that it would be entitled to the stabilized regime, subject to, among others . . . .”
- “The 2004 Feasibility Study, and its September 2004 update, similarly demonstrate that Phelps Dodge and SMCV relied on the Stability Agreement in relation to the Concentrator investment . . . .”

528. Again, in paragraph 371 of its Memorial, Claimant alleges other parties’ reliance on the 1998 Stabilization Agreement when it acquired its investments in SMCV, the so-called “Cerro Verde production unit,” and the Mining and Beneficiation Concessions:<sup>1108</sup>

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<sup>1107</sup> Claimant’s Memorial at para. 297 (emphasis added).

<sup>1108</sup> Claimant’s Memorial at para. 371 (emphasis added).

- “SMCV and Freeport’s predecessor, Phelps Dodge, invested in the Concentrator in reliance on the reasonable expectation that Peru would honor those guarantees, as discussed . . . .”
- “Mr. Morán testifies that Phelps Dodge’s Finance Committee relied on the Stability Agreement in recommending approval of the Concentrator investment to Phelps Dodge.”
- “Mr. Davenport testifies that the Stability Agreement was ‘of paramount importance to Phelps Dodge’ in considering the Concentrator investment.”
- “Ms. Torreblanca testifies that SMCV’s approval of the Concentrator investment was conditioned on, among others, ‘approval of SMCV’s request to expand the Beneficiation Concession . . . .’”

529. To be clear, Claimant’s allegation that other parties, *i.e.*, Phelps Dodge, Cyprus, and SMCV, relied on the 1998 Stabilization Agreement is wholly irrelevant. Other parties’ alleged reliance, even if proven, does not establish Claimant’s own reliance that is expressly required under Articles 10.16.1(b) and 10.28 of the TPA, since none of those parties is the claimant in this arbitration. The only party to this arbitration is Freeport McMoRan Inc. The TPA requires the entity bringing the claim—Freeport McMoRan—to have relied on the purported investment agreement in order to make a covered investment. Similarly, alleging reliance by its “predecessors in interest” or by Phelps Dodge as its “predecessor” does not cure the lack of Claimant’s own reliance as required under the TPA.

530. Not only did Claimant fail to prove its own reliance, evidence suggests that Claimant likely did not rely on the 1998 Stabilization Agreement when it acquired its investments in SMCV, the so-called “Cerro Verde production unit,” and the Mining and Beneficiation Concessions. Evidently, other motives drove that investment. Claimant’s own statements (through its President, the Chairman of its board of directors, and its press release) and related news reports suggest that Claimant’s acquisition of Phelps Dodge, through which Claimant acquired 53.56% of SMCV, was specifically motivated by Claimant’s desire to expand

the size of Freeport-McMoRan so that Claimant could dominate the global mining industry.<sup>1109</sup>

Those public statements make no mention of the 1998 Stabilization Agreement nor of the Concentrator Project or other such plans.

531. Claimant was quick to tout the fact that, with its acquisition of Phelps Dodge, Freeport-McMoRan became the “world’s largest publicly traded copper producer.”<sup>1110</sup> In an article published by the *New York Times* entitled “Mining firms to merge to make a new No. 1,” Freeport-McMoRan’s President and Chief Executive, Mr. Richard Adkerson, explains Claimant’s motivation that led to its acquisition of Phelps Dodge:

Like companies involved in other mining mergers, Freeport-McMoRan promoted the idea that increased size has become an important competitive factor in the mining industry.

“We have been watching the industry consolidation, fewer companies, larger companies, but we had not been playing a role in it,” said Richard Adkerson, Freeport-McMoRan’s president and chief executive.<sup>1111</sup>

532. Similarly, other reports, including one quoting Mr. James R. Moffett, the Chairman of Freeport-McMoRan’s board of directors, suggest that Claimant’s acquisition of Phelps Dodge was largely motivated by Claimant’s desire to better compete globally against other mining companies:

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<sup>1109</sup> Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, “Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune,” *The New York Times*, November 19, 2006; Exhibit RE-109, “Freeport-McMoRan to Buy Phelps Dodge for \$25.9B,” *Reliable Plant*, available at [https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-\\$259b](https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-$259b); Exhibit CE-563, Steve James, “Freeport Acquires Phelps Dodge, Launches Offering,” *Reuters*, March 19, 2007; Exhibit RE-110, “Freeport-McMoRan Copper & Gold Inc. and Phelps Dodge Corp. Shareholders Approve Acquisition,” March 14, 2007, available at <https://investors.fcx.com/investors/news-releases/news-release-details/2007/FCX-and-Phelps-Dodge-Corp-Shareholders-Approve-Acquisition/default.aspx>.

<sup>1110</sup> Exhibit RE-110, “Freeport-McMoRan Copper & Gold Inc. and Phelps Dodge Corp. Shareholders Approve Acquisition,” March 14, 2007, available at <https://investors.fcx.com/investors/news-releases/news-release-details/2007/FCX-and-Phelps-Dodge-Corp-Shareholders-Approve-Acquisition/default.aspx>; see also Exhibit CE-563, Steve James, “Freeport Acquires Phelps Dodge, Launches Offering,” *Reuters*, March 19, 2007; Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, “Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune,” *The New York Times*, November 19, 2006; Exhibit RE-109, “Freeport-McMoRan to Buy Phelps Dodge for \$25.9B,” *Reliable Plant*, available at [https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-\\$259b](https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-$259b).

<sup>1111</sup> Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, “Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune,” *The New York Times*, November 19, 2006 (emphasis added).

- Reliable Plant News, “Freeport-McMoRan to buy Phelps Dodge for \$25.9B”:

The company’s increased scale of operations, management depth and strengthened cash flow will provide an improved platform to capitalize on growth opportunities in the global market . . . .

James R. Moffett, chairman of the board of FCX, said: “This transaction combines two leading mining companies to form a strong industry leader at a time when we see significant long-term opportunities in our industry . . . .”<sup>1112</sup>

- Fox News, “Freeport-McMoRan's Acquires Phelps Dodge, Becomes World’s Largest Publicly-Traded Copper Company”:

[T]he companies say the combination will make it the world’s largest publicly traded copper company—and the largest metals and mining company based in North America— . . . . “This is a competitive, global marketplace in which there is a number of significant producers,” [Mr. Richard Adkerson] said. “We will be a large company, but not anything like one that will cause any concerns.”<sup>1113</sup>

- Reuters, “Freeport acquires Phelps Dodge, launches offering”:

Freeport-McMoRan Copper & Gold Inc. (FCX.N) on Monday completed its \$25.9 billion acquisition of Phelps Dodge Corp. PD.N—one of the most famous names in U.S. mining history—to form the world’s largest publicly traded copper company.<sup>1114</sup>

533. In fact, Claimant’s own press release (published on Freeport-McMoRan’s website) in which it quotes Mr. Adkerson, Freeport-McMoRan’s President and Chief Executive, confirms the fact that Claimant acquired Phelps Dodge so that Freeport-McMoRan would dominate the global copper market as the world’s largest publicly traded copper producer:

<sup>1112</sup> Exhibit RE-109, “Freeport-McMoRan to Buy Phelps Dodge for \$25.9B,” *Reliable Plant*, available at [https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-\\$259b](https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-$259b) (emphasis added).

<sup>1113</sup> Exhibit RE-111, Associated Press, “Freeport-McMoRan’s Acquires Phelps Dodge, Becomes World’s Largest Publicly-Traded Copper Company,” *Fox News*, January 13, 2015, available at <https://www.foxnews.com/story/freeport-mcmorans-acquires-phelps-dodge-becomes-worlds-largest-publicly-traded-copper-company> (emphasis added).

<sup>1114</sup> Exhibit CE-563, Steve James, “Freeport Acquires Phelps Dodge, Launches Offering,” *Reuters*, March 19, 2007 (emphasis added).

Richard C. Adkerson, FCX's President and Chief Executive Officer, said, "We are pleased with the approval from shareholders which will allow us to complete the acquisition of Phelps Dodge. This is an exciting time for our company as we transform FCX into the world's largest publicly traded copper producer."<sup>1115</sup>

534. Claimant's own statements (through its President, the Chairman of its board of directors, and its press release) and related news reports all suggest that Claimant's acquisition of Phelps Dodge, then the world's second largest copper producer,<sup>1116</sup> was largely driven by Claimant's desire to dominate and better compete in the global copper industry.<sup>1117</sup> There is no suggestion that the acquisition of Phelps Dodge was driven by a desire or intention to build a Concentrator Project, nor by the existence or not of any stabilization benefits that might exist for the Cerro Verde mine. It is by far more likely that Claimant would have acquired Phelps Dodge (and with it, the Cerro Verde mine) whether or not the 1998 Stabilization Agreement ever existed—indeed, Claimant has nowhere claimed that the 1998 Stabilization Agreement was a requirement for the investment, or that it would not have made the Phelps Dodge investment without such an Agreement in place. Perhaps most damning is the fact that Claimant, knowing that its own reliance on the 1998 Stabilization Agreement is a precondition to bringing a claim (on behalf of SMCV), for breach of an investment agreement, did not present any evidence demonstrating that reliance on the 1998 Stabilization Agreement.

535. Because Claimant has not proven that it relied on the 1998 Stabilization Agreement when it acquired SMCV, the so-called "Cerro Verde production unit," and the Mining and Beneficiation Concessions, it failed to meet the reliance requirement under Article

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<sup>1115</sup> Exhibit RE-110, "Freeport-McMoRan Copper & Gold Inc. and Phelps Dodge Corp. Shareholders Approve Acquisition," March 14, 2007, available at <https://investors.fcx.com/investors/news-releases/news-release-details/2007/FCX-and-Phelps-Dodge-Corp-Shareholders-Approve-Acquisition/default.aspx> (emphasis added).

<sup>1116</sup> Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, "Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune," *The New York Times*, November 19, 2006.

<sup>1117</sup> Exhibit RE-108, Andrew Ross Sorkin and Ian Austen, "Mining Firms to Merge to Make a New No. 1 - Business - International Herald Tribune," *The New York Times*, November 19, 2006.

10.16.1(b) and failed to establish that the 1998 Stabilization Agreement is an “investment agreement” within the meaning of the TPA. As such, it cannot submit a claim, on behalf of SMCV, for breaches of the 1998 Stabilization Agreement under the TPA, and, thus, the Tribunal has no jurisdiction to hear such claims.

#### **IV. LEGAL ARGUMENTS ON THE MERITS**

536. Claimant raises two broad claims in this arbitration: (1) on behalf of SMCV, that Perú breached the 1998 Stabilization Agreement, and (2) on its own behalf and that of SMCV, that Perú violated its fair and equitable treatment obligations in Article 10.5 of the TPA. Neither claim has merit, as addressed in turn below.

##### **A. PERÚ DID NOT BREACH THE 1998 STABILIZATION AGREEMENT**

537. Claimant alleges that Perú violated its obligations to SMCV under the 1998 Stabilization Agreement. As an initial matter, as discussed in Section III, the Tribunal does not have jurisdiction to hear this claim.<sup>1118</sup> But even were that not the case, this claim must fail for at least two reasons.

538. *First*, whether Perú violated its obligations under the 1998 Stabilization Agreement turns on the scope of that agreement, which is a question of Peruvian law that Peruvian courts, including the Supreme Court of Perú, have already answered. SMCV, on whose behalf Claimant brings this claim, was a party to those cases. It is barred by collateral estoppel from relitigating that issue and is bound by the numerous adverse Peruvian court decisions.

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<sup>1118</sup> Of particular relevance to this claim, as discussed in Section III.D, the Tribunal does not have jurisdiction over this claim because, to summarize, Article 10.16(1)(b)(i)(C) of the TPA allows a U.S. investor to bring a claim to investor-state arbitration on behalf of a Peruvian juridical person that the investor owns or controls for breach of “an investment agreement” provided that, *inter alia*, the covered investment was acquired “in reliance on the relevant investment agreement.” Exhibit CA-10, US-Perú TPA at Art. 10.16(1)(b)(i)(C). The “covered investment” here is Claimant’s (the U.S. person’s) investment in SMCV, and Claimant argues that the Stabilization Agreement is an “investment agreement.” Thus, Claimant must prove that it relied upon the Stabilization Agreement in making its investment in SMCV in 2007 in order for the Tribunal to have jurisdiction over the claim, brought on behalf of SMCV, that Perú breached the Stabilization Agreement it signed with SMCV. Because Claimant has failed to make this showing, the Tribunal lacks jurisdiction over this claim.

Claimant cannot appeal those decisions here, under the guise of a treaty claim. The Tribunal must (or, at a minimum, should) respect the Peruvian courts' decisions, particularly that of the Peruvian Supreme Court.

539. *Second*, even if the Tribunal were to reach the merits of Claimant's breach-of-contract claims in these proceedings, Claimant's claims would nevertheless fail because, as explained in Section III.A.3 below, Perú did not breach the 1998 Stabilization Agreement. The Agreement is clear: stability guarantees apply to the investment project that is specifically identified in the feasibility study accompanying the application for the Agreement, not to anything that SMCV happens to do thereafter within the boundaries of the concession(s). Perú has been consistent and transparent on this point, including in numerous reports and publicly televised presentations to Congress dating back at least to 2005. Perú did not violate the 1998 Stabilization Agreement by imposing the Assessments on the Concentrator Plant activities.

540. Perú elaborates on these two points below.

**1. The Tribunal Must Respect the Peruvian Court Decisions Holding that the Stabilization Agreement Does Not Cover the Concentrator Project**

a. SMCV, on Whose Behalf Claimant Asserts the Breach-of-Contract Claim, Is Collaterally Estopped from Arguing that the 1998 Stabilization Agreement Covers the Concentrator Project

541. Claimant asserts that Perú, in imposing the Tax and Royalty Assessments against SMCV based on the Concentrator-related activities, breached the 1998 Stabilization Agreement between Perú and SMCV.<sup>1119</sup> But the question of whether Perú violated its obligations under the 1998 Stabilization Agreement turns on the scope of the Agreement, *i.e.*, whether or not it covered the Concentrator Project. It is undisputed that the 1998 Stabilization Agreement is governed by Peruvian law.<sup>1120</sup> This (the Agreement's scope) is thus a question of Peruvian law

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<sup>1119</sup> See Claimant's Memorial at para. 289.

<sup>1120</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1; Exhibit CER-2, Bullard Report at paras. 11, 13.

that has been answered by Peruvian courts, including the Supreme Court of Perú. Claimant does not agree with the answer, but the question has been answered in cases to which SMCV was a party. Absent a denial of justice or due process violation (the latter of which Claimant does raise—but only with respect to the Tax Tribunal determinations, as addressed in Section III.B.1.c), SMCV, and therefore also Claimant proceeding here on its behalf, is collaterally estopped from arguing that the 1998 Stabilization Agreement covers the Concentrator Project.

542. Collateral estoppel, also known as issue preclusion (or issue estoppel), is the principle that a party cannot contest, in subsequent proceedings, an issue of fact or law that has already been distinctly raised and finally decided in earlier proceedings between the same parties (or their privies).<sup>1121</sup> Under the doctrine of collateral estoppel, “a question may not be re-litigated if, in a prior proceeding: (a) it was put in issue; (b) the court or tribunal actually decided it; . . . (c) the resolution of the question was necessary to resolving the claims before that court or tribunal”<sup>1122</sup>; and (d) the current case involves the same parties or privies of those parties. And, to be certain, as the *Apotex Holdings v. USA* tribunal observed, “[i]t is clear that past international tribunals have applied forms of issue estoppel.”<sup>1123</sup>

543. Here, collateral estoppel applies to the Peruvian Superior Court and Supreme Court determinations that the 1998 Stabilization Agreement does not cover the Concentrator Plant. As explained in Section II.H, above, SMCV challenged the Tax Tribunal’s decision on the 2008 Royalty Assessment before the 18th Contentious Administrative Court. In a December

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<sup>1121</sup> See Exhibit RA-18, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 (Redacted) (“*Apotex Holdings v. United States*, Award”), at para 7.17.

<sup>1122</sup> Exhibit RA-19, *RSM Production Corporation and others v. Grenada II*, ICSID Case No. ARB/10/6, Award, December 10, 2010 (“*RSM v. Grenada II*, Award”), at para. 4.6.4.

<sup>1123</sup> Exhibit RA-18, *Apotex Holdings v. USA*, Award at para. 7.18; see also Exhibit RA-19, *RSM v. Grenada II*, Award at para. 7.1.2 (“It is also not disputed that the doctrine of collateral estoppel is now well established as a general principle of law applicable in the international courts and tribunals such as this one.”); Exhibit RA-20, Filip J.M. De Ly and Audley William Sheppard, “ILA Final Report on Res Judicata and Arbitration\*Seventy-second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4–8 June 2006,” in William W. Park (ed.), *Arbitration International*, Vol. 25, Issue 1 (2009), at para. 6 (recommending, in part, “a more extensive notion of *res judicata* than is known in civil law jurisdictions in relation to issue estoppel”).

17, 2014 decision, that court of first instance decided in favor of SMCV.<sup>1124</sup> However, SUNAT appealed to the Sixth Chamber of the Superior Court of Lima (appellate court), which, on January 29, 2016, revoked the 2008 First Instance Judgment and confirmed that the 1998 Stabilization Agreement's scope was limited to the Leaching Project and that SMCV had to pay royalties with respect to the Concentrator Project, as assessed under the 2008 Royalty Assessment.<sup>1125</sup>

544. In particular, the Superior Court held that, under the Mining Law and Regulations, “the contractual benefits arising from the Stability Agreement . . . cover exclusively and inclusively the investment made in a specific mining concession, which allows to establish by logical inference that a future investment, subsequent to the date of conclusion of the contract, will not be covered by the benefits of the Stability Agreement signed before this latest investment.”<sup>1126</sup> Therefore, according to the Superior Court, “the benefits of legal Stability Agreements should not be applied broadly to the other activities of the title holders of mining activities; consequently, the so-called Primary Sulfide Project [*i.e.*, the Concentrator Project] is not covered by the guarantees granted by such contract for promotion and guarantee of investment, since the project was implemented after having concluded the Stability Agreement with the State in 1998.”<sup>1127</sup>

545. Peru's Supreme Court affirmed the Superior Court's decision. It considered the language of the 1998 Stabilization Agreement, the Mining Law, and the Mining Regulations, and, as Claimant concedes,<sup>1128</sup> the Supreme Court concluded that the 1998 Stabilization

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<sup>1124</sup> See Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014.

<sup>1125</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016.

<sup>1126</sup> See Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016.

<sup>1127</sup> Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016, at p. 10.

<sup>1128</sup> See Claimant's Memorial at paras. 226-28.

Agreement was limited to the investment project detailed in the 1996 Feasibility Study.<sup>1129</sup> This analysis was the focus of the Court's 80-page opinion and, quite obviously, was necessary to the Court's judgment as to whether the 2008 Royalty Assessment was correct. The scope of the 1998 Stabilization Agreement (*i.e.*, whether it covered the Concentrator Project) was the determinative issue before the Supreme Court: If the 1998 Stabilization Agreement did not cover the Concentrator Project (as the Superior Court and Supreme Court held), then the 2008 Royalty Assessment was correct, and conversely, had the courts held that the 1998 Stabilization Agreement did cover the Concentrator Project, then the Assessment would have been incorrect.

546. All of the requirements for collateral estoppel are therefore met with respect to the issue of whether the 1998 Stabilization Agreement covered the Concentrator Project: (a) it was put in issue in the court proceedings; (b) it was decided by the Peruvian Superior and Supreme Courts; (c) the issue was necessary to those courts' resolutions of the claims before them; and (d) the case was between SMCV (on whose behalf Claimant asserts the breach-of-contract claims here) and SUNAT (a Peruvian agency and privy of Respondent). In sum, SMCV was already afforded a full and fair opportunity in Peruvian courts to litigate the issue of whether the 1998 Stabilization Agreement covered the Concentrator Project. SMCV took full advantage of that opportunity—and lost, repeatedly. Claimant, on SMCV's behalf, asks this Tribunal to ignore those decisions and give SMCV a second (or, more accurately, a third and fourth) bite at the apple. That is an abuse of the international arbitration mechanism that the Tribunal must reject.

b. The Tribunal Should Respect the Peruvian Court Decisions as a Prudential Matter

547. In addition, even if collateral estoppel did not bar Claimant from disputing the scope of the 1998 Stabilization Agreement (which it does), the Tribunal should nonetheless

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<sup>1129</sup> See, e.g., Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017, at pp. 26-27, 72.

afford the Peruvian court decisions significant deference as a prudential matter. To recall, Article 10.16.1 of the TPA allows a claimant to bring into the treaty forum a contractual claim that would otherwise have to be brought in a domestic court or some other contractually agreed-upon forum. Importantly, this provision does not change the scope or content of the underlying contractual obligations, nor does it change the fact that the scope and content of such contractual obligations are governed by local, not international, law.<sup>1130</sup> When a definitive answer under the governing law has already been given for the precise legal questions that are being (re)posed in the treaty forum, there is no cause, nor room, for any further analysis.

548. Here, Peruvian law unquestionably governs the 1998 Stabilization Agreement.<sup>1131</sup> If the Tribunal were to consider the merits of Claimant’s claims that Perú breached the 1998 Stabilization Agreement, the Tribunal would need to consider that question under Peruvian law, and Peruvian law alone. The question of whether Perú breached the 1998 Stabilization Agreement itself turns on the scope of the stability guarantees under the Agreement and Peru’s Mining Laws and Regulations (which are incorporated into the contract). That is, under Peruvian law, were the stability guarantees limited to the designated investment project, as Perú argues, in which case Perú’s imposition of the Assessments and related measures would not have breached the Agreement? Or, under Peruvian law, did the stability guarantees extend to the entire concession, as Claimant argues, in which case the imposition of the Assessments might have breached the contract? That is the determinative question.

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<sup>1130</sup> Cf. Exhibit RA-21, *WNC Factoring Ltd v. The Czech Republic*, PCA Case No 2014-34, Award, February 22, 2017, at para. 335 (umbrella clauses “are intended to give effect to legal commitments entered into by the host state with regard to investments, not to change their scope or content” (emphasis added)); Exhibit RA-22, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007, at para. 95(c) (“[t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law” (emphasis added)).

<sup>1131</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1; Exhibit CER-2, Bullard Report at paras. 11, 13.

549. Fatally for Claimant’s contractual claims, the Tribunal does not need to find the answer to—and should not answer—this question for itself because, as already discussed, the Peruvian Supreme Court has already provided the answer. To reiterate, the Supreme Court issued an 80-page decision affirming, as a matter of Peruvian law, the Superior Court’s appellate decision that SUNAT’s imposition of the 2008 Royalty Assessment was legal, on the basis that the 1998 Stabilization Agreement was limited to the “Cerro Verde Leaching Project,” and did not include the Concentrator and the “Primary Sulfides Project.”<sup>1132</sup> It is not the Tribunal’s place to substitute its opinion on this Peruvian law question for that of the Peruvian Supreme Court. The Tribunal is not a Peruvian *über* court of appeals.<sup>1133</sup>

c. Claimant’s Attempt to Downplay the Impact of the Peruvian Court Decisions Is Futile

550. Claimant makes a brief, one paragraph argument that the Superior Court and Supreme Court decisions in the 2008 Royalty Case are not fatal to its breach-of-contract claims.<sup>1134</sup> *First*, Claimant argues that the courts were wrong.<sup>1135</sup> But that assertion could only even possibly be relevant if it could be shown that the Supreme Court’s decision was so erroneous as to be “clearly improper and discreditable”—the stringent standard for a substantive

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<sup>1132</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017.

<sup>1133</sup> *See, e.g.*, Exhibit RA-6, *Mondev v. USA*, Award at para. 127 (“The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal . . . .”); Exhibit RA-23, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, June 22, 2010, at para. 274 (“The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts.”); Exhibit RA-24, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (redacted), March 5, 2011, at paras. 249-50 (The investor’s claims are “based on the assumption that the present Tribunal would have the authority to correct or cure an error in law possibly made by a Slovak court as an appeal court would do. In other words, the Claimant seems to assume that international law prohibits ‘wrong’ judiciary decisions as such and that the State becomes automatically responsible in international law if one of its courts has made a decision which is (possibly) wrong under municipal law.”).

<sup>1134</sup> *See* Claimant’s Memorial at para. 340.

<sup>1135</sup> *See* Claimant’s Memorial at para. 340.

denial-of-justice claim,<sup>1136</sup> if one were even to assume *arguendo* that such claims are permissible.<sup>1137</sup> Claimant does not even try to state a substantive denial of justice claim nor argue that the Supreme Court’s decision was “clearly improper and discreditable”. That being the case (setting aside Claimant’s due process FET claim relating solely to certain Tax Tribunal decisions, which Perú addresses in Section III.B.1.c), as discussed above, it is not the Tribunal’s place to act as an international appellate court to review the Peruvian Supreme Court’s decision.

551. *Second*, Claimant argues that the Supreme Court’s decision in the 2008 Royalty Assessment case is not precedential. Under the Peruvian legal system, that is true (up to a point), but for this arbitration’s purposes it is totally irrelevant. As Respondent’s expert Dr. Eguiguren explains, while the decision may not be precedential generally and *erga omnes*, it certainly is binding on the parties to the dispute.<sup>1138</sup> As already explained, SMCV had a full and thorough opportunity to argue to Peruvian administrative reviewers and courts of all levels that the stability guarantees apply to the entire mining unit or concession, and SMCV took full advantage of that opportunity.<sup>1139</sup> But it lost. Perú’s Supreme Court disagreed. SMCV (and Claimant) need to accept that decision. It is simply improper to ask this Tribunal to reverse the Supreme Court’s decision.

552. *Third*, and finally, in just a single sentence, Claimant contends that “it is ultimately for the Tribunal to decide whether there has been a breach of the State’s international

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<sup>1136</sup> Exhibit RA-6, *Mondev v. USA*, Award at para. 127. Of course, Respondent also insists that the Supreme Court’s decision *was* correct on its merits.

<sup>1137</sup> *See, e.g.*, Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at p. 5 (“A thesis of this study is that the category of substantive denial of justice may now be jettisoned. . . . To the extent that national courts disregard or misapply national law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner which scholars have often referred to as technical or procedural denial of justice.”); *id.* at p. 7 (“[I]nternational fora have no reason to recognise a category of substantive denials of justice. In international law, denial of justice is about due process, nothing else — and that is plenty.”).

<sup>1138</sup> Exhibit RER-1, Eguiguren Report at paras. 99, 101.

<sup>1139</sup> Exhibit RER-1, Eguiguren Report at paras. 101-02; Exhibit RER-2, Morales Report at paras. 86-89, 99 -101.

law obligations under the umbrella clause.”<sup>1140</sup> This argument is nonsensical. Of course, as a general matter, it is for the Tribunal to decide whether Respondent has breached its international law obligations. However, first, Article 10.16.1 is not an umbrella clause; it does not impose on the Parties to the TPA a substantive obligation to observe the commitments in, *inter alia*, investment agreements (and thereby convert domestic law breaches of contract into international law Treaty violations). Article 10.16.1 merely allows a claimant to bring certain breach-of-contract claims into the investor-state forum. Thus, there simply is no “international law obligation[.]” implicated here. And, second, even if that were not the case, Claimant’s argument ignores the fact that the question of whether there was a breach of the 1998 Stabilization Agreement is governed by Peruvian law—and has already been adjudicated at the highest level of the Peruvian judiciary. The cases that Claimant cited for support for this single sentence<sup>1141</sup>—*Eureko B.V. v. Poland* and *ESPF v. Italy*—do not undermine Perú’s analysis.

553. In *Eureko B.V. v. Poland*, the tribunal rejected the respondent’s argument “that international law requires that the scope and extent of the State’s contractual obligations first be determined by the contractual forum before a Bilateral Investment Treaty tribunal can consider whether the State breached any obligations duly determined to exist.”<sup>1142</sup> But that is not what Perú is arguing. Perú is not arguing that a tribunal cannot, generally, consider whether a respondent breached a contract under domestic law until a domestic court considers the claim. Rather, Perú is arguing that when the host state’s highest court has already considered and decided an issue of domestic law, absent a denial of justice or due process issue, the tribunal should respect that decision of the host state’s highest court on that issue, generally, and must do so when the requirements for collateral estoppel are met. The *Eureko* decision does not speak to

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<sup>1140</sup> Claimant’s Memorial at para. 340.

<sup>1141</sup> Claimant’s Memorial at para. 340 n.918.

<sup>1142</sup> Exhibit CA-122, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award and Dissenting Opinion, August 19, 2005 (“*Eureko v. Poland*, Award”), at para. 94.

these issues.<sup>1143</sup> And in *ESPF v. Italy*, while the tribunal did decline to put significant weight on an Italian court’s decision, unlike here, that Italian court decision was not rendered in a case involving the same parties to the arbitration and “the circumstances considered by the Constitutional Court [were] different than those” in the arbitration.<sup>1144</sup>

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554. In sum, for the reasons discussed above, collateral estoppel should bar Claimant from arguing, on SMCV’s behalf, that the 1998 Stabilization Agreement covers the Concentrator Project and was breached by Peru’s Assessments. SMCV has already litigated this issue in the Peruvian courts, which have repeatedly held that the stability guarantees provided under the 1998 Stabilization Agreement were limited to the investment project that was the subject of that Agreement and did not encompass SMCV’s subsequent project, the Concentrator Plant. Absent a denial of justice or due process issue (which, as discussed in Section III.B.1.c, below, does not exist in this case), the Tribunal must respect the Peruvian courts’ resolution of that question, which is fatal to the breach-of-contract claims.

## **2. Perú Did Not Violate the 1998 Stabilization Agreement**

555. To recall, Claimant alleges that Perú “repeatedly breached its obligations under the Stability Agreement to grant stability guarantees to the entire Cerro Verde Mining Unit.”<sup>1145</sup> Even setting aside for the moment that the Tribunal does not have jurisdiction over this claim (as explained in Section III, above), Perú just explained that the Tribunal should not assess the claim anew, because SMCV (on whose behalf Claimant asserts the claim) has already fully litigated

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<sup>1143</sup> Claimant quotes the *Eureko B.V. v. Poland* tribunal’s determination that it was “require[d] to ‘consider whether the acts of which Eureko complains, whether or not also breaches of the SPA and the First Addendum, constitute breaches of the Treaty.’” Claimant’s Memorial at para. 340 n.918. To be clear, the tribunal considered whether the respondent breached a number of treaty provisions (FET, FPS, expropriation, the umbrella clause); the tribunal was not speaking solely to the umbrella clause and suggesting that the respondent did or could breach the umbrella clause without breaching the contracts.

<sup>1144</sup> Exhibit CA-251, *ESPF Beteiligungs GmbH et al. v. Italy*, ICSID Case No. ARB/16/5, Award, September 14, 2020, at para. 823.

<sup>1145</sup> Claimant’s Memorial at para. 300.

the determinative Peruvian law question, which has been heard, considered, and finally resolved before Perú's highest court. But even if the Tribunal were to reach the breach-of-contract claims and even if the Tribunal were to decide to assess anew, for itself, Claimant's arguments about the scope of the 1998 Stabilization Agreement (it should not), Claimant's claim would nonetheless fail, because Perú did not violate the 1998 Stabilization Agreement.

556. Claimant makes three primary arguments in support of its claims that Perú breached the 1998 Stabilization Agreement: "(i) [u]nder the Mining Law and Regulations, stability guarantees applied to the entire mining unit or concessions in which the investor made its qualifying minimum investment; (ii) [t]he Stability Agreement required Perú to apply the stabilized regime to the entire Cerro Verde Mining Unit, including the Concentrator; and (iii) Perú's novel interpretation limiting stability guarantees only to the investment program included in the Feasibility Study is entirely unsupported by the plain terms of the Mining Law and Regulations and the Stability Agreement itself, flies in the face of the Government's own practice, and undermines basic purposes of stability guarantees in the first place."<sup>1146</sup> Because Perú has largely addressed these issues in previous Sections, for the sake of brevity, Perú will not repeat each of its responses to these points here in full but, instead, will summarize the relevant points below and discuss in greater detail only those issues that have not already been addressed elsewhere in this brief.

557. The bottom line is: the Mining Law and Regulations and the 1998 Stabilization Agreement are clear. The stability guarantees apply to the specific investment project that is the subject of the Stabilization Agreement, not to the entire concession(s) and to anything that might happen there. Perú has been consistent in this interpretation, as evidenced by: (i) Mr. Isasi's April 2005 Report, (ii) Minister Sánchez and Mr. Isasi's June 2005 presentation before the

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<sup>1146</sup> Claimant's Memorial at para. 300.

Energy and Mines Congressional Committee, (iii) MINEM's September 2005 Report and October 2005 Letter, (iv) MINEM's November 2005 Letter and Minister Sánchez's public statements, (v) Mr. Isasi's May 2006 presentation before the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee, and (vi) MINEM's June 2006 Report.<sup>1147</sup> In each of these examples, Perú (often publicly) stated its interpretation that the stability guarantees apply to the specific investment project that is the subject of the Stabilization Agreement.

558. This being the case, Perú's imposition of the Assessments against SMCV on activities related to the Concentrator Plant that fell outside the scope of the 1998 Stabilization Agreement did not violate the Agreement.

a. The Mining Law and Regulations Provide that Stability Guarantees Apply to the Specific Investment Project

(i) *The Mining Laws and Regulations Provide that Stabilization Agreements Apply to the Specific Investment Project, Not the Entire So-Called Mining Unit or Concessions*

559. Perú has already explained in Section II.A that stabilization agreements are limited to specific investment projects that have been carefully assessed and defined at the time the agreement is signed. To summarize:

- Title Nine of the Mining Law shows stabilization agreements' limited scope. Nothing in Title Nine of the Mining Law indicates that stabilization agreements grant benefits with respect to an entire Mining Unit, which is simply an administrative construct in order to group together mining concessions and other mining activities that share the same location<sup>1148</sup> (Section II.A.2).
- Articles 79 and 83 of the Mining Law provide that mining companies are only entitled to benefit from a stabilization agreement if they commit to make an investment for a minimum amount of funds and over a required amount of time.<sup>1149</sup> That investment must be clearly defined in an "investment program," which the mining company must submit to the State (MINEM) for its

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<sup>1147</sup> See *supra* at Section II.D.

<sup>1148</sup> See Exhibit RWS-1, Polo Statement at paras. 16, 29.

<sup>1149</sup> See Exhibit CA-1, General Mining Law at Arts. 79, 83.

approval.<sup>1150</sup> An “investment program” is a detailed description of the investment project that the mining company is going to make (including the schedule for the investment and the projected value of the investment to be made), which will be covered by the stabilization agreement.<sup>1151</sup> And, in the case of 15-year stabilization agreements, investment programs are included within a technical-economic feasibility study which is submitted to and approved by MINEM and is required in order to sign the stabilization agreement.<sup>1152</sup> To recall, the purpose of stability guarantees is to limit the risk to the investment project of changes to the legal regime and ensure that the investor’s rate of return for that project is not affected by those changes. It is, thus, logical that the benefits granted by stabilization agreements apply exclusively to the investment project for which the agreement is entered into.<sup>1153</sup> Vice Minister César Polo explains in his witness statement that he was the one who proposed to include in the law this requirement to clearly define the specific investment project that would benefit from the stabilization agreement<sup>1154</sup> (Section II.A.2).

- Articles 79 (referring to 10-year stabilization agreements) and 83 (referring to 15-year stabilization agreements) of the Mining Law provide 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.”<sup>1155</sup> Thus, the law specifically provides that the activities related to (“in whose favor”) the investment project that was made—the investment project that was detailed in an investment program submitted to and approved by MINEM—are the ones that receive benefits from the stabilization agreement (Section II.A.2).
- Other provisions in the Mining Law provide further evidence that the scope of the stabilization agreement is limited to the investment project described in the investment program. For example, the Mining Law provides that stability benefits only start taking effect once the mining company has completed the investment—the investment that was detailed in the investment program.<sup>1156</sup> If it were the case that stability benefits would apply to any investment anywhere in

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<sup>1150</sup> See Exhibit CA-1, General Mining Law at Arts. 72, 79, 83.

<sup>1151</sup> See Exhibit RWS-1, Polo Statement at paras. 21-25.

<sup>1152</sup> See Exhibit CA-1, General Mining Law at Art. 85.

<sup>1153</sup> See Exhibit RWS-1, Polo Statement at paras. 12-14; Exhibit RWS-3, Tovar Statement at para. 62.

<sup>1154</sup> See Exhibit RWS-1, Polo Statement at paras. 11, 21-22.

<sup>1155</sup> Exhibit CA-1, General Mining Law at Arts. 79, 83 (emphasis added). These provisions has been included since 1992, when the first version of the Mining Law was published; *see also* Exhibit RE-22, Single Unified Text of the General Mining Law, Annotated and Updated as of 2021.

<sup>1156</sup> Exhibit CA-1, General Mining Law at Art. 78 (“Mining activity titleholders who start or are carrying out operations greater than 350 MT/day and up to 5,000 MT/day, or those who make the investment provided for in Article 79 of this text, shall enjoy tax stability that will be guaranteed to them by agreement entered into with the State for a term of ten years, counted as from the fiscal year in which the execution of the investment is accredited.”) (emphasis added), Art. 82 (“In order to promote investment and facilitate the financing of mining projects with an initial capacity of not less than 5,000 MT/day or expansions intended to reach a capacity of not less than 5,000 MT/day referring to one or more Economic-Administrative Units, mining activity titleholders shall enjoy tax stability that shall be guaranteed through an agreement entered into with the State for a term of fifteen years, starting from the fiscal year in which the execution of the investment or expansion, as the case may be, is accredited.”) (emphasis added).

the concession at any time, as Claimant alleges, it would not be necessary to wait until the execution of a specific investment project to start applying the stability benefits (Section II.A.2).

- The 1993 Mining Regulations are consistent with the Mining Law. In particular, Article 22 echoes the language of Articles 79 and 83 of the Mining Law, which provide that the benefits of a stability contract “shall apply exclusively to the activities of the mining company in whose favor the investment is made.”<sup>1157</sup> Article 22 of the 1993 Regulation provides that stability guarantees “shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.”<sup>1158</sup> And, even more importantly, Article 24 provides that the General Mining Directorate of MINEM must submit to the Office of the Vice Minister of Mines the Resolution that approved the feasibility study/investment plan, “which will serve as the basis to determine the investments that are the subject matter of the agreement.”<sup>1159</sup> As discussed above, the language in Article 24 is fatal to Claimant’s argument, because it provides that the investments detailed in the feasibility study—not any eventual and undefined investments done within a concession or so called “mining unit”—are the investments that are the “subject matter” of the agreement.<sup>1160</sup> Thus, all four articles limit the scope of stabilization agreements to specific investment project (Section II.A.3).

560. In sum, the legal framework applicable to stabilization agreements in Perú shows that the benefits granted through these agreements are limited to the specific investment project for which the agreement was signed.

(ii) *Vice Minister Polo Proposed the Key Provision in Dispute and Confirms that the Mining Law Granted Stability Guarantees Only to the Specific Investment Project*

561. Claimant argues that “[t]he Mining Law’s drafters confirm that its provisions were intended to convey stability guarantees to the entire mining unit or concession in which an investor made its qualifying minimum investment.”<sup>1161</sup> Specifically, Claimant relies upon its

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<sup>1157</sup> Exhibit CA-1, General Mining Law at Arts. 79, 83 (emphasis added). That provision has been included since 1992, when the first version of the Mining Law was published; *see also* Exhibit RE-22, Single Unified Text of the General Mining Law, Annotated and Updated as of 2021.

<sup>1158</sup> Exhibit CA-2, Mining Regulations at Art. 22 (emphasis added).

<sup>1159</sup> Exhibit CA-2, Mining Regulations at Art. 24 (emphasis added).

<sup>1160</sup> *See* Claimant’s Memorial at para. 337(c).

<sup>1161</sup> Claimant’s Memorial at para. 305.

witness statement from Ms. Chappuis and its expert report from Ms. Vega.<sup>1162</sup> However, these statements are unconvincing in light of Mr. Polo's contrary testimony about his own experience drafting the relevant provisions of the Law.

562. At the time that the Mining Law was drafted, Mr. Polo was the Vice Minister of MINEM and Ms. Chappuis's superior.<sup>1163</sup> He drafted L.D. 708 along with Ms. Chappuis.<sup>1164</sup> Mr. Polo has provided a witness statement in which he confirms that the stabilization agreements were only intended to provide stability to the investment project for which the agreement was signed:

Under the stability regime that we created through Decree 708, those investment projects—not the concessions where the projects were developed nor the economic administrative unit that groups more than one concession—would enjoy legal stability as long as they were contained in an investment program approved by the MINEM, and the MINEM had signed with the owner of the mining activity a stability contract regarding this investment program.

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During the drafting process of these articles, I proposed that we include this phrase in order to make it absolutely clear that the stability regime benefited solely and exclusively the investment for which the contract had been signed. This investment would be detailed in an investment program that had to be reviewed and approved by the MINEM, prior to signing the contract.

Therefore, the benefits granted were limited to the investment project. It was never the intention of the State to create a system of unlimited stability that would benefit any investment made within a mining concession. That would be to assume that the State was willing to blindly guarantee stability to a mining company for indeterminate and eventual investments, without knowing what the impacts of that agreement would be.<sup>1165</sup>

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<sup>1162</sup> See Claimant's Memorial at paras. 306-07.

<sup>1163</sup> See Exhibit RWS-1, Polo Statement at para. 1; Exhibit CWS-3, Chappuis Statement at para. 6.

<sup>1164</sup> See Exhibit RWS-1, Polo Statement at para. 11; Exhibit CWS-3, Chappuis Statement at para. 16.

<sup>1165</sup> Exhibit RWS-1, Polo Statement at paras. 16, 18-19.

563. Mr. Polo and Ms. Chappius agree that it was Mr. Polo who proposed the key provision in dispute (*i.e.*, “[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made”<sup>1166</sup>).<sup>1167</sup> Mr. Polo’s explanation of his intent in proposing that provision therefore is determinative.

564. Moreover, while Mr. Polo’s witness statement undermines Claimant’s position, it is actually consistent with Ms. Chappius’s factual recollection. Ms. Chappius admits that the aforementioned phrase was meant to have a limiting effect. Ms. Chappius explained that “[w]e included this provision bearing in mind the privatization of Empresa Minera del Centro del Perú (‘Centromín’), the State’s largest mining conglomerate at that time.”<sup>1168</sup> According to Ms. Chappius, “Centromín operated nine mines, as well as some non-mining activities around the mines, such as hydropower stations. . . . [W]hen we drafted this provision, we wanted to make clear that stability would benefit only the concession or mining unit that was the target of the investment, to the exclusion of other mining units or non-mining activities that were part of the conglomerate but did not receive the investment directly.”<sup>1169</sup>

565. Thus, Ms. Chappius understood that the provision was intended to exclude a conglomerate’s other mining units or non-mining activities, which the provision undoubtedly does. But the provision can both exclude a conglomerate’s other mining units and the company’s other mining activities that are not part of the specific investment project; the provision can accomplish both of those purposes. So, Ms. Chappius may very well be right that the exclusion of a conglomerate’s other mining units or non-mining activities was one purpose of this clause, but that does not mean that Mr. Polo—who proposed the clause—did not also intend

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<sup>1166</sup> Exhibit CA-1, General Mining Law at Arts. 79, 83 (“*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión.*”).

<sup>1167</sup> See Exhibit RWS-1, Polo Statement at para. 18; Exhibit CWS-3, Chappuis Statement at para. 21.

<sup>1168</sup> Exhibit CWS-3, Chappuis Statement at para. 21.

<sup>1169</sup> Exhibit CWS-3, Chappuis Statement at para. 21 (footnotes omitted).

for it to exclude a company's other mining activities that were not part of the specific investment project. In fact, Mr. Polo explicitly confirms that intent.<sup>1170</sup>

566. Further, Ms. Chappius explicitly admits that whether a company's mining activities that were not part of the specific investment project should or should not be granted stability "never occurred to" her.<sup>1171</sup> She actually claims that it never occurred to "us," which presumably is referring to herself and Mr. Polo. But, of course, Ms. Chappius cannot possibly know what did or did not occur to Mr. Polo—who confirms that it absolutely did occur to him.<sup>1172</sup>

567. Finally, Mr. Polo's statement is also more convincing than Ms. Vega's understanding of the scope of the stability guarantees. As Ms. Vega explains in her expert report, she drafted the 1992 TUO that consolidated L.D. 708 with L.D. 109,<sup>1173</sup> but she did not determine the substance of either legislative decree. Again, it was Mr. Polo who proposed the key clause in dispute here regarding the scope of the stability guarantees (*i.e.*, "[t]he effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made"<sup>1174</sup>). Ms. Vega just moved Mr. Polo's words from L.D. 708 to the TUO. His intent in proposing those words is therefore more relevant than whatever Ms. Vega may have understood them to mean.

*(iii) Perú Has Consistently Applied Stability Guarantees Only to the Specific Investment Project on Which the Stabilization Agreements Are Based*

568. Claimant argues that until Perú adopted "Mr. Isasi's novel and restrictive interpretation of the scope of stability guarantees [sometime in mid-2006], the Government had

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<sup>1170</sup> Exhibit RWS-1, Polo Statement at paras. 17-19.

<sup>1171</sup> Exhibit CWS-3, Chappuis Statement at para. 23.

<sup>1172</sup> Exhibit CER-5, Vega Report at para. 23.

<sup>1173</sup> Exhibit CER-5, Vega Report at para. 23.

<sup>1174</sup> Exhibit CA-1, General Mining Law at Arts. 79, 83 ("*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión.*").

also consistently interpreted the Mining Law and Regulations as applying stability on the basis of an entire mining unit or concession.”<sup>1175</sup> This simply is not true.

569. As explained in Section II.D, Perú did not change its interpretation of the Mining Laws or the 1998 Stabilization Agreement, whether as a result of political pressure or for any other reason—because there was no change, period. To the contrary, the June 2006 Report was entirely consistent with MINEM’s interpretation as consistently expressed in various sources and on numerous occasions, *e.g.*: (i) Mr. Isasi’s April 2005 Report, (ii) Minister Sánchez and Mr. Isasi’s June 2005 presentation before the Energy and Mines Congressional Committee, (iii) the September 2005 Report and October 2005 Letter, (iv) the November 2005 Letter and Minister Sánchez’s public statements, (v) Mr. Isasi’s May 2006 presentation before the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee, and (vi) the June 2006 Report. The April 2005 Report explicitly states that “only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.”<sup>1176</sup> And, in his May 2006 publicly-televised presentation to Congress, Mr. Isasi explained that “[s]tability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession.”<sup>1177</sup>

570. And as further explained in Section II.D:

- Mr. Isasi, the author of MINEM’s April 2005 Report, explains in his witness statement that his position, and MINEM’s official position, have always been consistent on the scope of stabilization agreements—that is, stabilization agreements only cover the investment outlined and planned in the feasibility study that served as the basis for the agreement<sup>1178</sup> (Section II.D.7).
- Nothing in the Mining Council’s resolution regarding the Parcoy Project could be understood as confirming Claimant’s view that stability benefits provided in the 1998 Stabilization Agreement extended to all investments in Cerro Verde’s

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<sup>1175</sup> Claimant’s Memorial at para. 313.

<sup>1176</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17.

<sup>1177</sup> See Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, at slide 8 (citation omitted).

<sup>1178</sup> See Exhibit RWS-2, Isasi Statement at paras. 13-14, 21, 55, 57.

Mining Unit, including SMCV's investment in the Concentrator Project (Section II.D.1).

- SUNAT's Mr. Cruz never confirmed SMCV's understanding of the scope of the 1998 Stabilization Agreement.<sup>1179</sup> In fact, he could not have confirmed that understanding<sup>1180</sup> because MINEM, as party to the Agreement, was the entity in charge of interpreting the contract, not SUNAT. SUNAT's silence after receiving SMCV's letter in March 2005 was not a tacit agreement with SMCV's interpretation of the 1998 Stabilization Agreement;<sup>1181</sup> SUNAT remained silent simply because there were no royalties yet at issue, so it had no need to speak. SMCV had not finished building the Concentrator Plant and had not started its operation; so, at the time, it was not necessary to oversee SMCV's obligation to pay royalties on the ore processed in that Plant<sup>1182</sup> (Section II.D.5).
- Perú did not confirm Claimant's understanding of the scope of the 1998 Stabilization Agreement in the process of issuing the 2004 Royalty Law (Section II.D.3).

571. In sum, Perú has consistently interpreted the scope of stability guarantees as applying only to the investment project specifically identified in those agreements, and not to investments made at any time and for any purpose in the whole of the so-called mining unit or concession(s). This interpretation has always been founded on the plain language of the law and the specific agreement. There was no change in interpretation at the Ministry, let alone an abrupt about-face as Claimant alleges.

(iv) *Stabilization Agreements Do Not Need to Extend to an Entire Mining Unit to Achieve Their Intended Purpose*

572. Claimant asserts that “[t]he Mining Law and Regulations also must be interpreted as having applied stability guarantees to all investments that a mining company makes within its mining unit because it is the only interpretation that is consistent with the Government's stated purpose of promoting private investment in the mining sector.”<sup>1183</sup> Perú has already explained in

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<sup>1179</sup> See Exhibit RWS-7, Cruz Statement at para. 19.

<sup>1180</sup> See Exhibit RWS-7, Cruz Statement at para. 20.

<sup>1181</sup> See Exhibit RWS-7, Cruz Statement at paras. 21-22.

<sup>1182</sup> See Exhibit RWS-7, Cruz Statement at paras. 21-22.

<sup>1183</sup> Claimant's Memorial at para. 308.

Section II.A.1 why that simply is not true. Moreover, as a general matter, this argument is entirely irrelevant. The question of what Claimant believes the scope of stabilization agreements should be has no bearing on the actual scope of the 1998 Stabilization Agreement (and the Mining Law incorporated therein). Nevertheless, Perú addresses Claimant’s specific arguments below.

573. *First*, Claimant argues that “promoting private investment in mining was the Government’s primary objective in adopting the landmark stability incentives that [L.D.] 708 introduced into the Mining Law.”<sup>1184</sup> No one disputes this point. But it does not advance Claimant’s argument. Perú’s goal, without a doubt, was to promote private investment in the mining sector. But, again, that fact does not tell us anything about the limits or parameters of Perú’s actions taken to further that goal (*i.e.*, the scope of the stability guarantees). Perú obviously did not endeavor to promote private investment at any cost whatsoever; it had a sovereign responsibility to choose and strike an appropriate balance between that goal and the program’s impact on, among other things, the public fisc.<sup>1185</sup> Offering stability guarantees with regard to specific investment projects still significantly incentivized investment and furthered Perú’s goal.

574. *Second*, Claimant argues that “to accomplish the purpose of promoting foreign investment, it is critical for stability guarantees to apply to the entire mining unit or concession, given the basic commercial realities of mining operations.”<sup>1186</sup> Claimant relies on Professor Otto’s report in an attempt to show that (i) the “[d]istinctive characteristics of mining” make stability of the fiscal and administrative framework particularly important; (ii) stability guarantees are only effective with respect to an entire concession or mining unit, because mining

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<sup>1184</sup> Claimant’s Memorial at para. 309.

<sup>1185</sup> Exhibit RER-4, Ralbovsky Report at paras. 19, 39, 44.

<sup>1186</sup> Claimant’s Memorial at para. 310.

investments are “dynamic”; and (iii) “if these types of subsequent investments do not enjoy stability, then stability guarantees become ‘significantly less attractive’ in the initial investment decision, and mining companies would have a ‘disincentive’ to make those subsequent improvements.”<sup>1187</sup>

575. But, as Respondent’s international tax and mining expert Mr. Ralbovsky explains, Claimant greatly overstates the relative importance of stabilization agreements, or tax concerns generally, in an investor’s decision of whether to invest. According to Mr. Ralbovsky, “[w]hile fiscal stability may be an important factor when a company is investing, other factors have been found to be equally, if not more, important. For example, the IGF/OECD Practice Guide refers to a recent study conducted by the Fraser Institute in 2017 that indicate[d] [that] mining investment decisions are influenced by the following factors in order of importance: (1) quality of the resource; (2) economic factors (location of the resource, price outlook for the minerals and technology); and (3) policy climate (enforcement of existing rules, taxation, infrastructure and others).”<sup>1188</sup> Mr. Ralbovsky also cites to three additional studies that support the notion that there are other more important factors that influence mining companies’ investment decisions than possible tax benefits.<sup>1189</sup>

576. Mr. Ralbovsky notes that as “an international mining tax expert in the industry for over 35 years,” he “do[es] not recall a single mine or exploration target being pursued solely because of the favorable tax climate in the host country. The size and quality of the mineral available to be extracted and examined in the light of all other risks and potentials, have far outweighed tax incentives.”<sup>1190</sup> Nor has Mr. Ralbovsky “ever seen a mining company examine two potential mining investments and then chose one over the other because of taxes”; it may

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<sup>1187</sup> Claimant’s Memorial at para. 310.

<sup>1188</sup> Exhibit RER-4, Ralbovsky Report at para. 33.

<sup>1189</sup> Exhibit RER-4, Ralbovsky Report at para. 33.

<sup>1190</sup> Exhibit RER-4, Ralbovsky Report at para. 34.

well be that “[t]axes are important and are often considered by mining companies in evaluating their investment opportunities, but there are too many other factors such as the size and quality of the mineral deposit, processing, infrastructure, permitting, and other differences between the competing options for [Mr. Ralbovsky] to say, ‘Taxes make the difference.’”<sup>1191</sup>

577. Claimant also claims that, when L.D. 708 and the Mining Law were being drafted, Ms. Vega and Ms. Chappuis understood that stabilization agreements had to protect an investor’s entire mining unit or concession.<sup>1192</sup> Specifically, Ms. Vega says that she recalls discussing with Vice Minister Patsias “whether we should incorporate the broad definition of EAU” and “the concept of a ‘single production unit’ encompassing both mining and beneficiation concessions,” deciding that they should do that because “[t]he broad application of stability benefits to a single production unit was consistent with President Fujimori’s push to promote foreign investment in mining.”<sup>1193</sup>

578. This is a circular argument. At the highest level, Claimant is arguing that Article 82 should be read to provide stability to entire EAUs (even though, by its very terms, it does not); Claimant supports this argument by contending that it makes sense or is necessary for stabilization agreements to protect the entire mining unit or concession; Claimant then supports that argument by saying that one of the drafters understood that it makes sense or is necessary for stabilization agreements to protect the entire mining unit or concession; and, finally, it supports that argument by showing that Article 82’s use of the term “Economic-Administrative Units” has a broad definition (*i.e.*, that the drafters intended the stability protection to be broad), all of which only supports Claimant’s argument if Article 82 were providing stability to the entire EAU—the

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<sup>1191</sup> Exhibit RER-4, Ralbovsky Report at para. 34.

<sup>1192</sup> See Claimant’s Memorial at para. 311.

<sup>1193</sup> Exhibit CER-5, Vega Report at para. 38.

initial point in dispute. It is convoluted, but Claimant is essentially arguing that Article 82 applies to the entire mining unit, because Article 82 applies to the entire mining unit.

579. Of course, as discussed in Section II.A.2, Article 82 does not state that stabilization agreements are intended to cover the entire mining unit in which an investment is made. Instead, the article invokes EAUs in establishing the minimum operation size of a mining company that is required in order to be eligible to enter into a 15-year stabilization agreement: in order to qualify for a 15-year stabilization agreement, a mining company is required to have operations producing at least 5,000 MT/day, which may come from one or more EAUs.

580. Claimant relies on Ms. Chappuis’s assertions that limiting the scope of the stability guarantees to the investment “would have been directly at odds with Minister Sánchez Albavera’s instructions to grant extensive stability guarantees to make Perú more competitive internationally,” and that “[s]uch a limitation would ignore how the mining industry works,” because “a processing circuit that may be appropriate at the time of the initial investment could be less efficient or even useless” later on and require additional investment.<sup>1194</sup> Both of these points can be easily swept away. To Ms. Chappuis’s first point, 15-year stabilization agreements, even limited to specific investment projects, can still be extensive and significantly attract private investment. Neither Party’s reading of the Mining Law would be at odds with a general instruction to grant extensive stability guarantees. It is just a question of how extensive. To Ms. Chappuis’s second point, limiting the stability guarantees to specific investment projects does not ignore how the mining industry works—nothing would prevent a mining company from making a subsequent investment and seeking to secure a new stabilization agreement. Indeed, SMCV itself obtained multiple Stabilization Agreements, including the 1994 Stabilization Agreement, the 1998 Stabilization Agreement, and the 2012 Stabilization Agreement.

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<sup>1194</sup> Claimant’s Memorial at para. 311(b) (quoting Exhibit CWS-3, Chappuis Statement at paras. 23-24).

581. *Third*, and finally, Claimant argues that “international practice confirms that stability guarantees typically apply to entire mining units.”<sup>1195</sup> Whether or not it is typical in international practice for governments to provide stability guarantees to an entire mining unit is irrelevant to interpreting the Mining Laws and Regulations applicable in Perú and, more significantly, the specific provisions in SMCV’s 1998 Stabilization Agreement.<sup>1196</sup> It is simply not credible for Claimant to assert, as it does in these proceedings, that its understanding (or that of SMCV) of the express terms of the 1998 Stabilization Agreement granted by Perú was based on policy and practice regarding stabilization agreements in other countries. Claimant was investing in Perú. Its understanding of the scope of the 1998 Stabilization Agreement thus should have been based on Perú’s Mining Law and Regulation and the text of the Agreement itself. As Respondent’s expert Mr. Ralbovsky explains, “[o]nce a stability agreement is negotiated, agreed to, and signed, the theories of . . . ‘how other countries do it’ are irrelevant for interpreting those agreements. . . . In this instance, the Stability Agreement is based on the terms of the Agreement itself, [Perú’s] Mining Law, and the Mining Regulations, as embodied in the signed Stability Agreement.”<sup>1197</sup>

b. The 1998 Stabilization Agreement Provides Stability Guarantees to the Specific Investment Project Identified in the 1996 Feasibility Study

582. Ultimately, these are breach-of-contract claims. The determinative question is therefore whether, by imposing the Assessments, Perú breached the 1998 Stabilization Agreement. This turns upon whether the stability guarantees therein were provided with respect to the investment project defined in the 1996 Feasibility Study or, whether, once the 1998 Stabilization Agreement was in SMCV’s hands, its guarantees automatically extended to any

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<sup>1195</sup> Claimant’s Memorial at para. 312.

<sup>1196</sup> Exhibit RER-4, Ralbovsky Report at para. 49.

<sup>1197</sup> Exhibit RER-4, Ralbovsky Report at para. 49.

investments and any activities carried out anywhere at any costs in SMCV's concessions or so-called mining unit that was named in the Agreement. As explained in Section II.B.3, the 1998 Stabilization Agreement is clear: the stability guarantees apply to the specific investment project identified in the 1996 Feasibility Study only. The breach-of-contract claims, therefore, must fail.

(i) *The Language of the 1998 Stabilization Agreement Clearly Applies the Stability Guarantees to the Specific Investment Project Identified in the Agreement*

583. Claimant argues that “the Stability Agreement confirmed that stability guarantees applied to all mining activities carried out within SMCV’s Mining Unit, which comprises the Mining and Beneficiation Concessions.”<sup>1198</sup> As explained in Section II.B.3, Claimant misinterprets the Agreement. To summarize:

- The First Clause of the 1998 Stabilization Agreement provides the purpose, and defines the scope, of the Agreement: On January 25, 1996, SMCV requested that a stabilized regime be “granted to it, in relation with the investment in its concession: Cerro Verde No. 1, No. 2 and No. 3, hereinafter ‘The leaching project of Cerro Verde.’”<sup>1199</sup> Towards that end, SMCV submitted a feasibility study, the objective of which was to evaluate the “feasibility to extend the production capacity from 72,000,000 to 105,000,000 lbs. (48,000 MT) of [c]opper cathodes per year coming from the heap leaching of the copper mineral in the facilities of Cerro Verde with recovery of 65%, that will be installed with the necessary equipment to improve the leaching of the secondary sulfides using the last technology and at the same time increase the production.”<sup>1200</sup> In other words, the purpose of the investment was to increase SMCV’s production capacity of copper cathodes through the leaching of secondary sulfide ore extracted from the Cerro Verde Mine. Nothing in this text mentions a future investment in a concentrator plant to process primary sulfide ore (a different type of copper ore) to produce copper concentrate (a different product), which was the purpose of the investment made in 2004-2006 to build the Concentrator<sup>1201</sup> (Section II.B.3).
- The Second Clause of the Agreement provides that the General Mining Directorate of MINEM approved the 1996 Feasibility Study on May 6, 1996, via Resolution No. 155-96-EM/DGM.<sup>1202</sup> SMCV’s 1996 Feasibility Study outlined

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<sup>1198</sup> Claimant’s Memorial at para. 321.

<sup>1199</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1 (emphasis added).

<sup>1200</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clauses 1.2-1.3 (emphasis added).

<sup>1201</sup> Exhibit RER-4, Ralbovsky Report at paras. 51-60.

<sup>1202</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 2.

the investment program for the Leaching Project, which was to be completed in 1997 (Section II.B.3).

- The Third Clause of the Agreement provides that “[a]ccording to what is expressed in 1.1., the Leaching Project of Cerro Verde is circumscribed to the concessions, related in Exhibit I, with the corresponding areas.”<sup>1203</sup> Exhibit I describes SMCV’s Mining and Beneficiation Concessions.<sup>1204</sup> Contrary to Claimant’s assertion, the third clause does not state that the terms of the 1998 Stabilization Agreement apply to every investment made within SMCV’s Mining and Beneficiation Concessions. Notably, Claimant is unable to refer to any language that specifically makes such a claim. Rather, the Third Clause, including the cross-reference to Exhibit I of the Agreement, simply identifies the location where the Leaching Project would be developed<sup>1205</sup> (Section II.B.3).
- The second paragraph in the Third Clause states that the fact that the Leaching Project is “circumscribed” to the Mining and Beneficiation Concessions “does not prevent [SMCV] from incorporating other mining rights to the Cerro Verde Leaching Project after approval by the General Direction of Mining.”<sup>1206</sup> This means that if the specific project that is the subject of the Agreement as discussed in the 1996 Feasibility Study were to expand, SMCV would need to receive approval from the State before any such expansion could obtain stability benefits under the Agreement.<sup>1207</sup> It does not mean, however, that the Agreement would cover an entirely new and different investment project, like the Concentrator Project (Section II.B.3).
- The Fourth, Fifth, Sixth, Seventh, and Eighth Clauses refer to the investment program that was included in the 1996 Feasibility Study and link the effects of the Agreement to the investment project that is outlined in that investment program (*i.e.*, the Leaching Project) (Section II.B.3).
- The Ninth Clause grants the stability guarantees to SMCV in accordance with the Mining Law and Regulations,<sup>1208</sup> which, as discussed in Section II.A, limit the stability guarantees to the investment project detailed in the 1996 Feasibility Study.

584. In sum, the 1998 Stabilization Agreement is clear: the stability guarantees were granted with respect to the specific investment project that is the subject of the Agreement, and of the 1996 Feasibility Study, *i.e.*, the Leaching Project.

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<sup>1203</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

<sup>1204</sup> Exhibit CE-12, 1998 Stabilization Agreement at Exhibit I.

<sup>1205</sup> See Exhibit RWS-3, Tovar Statement at paras. 24-26; Exhibit RWS-4, Bedoya Statement at paras. 37-41.

<sup>1206</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

<sup>1207</sup> See Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.2.

<sup>1208</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 9.

(ii) *Perú's Course of Conduct Was Clear and Consistent: the 1998 Stabilization Agreement Applied Only to the Leaching Project*

585. Claimant argues that Perú “repeatedly confirmed that stability guarantees would apply to Cerro Verde’s entire unit.”<sup>1209</sup> Perú has already addressed these arguments in Sections II.B.1 (explaining that Mineró Perú’s promotion of the sale of Cerro Verde did not include any promises to provide stabilization agreements with an unlimited scope), II.D.4.a (explaining that Ms. Chappuis’s alleged oral confirmation that the 1998 Stabilization Agreement would apply to the Concentrator Project, even if true, is insufficient given that it was not in writing and her superior, Vice Minister Polo, explicitly stated that he disagreed), and II.E (explaining that Perú did not mislead SMCV during the 2006 discussions or mislead SMCV into making voluntary contributions and GEM payments).

586. In addition to the items addressed above, Claimant points to an internal 1997 MINEM memorandum discussing how the 1994 Stabilization Agreement could co-exist with the 1998 Stabilization Agreement.<sup>1210</sup> Claimant insists that the memorandum explains that two tax regimes could not co-exist within the same unit, but Claimant entirely ignores that MINEM, in a subsequent 1998 memorandum, completely abrogated both decision and reasoning in the 1997 memorandum.<sup>1211</sup> Specifically, MINEM explained in the 1998 memo (signed by the Legal Director of the Ministry and sent to the Vice Minister of Mines at the time) that both stabilization agreements were able to coexist because each contract was intended to protect a “different investment.”<sup>1212</sup> Claimant’s reliance on the abrogated 1997 memorandum is completely misplaced.

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<sup>1209</sup> Claimant’s Memorial at para. 331.

<sup>1210</sup> See Claimant’s Memorial at para. 332(b); Exhibit CE-356, MINEM, Report No. 708-97-EM/DGM/OTN, December 30, 1997.

<sup>1211</sup> See generally Exhibit RE-23, MINEM, Report No. 002-98-EM/OGAJ, January 6, 1998.

<sup>1212</sup> Exhibit RE-23, MINEM, Report No. 002-98-EM/OGAJ, January 6, 1998, at p. 2.

587. Claimant also relies on the President of Perú “applaud[ing]” the investment in the Concentrator and confirming that Perú would “fulfill [its] responsibility to maintain economic and legal stability.”<sup>1213</sup> But this general platitude does not prove anything. It is unclear whether the President was even referring to the specific stability guarantees that SMCV had under the 1998 Stabilization Agreement, or whether the President was just speaking in general terms. And, even to the extent that the President was referring to the specific guarantees, there is absolutely no mention of the scope of those guarantees.

588. Contrary to Claimant’s arguments, Perú has been consistent in its interpretation of the scope of the 1998 Stabilization Agreement. To recall:

- **Mr. Isasi’s April 2005 Report:** “[I]t is not the mining titleholder (individuals or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.”<sup>1214</sup> This last sentence could not be any more clear.
- **Minister Sánchez and Mr. Isasi’s June 2005 presentation before the Energy and Mines Congressional Committee:** The high-ranking MINEM officials explained—in a publicly televised presentation—the relationship between the Royalty Law and mining stabilization agreements, in particular, that mining companies would be subject to paying royalties with respect to their investment projects that were not part of a mining stabilization agreement.<sup>1215</sup> Minister Sánchez explained:

Then, who pays royalties? All mining titleholders pay royalties, but not for all of their projects. The mining titleholders that before the Mining Royalty Law entered into law-contracts with administrative stability, will exclude from the royalty calculation basis the value of concentrates or equivalents, derived from the stabilized project.<sup>1216</sup>

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<sup>1213</sup> Claimant’s Memorial at para. 332(d); Exhibit CE-471, “Peru: President Toledo Announces and Investment of US\$850 Million in Cerro Verde,” *Europa Press*, October 12, 2004.

<sup>1214</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (emphasis added).

<sup>1215</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts).

<sup>1216</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 26.

And Mr. Isasi further explained to the Congressional Committee:

[I]t must not be confused who is the obliged subject, which is the company, with how much it has to pay; that is, the obliged subject is a mining company but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects.

The non-stabilized mining projects pay royalties, the stabilized projects do not pay royalties. Stabilized, of course, before the royalty law because there are stability contracts that were entered into after, where it has been expressly indicated that royalties must be paid.<sup>1217</sup>

- **The September 2005 Report and October 2005 Letter:** In response to a request from Congressman Alejandro Oré,<sup>1218</sup> Mr. Isasi prepared MINEM's September 2005 Report explaining that SMCV was entitled to the profit reinvestment benefit that had been stabilized under the 1998 Stabilization Agreement, but that this conclusion did not mean that MINEM agreed with Claimant's assertion that the 1998 Stabilization Agreement covered both the Leaching Project and the Concentrator Project.<sup>1219</sup> In fact, the September 2005 Report makes a distinction between the Leaching Project and the Concentrator Project, explaining that the scope of the Stabilization Agreement is limited to the Leaching Project that was described in the 1996 Feasibility Study to increase the production of copper cathodes<sup>1220</sup> and the analysis of the Report focuses on the scope of the stability applied to the Leaching Project.<sup>1221</sup> MINEM's September 2005 Report was forwarded to Congress on October 3, 2005,<sup>1222</sup> and, in the cover letter, the Minister explained to the Congressman that, although SMCV was entitled to use the profit reinvestment benefit under the 1998 Stabilization Agreement (*i.e.*, to reinvest profits tax-free from the Leaching Project, the stabilized project, into a new investment), the Concentrator Project (the new investment on which the profits would be invested) "will not enjoy the tax, exchange-rate and

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<sup>1217</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29 (emphasis added).

<sup>1218</sup> See Exhibit CE-507, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía, September 15, 2005.

<sup>1219</sup> See Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005.

<sup>1220</sup> See Exhibit RWS-2, Isasi Statement at paras. 27-29; Exhibit CE-512, MINEM, Report No. 385-2005-MEM/OGJ, September 22, 2005, paras. 2.2.2, 3.1.1.

<sup>1221</sup> See Exhibit RWS-2, Isasi Statement at paras. 30-33.

<sup>1222</sup> See Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005.

administrative stability regime, since for said Project the signing of [a stabilization agreement] has not been applied for.”<sup>1223</sup>

- **The November 2005 Letter and Minister Sánchez’s public statements:** In response to a letter from Congressman Diez Canseco, on November 8, 2005, Minister Sánchez (the “November 2005 Letter”)<sup>1224</sup> again repeated what had already been explained to Congress in the 2005 Presentation, the April 2005 Report, the September 2005 Report, and the October 2005 letter. In particular, the Minister explained that the Concentrator Project was not subject to the 1998 Stabilization Agreement (*i.e.*, it would not receive any stabilization benefits).<sup>1225</sup> Minister Sánchez explained the legal bases for MINEM’s position, which were the same ones that had already been outlined in the April and September 2005 Reports.
- **Mr. Isasi’s May 2006 presentation before the Working Group for Cerro Verde Matters of the Energy and Mines Congressional Committee:** In May 2006, Mr. Isasi again appeared before the Energy and Mines Congressional Committee in a publicly televised hearing to explain the scope of mining stabilization agreements and, in particular, the scope of the 1998 Stabilization Agreement. Mr. Isasi explained why the reinvestment benefit did apply to the Leaching Project, but not to the Concentrator Project—namely, that the latter was a new and different project from the Leaching Project, which was the investment project that had actually been stabilized in 1998. Specifically, the presentation stated that “[s]tability is given to the investment project clearly delineated by the 1996 Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession.”<sup>1226</sup> Therefore, although SMCV was allowed to use the profit reinvestment benefit to finance the Concentrator Project with tax-free funds obtained from the (stabilized) Leaching Project, that was where the benefit would end. The profits resulting from the sale of the ore that was processed at the Concentrator Project would not, in turn, receive the profit reinvestment benefit.<sup>1227</sup> Moreover, Mr. Isasi explained that mining royalties did not apply to the Concentrator Project, because that project was not covered by the Stabilization Agreement. The slides used in that presentation could not possibly be any more explicit.<sup>1228</sup>

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<sup>1223</sup> Exhibit CE-515, MINEM, Report No. 1725-2005-MEM/DM, October 3, 2005 (“Unlike the Leaching Project that is covered by the February 13, 1998 Agreement, the Primary Sulfide Project will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of an Agreement on Guarantees and Measures to Promote Investment has not been applied for.”).

<sup>1224</sup> See Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005.

<sup>1225</sup> See Exhibit CE-519, MINEM, Report No. 2004-2005-MEM/DM, November 8, 2005, para. 1.

<sup>1226</sup> See Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 8 (citations omitted).

<sup>1227</sup> See Exhibit RWS-2, Isasi Statement at para. 34; Exhibit RWS-3, Tovar Statement at paras. 36, 43.

<sup>1228</sup> Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 12.

**MINING ROYALTIES DO APPLY TO THE CERRO VERDE PRIMARY SULFIDE PROJECT**

- ❑ Cerro Verde's primary sulfide project is not part of the Leaching Project, for this reason it does not benefit from the stabilized regime subject of the 13 February 1998 contract.
- ❑ It is a new project that does not benefit from tax, exchange rate and administrative stability.
- ❑ In consequence, the sulfides project will pay royalties when it enters into production.

- **The June 2006 Report:** Mr. Isasi categorically stated, again, that the Concentrator Project was outside the scope of the 1998 Stabilization Agreement.<sup>1229</sup> As explained in the Report, Article 83 of the Mining Law and Article 22 of the Mining Regulations provide that stability benefits apply exclusively to the specific investment project for which the agreement was signed:

It follows that stabilization is not granted in a general way to a company or for a specific mining concession, but in relation to a specific project, clearly delimited and approved by the Ministry of Energy and Mines, because the purpose is to confer legal certainty on the investor in the sense that the internal rate of return of their new guaranteed investment will not be affected by subsequent legislative innovations.<sup>1230</sup>

589. In sum, Perú has been clear and consistent: the 1998 Stabilization Agreement does not apply to the Concentrator Project. The evidence on which Claimant relies does nothing to disprove this critical point.

*(iii) Whether Cerro Verde Is a So-Called Integrated Mining Unit Is Irrelevant*

590. Claimant insists that Cerro Verde operates as a single “mining unit” (whatever that means), that the single “mining unit” includes the Concentrator Project, and that, because the stability guarantees apply to the entirety of Cerro Verde’s integrated operations, they must apply

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<sup>1229</sup> See Claimant’s Memorial at paras. 142-44.

<sup>1230</sup> See Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006, at para. 5.2.

to the Concentrator Project as part of those operations.<sup>1231</sup> Notably, this syllogism rests entirely on Claimant’s (faulty) interpretation that the stability guarantees apply to the entirety of Cerro Verde’s operations. As discussed at length above, that interpretation is incorrect. Therefore, Cerro Verde’s level of operational integration is irrelevant.

591. Perú has also already explained in Section II.D.4 that MINEM’s approvals of the expansion of the Beneficiation Concession and of SMCV’s request to reinvest undistributed profits in the Concentrator Project did not indicate that the Concentrator Project would be covered by the 1998 Stabilization Agreement. There is, therefore, no need for Perú to repeat those arguments again here.

c. Perú’s Interpretation of the Scope of the 1998 Stabilization Agreement Is Entirely Consistent with the Text of the Agreement and the Relevant Laws and Regulations

(i) *The Feasibility Study Is a Critical Part of the Stability Framework*

592. Claimant argues that the 1996 Feasibility Study does not define the scope of the 1998 Stabilization Agreement but, rather, is just meant to demonstrate “an investor’s eligibility by virtue of its qualifying minimum investment program.”<sup>1232</sup> Claimant misinterprets the Agreement and legal framework and undersells the importance of the feasibility study.

593. As Mr. Polo explains, the feasibility study defines the scope of the investment project.<sup>1233</sup> It is the central document around which the stability framework operates. Claimant is correct that it demonstrates an investor’s eligibility. But it also provides the State with all the information it needs to assess whether the investor can enter into the stabilization agreement—among other things, it includes the list of all the works that the mining company must carry out for the execution of the specific project, the investment program (including the schedule and the

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<sup>1231</sup> See Claimant’s Memorial at paras. 326 *et seq.*

<sup>1232</sup> Claimant’s Memorial at para. 337; *see also id.* at para. 338.

<sup>1233</sup> Exhibit RWS-1, Polo Statement at para. 12.

amount of capital investment) for the project, and the profitability of the project.<sup>1234</sup> The date on which the feasibility study is approved becomes the date as of which the legal regime (tax rates, royalty rates, etc.) is stabilized.<sup>1235</sup> And the stabilization agreement enters into force once the project that was detailed in the feasibility study is completed.<sup>1236</sup> In other words, while this whole system is about encouraging investment, generally (hence why the investment project is protected), when it comes to a specific project and a specific stabilization agreement, the covered investment project is defined by the feasibility study. So, while Claimant is correct that the Mining Law does not explicitly state that the stability guarantees only apply to the feasibility study, as already explained, the Mining Law does provide that the stability guarantees only apply to the investment project,<sup>1237</sup> and that individual investment project is required to be defined in scope by the feasibility study approved by MINEM.

594. Claimant, relying on Ms. Chappius and Ms. Vega, argues that the investment project outlined in the 1996 Feasibility Study was meant to be a floor, not a ceiling.<sup>1238</sup> But the 1996 Feasibility Study was not meant to be either a floor or a ceiling. It simply defines the scope of the investment project and, in turn, sets the obligations and benefits under the 1998 Stabilization Agreement. Under Claimant's theory, the investment project is akin to a ticket that an investor can purchase to get into the door, and then after it is inside, it can do whatever it wants from that point forward for 15 years without any concern for regulatory changes. That is not how the system works.

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<sup>1234</sup> Exhibit RWS-1, Polo Statement at paras. 21-22; *see also* Exhibit RER-4, Ralbovsky Report at para. 62 (“SMCV had to submit a feasibility study showing that its investment plan was achievable. Per[ú] would not want to invest in a stability agreement with a mining company that was not going to be able to succeed, and Per[ú] would have wanted to see the size of the investment (*i.e.* foregone tax revenue) it was making by entering into the Stability Agreement.”).

<sup>1235</sup> Exhibit RWS-1, Polo Statement at para. 9.

<sup>1236</sup> Exhibit RWS-1, Polo Statement at paras. 9, 14.

<sup>1237</sup> Exhibit CA-1, General Mining Law at Art. 83.

<sup>1238</sup> Claimant's Memorial at para. 338.

595. Of course, as Ms. Chappius notes, “the more investments the company made after meeting the initial investment, the more the mining industry and the overall economy of the country would benefit.”<sup>1239</sup> No one disputes that. But Perú’s construction of the Agreement and legal framework does not discourage subsequent investment. Mining companies with a stabilization agreement are free to make any future investments they would like and, to the extent they fall outside the scope of the project in the feasibility study, they are free to seek a new stabilization agreement—just as SMCV did in both 1998 and 2012.<sup>1240</sup> If anything, this provides an investor with greater protection by allowing this subsequent investment to benefit from the stability guarantees for a full new 10- or 15-year period. (By contrast, if a subsequent investment occurred in year 14 of the stabilization agreement for the initial investment, the subsequent investment would only get one year of stability benefits.)

596. Claimant, relying on Ms. Vega, makes an additional argument that borders on the absurd: “[B]ecause Article 85 provided a mechanism for default acceptance of a feasibility study if the DGM fails to approve it within 90 days, the feasibility study *cannot* limit the scope of stability guarantees.”<sup>1241</sup> According to Ms. Vega, “Government inaction, and a feasibility study that has not been subjected to any Government scrutiny, cannot define the scope of stability guarantees” because “[i]f it did, the mining company itself would potentially have had the ability to define the scope of its stability agreement, which is plainly not the rule.”<sup>1242</sup>

597. Claimant and Ms. Vega have it backwards. It is Claimant that is proposing to have the mining companies define the scope of the stabilization agreements for themselves, without being “subjected to any Government scrutiny.” According to Claimant’s interpretation, once a mining company secures a stabilization agreement for one investment in its concession(s),

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<sup>1239</sup> Exhibit CWS-3, Chappuis Statement at para. 22.

<sup>1240</sup> Exhibit CE-644, 2012 Stabilization Agreement.

<sup>1241</sup> Claimant’s Memorial at para. 338(c) (emphasis in the original).

<sup>1242</sup> Exhibit CER-5, Vega Report at para. 53.

it can make an unlimited amount of further, unrelated, unscrutinized investments, at any cost, within the boundaries of the concession that would nonetheless be covered by the stabilization agreement and its benefits. Perú agrees that, plainly, this cannot be the rule.

598. Claimant also mistakenly believes that its view of the 1996 Feasibility Study is supported by the terms of the 1998 Stabilization Agreement. Claimant first looks to Clause 1, paraphrasing it as providing that “SMCV presented its application for stability by virtue of its ‘investment in its concession.’”<sup>1243</sup> But the text matters: SMCV did not present its application “by virtue of” its investment. Clause 1 is explicit that SMCV filed its application “in relation with the investment in its concession: Cerro Verde No. 1, No.2 and No. 3, hereinafter ‘The leaching project of Cerro Verde.’”<sup>1244</sup> This completely undermines Mr. Bullard’s opinion that “there is nothing in SMCV’s underlying request ‘to . . . be guaranteed the benefits’ of stability that shows that the company intended to extend those benefits solely to its leaching operations or in connection with its initial investment program submitted.”<sup>1245</sup> SMCV signed a contract which (i) stated that the application for a stabilization agreement was “in relation with the investment” (which was an investment in its leaching operations), and (ii) defined that investment as “The leaching project of Cerro Verde.” Clause 1 could not be more clear.

599. Clause 3 itemizes SMCV’s “Mining Rights” (not the investment), and in particular, delineates the concessions and areas to which the “Leaching Project of Cerro Verde is circumscribed.”<sup>1246</sup>

600. And, as Claimant notes, Sections 2 and 4 provide the “details regarding the DGM’s approval of the feasibility study, and described the qualifying investment program and the term of execution, during which time the feasibility study could be subject to

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<sup>1243</sup> Claimant’s Memorial at para. 339(a).

<sup>1244</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 1.1 (emphasis added).

<sup>1245</sup> Exhibit CER-2, Bullard Report at para. 40(a).

<sup>1246</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 3.

amendments”<sup>1247</sup>—with Perú’s approval.<sup>1248</sup> The fact that the 1996 Feasibility Study could not be amended (during the term of execution) unless Perú approved the amendment further undermines Claimant’s interpretation. If SMCV could make whatever investments it wanted, whenever it wanted, at whatever costs it wanted under the 1998 Stabilization Agreement after it made its initial investment and the contract came into force, why would SMCV ever bother to amend the 1996 Feasibility Study or get Perú’s approval to do so? Moreover, the fact that any amendments require Perú’s approval shows that the parties intended for Perú to have some control over what investment projects fell within the 1998 Stabilization Agreement. This, too, would be superfluous if Claimant could obtain stability benefits under the 1998 Stabilization Agreement for whatever investment projects it wanted, so long as those new projects came after the contract came into force.

(ii) *Perú’s Amendments to the Mining Law and Regulations Do Not Prove that Claimant’s Interpretation under the Previous Law and Regulations Was Correct*

601. In 2014, Perú amended its Mining Law as follows:

The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made, provided that said investments are expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the Stability Agreement; or, the additional activities that are performed after the execution of the investment program, provided that such activities are performed within the same concession where the Investment Project that is the subject matter of the agreement entered into with the State is being developed; they are related to the purpose of the Investment Project; that the amount of the additional investment is no less than the equivalent in domestic currency to US\$ 25,000,000.00; and they are previously approved by the Ministry of Energy and Mines, without prejudice to subsequent auditing from the aforementioned Sector.<sup>1249</sup>

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<sup>1247</sup> Claimant’s Memorial at para. 339(c).

<sup>1248</sup> Exhibit CE-12, 1998 Stabilization Agreement at Clause 4.2.

<sup>1249</sup> Exhibit CA-1, General Mining Law at Article 83-B (emphasis added).

602. Perú made a corresponding amendment to its Mining Regulations.<sup>1250</sup> Claimant argues that the fact that Perú deemed it necessary to implement such amendments proves that, prior to the amendments, stabilization agreements were not limited to the feasibility study's investment program.<sup>1251</sup> This argument is without merit.

603. Claimant appears to misread the revision. Claimant states that the amendment “expressly introduced a provision limiting certain stability agreements to the feasibility study’s investment program.”<sup>1252</sup> And Claimant only quotes the first part of the amendment.<sup>1253</sup> Claimant ignores the second part of the provision that explicitly permits the stability guarantees to cover “additional activities” if certain conditions are met.<sup>1254</sup>

604. Claimant therefore has it backwards: Claimant is correct that the amendment was only necessary to change the status quo, but that change was to now explicitly *include*, in certain circumstances, additional activities. As Dr. Eguiguren explains, “Carrying out this legislative reform can only be justified in order to modify the pre-existing situation, where it must be assumed that, until Law No. 30230, the stability guarantees fell exclusively on the investment included in the feasibility study provided for in the Contract, not thus to the additional investments linked to the project, much less to any other investment of the company in its concessions.”<sup>1255</sup> Dr. Eguiguren agrees with Ms. Vega<sup>1256</sup> in that “[o]therwise there would be no point in approving this legislative reform.”<sup>1257</sup> To emphasize his point, Dr. Eguiguren cites to

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<sup>1250</sup> Exhibit CA-2, Mining Regulations at Arts. 22, 39.

<sup>1251</sup> See Claimant’s Memorial at paras. 341-43.

<sup>1252</sup> Claimant’s Memorial at para. 342.

<sup>1253</sup> See Claimant’s Memorial at para. 342.

<sup>1254</sup> Exhibit CA-1, General Mining Law at Art. 83-B.

<sup>1255</sup> Exhibit RER-1, Eguiguren Report at para. 94.

<sup>1256</sup> Exhibit CER-5, Vega Report at para. 52 (“amendment in Article 83-B would have been unnecessary if the original text of Article 83 had already limited the scope of 15-year stability agreements to the investments contained in the feasibility study”).

<sup>1257</sup> Exhibit RER-1, Eguiguren Report at para. 94.

“the Explanatory Memorandum of this law, [where] the purpose and scope of the legislative reform is explained, giving an account of the legal situation existing before its approval with respect to the investments protected by the guarantees, [and] confirming that they referred exclusively to the content in the feasibility study included in the Contract.”<sup>1258</sup>

605. This argument is equally applicable to MINEM’s 2019 amendments to the Mining Regulations.<sup>1259</sup> Again, Claimant appears to miss the revision allowing for certain additional activities to fall under the stability guarantee. Claimant only cites to and discusses the revision to Article 22,<sup>1260</sup> which, after the amendments, does say that “[t]he contractual guarantees benefit the owners of mining activities exclusively for the investments covered in the contract that are undertaken in the concessions of Economic Administrative Units.”<sup>1261</sup> But Article 39 was also amended to provide, in relevant part, “[i]n Conformity with paragraph three of Article 83-B of the Single Unified Text, the contractual benefit also has effect on the additional activities undertaken following the execution of the Investment Program contained in the Technical Economic Feasibility Study.”<sup>1262</sup> Claimant ignores this provision and its negative implications for Claimant’s interpretation.

*(iii) Perú’s Interpretation Does Not Undermine the Mining Law’s Purpose of Promoting Investment*

606. Claimant’s final argument is that Perú’s interpretation of the scope of the 1998 Stabilization Agreement “upends the basic purpose that the Mining Law’s drafters sought to achieve in creating stability guarantees—to offer investors a predictable tax and administrative framework.”<sup>1263</sup> In addition to being incorrect, this argument is irrelevant. It is a criticism of

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<sup>1258</sup> Exhibit RER-1, Eguiguren Report at para. 94.

<sup>1259</sup> Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Arts. 22 and 39.

<sup>1260</sup> See Claimant’s Memorial at para. 343.

<sup>1261</sup> Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Art. 22.

<sup>1262</sup> Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at Art. 39.

<sup>1263</sup> Claimant’s Memorial at para. 344.

Perú's policy choice to limit the scope of the stability guarantees to investment projects because, in Claimant's view, it does not offer enough of an incentive. But Claimant's view on Perú's policy choice does not change the fact that Perú did in fact make the choice, and that Perú has every right to do so.

607. *First*, according to Claimant, "by their very nature, mining units require continuing investments over time."<sup>1264</sup> Claimant notes that it made this point before.<sup>1265</sup> Perú therefore has the same response: (1) Perú was not attempting to incentivize private investment at any cost.<sup>1266</sup> Perú can and must balance the costs and benefits of offering stability guarantees and, reflecting that balance, chose to offer those guarantees within a defined scope.<sup>1267</sup> That balancing does not in any way undermine Perú's goal of encouraging private investment. And (2) Claimant is overselling the importance of the administrative and fiscal framework in an investor's decision of whether to invest. As noted above, Mr. Ralbovsky has explained that "[w]hile fiscal stability may be an important factor when a company is investing, other factors have been found to be equally, if not more, important[,]” such as quality of the resource.<sup>1268</sup>

608. *Second*, Claimant argues that “there are many costs and assets within an integrated mining unit that cannot be allocated in any obvious and reasonable manner to a specific investment” and, “[a]s a result, applying separate stability regimes to different investments within the same integrated mining unit . . . would be administratively burdensome, and would require extensive regulatory guidance to implement in a non-arbitrary manner.”<sup>1269</sup> But, as Mr. Ralbovsky explains in his expert report, “accounting practitioners and government

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<sup>1264</sup> Claimant's Memorial at para. 345.

<sup>1265</sup> See Claimant's Memorial at para. 345 (informing the Tribunal that the argument was “discussed above (see Section IV.A.2.i.c above)”).

<sup>1266</sup> Exhibit RER-4, Ralbovsky Report at para. 44.

<sup>1267</sup> Exhibit RER-4, Ralbovsky Report at paras. 19, 39.

<sup>1268</sup> Exhibit RER-4, Ralbovsky Report at para. 33.

<sup>1269</sup> Claimant's Memorial at para. 346.

authorities have encountered this situation before and have identified several methods to differentiate those mining costs effectively. . . . The government of Per[ú] chose to allocate costs for SMCV in levying tax in 2011 by allocating costs according to the value of the copper content going to each alternative operation.”<sup>1270</sup> In fact, this is the method currently provided for in the Mining Regulations under Article 22;<sup>1271</sup> so, it is not as burdensome as Claimant would have the Tribunal believe.

609. *Third*, Claimant argues that “Peruvian law provided no guidance whatsoever on how to actually implement a stability regime based on individual investments.”<sup>1272</sup> Claimant argues that this confirms that Perú’s interpretation was not the intent of the Law’s drafters.<sup>1273</sup> But it does nothing of the sort. As Mr. Ralbovsky explains, “[I]t is common for a mining company to mine one pit, yield two different types of ore, process those two types of ore in two different processes, and allocate the shared mining costs to the two different processes in an appropriate manner, including when the processes occur in an integrated mining operation that will yield the exact same product (*i.e.* refined copper) when both processes are fully concluded.”<sup>1274</sup> According to Mr. Ralbovsky, “This allocation of shared costs occurs all the time for accounting and taxation purposes, including and especially in the mining sector.”<sup>1275</sup>

610. Moreover, Mr. Ralbovsky explains that “[t]here are generally two methods to differentiate the costs in this very situation where a miner has shared mining costs but two different processes: allocate the shared costs (1) based on the relative value of the copper that is sent to leaching or to the concentrator, or (2) based on the tons of ore moved for each

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<sup>1270</sup> Exhibit RER-4, Ralbovsky Report at paras. 87-88.

<sup>1271</sup> Exhibit RER-4, Ralbovsky Report at para. 88; Exhibit CA-2, Mining Regulations at Art. 22.

<sup>1272</sup> Claimant’s Memorial at para. 347.

<sup>1273</sup> *See* Claimant’s Memorial at para. 347.

<sup>1274</sup> Exhibit RER-4, Ralbovsky Report at para. 85.

<sup>1275</sup> Exhibit RER-4, Ralbovsky Report at para. 85.

operation.”<sup>1276</sup> Drs. Bravo and Picón echo this point.<sup>1277</sup> The fact that, at that time, Perú left the choice up to the company in no way undermines Perú’s interpretation of the scope of the stability guarantees.

611. *Fourth*, Claimant argues that SUNAT made certain mistakes in differentiating between stabilized and non-stabilized activities (applying the non-stabilized regime to certain Leaching Project activities) and that this somehow shows that “the stability regime was never intended to operate with multiple regimes within the same unit, and that doing so is extremely difficult.”<sup>1278</sup> Perú addresses the substance of these allegations in Sections II.I and III.B.2.d, below, in the context of Claimant’s FET claim. The important points here are (i) as just explained, separating the stabilized and non-stabilized activities is not “extremely difficult” nor at all uncommon. And (ii), the fact that SUNAT allegedly erred in calculating certain Assessments (or was unable to separate certain stabilized and non-stabilized activities because SMCV failed to keep separate records, as discussed in Section II.I) has no bearing whatsoever on the proper interpretation of the 1998 Stabilization Agreement. This argument is completely irrelevant.

612. *Fifth* and finally, Claimant argues that Perú treated certain investments made between 1999 and 2002 that were not included in the 1996 Feasibility Study as stabilized.<sup>1279</sup> According to Claimant, under Perú’s interpretation of the scope of the stability guarantees, these investments would not have been covered by the 1998 Stabilization Agreement because, like the Concentrator Project, they were not investments included in the 1996 Feasibility Study’s

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<sup>1276</sup> Exhibit RER-4, Ralbovsky Report at para. 88.

<sup>1277</sup> Exhibit RER-3, Bravo and Picón Report at para. 183 (“we believe that there are criteria and tax and accounting practices in Peru that prove that it was possible for SMCV to keep separate accounts for the activities of the Leaching Project and the Primary Sulfides Project”).

<sup>1278</sup> Claimant’s Memorial at para. 348; *see also id.* at para. 349.

<sup>1279</sup> *See* Claimant’s Memorial at para. 350.

investment program.<sup>1280</sup> Claimant, however, fails to mention that these investments were (i) made pursuant to a settlement agreement between Phelps Dodge and Minero Perú,<sup>1281</sup> and (2) were for the Leaching Project.<sup>1282</sup> In fact, SUNAT determined that the investments fell within the scope of the 1996 Feasibility Study because they were made to further the Study's goal of increasing production capacity of the Leaching Project to 48,000 metric tons of copper cathodes per year.<sup>1283</sup> The fact that Perú treated these subsequent investments in the Leaching Project, which were intended to further the goal for the Leaching Project outlined in the feasibility study and which Perú obtained pursuant to a settlement agreement, as stabilized provides no support for Claimant's contention that the Concentrator Project is covered by the 1998 Stabilization Agreement. To the contrary, Perú's treatment of these investments in the same Leaching Project as stabilized is entirely consistent with its interpretation that the stability guarantees apply to the investment project that is outlined in the 1996 Feasibility Study.

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613. In sum, even if the Tribunal were to determine that it has jurisdiction over the breach-of-contract claims, it must nevertheless reject the claims for two reasons. First, SMCV has already litigated the issue of whether the 1998 Stabilization Agreement covers the Concentrator Project and the Peruvian courts held that the stability guarantees are limited to the investment project specifically identified in the Agreement (in which case Perú could not have violated the 1998 Stabilization Agreement). SMCV, on whose behalf Claimant brings the claim,

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<sup>1280</sup> See Claimant's Memorial at para. 350(b).

<sup>1281</sup> See Exhibit CE-17, Escritura Transacción Extrajudicial, March 30, 2001.

<sup>1282</sup> See Claimant's Memorial at para. 87 (describing the investments).

<sup>1283</sup> See Exhibit CE-46, Resolution on Appeal of 2008 Royalty Assessments ("As can be seen, this expansion corresponds to disbursements related to the investment program contained in the submitted Feasibility Study, just as seen in the Cash Flow Statement (page 1449) and in the description of the Property, Machinery and Equipment, Works in Progress from Note 6 to the Financial Statements (page 1443) included in the Annual Report as of December 31, 2002 (pages 1424 to 1462), which do not distort the main objective of the contract, which is limited to the expansion of the production capacity from 72,000 to 105,000 pounds (48,000 MT) of copper cathodes from copper ore heap leaching." (emphasis added)); see also Exhibit CE-9, Feasibility Study, Executive Summary, 1996, at p.2.

is therefore collaterally estopped from relitigating this issue and, even were that not the case, this Tribunal is not a court of appeals and should respect the Peruvian Supreme Court's decision on this question of Peruvian law.

614. And, second, even if the Tribunal nevertheless were to consider the merits itself, the Mining Law and Regulations and the 1998 Stabilization Agreement are clear: the stability guarantees apply to the investment project specifically identified in the Agreement, not the entire mining unit or concessions. Perú has been consistent and transparent on this point, including in numerous reports and publicly televised presentations to Congress. This being the case, Perú's imposition of the Assessments did not violate its obligations under the 1998 Stabilization Agreement.

**B. RESPONDENT HAS NOT BREACHED ITS OBLIGATIONS UNDER THE FAIR AND EQUITABLE TREATMENT PROVISION**

615. Claimant alleges that Perú has breached its fair and equitable treatment ("FET") obligations under Article 10.5 of the TPA by frustrating Claimant's alleged legitimate expectations, by treating Claimant/SMCV arbitrarily, by failing to act with consistency and transparently, and by committing certain due process violations.<sup>1284</sup>

616. As Respondent explains below, these FET claims fail for two principal reasons. First, with the exception of the due-process claim, these claims fail because they allege violations of protections not actually provided for in the TPA. And second, even if the TPA promised the protections that Claimant propounds (it does not), these claims would fail because, contrary to Claimant's allegations, Respondent has been consistent and transparent in its interpretation of the scope of the 1998 Stabilization Agreement and has provided SMCV with a full and fair opportunity to litigate this issue in domestic courts.

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<sup>1284</sup> See Claimant's Memorial at para. 367.

## 1. The Customary International Law Minimum Standard of Treatment Does Not Provide the Scope of Protection that Claimant Imagines

617. Article 10.5.1 requires Perú to provide U.S. investors with “fair and equitable treatment and full protection and security” (“FPS”) “in accordance with customary international law.”<sup>1285</sup> As Article 10.5.2 explicitly provides, “[f]or greater certainty,” customary international law refers to the “customary international law minimum standard of treatment” (“MST”), and, thus, “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.”<sup>1286</sup> The language could not be more explicit: the agreement to provide FET (and FPS) does not create substantive rights beyond those guaranteed under the customary international law minimum standard of treatment (the content of which is discussed in the following three Subsections). This specification is critical, and also fatal to most of Claimant’s FET claims.

### a. The Content of the Customary International Law Minimum Standard of Treatment Has Not Merged with the Content of the Autonomous FET Standard

618. Claimant attempts to downplay the MST limitation, arguing that the MST “obligation of fair and equitable treatment is today ‘not materially different’ from the treaty-based ‘fair and equitable treatment’ standard as it has been interpreted by international investment tribunals.”<sup>1287</sup> Claimant’s argument, however, both ignores the actual text of Article 10.5 and misconstrues the relevant arbitral decisions. Rather, as Dr. F.A. Mann has explained, “[t]he terms ‘fair and equitable treatment’ envisage conduct which goes far beyond

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<sup>1285</sup> Exhibit CA-10, US-Perú TPA at Art. 10.5.1.

<sup>1286</sup> Exhibit CA-10, US-Perú TPA at Art. 10.5.2.

<sup>1287</sup> Claimant’s Memorial at para. 361.

the minimum standard and afford protection to a greater extent.”<sup>1288</sup> Only the latter—different and narrower—standard is promised in the TPA.

619. To start with the text, Article 10.5.1 of the TPA requires the State parties to afford investments “treatment in accordance with customary international law, including fair and equitable treatment.”<sup>1289</sup> As just noted above, Article 10.5.2 clearly states that “[t]he concept[] of fair and equitable treatment . . . do[es] not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment], and do[es] not create additional substantive rights.”<sup>1290</sup> To adopt Claimant’s position that the FET standard in the TPA is the same as an autonomous FET standard would deprive both (i) the phrase “in accordance with customary international law” in Article 10.5.1 and (ii) the entirety of Article 10.5.2 of the TPA, of their plain and ordinary meaning. There is no basis for such an interpretation. First, the Tribunal is obliged under the VCLT to interpret Article 10.5 in accordance with its ordinary meaning, in context.<sup>1291</sup> That mandate is incompatible with an interpretation of “fair and equitable treatment” that entirely ignores the context of the language immediately preceding it and immediately following it in Article 10.5 of the TPA. Second, had the drafters of the TPA intended for an autonomous FET standard to apply, they could simply have left out any reference to the customary international law minimum standard of treatment,<sup>1292</sup> as many other treaties have. The drafters did not do so; to the contrary, they emphasized the connection to customary international law in Article 10.5.2 (and the note in

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<sup>1288</sup> Exhibit RA-27, F.A. Mann, “British Treaties for the Promotion and Protection of Investments,” in 52 *BRIT. YB Int’l L.* 241 (1981), at p. 244.

<sup>1289</sup> Exhibit CA-10, US-Perú TPA at Art. 10.5.1 (internal citation omitted).

<sup>1290</sup> Exhibit CA-10, US-Perú TPA at Art. 10.5.2 (emphasis added).

<sup>1291</sup> Exhibit CA-49, Vienna Convention on the Law of Treaties, May 23, 1969 at Art. 31.

<sup>1292</sup> For example, the text of the TPA could read: “Each Party shall accord to investments of investors of the other Party fair and equitable treatment and full protection and security.”

Annex 10-A, which, as discussed more below, provides further guidance for how to determine the customary international law minimum standard of treatment in Article 10.5).

620. The body of relevant past arbitral decisions also supports Respondent’s position.<sup>1293</sup> As a 2007 UNCTAD Report on Fair and Equitable Treatment explained, “[t]he actual practice of application of FET clauses by arbitral tribunals has drawn a distinction solely between FET as an unqualified standard and the FET obligation linked to the minimum standard of treatment of aliens under customary international law”—“where the FET obligation is not expressly linked textually to the minimum standard of treatment of aliens, many tribunals have interpreted it as an autonomous, or selfstanding one” and “[i]nstead of deriving the content of the standard from its original source (customary international law), these tribunals chose to focus on the literal meaning of the provision itself.”<sup>1294</sup> For instance, in *Glamis Gold v. USA*, the tribunal held “that it may look solely to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law minimum standard of treatment, as opposed to any autonomous standard[,]” because it was dealing with a treaty that limited the FET protections to the MST, and it determined that arbitral decisions dealing with autonomous FET provisions did not provide guidance on that standard.<sup>1295</sup> The *Cargill v. Mexico* tribunal similarly dismissed as irrelevant arbitral decisions interpreting FET provisions with autonomous treaty language (as opposed to those interpreting a fair and equitable treatment clause “viewed by

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<sup>1293</sup> See, e.g., Exhibit RA-28, *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015 (“Exhibit RA-28, *Al Tamimi v. Oman*, Award”), at para. 386 (rejecting reliance on another case because it involved an autonomous treaty provision and not an FET provision limited to the MST, whereas the tribunal the *Al Tamimi* case faced an FET provision limited to MST); Exhibit RA-29, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 (Redacted) (“*Cargill v. Mexico*, Award”), at para. 278 (same); Exhibit RA-30, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009 (“*Glamis Gold v. USA*, Award”), at para. 611 (same).

<sup>1294</sup> Exhibit RA-31, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 2012, at xiv.

<sup>1295</sup> Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 611.

the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard”<sup>1296</sup>).

621. Claimant cites two cases in support of its position that Article 10.5’s MST language is irrelevant, but neither case actually dealt with an FET provision that was limited to the customary international law minimum standard of treatment—and, thus, neither tribunal actually applied an autonomous FET standard to a treaty provision that was explicitly limited to the MST, as Claimant asks this Tribunal to do.<sup>1297</sup> Claimant first cites to *Rumeli Telekom v. Kazakhstan*.<sup>1298</sup> That case was initiated under the Kazakhstan-Turkey BIT. While that BIT did not include an FET provision, the tribunal imported one from Kazakhstan’s other treaties (“in particular the United Kingdom-Kazakhstan BIT”) through the MFN clause.<sup>1299</sup> The FET provision in the United Kingdom-Kazakhstan BIT provides that “[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”<sup>1300</sup> There is no mention, in that provision or elsewhere in the BIT, of customary international law or the minimum standard of treatment (and the FET provision is certainly not textually tied to such standard). Therefore, when the respondent argued that its FET obligation did “not raise the

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<sup>1296</sup> Exhibit RA-29, *Cargill v. Mexico*, Award at para. 278.

<sup>1297</sup> See Claimant’s Memorial at para. 361 n.965. Claimant actually cites one additional case in that footnote—Exhibit CA-276, *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012 (“*Railroad Development v. Guatemala*, Award”), at para. 218. However, Claimant appears to be citing to that case to support its contention earlier in the same sentence that “the minimum standard of treatment is an evolving concept,” not to support its contention that the MST “obligation of fair and equitable treatment is today ‘not materially different’ from the treaty-based ‘fair and equitable treatment’ standard.” Claimant’s Memorial at para. 361. To be certain, the *RDC* tribunal did not find that the MST FET standard and the autonomous FET standard are the same. See Exhibit CA-276, *Railroad Development v. Guatemala*, Award at paras. 216-19.

<sup>1298</sup> See Claimant’s Memorial at para. 361 n.965; see also Exhibit CA-237, *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 (“*Rumeli v. Kazakhstan*, Award”).

<sup>1299</sup> Exhibit CA-237, *Rumeli v. Kazakhstan*, Award at para. 575.

<sup>1300</sup> Exhibit RE-114, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kazakhstan for the Promotion and Protection of Investments, signed and entered into force on November 23, 1995, at Art. 2(2).

obligation upon Respondent beyond the international minimum standard of protection,” the tribunal brushed it aside with just two sentences—one of which is the sentence upon which Claimant relies.<sup>1301</sup>

622. Similarly, *Murphy v. Ecuador*, the second case upon which Claimant relies,<sup>1302</sup> was initiated under the Ecuador-U.S. BIT signed in 1993. Article 3(a) of that BIT provides, in relevant part, that “[i]nvestment shall at all times be accorded fair and equitable treatment.”<sup>1303</sup> Again, there is no mention, in that provision or elsewhere in the BIT, of customary international law or the minimum standard of treatment (and the FET provision certainly was not textually tied to such standard). The tribunal dismissed the respondent’s argument to the contrary by, in essence, saying that the issue was irrelevant because the respondent would have violated the treaty under either standard.<sup>1304</sup> Thus, Claimant has not presented a single case in which a tribunal operated under an FET provision that was limited to the customary international law minimum standard of treatment and interpreted that standard to be equivalent to an autonomous FET standard.

623. In sum, Claimant’s suggestion that the FET protections in Article 10.5 (expressly limited to the MST) are essentially the same as an autonomous FET provision is wrong. As discussed in the next two Subsections, Article 10.5 of the TPA (like other FET provisions limited to the MST) is far more circumscribed.

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<sup>1301</sup> Exhibit CA-237, *Rumeli v. Kazakhstan*, Award at para. 611.

<sup>1302</sup> Claimant’s Memorial at para. 361 n.965; Exhibit CA-279, *Murphy Exploration & Production Co. Int’l v. Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, May 6, 2016 (“*Murphy v. Ecuador*, Partial Final Award”).

<sup>1303</sup> Exhibit RE-115, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on August 27, 1993, entered into force on May 11, 1997, at Art. 2(3)(a).

<sup>1304</sup> Exhibit CA-279, *Murphy v. Ecuador*, Partial Final Award at para. 208 (“The Tribunal does not find it necessary to determine for the purposes of the present case whether the FET standard reflects an autonomous standard above the customary international law standard.”).

b. FET Provisions Limited to the MST Are Breached Only by Particularly Egregious State Conduct

624. The customary international law minimum standard of treatment is the most basic standard of treatment that States have agreed must be provided to investors. Only particularly egregious conduct breaches that standard. Claimant therefore must meet a high bar to succeed on its FET claims.

625. Professor Borchard observed that the minimum standard sets an absolute floor of treatment, which ensures that States' treatment of aliens does not fall below "a civilized standard."<sup>1305</sup> As explained by the tribunal in *Neer v. Mexico*, for State action to breach this standard, the action should amount "to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."<sup>1306</sup>

626. Although the *Neer* case concerned the State's obligation to provide physical protection to a foreign person, tribunals have since relied upon *Neer* to describe the full scope of a State's obligations to protect investors and their investments. For example, each of the *Thunderbird*, *Glamis Gold*, *Cargill*, and *Al Tamini* tribunals interpreted a fair and equitable treatment obligation in a treaty that was expressly limited to the customary international law minimum standard of treatment and looked to *Neer* to explain the scope of the obligation.<sup>1307</sup>

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<sup>1305</sup> Exhibit RA-32, Edwin Borchard, "The 'Minimum Standard' of the Treatment of Aliens," in 33 *AM. Soc'y INT'L. PROC.* 51 (1939), at p. 58; see also Exhibit RA-33, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL/NAFTA), Partial Award, November 13, 2000 ("*S.D. Myers v. Canada*, Partial Award"), at para. 259 ("[t]he 'minimum standard' is a floor below which treatment of foreign investors must not fall").

<sup>1306</sup> Exhibit RA-34, *L. F. H. Neer and Pauline Neer (USA) v. United Mexican States*, 4 RIAA 60 (1926) ("*Neer v. Mexico*, Award"), at pp. 61-62.

<sup>1307</sup> See Exhibit RA-35, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006 ("*Thunderbird v. Mexico*, Award"), at para. 194; Exhibit RA-30, *Glamis Gold v. USA*, Award at paras. 614, 616; Exhibit RA-29, *Cargill v. Mexico*, Award at paras. 284, 286; Exhibit RA-28, *Al Tamimi v. Oman*, Award at para. 383.

In particular, the *Glamis Gold* tribunal explained that it was “evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard,” that the customary international law minimum standard has not moved beyond *Neer*:

The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1). . . . The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer* . . . .<sup>1308</sup>

627. Even if a tribunal were to consider that the customary international law minimum standard of treatment has evolved in some respects since *Neer*, claimants bringing FET claims under the customary international law minimum standard of treatment still have a very heavy burden. The *Thunderbird v. Mexico* tribunal, for instance, observed that:

Notwithstanding the evolution of customary law since decisions such as [the] *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.<sup>1309</sup>

628. And the *Cargill* tribunal used comparably strong language to describe the fair and equitable treatment standard in the context of the customary international law minimum standard of treatment:

The requirement of fair and equitable treatment is one aspect of this [international] minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a

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<sup>1308</sup> Exhibit RA-30, *Glamis Gold v. USA*, Award at paras. 614, 616 (emphasis added).

<sup>1309</sup> Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 194 (emphasis added).

tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.<sup>1310</sup>

629. The strong language used in these awards proves two points: (i) the *Neer* standard remains the foundation of the modern customary international law minimum standard of treatment; and (ii) this standard places an exceedingly high burden on claimants hoping to demonstrate a breach.

c. FET Provisions Limited to the MST Do Not Provide Many of the Protections that Claimant Seeks to Invoke

630. In addition to imposing a high bar to prove a breach, generally, FET provisions limited to the customary international law minimum standard of treatment also provide only the protections that have crystallized into customary international law. These protections do not include many of the protections upon which Claimant attempts to rely in this case.

631. To recall, Claimant alleges that Perú violated its FET obligations under the TPA by (i) frustrating Claimant's supposed legitimate expectations, (ii) treating Claimant/SMCV arbitrarily, (iii) failing to act consistently and transparently, and (iv) committing certain due process violations.<sup>1311</sup> As a factual matter, Claimant has failed to establish that Respondent committed these purported offenses. As explained in Section IV.B.2.b.i below, Respondent has been clear, consistent, and reasonable with respect to its interpretation of the scope of the 1998 Stabilization Agreement. Moreover, Perú did not deny Claimant justice; SMCV had every opportunity to litigate the Tax and Royalty Assessments before the Tax Tribunal and Peruvian

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<sup>1310</sup> Exhibit RA-29, *Cargill v. Mexico*, Award at para. 296 (emphasis added).

<sup>1311</sup> See Claimant's Memorial at para. 367.

courts—and availed itself of such opportunities. As a fundamental threshold matter, however, Claimant has failed to establish in the first instance that Respondent had an obligation under customary international law to protect Claimant’s legitimate expectations, or to refrain from arbitrary, inconsistent, or non-transparent actions against Claimant’s investment.

632. The customary international law minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. Thus, the FET obligation under the TPA includes only those rules of treatment that have crystallized into customary international law.<sup>1312</sup>

633. As stated in Annex 10-A to the TPA, “customary international law” “results from a general and consistent practice of States that they follow from a sense of legal obligation.”<sup>1313</sup> This understanding of customary international law is consistent with the understanding adopted by the International Law Commission<sup>1314</sup> and the International Court of Justice<sup>1315</sup>—*i.e.*, that customary international law requires both State practice and *opinio juris*. Relevant State practice must be extensive and virtually uniform,<sup>1316</sup> and must also be accepted as law, with States

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<sup>1312</sup> The customary international law minimum standard of treatment “provid[es] for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property.” Exhibit RA-37, “Fair and Equitable Treatment Standard in International Investment Law,” *OECD Working Papers on International Investment*, 2004/03, at p. 8 n.32.

<sup>1313</sup> Exhibit CA-10, US-Perú TPA at Annex 10-A.

<sup>1314</sup> See Exhibit RA-38, Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission, May 22, 2014, at para. 21; see also *id.* at Annex, Proposed Draft Conclusion 3 (stating that in order to determine the “existence of a rule of customary international law and its content, it is necessary to ascertain whether there is a general practice accepted as law”).

<sup>1315</sup> See, e.g., Exhibit RA-39, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (February 3), at para. 55 (“In particular . . . the existence of a rule of customary international law requires that there be ‘a settled practice’ together with *opinio juris*.”); Exhibit RA-40, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 I.C.J. 13 (June 3), at para. 27 (“It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”); Exhibit RA-41, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, 1986 I.C.J. 14 (June 27), at para. 183 (“[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States.”).

<sup>1316</sup> See, e.g., Exhibit RA-42, *North Sea Continental Shelf*, 1969 I.C.J. 3 (February 20), at para. 74 (to form a new rule of customary international law, “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is

performing the practice out of a sense of legal obligation.<sup>1317</sup> Both State practice and *opinio juris* must be demonstrably present in order “to support a finding that a relevant rule of customary international law has emerged.”<sup>1318</sup> To be clear, as the *Glamis Gold* tribunal correctly noted, “[a]rbitral awards . . . do not constitute State practice and thus cannot create or prove customary international law.”<sup>1319</sup> The burden is on the party seeking to rely on the rule to establish its existence,<sup>1320</sup> which, here, is Claimant. This is admittedly a “daunting task,”<sup>1321</sup> but, nevertheless, it is what the TPA requires—and Claimant has not met that requirement.

634. Except for denial of justice (which is explicitly provided for in the TPA), Claimant has failed to prove that the FET elements on which it seeks to rely have crystallized into customary international law:

- a. Legitimate expectations: An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligations on the State under the customary international law minimum standard of

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involved”); Exhibit RA-48, International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), at Draft Conclusion 9 and commentaries (citing authorities).

<sup>1317</sup> See Exhibit RA-42, *North Sea Continental Shelf*, 1969 I.C.J. 3 (February 20), at para. 77 (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.”); Exhibit RA-38, Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission, May 22, 2014 (citing authorities).

<sup>1318</sup> Exhibit RA-38, Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission, May 22, 2014, at paras. 22-23 (considering these requirements “indispensable for any rule of customary international law properly so called”).

<sup>1319</sup> Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605; see also Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217.

<sup>1320</sup> See, e.g., Exhibit RA-43, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005 (“*Methanex v. USA*, Award”), at Part IV, Chapter C, para. 26; Exhibit RA-29, *Cargill v. Mexico*, Award at para 273; Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 21.

<sup>1321</sup> Exhibit RA-31, *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 2012, at p. 45 (“Given that claimants bear the burden of proof, they face the daunting task of collecting evidence in order to demonstrate general State practice and *opinio juris*.”).

treatment. Although Claimant cites to certain cases that refer to an obligation to avoid frustrating an investor's legitimate expectations, none of these cases directly evaluated whether there exists State practice or *opinio juris* that "protection of an investor's legitimate expectations" is required under customary international law.<sup>1322</sup> As noted above, arbitral decisions are not State practice and are, therefore, insufficient to prove State practice or *opinio juris*.<sup>1323</sup> Notably, Claimant has not cited to any actual evidence of State practice or *opinio juris* to support its contention.<sup>1324</sup> And Perú is not aware of general and consistent State practice and *opinio juris* establishing an obligation under customary international law not to frustrate investors' legitimate expectations.<sup>1325</sup> Claimant has therefore failed to prove that States have an obligation to avoid frustrating investors' legitimate expectations as a matter of customary international law.

b. Arbitrariness: The customary international law minimum standard of treatment does not require that states refrain from acting in an arbitrary manner, but, rather, prohibits outrageous,<sup>1326</sup> "grossly unfair,"<sup>1327</sup> or "egregious and shocking"

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<sup>1322</sup> See Claimant's Memorial at para. 362; Exhibit CA-278, *Clayton et al v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015 ("*Clayton v. Canada*, Award"), at para. 445 (citing to other tribunals for potential breach where reliance has been induced by authorized state officials, but not evaluating state practice or *opinio juris*); Exhibit CA-279, *Murphy v. Ecuador*, Partial Final Award at paras. 206-08 (citing to other tribunal decisions to find that the protection of legitimate expectations is part of the customary international law standard without evaluating State practice or *opinio juris*); Exhibit CA-277, *Abengoa, S.A. et al. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award, April 18, 2013 ("*Abengoa v. Mexico*, Award"), at para. 641 (citing to other tribunal decisions to find that the protection of legitimate expectations from "shocking[]" violations is part of the customary international law standard without evaluating State practice or *opinio juris*); Exhibit CA-285, *Eco Oro Minerals Corp., v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, September 9, 2021, at para. 754 (citing to other tribunal decisions to find that the protection of legitimate expectations is part of the customary international law standard without evaluating State practice or *opinio juris*).

<sup>1323</sup> Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605; see also Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 217.

<sup>1324</sup> See Claimant's Memorial at paras. 361-62.

<sup>1325</sup> Exhibit RA-44, "Chapter 3: The Substantive Content of Article 1105," in Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013), at pp. 159-60 (explaining, in the context of NAFTA's identical call to the "customary international law minimum standard of treatment," that "[i]n the present author's view, there is little support for the assertion that there exists under customary international law any obligation for host States to protect investors' legitimate expectations").

<sup>1326</sup> See Exhibit RA-34, *Neer v. Mexico*, Award at paras. 4-5.

<sup>1327</sup> Exhibit RA-29, *Cargill v. Mexico*, Award at para. 296.

treatment.<sup>1328</sup> The cases that Claimant discusses do not show otherwise.<sup>1329</sup> To the contrary, in *Abengoa v. Mexico*, the tribunal actually stated that the MST required states to refrain from acting in a “grossly arbitrary” manner, as Respondent argues here.<sup>1330</sup> Claimant also cites to *Crystallex, Eureka*, and *Gold Reserve*,<sup>1331</sup> but the tribunals in those cases did not consider FET provisions limited to the MST.<sup>1332</sup> And, finally, Claimant relied upon *Railroad Development Corp. v. Guatemala*, but the tribunal there did not evaluate whether there exists State practice or *opinio juris* showing that protecting an investor against arbitrary state action is required under customary international law.<sup>1333</sup> Critically, Claimant has again failed to cite to any actual evidence of State practice or *opinio juris* to support its contention.<sup>1334</sup>

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<sup>1328</sup> Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 616.

<sup>1329</sup> See Claimant’s Memorial at para. 363; see also Exhibit CA-277, *Abengoa v. Mexico*, Award at para. 641 (“The Arbitral Tribunal holds that . . . the minimum level of treatment compels the State, at least, not to act in a manifestly and grossly arbitrary and unfair manner . . . .” (emphasis added)); Exhibit CA-222, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016 (“*Crystallex v. Venezuela*, Award”), at para. 530 (“The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the ‘international minimum standard of treatment’ under customary international law, but rather constitutes an autonomous treaty standard.”); Exhibit CA-213, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014 (“*Gold Reserve v. Venezuela*, Award”), at paras. 564 *et seq* (considering the claimant’s FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-122, *Eureka v. Poland*, Award at paras. 231-35 (considering the claimant’s FET claim without analyzing the customary international law minimum standard of treatment as tribunal was dealing with an autonomous FET standard); Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 219 (considering content of minimum standard of treatment without evaluating State practice or *opinio juris*).

<sup>1330</sup> Exhibit CA-277, *Abengoa v. Mexico*, Award at para. 641 (“The Arbitral Tribunal holds that . . . the minimum level of treatment compels the State, at least, not to act in a manifestly and grossly arbitrary and unfair manner . . . .” (emphasis added)).

<sup>1331</sup> See Claimant’s Memorial at para. 363.

<sup>1332</sup> See Exhibit CA-222, *Crystallex v. Venezuela*, Award at para. 530 (“The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the ‘international minimum standard of treatment’ under customary international law, but rather constitutes an autonomous treaty standard.”); Exhibit CA-213, *Gold Reserve v. Venezuela*, Award at paras. 564 *et seq* (considering the claimant’s FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-122, *Eureka v. Poland*, Award, at paras. 231-35 (considering the claimant’s FET claim without analyzing the customary international law minimum standard of treatment as tribunal was dealing with an autonomous FET standard).

<sup>1333</sup> See Exhibit CA-276, *Railroad Development v. Guatemala*, Award at para. 219 (considering content of minimum standard of treatment without evaluating State practice or *opinio juris*).

<sup>1334</sup> See Claimant’s Memorial at para. 363.

c. Consistency and Transparency: Finally, Claimant has failed to prove that there is an independent obligation in customary international law for the State to be consistent and transparent.<sup>1335</sup> Claimant discusses five cases, none of which actually support its position.<sup>1336</sup> The tribunals in *Crystallex*, *Gold Reserve*, and *Deutsche Telekom* did not consider FET provisions limited to the MST.<sup>1337</sup> The paragraphs from *Windstream v. Canada* to which Claimant cites<sup>1338</sup> do not discuss consistency and transparency (except for finding that the respondent acted in accordance with the treaty during a particular time despite noting that the respondent “could have been more transparent”<sup>1339</sup>—the only time that the tribunal used the word “transparent” in the entire

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<sup>1335</sup> See, e.g., Exhibit RA-45, *Mercer International Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, at para. 7.7; Exhibit RA-29, *Cargill v. Mexico*, Award at para. 294.

<sup>1336</sup> See Claimant’s Memorial at para. 364; Exhibit CA-280, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, September 27, 2016 (“*Windstream v. Canada*, Award”), at para. 351 (considering content of minimum standard of treatment without evaluating *opinio juris* because, while the tribunal determined “the content of a rule of customary international law such as the minimum standard of treatment can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*),” “neither Party has produced such evidence in this arbitration”); Exhibit CA-78, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, at para. 76 (finding that the FET provision in NAFTA included an element of transparency because of the reference to transparency as a general objective in NAFTA Article 102(1)); Exhibit CA-222, *Crystallex v. Venezuela*, Award at para. 530 (“The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the ‘international minimum standard of treatment’ under customary international law, but rather constitutes an autonomous treaty standard.”); Exhibit CA-213, *Gold Reserve v. Venezuela*, Award at paras. 564 *et seq* (considering the claimant’s FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-234, *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10, Interim Award, December 13, 2017 (“*Deutsche Telekom v. India*, Interim Award”), at para. 331 (considering the claimant’s FET without analyzing the customary international law minimum standard of treatment because the tribunal “observe[d] that the BIT does not refer to ‘international minimum standard’ or similar formulations, unlike other treaties”). *But see* Exhibit RA-46, *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529, Supplementary Reasons for Judgment of the Honourable Mr. Justice Tysoe, October 31, 2001, at paras. 70-72 (setting aside, in part, arbitral award because the tribunal’s determination that the FET provision, limited to the MST, in Article 1105 of NAFTA included a transparency obligation).

<sup>1337</sup> See Exhibit CA-222, *Crystallex v. Venezuela*, Award at para. 530 (“The Tribunal is of the opinion that the FET standard embodied in the Treaty cannot – by virtue of that formulation or otherwise – be equated to the ‘international minimum standard of treatment’ under customary international law, but rather constitutes an autonomous treaty standard.”); Exhibit CA-213, *Gold Reserve v. Venezuela*, Award at paras. 564 *et seq* (considering the claimant’s FET claim without analyzing the customary international law minimum standard of treatment); Exhibit CA-234, *Deutsche Telekom v. India*, Interim Award at para. 331 (considering the claimant’s FET without analyzing the customary international law minimum standard of treatment, because the tribunal “observe[d] that the BIT does not refer to ‘international minimum standard’ or similar formulations, unlike other treaties”).

<sup>1338</sup> See Claimant’s Memorial at para. 364(a) n.985 (citing Exhibit CA-280, *Windstream v. Canada*, Award at paras. 376-80).

<sup>1339</sup> Exhibit CA-280, *Windstream v. Canada*, Award at para. 376.

161-page decision). Rather, the *Windstream* tribunal found an FET violation, because the government kept the investor in “limbo” for too long while determining its policy on the development of offshore wind, faulting the government for failing “to take the necessary measures . . . to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project” “within a reasonable period of time after the imposition of [a] moratorium.”<sup>1340</sup>

And, most egregiously, while the *Metalclad v. Mexico* tribunal did both consider an FET provision limited to the MST and find a violation of said provision because of a lack of transparency, Claimant fails to disclose to the Tribunal that the reviewing court, in part, set aside the award because it rejected the tribunal’s determination that there was a transparency obligation in Chapter 11 of NAFTA (which, in Article 1105, contained the FET provision limited to MST).<sup>1341</sup> This is all to say nothing of the fact that Claimant, again, has provided no evidence of actual State practice or *opinio juris* to support its contention.<sup>1342</sup>

635. Individual States may decide expressly by treaty to extend protections under the rubric of “fair and equitable treatment” beyond those required by customary international law. However, unless and until the extension of such protections represents both a widespread State practice and one that is taken out of a sense of international legal obligation, any such protections are provided by those States independently and of their own volition.<sup>1343</sup> Independent State

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<sup>1340</sup> Exhibit CA-280, *Windstream v. Canada*, Award at para. 380.

<sup>1341</sup> See Exhibit RA-46, *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529, Supplementary Reasons for Judgment of the Honourable Mr. Justice Tysoe, October 31, 2001, at paras. 70-72.

<sup>1342</sup> See Claimant’s Memorial at para. 364.

<sup>1343</sup> See Exhibit RE-116, Free Trade Agreement between Singapore and Perú, signed on May 29, 2008, entered into force on August 1, 2009 (excerpts), at Chapter 10, *ad note* 10-6 (“With regards to this Article, customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”); see also Exhibit RA-47, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (redacted), January 12, 2011, at para. 176 (noting that Article 1105 of NAFTA “must be determined by reference to customary international law, not to standards

practice, even if conducted by multiple States, does not constitute a “customary international law minimum standard of treatment of aliens, including fair and equitable treatment” as required by the TPA.<sup>1344</sup> Thus, arbitral decisions interpreting “autonomous” FET provisions that do not call for treatment under the customary international law minimum standard, or evaluating “autonomous” practice by some States that has not crystallized into customary international law, cannot constitute evidence of the content of the customary international law standard that is required by Article 10.5 of the TPA.<sup>1345</sup> Nor, as previously discussed, are the decisions of international courts and arbitral tribunals interpreting “fair and equitable treatment” as a concept of customary international law themselves instances of “State practice” for purposes of evidencing customary international law, although such decisions may include a relevant examination of such practice.<sup>1346</sup>

636. In sum, the State parties to the TPA did not require compliance with anything more than the minimum standard of treatment for covered investments, as that standard has crystallized into customary international law through widespread and consistent State practice flowing from a sense of legal obligation. The legal protections that Claimant alleges apply to its claims are not specified in the TPA. If it wishes the Tribunal to apply such protections, Claimant

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contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law”).

<sup>1344</sup> See Exhibit RA-48, International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), at Conclusion 8, at pp. 135-38 (“The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent.”).

<sup>1345</sup> See, e.g., Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 608 (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”).

<sup>1346</sup> See Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605 (“Arbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law. They can, however, serve as illustrations of customary international law if they involve an examination of customary international law, as opposed to a treaty-based, or autonomous, interpretation.”) (internal citation omitted); Exhibit RA-29, *Cargill v. Mexico*, Award at para. 277 (“[T]he awards of international tribunals do not create customary international law but rather, at most, reflect [it].”); see also Exhibit RA-49, Maurice H. Mendelson, “The Formation of Customary International Law,” in 272 *Recueil Des Cours* 155 (1998), at p. 202 (noting that while such decisions may contribute to the formation of customary international law, they are not appropriately considered as evidence of “State practice”).

bears the heavy burden of demonstrating that each such protection has crystallized into an obligation under customary international law—meeting the requirements of both State practice and *opinio juris*.<sup>1347</sup> Indeed, “[t]he party which relies on a custom,” is obliged to “prove that this custom is established in such a manner that it has become binding on the other Party.”<sup>1348</sup> If Claimant cannot prove that the protections it wishes to apply are rules of customary international law, with documentation of both State practice and *opinio juris*, then the Tribunal cannot apply the protections that Claimant requests.<sup>1349</sup> Here, Claimant has failed to demonstrate that the

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<sup>1347</sup> See Exhibit RA-50, *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266 (November 20), at p. 276 (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); see also Exhibit RA-51, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Submission of Canada Pursuant to Article 832 of the Canada-Peru Free Trade Agreement, June 9, 2016, at paras. 7-10; Exhibit RA-52, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.)*, 1952 I.C.J. 176 (August 27), at p. 200; Exhibit RA-42, *North Sea Continental Shelf*, 1969 I.C.J. 3 (February 20), at paras. 74-80; Exhibit RA-30, *Glamis Gold v. USA*, Award at paras. 601-02 (noting that the claimant bears the burden of establishing a change in customary international law as “threshold issue,” by showing “(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)” (citations and internal quotation marks omitted); Exhibit RA-29, *Cargill v. Mexico*, Award at para. 273 (“[T]he proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant.”); Exhibit RA-53, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, at para. 185 (“The Investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); Exhibit RA-43, *Methanex v. USA*, Award at Part IV, Chapter C, para. 26 (citing *Asylum Case (Colombia v. Peru)* for placing burden on claimant to establish the content of customary international law, and finding that claimant, which “cited only one case,” had not discharged burden).

<sup>1348</sup> Exhibit RA-52, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.)*, 1952 I.C.J. 176 (August 27), at p. 200 (citation and internal quotation marks omitted); Exhibit RA-54, *The Case of the S.S. “Lotus” (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (September 27), at pp. 25-26 (holding that the claimant had failed to “conclusively prove[]” the “existence of . . . a rule” of customary international law); see also Exhibit RA-10, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at para. 177 (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”).

<sup>1349</sup> See Exhibit RA-29, *Cargill v. Mexico*, Award at para. 273 (“If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.”); see also Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 194 (“Notwithstanding the evolution of customary law since decisions such as [the] *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence. For the purposes of the present case, the Tribunal views acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards.”); Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 614 (“As regards the second form of evolution—the proposition that customary international law has moved beyond the minimum standard of treatment of aliens as defined in *Neer*—the Tribunal finds that the evidence provided by Claimant does not establish such evolution. This is evident in the abundant and continued use of adjective modifiers throughout arbitral awards, evidencing a strict standard.”)

protections it claims are part of FET are in fact protections provided under customary international law (with the exception of due process).<sup>1350</sup> Put another way, other than denial of justice, Claimant has failed to identify a single rule of customary international law that Perú could have breached. Nor has Claimant demonstrated that Perú has actually breached the protections on which Claimant (erroneously) relies, as discussed below.

## 2. Perú Provided Fair and Equitable Treatment

637. Even if the Tribunal were to find that the FET protections Claimant seeks to invoke are incorporated into the TPA's MST protection (which, except for Claimant's denial-of-justice claim, it should not), Claimant's FET claims nonetheless fail, because Perú has been consistent, transparent, and reasonable with its interpretation of the scope of the 1998 Stabilization Agreement, and has provided SMCV with a full and fair opportunity to litigate the issue in Peruvian courts.

638. In Subsection 1, below, Perú provides an overview of the standard with respect to the specific FET elements at issue (again, assuming only *arguendo* that those putative FET elements apply in the first place). Perú then addresses Claimant's arguments that Perú violated the FET obligations (limited to the MST) in Article 10.5 of the TPA by: (i) imposing Royalty Assessments against SMCV (Subsection 2.b.i); (ii) refusing to waive assessments of penalties and interest against SMCV that were imposed in connection with the Royalty and Tax Assessments (Subsection 2.b.ii); and (iii) refusing to refund certain of SMCV's GEM payments

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<sup>1350</sup> Even cases cited by Claimant recognize that claimants alleging a breach of the minimum standard of treatment (MST) face a high burden. For example, the *Murphy v. Canada* tribunal held that the MST standard is "set . . . at a level which protects against egregious behavior." Exhibit RA-55, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, May 22, 2012, at para. 153; *see also* Exhibit RA-6, *Mondev v. USA*, Award at para. 127 ("The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome[.]"); Exhibit CA-278, *Clayton v. Canada*, Award at paras. 427, 443 (adopting an understanding of fair and equitable treatment that "includes 'grossly' unfair, 'manifest' failure of natural justice and 'complete' lack of transparency").

(Subsection 2.b.iii). As demonstrated below, none of these measures constitutes a breach of Article 10.5 of the TPA.

a. Fair and Equitable Treatment Standard

639. While Perú contends that it did treat SMCV (and Claimant) fairly and equitably throughout the various administrative and judicial processes, it is also the case that the fair and equitable treatment standard does not require a State to provide an investor with perfect fairness or equity. As discussed in Section IV.B.1, above, this is even more true when the FET provision at issue is limited to the customary international law minimum standard of treatment, which only protects against particularly egregious and shocking conduct.<sup>1351</sup> Thus, not every act that could possibly be labeled as minimally “unfair” will constitute a breach of the Treaty. It would not be sufficient for Claimant to prove some modicum of unfairness. Under any reading of the FET standard, Claimant must demonstrate much more than that: it must show that it suffered “treatment [that] rises to [a] level that is unacceptable from the international perspective.”<sup>1352</sup>

640. Put another way, Claimant must establish that Perú’s treatment of SMCV fell “far below international standards.”<sup>1353</sup> In the words of the *Genin v. Estonia* tribunal, “[a]cts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.”<sup>1354</sup>

641. The *Waste Management v. Mexico* tribunal’s description of the FET standard requires that a claimant prove:

. . . conduct attributable to the State and harmful to the claimant [that] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a

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<sup>1351</sup> See, e.g., Exhibit RA-30, *Glamis Gold v. USA*, Award at paras. 614, 616.

<sup>1352</sup> Exhibit RA-33, *S.D. Myers v. Canada*, Partial Award at para. 263.

<sup>1353</sup> Exhibit RA-56, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 (“*Genin v. Estonia*, Award”), at para. 367.

<sup>1354</sup> Exhibit RA-56, *Genin v. Estonia*, Award at para. 367.

manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process. . . .<sup>1355</sup>

What is notable in *Waste Management* is not only the type(s) of State misconduct that must be shown, but also the severity. According to the *Waste Management* tribunal, a claimant must prove not just general unfairness, but conduct that is “*grossly unfair*”; not merely an inconsistent or opaque administrative process, but “a *complete lack* of transparency and candor;” or, not just an incorrect judicial decision, but a flat “lack of due process” that results in a “*manifest failure of . . . justice.*” Claimant here cannot possibly show any of these.

642. As mentioned, Claimant has identified four ways in which it argues Perú has breached its obligations under the fair and equitable treatment provision: (i) frustrating Freeport’s and SMCV’s legitimate expectations; (ii) acting arbitrarily based on political calculations; (iii) acting inconsistently and non-transparently; and (iv) denying SMCV due process. Before Perú addresses the specific actions that Claimant alleges violated these obligations (Subsection b), Perú outlines below the relevant standards for each of these FET elements upon which Claimant is relying. To be clear, the discussion that follows is offered only for the sake of completeness, because Perú insists that (except as to denial of justice) Claimant has not proven that the elements or protections discussed below are even part of Article 10.5’s FET obligation in the first place—they have not been proven to be part of the customary international law minimum standard of treatment (as discussed in Section IV.B.1.c above), and they do not bind the State parties to the TPA. The following discussion is offered only to establish that, even if the Tribunal were to treat these claimed protections as part of the MST (it should not), they would still be different—and much more difficult to establish—than Claimant

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<sup>1355</sup> Exhibit CA-269, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 (“*Waste Management v. Mexico, Award*”), at para. 98 (emphasis added).

has tried to present them. And they still would not have been violated as a factual matter, either, as is then discussed in Subsection b.

(i) *Legitimate Expectations*

643. As explained by the tribunal in *Biwater Gauff v. Tanzania*, “[T]he purpose of the fair and equitable treatment standard is to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”<sup>1356</sup> “Basic expectations” mean only those expectations that were fundamental to a claimant’s decision to make their investment, not any and all assorted expectations that claimants might have developed over the course of their investment.

644. Indeed, it is not difficult for investors to abuse the legitimate expectations protection by inventing, and then claiming to have held, expectations to match whatever subsequent State act occurred. As a result, tribunals caution that the legitimate expectations doctrine should not be improperly expanded: “it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it.”<sup>1357</sup> Furthermore, “not every expectation of an investor is protected; rather it must be an expectation recognized and protected in international law.”<sup>1358</sup> Some expectations, even if

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<sup>1356</sup> Exhibit RA-57, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 (“*Biwater Gauff v. Tanzania*, Award”), at para. 602 (emphasis added).

<sup>1357</sup> Exhibit RA-58, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013 (“*Arif v. Moldova*, Award”), at para. 533 (“Legitimate expectations as a basis for the analysis of whether a State has failed to accord an investment fair and equitable treatment are now an established feature of investment arbitration, but remain problematic. They are susceptible to a certain easy circularity of argument; investors normally have expectations in relation to a wide range of contingencies, great and small, and it is often relatively easy for a claimant to postulate an expectation to condemn the very conduct that it complains of in the case before it.”); see also Exhibit RA-59, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, at para. 67 (“A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.”).

<sup>1358</sup> Exhibit RA-58, *Arif v. Moldova*, Award at para. 536; see also Exhibit RA-60, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, March 7, 2017, at para. 509 (“Dichas expectativas deben ser razonables y legítimas, creadas por el Estado para que el inversionista confíe y se base en ellas, es decir, no resultan de un optimismo injustificado por parte del inversionista.”).

validly held, are “too minor” to support a fair and equitable treatment claim.<sup>1359</sup> It is therefore crucial that claimants identify with precision, and base their claims on, only those basic (*i.e.* foundational) expectations that actually induced claimants’ investments.

645. Any such basic expectation must also be objectively reasonable,<sup>1360</sup> it is not a question of the investor’s subjective hopes for its investment. Rather, it is an objective standard that is to be applied as of the time the investment is made:

Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all the circumstances of the case, due regard being paid to the host State’s power to regulate its economic life in the public interest.<sup>1361</sup>

646. A reasonable and legitimate expectation must also contain a degree of specificity that would allow a tribunal to assess whether the expectation was breached. As the *Minotte v. Poland* tribunal explained, “[T]here may, arguably, be a general expectation that States will observe basic standards such as reasonable consistency and transparency, [but] more specific expectations must be specifically created and proved.”<sup>1362</sup> It is therefore insufficient for

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<sup>1359</sup> Exhibit RA-58, *Arif v. Moldova*, Award at para. 536.

<sup>1360</sup> See, e.g., Exhibit RA-61, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, July 21, 2017, at para. 667 (“as long as those expectations were objectively reasonable”).

<sup>1361</sup> Exhibit RA-62, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009 (“*EDF v. Romania*, Award”), at para. 219; see also Exhibit CA-125, *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, March 17, 2006 (“*Saluka v. Czech Republic*, Partial Award”), at para. 304 (“[T]he scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations.”); Exhibit RA-63, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011 (“*El Paso v. Argentina*, Award”), at para. 358; Exhibit RA-64, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018 (“*Gavrilovic v. Croatia*, Award”), at para. 956 (“The reasonableness of an asserted expectation is to be determined objectively at the time the investment is made, with due regard to the circumstances of the case.”).

<sup>1362</sup> Exhibit RA-65, *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014, at para. 193; see also Exhibit RA-66, *Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award, June 27, 2016, at para. 199 (“On a fair reading, none of the statements relied upon by the Claimant are amenable to characterisation as a specific representation capable of creating a legitimate expectation . . . that Barbados would take any specific steps with regard to the environmental protection of the Sanctuary. The terms and context of these statements do not suffice to support the expression of an intention to create an obligation for the State. Nor is each reasonably amenable to be interpreted by an investor to create such an obligation.”)

claimants to espouse broad and vague “expectations” of good State conduct that purportedly induced the investment. A significant degree of specificity is needed to assess whether the expectation was legitimate and if that expectation was, in fact, thwarted.

647. In sum, even assuming that the Tribunal finds that the protection of legitimate expectations is provided for in Article 10.5’s promise of FET (despite its limitation to the MST), Claimant still must prove that (1) it held specified, objectively reasonable, and legitimate expectations about the treatment they would receive from Perú at the time it made the investment;<sup>1363</sup> (2) it made its investment in reliance on those legitimate expectations;<sup>1364</sup> and (3) Perú’s subsequent actions frustrated those basic and legitimate expectations that led to the investment.

(ii) *Arbitrariness*

648. Claimant contends that “tribunals have confirmed that government action is arbitrary if, among other factors, it is taken ‘not based on legal standards but on excess of discretion, prejudice or personal preference,’ or based on political calculations.”<sup>1365</sup> While Perú

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(emphasis added)), *id.* at para. 216 (“The Tribunal concludes that Barbados did not make specific and direct representations giving rise to any legitimate expectations.”).

<sup>1363</sup> Exhibit RA-62, *EDF v. Romania*, Award at para. 219; Exhibit RA-67, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, November 3, 2008, at para. 173; Exhibit RA-68, *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, at para. 127; Exhibit CA-163, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010 (“*Lemire v. Ukraine*, Decision on Jurisdiction and Liability”), at para. 265 (asking “[w]hich were the legitimate expectations of Claimant at the time he made his investment?”); Exhibit RA-69, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010, at para. 287 (“Tribunals have stated consistently that protected expectations must rest on the conditions as they exist at the time of the investment. They have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment.”).

<sup>1364</sup> Exhibit RA-57, *Biwater Gauff v. Tanzania*, Award at para. 602; *see also* Exhibit CA-150, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, at para. 259; Exhibit RA-70, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008 (“*Duke v. Ecuador*, Award”), at paras. 339-40; Exhibit RA-71, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 (“*Enron v. Argentina*, Award”), at para. 262; Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 146; Exhibit CA-269, *Waste Management v. Mexico*, Award at para. 98.

<sup>1365</sup> Claimant’s Memorial at para. 363.

does not entirely disagree with Claimant’s articulation, it is important to clarify the precise standard and the high bar to finding a State action to be arbitrary.

649. Professor Christoph Schreuer proffered a standard for arbitrariness in *EDF v. Romania* that has been widely repeated, characterizing the following kinds of measures as arbitrary:

[1] a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

[2] a measure that is not based on legal standards but on discretion, prejudice or personal preference;

[3] a measure taken for reasons that are different from those put forward by the decision maker; [and]

[4] a measure taken in wilful disregard of due process and proper procedure.<sup>1366</sup>

650. Under this approach, in order to prove that putatively arbitrary measures harmed Claimant’s investment, Claimant must prove, at a minimum, that the measures it identifies did not serve “any apparent legitimate purpose,” were “not based on legal standards,” were “taken for reasons that are different from those put forward by the decision maker,” or were “taken in wilful disregard of due process.” This establishes a high bar to prove that the measures that Claimant challenges were truly “arbitrary.”

651. This high bar has been emphasized in a number of well-known arbitral decisions. The *ELSI* tribunal described arbitrariness as “something opposed to the rule of law” rather than “something opposed to a rule of law,” explaining further that it required “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”<sup>1367</sup>

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<sup>1366</sup> Exhibit RA-62, *EDF v. Romania*, Award at para. 303.

<sup>1367</sup> Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (citing Exhibit RA-72, *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989 (“*ELSI* Judgment”), at para. 128) (emphasis added); *see also* Exhibit CA-163, *Lemire v. Ukraine*, Decision on Jurisdiction and Liability at para. 262 (“[a]rbitrariness has been described as ‘founded on prejudice or preference rather than on reason or fact’; ‘...contrary to the law because...[it] shocks, or at least surprises, a sense of juridical propriety’; or ‘wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety’; or conduct which ‘manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination’”).

The *Cargill* tribunal likewise held that an arbitrary action requires more than merely “inconsistent or questionable application of administrative or legal policy,” and instead must demonstrate “an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subvert[] a domestic law or policy for an ulterior motive.”<sup>1368</sup>

652. The tribunal in *Casinos Austria v. Argentina* recently explained, consistent with the *ELSI* tribunal’s distinction between an act that is inconsistent with “the” rule of law versus an act that is inconsistent with “a” rule of law, that not even a violation of domestic law will necessarily constitute arbitrary conduct under international law. “Rather, arbitrariness requires a qualitatively significant breach, an abuse of power, that imposes harm on a foreign investor contrary to the rule of law.”<sup>1369</sup> The *Casinos Austria* tribunal further explained that “[i]ndicators for arbitrariness in this sense can be, for example, a manifest lack of competence of the host State’s authority for taking the measure in question, bad faith applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an abuse of power.”<sup>1370</sup>

653. Thus, determining that an action is arbitrary does not involve a tribunal judging whether a measure is “good or bad” or whether it is “the best response” given the policy’s intent.<sup>1371</sup> Rather, a tribunal must identify “some important measure of impropriety [that] is manifest.”<sup>1372</sup> In sum, for a measure to be arbitrary, it is insufficient merely to show that the measure could have been better or is not perfect—Claimant must prove much more. Claimant

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<sup>1368</sup> Exhibit RA-29, *Cargill v. Mexico*, Award at para. 293.

<sup>1369</sup> Exhibit RA-73, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, November 5, 2021 (“*Casinos Austria v. Argentina*, Award”), at para. 348.

<sup>1370</sup> Exhibit RA-73, *Casinos Austria v. Argentina*, Award at para. 348.

<sup>1371</sup> Exhibit RA-71, *Enron v. Argentina*, Award at para. 281.

<sup>1372</sup> Exhibit RA-71, *Enron v. Argentina*, Award at para. 281.

must prove that the measure evidences manifest impropriety and raises questions about Perú's adherence to "the rule of law" itself.

654. One other point regarding Claimant's description of the arbitrariness standard is worth clarifying. As noted above, Claimant argues that "government action is arbitrary if, among other factors, it is taken 'not based on legal standards but on excess of discretion, prejudice or personal preference,' or based on political calculations."<sup>1373</sup> It is unclear from the structure of this sentence whether Claimant is arguing that a government action is arbitrary if it is taken "not based on legal standards but on . . . political calculations," or whether Claimant is arguing that "government action is arbitrary if . . . it is . . . based on political calculations." To the extent that Claimant is arguing the former, Perú does not disagree that such actions could be arbitrary under certain circumstances. But to the extent that Claimant is arguing the latter, that argument is clearly untenable.

655. As the *Electrabel S.A. v. Hungary* tribunal explained in rejecting the claimant's FET claim, while "[t]here is no doubt that by late 2005 and early 2006 there was political and public controversy in Hungary over the perceived high level of profits made by Hungarian Generators, including [claimant's investment]," "politics is what democratic governments necessarily address; and it is not, ipso facto, evidence of irrational or arbitrary conduct for a government to take into account political or even populist controversies in a democracy subject to the rule of law."<sup>1374</sup> In a functioning democracy, politics are how citizens express their will; a democratic government is arguably obliged to take such considerations into account in every decision. More than just the label "political" is needed to make a democratic state's action

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<sup>1373</sup> Claimant's Memorial at para. 363.

<sup>1374</sup> Exhibit RA-74, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, at para. 8.23; cf. Exhibit RA-75, *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. Slovak Republic*, PCA Case No. 2017-08, Award, October 7, 2020, at para. 555 ("State intent is often the product of a mix of factors, including political compromises, partisan considerations, and competing interests.").

arbitrary; in Prof. Schreuer's listing, for example, "political" considerations do not stand alone as potentially wrongful, but rather are coupled with other features in order to give rise to a legitimate concern about arbitrariness.<sup>1375</sup> In any event, that is not what occurred in this case, as discussed in Subsection 2.b below.

(iii) *Inconsistency and Non-transparency*

656. Claimant next argues that a State violates its FET obligation "if it fails to act with reasonable consistency and transparency in the treatment of foreign investments."<sup>1376</sup>

Consistency and transparency, however, are not distinct FET elements.

657. Tribunals have routinely held that an investor cannot prove a breach of an FET obligation simply by labeling certain State acts or statements by State actors as "inconsistent."<sup>1377</sup> Rather, tribunals acknowledge that governments are not monolithic; modern bureaucracies involve great numbers of people who may take differing views within their respective and particular roles in the State's legal framework. As one tribunal explained in a recent decision, "[t]he modern nation-State typically endows different agencies with different legal and policy responsibilities and objectives."<sup>1378</sup> Alleged inconsistencies or even

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<sup>1375</sup> Exhibit RA-62, *EDF v. Romania*, Award at para. 303.

<sup>1376</sup> Claimant's Memorial at para. 364.

<sup>1377</sup> See, e.g., Exhibit CA-245, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, August 27, 2019 ("*Glencore v. Colombia*, Award"), at para. 1420 (explaining that "[t]here is no inconsistency and no breach of legitimate expectations, however, when the second agency, applying substantive legal criteria established in a pre-existing legal framework, takes a decision which diverges from that previously adopted by another agency"); Exhibit RA-76, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016 ("*Philip Morris v. Uruguay*, Award"), at para. 528 (the tribunal did not find a violation of the FET claim after two Uruguayan courts, the TCA and the SCJ, issued contradictory decisions that operated to bar claimants from judicial review because "[u]nder the Uruguayan judicial system, the SCJ can uphold the constitutionality of a law based on an interpretation of the scope of that law, in application of constitutional principles. That interpretation, however, does not bind the TCA when it determines, on the basis of the principles provided by administrative law, the legality of decrees rendered under that same law. That position does not seem to be manifestly unjust or improper, either in general or in the context of this case. Here both courts separately upheld the legality of the measure the Claimants sought to challenge, each under its own jurisdiction and applying its own legal criteria.").

<sup>1378</sup> Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1420.

disagreements among, or within, such agencies, without something more, cannot be grounds to find a breach of the FET obligation.

658. In fact, when tribunals consider the purported inconsistency of State conduct with respect to the FET standard, their analysis is often framed in terms of “arbitrary” or “unjustifiable” acts, which implies State conduct far more severe and reproachable than mere “inconsistency.” For example, in *Biwater Gauff*, the tribunal reasoned that “the [FET] standard also implies that the conduct of the State must be transparent, consistent, and non-discriminatory, that is, not based on unjustifiable distinctions or arbitrary.”<sup>1379</sup> The *Lemire v. Ukraine* tribunal also linked together “arbitrary, discriminatory or inconsistent” treatment.<sup>1380</sup> Other tribunals have considered the question of the consistency of a State’s conduct, not alone, but in the context of assessing whether the investor’s legitimate expectations were violated.<sup>1381</sup> Even in *Crystallex*—a case cited by Claimant in support of its position that consistency and transparency are standalone FET elements<sup>1382</sup>—the tribunal in fact considered “[a]rbitrariness, lack of transparency and consistency” together.<sup>1383</sup>

659. Rather than starting from a premise that mere inconsistency could be a breach of the FET standard, a more appropriate test is to examine whether the claimed inconsistencies breach other accepted tenets of the FET standard. The question, for example, would be whether the putative inconsistency is sufficiently egregious that it may be considered grossly arbitrary or in bad faith. Even in *Tecmed*, for example, which is routinely criticized as setting too low a bar for FET claims, the tribunal stated that a foreign investor “expects the host State to act

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<sup>1379</sup> Exhibit RA-57, *Biwater Gauff v. Tanzania*, Award at para. 602.

<sup>1380</sup> Exhibit CA-163, *Lemire v. Ukraine*, Decision on Jurisdiction and Liability at para. 284; see also Exhibit RA-77, *Bosh International, Inc and B & P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award, October 25, 2012, at para. 212 (following the *Lemire* reasoning).

<sup>1381</sup> See, e.g., Exhibit RA-58, *Arif v. Moldova*, Award at para. 547; Exhibit CA-125, *Saluka v. Czech Republic*, Partial Award at para. 306.

<sup>1382</sup> See Claimant’s Memorial at para. 363(a).

<sup>1383</sup> Exhibit CA-222, *Crystallex v. Venezuela*, Award at paras. 576 *et seq.*

consistently,” but then promptly elaborated that “consistency” implied that the State would act “without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.”<sup>1384</sup> In any event, Perú did not act inconsistently, as explained in Subsection 2.b.i.c, below.

660. In addition, Professors Dolzer and Schreuer explain that transparency means that “the legal framework for the investor’s operations is readily apparent and . . . any decisions affecting the investor can be traced to that legal framework.”<sup>1385</sup> To be clear, as held by the *Urbaser v. Argentina* tribunal, the transparency requirement “cannot mean that [the State] has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities.”<sup>1386</sup> This again evinces the “high threshold to be met in order to establish a breach.”<sup>1387</sup> As discussed in Subsection 2.b.i.c, below, there is no evidence that Respondent fell short of any transparency obligations.

(iv) *Denial of Justice*

661. Lastly, Claimant argues that “tribunals have further confirmed that an absence of fair procedure or a finding of serious procedural shortcoming in administrative or judicial

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<sup>1384</sup> Exhibit CA-99, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award, May 29, 2003, at para. 154.

<sup>1385</sup> Exhibit CA-197, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2012), at p. 13 of PDF (citing the UNCTAD Series on Issues in International Investment Agreements, Fair and Equitable Treatment (1999), at p. 51).

<sup>1386</sup> Exhibit RA-78, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016 (“*Urbaser v. Argentina*, Award”), at para. 628.

<sup>1387</sup> Exhibit RA-79, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum, December 30, 2019, at para. 660; see also Exhibit CA-269, *Waste Management v. Mexico*, Award at para. 98 (“the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct . . . involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process” (emphasis added)).

proceedings violates the minimum standard of treatment.”<sup>1388</sup> Claimant’s argument is essentially one of denial of justice, although Claimant is clearly working to avoid saying so expressly—presumably because it knows very well just how high that particular bar is set.

662. Claimant bears a heavy burden to prove that Respondent denied it justice. A denial of justice occurs not where a court makes a mistake, but where a State fails to create and maintain a system of justice that assures that foreign investors do not face injustice and are not deprived of the right to correct an injustice.<sup>1389</sup> A denial of justice thus suggests a failure of the entire State judicial system to satisfy minimum standards of fairness.<sup>1390</sup> Simply put, “Respondent can only be held liable for denial of justice . . . if the Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be adopted in cases of major procedural errors such as lack of due process.”<sup>1391</sup> In the words of one commentator, “[o]nly if there is clear evidence of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law.”<sup>1392</sup> At least one tribunal has considered that bad faith is also a necessary element, asking “whether the judiciary has denied justice by applying procedures that are so void of reason that they breathe bad faith.”<sup>1393</sup> Proving bad faith or a systemic failure of justice is a remarkably high bar—and, as discussed in Subsection 2.a.iii, below, one that Claimant cannot possibly overcome.

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<sup>1388</sup> Claimant’s Memorial at para. 365.

<sup>1389</sup> See Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at pp. 77 and 84-87.

<sup>1390</sup> See Exhibit RA-80, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (Redacted Version), April 23, 2012, at para. 273.

<sup>1391</sup> Exhibit RA-81, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, September 12, 2010 (“*RosInvestCo v. Russia*, Award”), para. 279.

<sup>1392</sup> Exhibit RA-82, Christopher Greenwood, “State Responsibility for the Decisions of National Courts,” in *Issues of State Responsibility Before International Judicial Institutions* (Malgosia Fitzmaurice, et al. eds.) (2004), at p. 58.

<sup>1393</sup> Exhibit RA-58, *Arif v. Moldova*, Award at para. 482; see also Exhibit RA-83, G. G. Fitzmaurice, “The Meaning of the Term ‘Denial of Justice,’” 13 BRIT. Y.B. INT’L L. 93 (1932), at pp. 110-11 (“[T]he element of bad faith must be present, and it must be clear that the court was actuated by bias, by fraud, or by external pressure, or was not impartial; or the judgment must be such as no court which was both honest and competent could have delivered.”).

663. To be clear, although Claimant certainly disagrees with and complains about the ultimate resolution of SMCV’s dispute(s) before the Peruvian courts, in its articulation of its denial of justice claim, Claimant does not appear to be claiming a substantive denial of justice. Rather, Claimant limits its claims to procedural denial of justice. That is just as well, because it is not at all clear that a so-called substantive denial of justice—where the substantive outcome of a judicial proceeding is said to deny justice—is a legitimate part of the denial of justice protection that is understood to be embedded in the FET standard.<sup>1394</sup>

664. In that regard, when considering any claim based on acts of the judiciary, it is essential not to lose sight of the bedrock principle that international tribunals do not sit as courts of appeal to hear challenges to or to reverse a respondent state’s domestic court’s judgments.<sup>1395</sup> Even when a domestic court misapplies or even disregards its own national laws, that cannot generate international responsibility for the State “unless [the courts] have misconducted themselves in some egregious manner,” which would then be characterized as a “technical or procedural denial of justice.”<sup>1396</sup> On this approach, it is the lack of due process—not a disagreement with the substance of a court decision—that would constitute a denial of justice

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<sup>1394</sup> See, e.g., Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at p. 5 (“A thesis of this study is that the category of substantive denial of justice may now be jettisoned. . . . To the extent that national courts disregard or misapply national law, their errors do not generate international responsibility unless they have misconducted themselves in some egregious manner which scholars have often referred to as technical or procedural denial of justice.”); *id* at p. 7 (“[I]nternational fora have no reason to recognize a category of substantive denials of justice. In international law, denial of justice is about due process, nothing else—and that is plenty.”).

<sup>1395</sup> See, e.g., Exhibit RA-6, *Mondev v. USA*, Award at para. 126 (referencing investment tribunals’ lack of competence to determine whether domestic court’s judgments have been rendered in conformity with the applicable domestic law); Exhibit RA-58, *Arif v. Moldova*, Award at para. 441 (“Indeed, international tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if ‘[a] simple difference of opinion on the part of the international tribunal is enough’ to allow a finding that a national court has violated international law.”); Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at p. 7 (“Substantive rights under national law, on the other hand, are created by the state, and are subject to the sovereign authority to legislate, and to interpret.”).

<sup>1396</sup> Exhibit RA-25, Jan Paulsson, *Denial of Justice in International Law* (2005) (excerpts), at p. 5.

under international law.<sup>1397</sup> Thus, the due process question is not whether the courts or administrative bodies in the host state made the “right” decision, or the decision that the tribunal would have made had it been in the courts’ place. The question is whether the judiciary afforded the investor a meaningful and fundamentally fair opportunity to adjudicate its claims.

665. As the *Mondev* tribunal put it, the question is whether, “having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.”<sup>1398</sup> In articulating this “clearly improper and discreditable” standard, the tribunal relied on the ICJ judgment in *Eletronica Sicula S.p.A. (ELSI)*, which defined arbitrary conduct as “a wilful disregard of due process of law . . . which shocks, or at least surprises, a sense of juridical propriety.”<sup>1399</sup> The *Mondev* tribunal may have restated this high standard, but it did nothing to lower the bar for investors—Claimant must show that Perú willfully disregarded due process of law, such that the final outcome of Claimant’s dispute was clearly improper, discreditable, and fundamentally unfair.

666. In fact, the bar for Claimant is even higher than that because, here, it puts forth a due process claim only with respect to the Tax Tribunal proceedings.<sup>1400</sup> As Claimant acknowledges,<sup>1401</sup> the Tax Tribunal is a part of the Peruvian executive branch, not the judiciary. A number of tribunals have observed that “[t]he standard of review of the State measure will also vary according to the nature of the decision-making process at issue: administrative proceedings

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<sup>1397</sup> Exhibit RA-81, *RosInvestCo v. Russia*, Award at para. 279 (“Such failure is mainly to be adopted in cases of major procedural errors such as lack of due process.”); see also Exhibit RA-23, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, June 22, 2010, at para. 279.

<sup>1398</sup> Exhibit RA-6, *Mondev v. USA*, Award at para. 127 (emphasis added).

<sup>1399</sup> Exhibit RA-72, *ELSI* Judgment at para. 128.

<sup>1400</sup> See Claimant’s Memorial at paras. 384 *et seq.*

<sup>1401</sup> See Claimant’s Memorial at paras. 387-88.

trigger less stringent due process obligations than judicial proceedings.”<sup>1402</sup> That is because “[i]n administrative proceedings, . . . the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review.”<sup>1403</sup>

667. As discussed in Subsection 2.b.i.d, below, Claimant’s complaints about the legal process comes nowhere remotely close to meeting this high standard.

b. Perú was Consistent, Transparent, and Reasonable in its Interpretation of the Scope of the 1998 Stabilization Agreement and Provided SMCV with a Full and Fair Opportunity to Litigate the Issue Before Peruvian Courts

(i) *Perú Did Not Breach Its Fair and Equitable Treatment Obligations by Imposing the Royalties Assessments on SMCV*

668. Claimant argues that Perú breached its FET obligations when it imposed the Royalty Assessments on SMCV’s Concentrator Project activities. Specifically, Claimant argues that Perú (a) frustrated Phelps Dodge’s and SMCV’s legitimate expectations, (b) acted in an arbitrary manner, (c) acted inconsistently and without transparency, and (d) committed certain due process violations during the Tax Tribunal (*i.e.*, administrative) proceedings. As discussed below, each of these claims is without merit because Perú has, at all times, been consistent, transparent, and reasonable in its interpretation of the scope of the 1998 Stabilization Agreement and it has provided SMCV a full and fair opportunity to litigate that issue in Peruvian administrative and judicial proceedings.

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<sup>1402</sup> Exhibit RA-84, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, June 21, 2019 (“*United Utilities v. Estonia*, Award”), at para. 870; *see also* Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 200; Exhibit RA-76, *Philip Morris v. Uruguay*, Award at para. 569.

<sup>1403</sup> Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1319.

(a) Perú Did Not Frustrate Claimant's Legitimate Expectations

669. Claimant first claims that Perú frustrated SMCV's and Freeport's legitimate expectations.<sup>1404</sup> According to Claimant, "SMCV, and Freeport's predecessor, Phelps Dodge, invested in the Concentrator in reliance on the stability guarantees set forth in the Stability Agreement, which they understood would apply to the Concentrator based on the existing legal framework and specific assurances given by Peruvian officials."<sup>1405</sup> As discussed below, this claim is both fatally flawed and contrary to the record evidence.

670. This claim is fatally flawed, because it is based on other entities' expectations (that, Respondent notes, were purportedly formed years before the TPA was signed, let alone came into force, as discussed in Section III.B). To be clear, Claimant is not asserting that it, Freeport, relied upon the 1998 Stabilization Agreement to invest in and construct the Concentrator. Claimant cannot not make such an assertion, because Claimant, Freeport, did not make an investment until March 2007—after the Concentrator was built; obviously, Claimant therefore could not possess any expectations regarding the 2004-2006 construction of the Concentrator. Nor does Claimant assert a claim that Perú violated legitimate expectations formed by Freeport when it made its investment in March 2007. Rather, Claimant is seeking to rely on the expectations that other entities supposedly held when they invested in the Concentrator years before Claimant ever made its investment (and, again, years before the TPA was signed or entered into force). Claimant has entirely failed to explain why it has any right to rely on those other entities' alleged expectations and the Tribunal should reject its attempt to do so.

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<sup>1404</sup> See Claimant's Memorial at paras. 368-71.

<sup>1405</sup> Claimant's Memorial at para. 368.

671. Moreover, even if Claimant could “inherit” the expectations of others, Claimant’s legitimate expectations claim must fail because any expectation that Phelps Dodge or SMCV had that the 1998 Stabilization Agreement would cover the Concentrator Project was not objectively reasonable.<sup>1406</sup> Claimant alleges that Phelps Dodge’s and SMCV’s expectations were based on (i) the existing legal framework, and, in particular, the Mining Law,<sup>1407</sup> and (ii) “officials frequently confirm[ing] SMCV’s understanding.”<sup>1408</sup> Respondent has already explained in detail in Section II.A.2 that the Mining Law clearly provided that the stability guarantees are limited to the investment project outlined in the feasibility study and will not rehash that argument here.<sup>1409</sup> SMCV could not reasonably have relied upon the Mining Law in forming its expectations.

672. With respect to the conduct of Peruvian officials, Claimant highlights three points. *First*,<sup>1410</sup> Claimant cites to a statement by the President of Perú “laud[ing]” the investment in the Concentrator and confirming that Perú would “fulfill [its] responsibility to maintain economic and legal stability.”<sup>1411</sup> But, of course, this statement came after SMCV’s decision to invest in the Concentrator (according to Claimant, it was “laud[ing]” that very decision). For a legitimate expectations claim to succeed, though, a claimant must show, *inter alia*, that the investor relied on that expectation in making its investment.<sup>1412</sup> This imposes a temporal aspect on the analysis as, obviously, the expectation must have been formed at (or before) the time that the investment is made; it would be logically impossible for an investor to

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<sup>1406</sup> See, e.g., Exhibit RA-64, *Gavrilović v. Croatia*, Award at para. 956 (“The reasonableness of an asserted expectation is to be determined objectively at the time the investment is made, with due regard to the circumstances of the case.”).

<sup>1407</sup> See Claimant’s Memorial at para. 369.

<sup>1408</sup> Claimant’s Memorial at para. 370.

<sup>1409</sup> See, e.g., Exhibit CA-1, General Mining Law at Arts. 79, 83 (“*El efecto del beneficio contractual recaerá exclusivamente en las actividades de la empresa minera en favor de la cual se efectúe la inversión.*”) (emphasis added).

<sup>1410</sup> Respondent notes that it is not addressing the three points in the order that Claimant presented them. See Claimant’s Memorial at para. 370.

<sup>1411</sup> Claimant’s Memorial at para. 370(c).

<sup>1412</sup> See, e.g., Exhibit RA-70, *Duke v. Ecuador*, Award at para. 340.

rely upon statements in making an investment if those statements were made after the investor had made the investment. Because SMCV obviously could not have relied upon a statement “laud[ing]” its decision in making said investment, this statement is irrelevant. This is to say nothing of the fact that it is entirely unclear whether the President was even referring to the specific stability guarantees that SMCV had under the 1998 Stabilization Agreement, or whether the President was just speaking in general terms. And, even to the extent that the President was referring to the specific guarantees, there is absolutely no mention of the scope of those guarantees.

673. *Second*, Claimant cites to the DGM’s approval of the expansion of the Beneficiation Concession to include the Concentrator.<sup>1413</sup> Respondent has already explained in Section II.D.4.b that this decision had no bearing whatsoever on the scope of the stability guarantees under the 1998 Stabilization Agreement, which was limited to the Leaching Project as described in the feasibility study.

674. *Third*, Claimant cites to certain statements allegedly made by Ms. Chappius to SMCV officials.<sup>1414</sup> According to Claimant, Ms. Chappius “explicitly confirmed to representatives from SMCV and Phelps Dodge that the Stability Agreement would apply to the planned concentrator.”<sup>1415</sup> Claimant does not point to any contemporaneous evidence that these statements were made. In fact, the contemporaneous evidence actually shows that on September 8, 2003, the DGM sent a report to SMCV officially notifying it that “the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project, and not to the company.”<sup>1416</sup>

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<sup>1413</sup> See Claimant’s Memorial at para. 370(b).

<sup>1414</sup> See Claimant’s Memorial at para. 370(a).

<sup>1415</sup> Claimant’s Memorial at para. 370(a).

<sup>1416</sup> Exhibit CE-398, MINEM, Report No. 509-2003-MEM-DGM-TNO, September 8, 2003, p. 1, numeral 4.

675. Instead, Claimant cites to the witness statements of Ms. Torreblanca, Ms. Chappius, and Mr. Davenport.<sup>1417</sup> But each of these witness statements confirm that, at the relevant time, both SMCV officials and Ms. Chappius knew that Mr. Polo—the Vice Minister of Mines, *i.e.*, Ms. Chappius’s boss, and the drafter of the relevant language of the Mining Law—and, therefore, MINEM, held the position that stability guarantees are limited to the investment project in the feasibility study and that the Concentrator Project would not be covered by the guarantees in the 1998 Stabilization Agreement.<sup>1418</sup> In their own witness statements submitted with this Counter-Memorial, Mr. Polo and Mr. Tovar both confirm MINEM’s position at that time (and, in fact, at all times).<sup>1419</sup> In fact, Mr. Tovar explains that he “participated in various meetings with Cerro Verde’s officers during that time period (2004) and on those occasions, MINEM officials did not confirm to Cerro Verde’s representatives that the Stabilization Agreement covered the Concentrator project” as “it was always clear to MINEM—and moreover, it always maintained—that the Stabilization Agreement’s scope of application was confined to the Leaching Plant Project.”<sup>1420</sup> And each of the witness statements on which Claimant relies confirm that SMCV requested a written guarantee or amendment to the Stabilization Agreement providing that the Concentrator Project would be covered. Of course,

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<sup>1417</sup> See Claimant’s Memorial at para. 370(a) n.1003.

<sup>1418</sup> See Exhibit CWS-11, Torreblanca Statement at para. 25 (“Around the same time, I remember that Vice-Minister of Mines Cesar Polo had expressed doubts about whether the Stability Agreement would actually apply to our investment in the Concentrator.”); Exhibit CWS-5, Davenport Statement at para. 38 (“We were also aware that César Polo, who then served as Vice-Minister of Mines, expressed doubt about whether the Stability Agreement would apply to the concentrator.”); Exhibit CWS-3, Chappuis Statement at para. 53 (“Vice-Minister Polo had a different view”).

<sup>1419</sup> See Exhibit RWS-1, Polo Statement at para. 38 (“As Vice Minister of Mines, I was aware of the debates that took place within MINEM and in Congress regarding this issue. MINEM’s position was always the same: The Leaching Project was the project stabilized by the Stabilization Agreement and the Primary Sulfides Project was a new investment project, which is not part of the Leaching Project, and therefore, does not enjoy the stabilized regime (tax, currency exchange, or administrative) under the Stabilization Agreement.”); Exhibit RWS-3, Tovar Statement at para. 11 (“participated in various meetings with Cerro Verde’s officers during that time period (2004) and on those occasions, MINEM officials did not confirm to Cerro Verde’s representatives that the Stabilization Agreement covered the Concentrator project. As I will explain below, it was always clear to MINEM—and moreover, it always maintained—that the Stabilization Agreement’s scope of application was confined to the Leaching Plant Project.”).

<sup>1420</sup> Exhibit RWS-3, Tovar Statement at para. 11.

MINEM did not and could not provide such a written guarantee or amendment, because it would be contrary to the Mining Law. No reasonable, objective person would rely on the informal, oral statement of a single official when (1) the department's official position—contrary to the alleged statement—has already been made clear in a written letter to the person, (2) the person knows that official's superior—the Vice Minister of the department and the drafter of the language about which the statement is made—has directly contradicted that statement, and (3) the person requested that the official put the statement in writing and the official declined.<sup>1421</sup>

676. In sum, even assuming that Claimant can inherit the expectations of other parties, that Phelps Dodge and/or SMCV actually believed that the Concentrator Project would be covered by the stability guarantees in the 1998 Stabilization Agreement, and that SMCV relied on that assumption in making its investment in the Concentrator, because there was no reasonable, objective basis for that assumption, the legitimate expectations claim must fail.

(b) Perú Did Not Act in an Arbitrary Manner in Interpreting the Scope of the 1998 Stabilization Agreement

677. Claimant claims that Perú performed a “*volte-face*” in its interpretation of the scope of the 1998 Stabilization Agreement as a result of “political pressure” and, thus, breached its obligation not to act in an arbitrary manner.<sup>1422</sup> Claimant's assertion is without merit. As discussed in Section II.D as well as in connection with Claimant's breach-of-contract claim in Section III.A.3.b.ii, Perú's interpretation of stability agreements has been consistent and public from the outset.

678. Claimant dedicates a great deal of ink in its Memorial to discussing the politics surrounding the enactment of the Royalty Law and the government's decision to grant SMCV's

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<sup>1421</sup> Cf. Exhibit RA-36, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, December 1, 2005, at para. 32 (“A review of these cases suggests that conduct, informal, oral or general assurances can give rise to or support the existence of a legitimate expectation,” “[b]ut the threshold for such informal and general representations is quite high.”).

<sup>1422</sup> Claimant's Memorial at para. 373.

profit reinvestment request in December 2004.<sup>1423</sup> These points have no bearing on the foundational allegation of Claimant’s claim: whether Perú performed an abrupt about-face with respect to its interpretation of the scope of stability agreements, in the first place. But at the point in the Memorial where Claimant finally does reach that question, arguing that “although the Government initially defended stability guarantees, it ultimately reversed course and adopted its novel and restrictive interpretation of SMCV’s Stability Agreement,”<sup>1424</sup> Claimant identifies little evidence to support its theory. That is no surprise to Respondent, because it did not change course in 2005 or 2006, but Respondent will unpack Claimant’s “evidence” nonetheless.

679. Claimant seems to pinpoint the alleged change in the government’s views on the stability guarantees to sometime in September or October 2005, or perhaps June 2006.<sup>1425</sup> Claimant has argued that Mr. Isasi’s April 2005 report supported its interpretation (it did not). But Claimant then describes countervailing forces: “[i]n September 2005, Congressman Diez Canseco demanded that Minister Sánchez Mejía revoke SMCV’s reinvestment benefit and order SMCV to pay royalties, threatening to file a constitutional complaint against Minister Sánchez Mejía if he failed to comply.”<sup>1426</sup> Claimant posits that “[o]nly days after . . . , Minister Sánchez Mejía made statements to the press asserting that the Concentrator would not be protected by SMCV’s existing Stability Agreement” and then sent “a letter to Congressman Oré taking the position that SMCV would have to pay royalties for the Concentrator” several weeks later.<sup>1427</sup> And then, by June 2006, Mr. Isasi issued his new report that, according to Claimant, supposedly

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<sup>1423</sup> See Claimant’s Memorial at paras. 374-77.

<sup>1424</sup> Claimant’s Memorial at para. 377 (footnote omitted).

<sup>1425</sup> See Claimant’s Memorial at para. 377(a) (“Only days after Congressman Diez Canseco threatened to file a constitutional complaint against Minister Sánchez Mejía if he did not revoke SMCV’s reinvestment benefit, Minister Sánchez Mejía made statements to the press asserting that the Concentrator would not be protected by SMCV’s existing Stability Agreement.”) and para. 377(b) (“Mr. Isasi’s June 2006 non-binding legal report (the ‘June 2006 Report’), which for the first time set out the novel and restrictive interpretation that ‘stabilization is not . . . for a specific mining concession, but in relation to a *specific project* . . .”).

<sup>1426</sup> Claimant’s Memorial at para. 376(c).

<sup>1427</sup> Claimant’s Memorial at para. 377(a).

represented a *volte-face* by now denying that the stability guarantees would extend to the Concentrator.<sup>1428</sup>

680. Claimant’s hypothesis—for which it provides no direct evidence—is proven false by the facts that (1) the April 2005 report did not support Claimant’s interpretation of the scope of the stability guarantees (*i.e.*, there was no *volte-face* away from the April 2005 report, due to political pressure or otherwise, because it was consistent with later statements); and (2) in June 2005, months before Congressman Diez Canseco’s alleged threat, Minister of Mines Glodomiro Sánchez and Legal Director Isasi, high-level MINEM officials, appeared before Congress’s Energy and Mines Commission (for a publicly-televised hearing) and explained that mining companies would be subject to paying royalties with respect to their investment projects that were not part of a mining stabilization agreement.<sup>1429</sup>

681. *First*, as Mr. Isasi explains, the context of his April 2005 report is important to understand.<sup>1430</sup> It was not written to define the scope of stability agreements but, rather, to confirm MINEM’s position that the new Royalty Law did not apply where a stability agreement was in effect.<sup>1431</sup> This was necessary because, as Mr. Isasi details, the Constitutional Court’s April 2005 judgment that the Royalty Law was constitutional had an error that created some uncertainty with regard to its application to activities covered by stability guarantees.<sup>1432</sup>

682. Nevertheless, the report is clear: “It is not the mining titleholder (individuals or legal entity) who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the

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<sup>1428</sup> See Claimant’s Memorial at para. 377(b).

<sup>1429</sup> See *supra* at Sections II.D.7, II.D.8.

<sup>1430</sup> Exhibit RWS-2, Isasi Statement at paras. 13-16.

<sup>1431</sup> Exhibit RWS-2, Isasi Statement at paras. 14-17.

<sup>1432</sup> Exhibit RWS-2, Isasi Statement at para. 16.

enactment of Law No. 28258. Therefore, only the mining projects referred to in these agreements will be excluded from the royalty calculation basis.<sup>1433</sup>

683. Claimant focuses on Mr. Isasi's distinction between the application of the stability agreements to mining companies (which they do not, on the whole) with the application of the stability agreements to mining concessions, which are covered "depending on whether or not they are part of a project set out in a stability agreement."<sup>1434</sup> This latter clause qualifies and limits the term "mining concession." Moreover, if that were not clear enough, Mr. Isasi explicitly states in the very next sentence that "only the mining projects referred to in these agreements" are stabilized.<sup>1435</sup> Twice, Claimant quotes the passage above, but, conveniently (and misleadingly), omits the last sentence.<sup>1436</sup>

684. *Second*, as explained in Section II.D.8, in June 2005, Minister Sánchez and MINEM's Legal Director, Mr. Isasi, made a publicly-televised presentation before the Energy and Mines Congressional Committee explaining the relationship between the Royalty Law and mining stabilization agreements. In particular, they explained that mining companies would be subject to paying royalties with respect to their investment projects that were not part of a mining stabilization agreement.<sup>1437</sup> During the presentation, Minister Sánchez explained:

Then, who pays royalties? All mining titleholders pay royalties but not for all of their projects. The mining titleholders that before the Mining Royalty Law entered into law-contracts with administrative stability, will exclude from the royalty calculation basis the value of the concentrates or equivalents, derived from the stabilized project.<sup>1438</sup>

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<sup>1433</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (emphasis added).

<sup>1434</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (emphasis added).

<sup>1435</sup> Exhibit CE-494, MINEM, Report No. 153-2005-MEM/OGAJ, April 14, 2005, at para. 17 (emphasis added).

<sup>1436</sup> See Claimant's Memorial at paras. 128, 314.

<sup>1437</sup> See *generally* Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts).

<sup>1438</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 26.

685. And Mr. Isasi further explained to the Congressional Committee:

[I]t must not be confused who is the obliged subject, which is the company, with how much it has to pay; that is, the obliged subject is a mining company but when determining how much it must pay, the tax administration has to determine what is the reference basis, and to determine the reference basis, it must determine which are the stabilized mining projects are and which are the non-stabilized projects.

The non-stabilized mining projects pay royalties, the stabilized projects do not pay royalties. Stabilized, of course, before the royalty law [passed], because there are stability contracts that were entered into after, where it has been expressly indicated that royalties must be paid.<sup>1439</sup>

686. Thus, both Minister Sanchez and Mr. Isasi unequivocally stated before Congress that mining companies would be exempt from paying royalties only with respect to the project(s) that had been stabilized prior to the Royalty Law.

687. In sum, Claimant has failed to prove that Perú changed its interpretation of the scope of the stability guarantees at all, let alone that it performed a *volte-face* due to political pressure. And even if a change by Perú could have been established in fact, Claimant would still be very far from establishing that such a policy change would be grossly arbitrary in violation of Article 10.5 of the TPA.

(c) Perú Did Not Act Inconsistently or Non-Transparently with Respect to Whether It Would Impose Royalties on the Concentrator's Products

688. Claimant next claims that Perú acted inconsistently and non-transparently because, according to Claimant, Perú changed its interpretation of the scope of the 1998 Stabilization Agreement but did not immediately disclose its changed views or Mr. Isasi's June 2006 Report to SMCV. Claimant makes a number of allegations in support of this claim: namely, (i) that "Peruvian officials knew from the outset that SMCV understood that the

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<sup>1439</sup> See Exhibit RE-29, Energy and Mines Congressional Committee, Congress of the Republic, Meeting Minutes, June 8, 2005 (excerpts), at p. 29.

Concentrator would be stabilized—and officials frequently confirmed SMCV’s understanding”<sup>1440</sup>; and (ii) that it did this while also soliciting additional financial contributions from SMCV, which, according to Claimant, were “clearly premised on the understanding that SMCV enjoyed stability for its entire mining unit.”<sup>1441</sup>

689. Each of these arguments—and the claim as a whole—must fail because, again, Perú’s interpretation of the scope of the 1998 Stabilization Agreement has been consistent and public. Perú has already discussed the evidence of Perú’s consistent position in the preceding Subsections (and in greater detail in Section II.D) and will not repeat each of those points here. Instead, Respondent will briefly address the evidence on which Claimant tries to rely in asserting that Perú allegedly acted inconsistently and non-transparently.

690. *First*, in support of its assertion that Peruvian officials knew that SMCV understood the Concentrator would be stabilized and allegedly confirmed that understanding, Claimant references Minister Sánchez’s October and November 2005 letters to two congressmembers and Mr. Isasi’s June 2006 Report. Perú has already explained a number of times why its position in these documents is consistent with the position it had all along (*i.e.*, there was no *volte-face*).<sup>1442</sup>

691. With respect to transparency, Perú recalls the discussion by the *Urbaser* tribunal that transparency “cannot mean that [the State] has to act under complete disclosure of any aspect of its operation. It rather means that in relation to a foreign investor, the authorities of the State shall act in a way to create a climate of cooperation in support of investment activities.”<sup>1443</sup> Perú, therefore, is not under an obligation to turn over to Claimant or SMCV every document that any branch creates that may have a bearing on the company or its activities, particularly

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<sup>1440</sup> Claimant’s Memorial at para. 381.

<sup>1441</sup> Claimant’s Memorial at para. 382.

<sup>1442</sup> *See supra* Sections II.D.9, II.D.10.

<sup>1443</sup> Exhibit RA-78, *Urbaser v. Argentina*, Award at para. 628.

where Claimant and SMCV knew or should have already known the principal contents of the document about which Claimant complains (*i.e.*, Perú’s interpretation of the scope of the 1998 Stabilization Agreement)—in fact, Claimant concedes that Minister Sánchez “made a general statement to the press that the Concentrator would not be stabilized around the same time.”<sup>1444</sup>

692. But in any case, as set out in Sections II.D.8, II.D.11, Perú was transparent in one of the most open ways possible: through its public, even televised, statements to key Committees of Perú’s Congress. To recall, in addition to the June 2005 presentation to Congress described in the preceding Subsection (and Section II.D.11), in May 2006, Legal Director Mr. Isasi again appeared before the Energy and Mines Congressional Committee to explain the scope of mining stabilization agreements and, in particular, this time they also specifically discussed the scope of the 1998 Stabilization Agreement. Mr. Isasi explained why the reinvestment benefit did apply to SMCV’s Leaching Project, but not to SMCV’s Concentrator Project—namely, that the latter was a new and different project from the Leaching Project, which was the investment project that had actually been stabilized in 1998. Specifically, the presentation stated that “[s]tability is given to the investment project clearly delineated by the Feasibility Study and agreed upon in the Contract. It is not granted to the company generally or to the Concession.”<sup>1445</sup> Although SMCV was allowed to use the profit reinvestment benefit to finance the Concentrator Project with tax-free funds obtained from the (stabilized) Leaching Project, that was where the benefit would end. The profits resulting from the sale of the ore that was processed at the Concentrator Project would not, in turn, be eligible for the profit reinvestment benefit.<sup>1446</sup> And Mr. Isasi explained that mining royalties did apply to the Concentrator Project, because that project was not covered

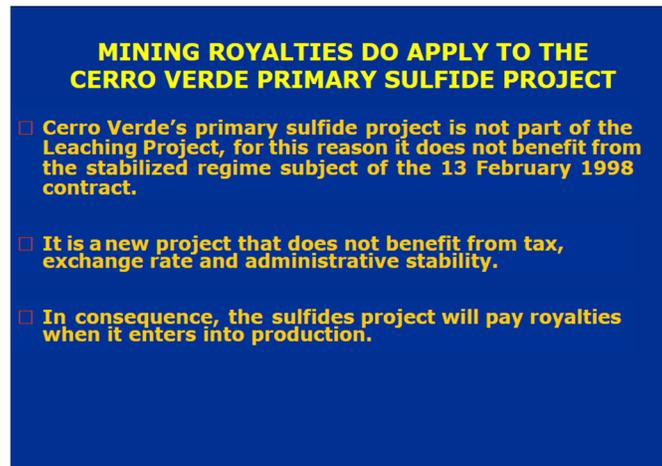
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<sup>1444</sup> Claimant’s Memorial at para. 381(a).

<sup>1445</sup> See Exhibit RE-3, MINEM, “Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” May 2006, slide 8.

<sup>1446</sup> See Exhibit RWS-2, Isasi Statement at para. 49; Exhibit RWS-3, Tovar Statement at paras. 34-36.

by the 1998 Stabilization Agreement. The slides used in that presentation could not possibly be any more explicit:<sup>1447</sup>



693. Thus, SMCV and Claimant were, or at the very least should have been, well aware of Perú's position long before the 2008 date Claimant alleges in these proceedings. In fact, Claimant admits that SMCV was aware of Minister Sánchez's public statements to the press that the Concentrator would not be stabilized in or around November 2005.<sup>1448</sup> The government was being fully transparent.

694. *Second*, Claimant discusses its voluntary contributions and GEM payments in order to argue that Perú's solicitation of the additional contributions, which Claimant alleges were "clearly premised on the understanding that SMCV enjoyed stability for its entire mining unit," was unfairly inconsistent with Perú's internal assessment that the royalties would apply to the Concentrator.<sup>1449</sup> But, as discussed in Section II.E, above, there is no basis for Claimant's assertion that soliciting or accepting voluntary contributions and GEM payments was any kind of confirmation by the State that SMCV enjoyed stability for any investments in its entire mining

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<sup>1447</sup> Exhibit RE-3, MINEM, "Reinvestment of Profits and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project," May 2006, slide 12.

<sup>1448</sup> See Claimant's Memorial at para. 381(a) ("While Mr. Sánchez Mejía made a general statement to the press that the Concentrator would not be stabilized around the same time . . .").

<sup>1449</sup> Claimant's Memorial at para. 382.

unit (as opposed to just the investment project identified in the 1998 Stabilization Agreement). Neither those programs nor SMCV's participation in them changed the scope of the 1998 Stabilization Agreement, and Perú did nothing unfair or inconsistent in creating or growing the programs.

695. Claimant also points to alleged inquiries from Ms. Torreblanca (i) to MINEM's Director General of Mining, seeking confirmation about the scope of the stability guarantees in 2011, prior to committing to a particular amount of GEM payments and (ii) to MEF, seeking confirmation of SMCV's understanding that it would only have to pay GEM and not the IEM (the Special Mining Tax) nor the Mining Royalty.<sup>1450</sup> But neither MINEM nor MEF affirmed Ms. Torreblanca's alleged understanding that providing voluntary contributions and making GEM payments meant that all mining investments of SMCV would be exempt from paying royalties. Thus, as discussed in greater detail in Section II.E, above, the government was not acting inconsistently as Claimant asserts.

696. In sum, Perú was consistent and transparent throughout: the stability guarantees applied only to the Leaching Project, not to the Concentrator Plant Project. Claimant cannot point to any evidence that shows otherwise. Rather, Claimant attempts to rely on SMCV's supposed understanding at the time, which, even if true, would be unreasonable under the circumstances. Thus, there is no inconsistency or lack of transparency in the first place, much less to a sufficient kind or degree to even come close to making out an FET violation.

(d) The Tax Tribunal Did Not Commit Due Process Violations

697. Claimant's fourth and final FET claim with respect to the imposition of the Royalties and Tax Assessments is its contention that the Tax Tribunal committed serious due

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<sup>1450</sup> See Claimant's Memorial at para. 382(c).

process violations.<sup>1451</sup> Claimant breaks up its claim between (a) the 2008 and 2006-2007 Royalty Assessment cases, and (b) the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessment cases.

698. As an initial matter, as Claimant acknowledges,<sup>1452</sup> the Tax Tribunal is a part of the Peruvian executive branch; it has an adjudicatory function but it falls within the administration of law, not the judiciary. As discussed above, a number of tribunals have observed that “[t]he standard of review of the State measure will also vary according to the nature of the decision-making process at issue: administrative proceedings trigger less stringent due process obligations than judicial proceedings.”<sup>1453</sup> That is because “[i]n administrative proceedings, . . . the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review.”<sup>1454</sup>

699. And, notably, SMCV had the opportunity to appeal any and all decisions of the Tax Tribunal to the Peruvian courts and has, in fact, fully availed itself of that opportunity. Yet, Claimant has not asserted a denial of justice claim before this Tribunal with respect to Perú’s judicial decisions (whether of the first-instance Contentious Administrative Courts, the appellate Superior Courts, or the Supreme Court). Claimant has expressed disagreement with the contents of certain of those decisions, to be sure. However, Claimant has not alleged that the Peruvian courts deprived SMCV of its due process rights in violation of the FET obligations under the Treaty—that claim is directed only to the Tax Tribunal. Thus, Claimant has a particularly high

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<sup>1451</sup> See Claimant’s Memorial at paras. 384 *et seq.*

<sup>1452</sup> See Claimant’s Memorial at para. 387.

<sup>1453</sup> Exhibit RA-84, *United Utilities v. Estonia*, Award at para. 870; see also Exhibit RA-35, *Thunderbird v. Mexico*, Award at para. 200; Exhibit RA-76, *Philip Morris v. Uruguay*, Award at para. 569.

<sup>1454</sup> Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1319.

bar to prove that the Tax Tribunal acted in such an egregious manner as to constitute a denial of justice in breach of Perú's obligations under the TPA. It is a bar that Claimant has failed to come close to reaching.

700. That is because, as discussed at length in Section II.G and highlighted below, Claimant primarily relies on wild speculations concerning the motives of certain actors, including in particular the President of the Tax Tribunal, Ms. Olano Silva, who is appearing as a witness for Perú in this arbitration. Claimant attempts to construe normal, administrative activities as evidence of nefarious and biased conduct. But Claimant cannot substantiate its conspiracy theories on these facts.

701. Moreover, even if Claimant's speculations were true (they are not)—primarily, that President Olano Silva violated the Tax Tribunal's Rules of Procedure and interfered in SMCV's Royalty Assessment challenges—this still would be insufficient to meet the very high standard required for a finding of a denial of justice at the administrative level, where the alleged affected party could and did appeal the determinations in court (and where no allegations have been made that the affected party has been denied justice in the domestic court proceedings). Thus, the alleged breaches of the Tax Tribunal's Rules of Procedure, even if they had occurred (they did not), would be insufficient to establish a Treaty breach.

*(1) There Were No Procedural Irregularities  
with Respect to the 2008 and 2006-2007  
Royalty Assessment Cases*

702. Claimant points out a number of supposed “[p]rocedural [i]rregularities” that it claims are evidence that Tax Tribunal President Olano Silva wrongfully interfered with SMCV's challenges to the 2008 and 2006-2007 Royalty Assessments.<sup>1455</sup> Claimant starts by implying that President Olano Silva is biased in favor of SUNAT and the government, because her position is

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<sup>1455</sup> Claimant's Memorial at Section IV.B.2.iv.a.

ultimately under the charge of the Ministry of Economy (MEF). Putting aside that, as discussed below, Claimant has no actual proof of any such bias, this argument is exactly why tribunals require a higher showing for denial of justice claims relating to administrative, as opposed to judicial, actions. As the *Glencore v. Colombia* tribunal explained, “[i]n administrative proceedings, . . . the decision-maker is often the investigator, the accuser, and the adjudicator, and a related officer (who may be the senior officer of the decision-maker) is often the one who rules on appeal. Due process does not require strict separation of these functions - provided that the final administrative decision is subject to full judicial review.”<sup>1456</sup>

703. Claimant complains that two emails from March and April 2013 show that President Olano Silva “charged her assistant[,] Ms. Villanueva[,] with drafting the resolution of the 2008 Royalty case.”<sup>1457</sup> This is a perfect example of Claimant mischaracterizing the facts in an attempt to portray routine administrative acts as somehow inappropriate. As President Olano Silva explains in her witness statement, Ms. Villanueva was assigned to support the *vocal* of Chamber No. 1 handling the 2008 Royalty Assessment case because of a staff shortage.<sup>1458</sup> In fact, this was not the only time Ms. Villanueva would be asked to assist others—for example, in 2013 and 2014, President Olano Silva assigned Ms. Villanueva to the Technical Office, the Complaints Attention Office, and to certain members in various Chambers, as needed, due to staff shortages at that time.<sup>1459</sup> This was explicitly within President Olano Silva’s authority.<sup>1460</sup>

704. And the emails on which Claimant relies actually harm its case. In the March 22, 2013, email from Ms. Villanueva to President Olano Silva, Ms. Villanueva merely asked her

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<sup>1456</sup> Exhibit CA-245, *Glencore v. Colombia*, Award at para. 1319.

<sup>1457</sup> Claimant’s Memorial at para. 390.

<sup>1458</sup> Exhibit RWS-5, Olano Statement at para. 46.

<sup>1459</sup> Exhibit RWS-5, Olano Statement at para. 46.

<sup>1460</sup> Exhibit RWS-5, Olano Statement at paras. 9, 46; *see also* Exhibit CA-186, Manual of the Operation and Functions of the Tax Tribunal, at p. 12.

boss, the President of the Tax Tribunal and an experienced tax attorney, to discuss a case with her.<sup>1461</sup> There is nothing unusual about that, particularly given that this challenge was proceeding at the same time as the 2006-2007 Royalty Assessment case and, as President Olano Silva explains, she needed to ensure there was consistent application of law, as was her job (if the Chambers came to different conclusions, President Olano Silva would have had to call the Plenary Chamber to resolve the difference).<sup>1462</sup> In addition, Ms. Villanueva explicitly stated that she saw “good arguments for both sides,” and that while she was “more or less leaning to one side,” she would “continue working on” it.<sup>1463</sup> This shows both that Ms. Villanueva was objective (she is weighing the arguments of both sides) and that she was not sent to assist Chamber No. 1 with a particular outcome in mind; if that were the case, Ms. Villanueva would not have needed to consult with the President. Claimant also disingenuously emphasizes the fact that this consultation was sought “*before*” the hearing. But that is exactly what every law clerk does (and should do) in preparing for a hearing; there is nothing nefarious about it.

705. Claimant also cites a April 24, 2013, email from Ms. Villanueva to a SUNAT official requesting a copy of SMCV’s 1994 Stabilization Agreement.<sup>1464</sup> Claimant calls this an “*ex parte* communication” and argues that it shows that “Ms. Villanueva was in possession of and actively working on the case file.”<sup>1465</sup> Of course, Ms. Villanueva was working on the case file—because it was her job to do so. Moreover, as President Olano Silva explains, SMCV was

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<sup>1461</sup> Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

<sup>1462</sup> Exhibit RWS-5, Olano Statement at para. 49.

<sup>1463</sup> Exhibit CE-648, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (March 22, 2013, 4:02 PM PET).

<sup>1464</sup> Exhibit CE-81, Emails between Úrsula Villanueva Arias and Gabriela Bedoya, April 24, 2013.

<sup>1465</sup> Claimant’s Memorial at para. 390(b).

informed of the request.<sup>1466</sup> And these types of requests are made in the normal course of business (and are even explicitly provided for in the Tax Code).<sup>1467</sup>

706. Finally, Claimant cites to a statement of its witness, Mr. Estrada, a former law clerk at the Tax Tribunal.<sup>1468</sup> Notably, Mr. Estrada does not claim to have any first-hand knowledge of, or to have had any role in, the Tax Tribunal's consideration of SMCV's challenges to the various Royalty Assessments. So his testimony is of little value.<sup>1469</sup> But, equally as important, the allegations he does make are generally unsupported. For example, he claims, and Claimant quotes, that President Olano Silva "improperly intervened to influence the resolution of cases of high interest to her, with the help of her assistants."<sup>1470</sup> But he provides no specific examples and no contemporaneous evidence to support his allegation, and President Olano Silva denies any such allegations.<sup>1471</sup>

707. **Second**, Claimant argues that President Olano Silva had the 2008 Royalty Assessment case proceed on a "fast track" so that Ms. Villanueva's draft would be issued before a decision in the 2006-2007 Royalty Assessment case (which was being heard at the time by Chamber No. 10).<sup>1472</sup> Claimant primarily relies on two points in support of this argument: (i) Mr. Estrada's testimony that cases are generally decided in the order in which they are filed; and (ii) the fact that the 2006-2007 Royalty Assessment case was filed nine months before the 2008 Royalty Assessment case, but the decisions were issued in the other order. This argument is unpersuasive. As President Olano Silva explains, while, of course, cases are generally heard in the order in which they are received, there is no hard and fast rule, and the speed at which any

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<sup>1466</sup> Exhibit RWS-5, Olano Statement at para. 50.

<sup>1467</sup> Exhibit RWS-5, Olano Statement at para. 50.

<sup>1468</sup> See Claimant's Memorial at paras. 390(e)-(f).

<sup>1469</sup> See *supra* at Section II.G.2.a.i.

<sup>1470</sup> Exhibit CWS-6, Estrada Statement at para. 33.

<sup>1471</sup> See *supra* at Section II.G.2.a.i.

<sup>1472</sup> Claimant's Memorial at para. 391.

particular case progresses depends on the circumstances (*e.g.*, some cases are handled by attorneys with a heavy caseload, some are assigned to Chambers or *vocales* with a heavy docket, hearing dates might get pushed back, scheduling conflicts might require extensions of time).<sup>1473</sup> There are any number of reasons why one case might proceed more quickly than another. And nine months is not a significant difference in filing dates. Moreover, Claimant entirely fails to explain how exactly President Olano Silva supposedly put the 2008 Royalty Assessment case on an alleged “fast track.” And, finally, Claimant’s citation to an email from Chamber No. 10’s presiding *vocal*, Mr. Carlos Hugo Moreano Valdivia,<sup>1474</sup> does not prove anything other than that Mr. Moreano was disappointed that his Chamber and Chamber No. 1 did not do a better job of coordinating before Chamber No. 1 issued its resolution, given that Chamber No. 10 (handling the 2006-2007 Royalty case) was dealing with the same issues.<sup>1475</sup> It is ironic that Claimant, at various points in its Memorial, criticizes President Olano Silva for “interfering” when she is trying to coordinate between the various Chambers, while, on the other hand, tries to point to her failure to coordinate to Mr. Moreano’s satisfaction as, somehow, evidence of her wrongdoing.

708. And *third*, Claimant argues that President Olano Silva “seemingly imposed” the resolution from the 2008 Royalty Assessment case on the *vocales* of Chamber No. 10 for the 2006-2007 Royalty Assessment case.<sup>1476</sup> It is telling that Claimant felt it necessary to qualify its allegation with “seemingly.” It did so, because it knows that it does not have any direct evidence that this is the case. Rather, Claimant relies entirely on the fact that the resolution in the 2006-2007 Royalty Assessment case used similar language to that used in the 2008 Royalty Assessment case. Of course, this is to be expected—the two resolutions came from the same body (the Tax Tribunal) and were dealing with the same issues and the same parties. Moreover,

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<sup>1473</sup> Exhibit RWS-5, Olano Statement at paras. 53-54.

<sup>1474</sup> Claimant’s Memorial at para. 391(d).

<sup>1475</sup> *See supra* at Section II.G.2.

<sup>1476</sup> Claimant’s Memorial at para. 392.

there would be nothing wrong with Chamber No. 10 embracing and borrowing language from the decision of Chamber No. 1, if indeed that happened. In fact, it is to be desired—consistency in the application of law creates fairness and transparency. If the resolutions had come to different results, Claimant surely would have come to this Tribunal and argued instead that Perú breached the TPA by acting arbitrarily and inconsistently.

709. In addition, Claimant’s suggestion that this result was imposed over the actual views of the *vocales* in Chamber No. 10 is belied by the record. Later in the email chain in which Mr. Moreano expressed his displeasure about the level of coordination, Licette Zuñiga Dulanto, the *vocale ponente* for Chamber No. 1, stated that she “spoke with Luis Cayo [the *vocal ponente* in Chamber No. 10 primarily handling the 2006-2007 Royalty case] before the session,” and “they were in agreement to confirm and it seemed to us that the terms of the resolution were quite clear and would not provoke discussion, so we agreed that after the session I would send them a copy of the draft to coordinate any adjustments, which I did yesterday immediately after the session.”<sup>1477</sup>

710. Thus, it is clear that the *vocales* in Chamber No. 1 were not trying to dictate the content of Chamber No. 10’s resolution, but, rather, were trying to coordinate to ensure that both Chambers were taking consistent approaches to related issues (which, again, is what an administrative agency handling the same issues for the same parties ought to do). And the fact that the two Chambers were discussing the general content of the draft resolutions clarifies any assertion that Chamber No. 10 was just copying and pasting the 2008 Royalty Assessment resolution without any consideration—to the contrary, the Chamber No. 10 *vocales* clearly carefully considered the language in the 2008 Royalty Assessment resolution before finalizing their own resolution in the 2006-2007 case.

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<sup>1477</sup> Exhibit CE-652, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (May 22, 2013, 8:58 AM PET).

(2) *There Were No Procedural Irregularities With Respect to the 2009 and 2010-2011 Royalty Assessment Cases*

711. Claimant also argues that its 2009, 2010-2011, and Q4 2011 Royalty Assessment cases suffered from due process violations.<sup>1478</sup> Claimant again fails to support these claims and, implicitly, hopes for the application of a lower bar to meet its burden than the case law provides.

712. *First*, Claimant complains that the Tax Tribunal reassigned the 2010-2011 Royalty Assessment case to a recently appointed *vocal*, Mr. Mejía.<sup>1479</sup> As President Olano Silva explains, reassigning cases to newly appointed members is a routine step, in order to try to ensure an equitable distribution of work.<sup>1480</sup> There was nothing nefarious about the reassignment. In addition, Claimant's implications that assigning the case to Chamber No. 1 was unfair because Chamber No. 1 decided the 2008 Royalty Assessment case is without merit—the case was reassigned from Chamber No. 10, which, as discussed above, had decided the 2006-2007 Royalty Assessment case at the same time (another decision with which Claimant disagrees). It also makes sense, from both an administrative efficiency perspective and a consistency-of-law perspective, to assign cases to Chambers that are already familiar with the issues before them.

713. Claimant further complains that Mr. Mejía was “blatantly conflicted,” because he previously worked “at the very SUNAT department that had confirmed the 2010-2011 Royalty Assessments in the first place, and even represented SUNAT against SMCV before the Court of Appeals in the 2006-2007 Royalty Case.”<sup>1481</sup> There is no merit to Claimant's assertion. As President Olano Silva explains, Mr. Mejía performed no work on any matter, administrative or otherwise, related to SMCV, regardless of what others in the SUNAT department in which he

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<sup>1478</sup> See Claimant's Memorial at paras. 395 *et seq.*

<sup>1479</sup> See Claimant's Memorial at para. 396.

<sup>1480</sup> Exhibit RWS-5, Olano Statement at para. 66.

<sup>1481</sup> Claimant's Memorial at para. 396(b) (emphasis omitted).

worked might have done.<sup>1482</sup> Under the applicable law, there was no basis for Mr. Mejía to be recused.<sup>1483</sup>

714. Claimant then tries to suggest that Perú implicitly admits that the recusal law in the Tax Code was insufficient, because the law was revised in 2018 after it failed to result in Mr. Mejía’s recusal.<sup>1484</sup> But the revision had nothing to do with Mr. Mejía. In fact, as President Olano Silva confirms, Mr. Mejía would not have been required to recuse himself even under the new law, because, again, he did not work “directly and actively” on the issues in SMCV’s case in his prior position.<sup>1485</sup>

715. *Second*, Claimant argues that, when SMCV requested that Mr. Mejía recuse himself from the 2010-2011 Royalty Assessment case, President Olano Silva improperly interfered in the Plenary Chamber’s decision to reject SMCV’s recusal request, in violation of the Tax Tribunal’s Rules of Procedure.<sup>1486</sup> This argument is without merit. In support of its assertion that President Olano Silva allegedly improperly interfered in the Tax Tribunal’s decision to reject SMCV’s recusal request, Claimant points to the fact that President Olano Silva asked her staff to prepare “draft minutes” related to the upcoming deliberations and circulated them before the meeting of the Plenary Chamber.<sup>1487</sup> Claimant then notes that when the Chamber No. 5 *vocales* responded in disagreement, President Olano Silva said, “let me know which way the vote is going so I can start working on the draft resolution.”<sup>1488</sup> And Claimant

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<sup>1482</sup> Exhibit RWS-5, Olano Statement at paras. 77-78.

<sup>1483</sup> Exhibit RWS-5, Olano Statement at para. 77.

<sup>1484</sup> See Claimant’s Memorial at para. 396(c).

<sup>1485</sup> Exhibit RWS-5, Olano Statement at para. 79.

<sup>1486</sup> See Claimant’s Memorial at para. 397.

<sup>1487</sup> See Claimant’s Memorial at para. 397(a).

<sup>1488</sup> Claimant’s Memorial at para. 397(b); Exhibit CE-717, Email from Zoraida Alicia Olano Silva to the *vocales* (June 21, 2018, 11:21 AM PET) .

relies on the fact that the Plenary Chamber rejected SMCV's recusal request just two days after receiving the request.<sup>1489</sup>

716. What Claimant does not disclose, however, is that, by law, the Plenary Chamber was required to decide the recusal request within three days.<sup>1490</sup> Moreover, as President Olano Silva explains, in processing SMCV's recusal request, she simply followed the normal procedure: the affected member submits a report to the President stating his or her reasons for not recusing; then the President and the Technical Office, which functions as the technical secretariat in these cases, send the members of the Plenary Chamber a draft preliminary resolution based on a study of the member's report and the relevant background information for the members' consideration before the meeting; and, on the day of its meeting, the Plenary Chamber decides, by majority vote, to grant or deny the request.<sup>1491</sup> This process is part of what makes it possible for the Plenary Chamber to act quickly under the statutory three-day timeframe. Thus, there was nothing out of the ordinary in the Tax Tribunal's consideration of SMCV's recusal request.

717. *Third*, Claimant complains that Chamber No. 1 moved quickly on the 2010-2011 Royalty Assessment case while Chamber No. 2 took five years longer to hold a hearing for the 2009 Royalty Assessment case.<sup>1492</sup> Admittedly, five years is a long time. But, as President Olano Silva explains, in 2012, the year in which the 2009 Royalty Assessment case was brought to the Tax Tribunal, the total number of cases submitted to the Tax Tribunal was close to 20,000,

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<sup>1489</sup> See Claimant's Memorial at para. 397(c).

<sup>1490</sup> Exhibit RWS-5, Olano Statement at para. 69; Exhibit RE-18, Single Unified Text of the Law of General Administrative Procedure, Law No. 27444, Approved by Supreme Decree No. 006-2017-JUS, March 17, 2017, at Art. 141.

<sup>1491</sup> Exhibit RWS-5, Olano Statement at para. 69.

<sup>1492</sup> See Claimant's Memorial at para. 398.

one of the highest number of cases over the last twenty years.<sup>1493</sup> Claimant’s own witness, Mr. Estrada, has also discussed the high caseload of the Tax Tribunal.<sup>1494</sup>

718. Claimant also repeats its argument that the *vocales* have disregarded their duty to independently consider and decide cases because they apparently relied on or even echoed the 2008 Royalty Assessment decision of the Tax Tribunal in ultimately deciding in SUNAT’s favor.<sup>1495</sup> But, again, considering prior resolutions—and ensuring that the Tax Tribunal treats litigants (indeed, the same litigant) with similar issues consistently—is in no way an abdication of the duty to independently decide cases. Claimant seemingly forgets that, at the same time, it argued forcefully in Section IV.B.2.iii of its Memorial that Perú has a duty to act consistently with regard to Claimant’s investment.

719. *Fourth*, and finally, Claimant argues that the fact that SMCV’s Q4 2011 Royalty Assessment case was assigned to Ms. Villanueva, who by then had been appointed as a *vocal* in Chamber No. 9, is somehow evidence that SMCV was “denied the opportunity to have its case properly heard and decided by an impartial decision-maker.”<sup>1496</sup> But the only evidence that Claimant submits for its allegation that Ms. Villanueva is not impartial, is that she had worked on the 2008 Royalty Assessment case. By Claimant’s logic, any judge or arbitrator who decides one case against a party (or, in Ms. Villanueva’s case, assisted *vocales* in deciding a case against a party) can never be impartial vis-à-vis that party in any future case. That is nonsensical. And it ignores the realities of administrative practice, which often involves government officials adjudicating issues between repeat parties.

720. In sum, Claimant has utterly failed to meet the high burden that accompanies its denial of justice claim. Claimant almost entirely relies on mischaracterizations and speculation,

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<sup>1493</sup> See Exhibit RWS-5, Olano Statement at Annex B.

<sup>1494</sup> See Exhibit CWS-6, Estrada Statement at para. 10.

<sup>1495</sup> See Claimant’s Memorial at para. 398.

<sup>1496</sup> Claimant’s Memorial at para. 399.

trying to make routine administrative practice appear nefarious and biased. The fact of the matter is that the Tax Tribunal properly adjudicated SMCV's royalty cases and, consistently (and consistent with MINEM's interpretation), found that the stability guarantees did not extend to the Concentrator Plant Project. SMCV was afforded due process of law throughout these proceedings and, when it received the Tax Tribunal's decisions that it did not like, SMCV challenged them in court (*i.e.*, it continued to be afforded due process)—and lost there, too. In continuing to push the same claims before this Tribunal, Claimant is clearly trying to get a second bite (or rather, a third or fourth bite) at the apple. Not only is there no evidence to support Claimant's allegations, but Claimant's attempt to relitigate the issues it has already fully and finally litigated in Perú is an impermissible use of this arbitral forum and should be rejected by the Tribunal.

(ii) *Perú Did Not Breach Its Fair and Equitable Treatment Obligations by Maintaining the Assessments of Penalties and Interest Against SMCV*

721. Claimant claims that Perú also violated its obligation of fair and equitable treatment under Article 10.5 of the TPA each time it declined to waive the imposition of penalties and interest.<sup>1497</sup> Specifically, Claimant alleges that the various SUNAT, Tax Tribunal, and court decisions rejecting SMCV's requests to waive the interest and penalties were arbitrary.<sup>1498</sup> To recall, arbitrariness is “something opposed to the rule of law” rather than “something opposed to a rule of law,” and requires the Tribunal to find that Perú's actions constituted “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”<sup>1499</sup> This claim must fail because SUNAT, the Tax Tribunal, and the Peruvian courts all acted appropriately and in accordance with Peruvian law—and, even if the

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<sup>1497</sup> See Claimant's Memorial at paras. 400 *et seq.*

<sup>1498</sup> See Claimant's Memorial at para. 402.

<sup>1499</sup> Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (quoting Exhibit RA-72, *ELSI* Judgment at para. 128) (emphasis added).

Tribunal were to disagree with the merits of any of the decisions rejecting SMCV's requests to waive the interest and penalties, at a minimum, there is no basis to find that the decisions rise to the level of "something opposed to the rule of law" or an act that shocks a sense of judicial propriety.

722. For certain of the Royalty Assessment cases, SMCV failed to timely raise the issue of penalties and interest and, when it belatedly tried to do so on appeal, the Peruvian courts reasonably rejected SMCV's attempt to enlarge the scope of the case on appeal. There is nothing arbitrary or unreasonable about those decisions. For the Royalty Assessment cases in which SMCV did timely object to the penalties and interest, SUNAT and the Tax Tribunal considered the merits of Claimant's arguments, and, acting entirely within their discretion, rejected the requests. Claimant may disagree with the outcome of those decisions, which are discussed next in greater detail, but it cannot show that they violated Perú's FET obligations.

(a) "Reasonable Doubt" Applies in Two Specific, Codified Situations, Neither of Which Is Present Here

723. Claimant first argues that Article 170 of the Tax Code provides that the government must waive penalties and interest if there is "reasonable doubt" with respect to the interpretation of the relevant law.<sup>1500</sup> As a general matter, Perú does not disagree that "reasonable doubt" can be a basis for seeking waiver of penalties and interest—as Drs. Bravo and Picón explain in their expert report, this notion is found in Articles 92(g) and 170 of the Tax Code.<sup>1501</sup> Specifically, until an amendment in 2016,<sup>1502</sup> Article 92(g) provided that taxpayers were entitled to "[r]equest the non-application of interest and penalties in cases of reasonable

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<sup>1500</sup> See Claimant's Memorial at para. 403.

<sup>1501</sup> Exhibit RER-3, Bravo and Picón Report at para. 70; Exhibit CA-14, Tax Code, at Arts. 92(g), 170.

<sup>1502</sup> The amendment revised Article 92(g) to provide that taxpayers are entitled to "[r]equest the non-application of interest and adjustment for inflation based on the Consumer Price Index, if applicable, and of penalties in cases of reasonable doubt or conflicting criteria in accordance with the provisions of Article 170." Exhibit CA-14, Tax Code, at Article 92(g).

doubt or dual criteria in accordance with the provisions of Article 170.”<sup>1503</sup> And, until the 2016 amendment,<sup>1504</sup> Article 170 provided in relevant part that:

The assessment of interest or sanctions is inappropriate if:

1. As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation would have been paid until it was clarified, provided the clarifying provision expressly states that this paragraph is applicable.

To this end, the clarification may be made by means of a Law or provision of a similar rank, a Supreme [Decree] endorsed by the Ministry of Economy and Finance, a Superintendency Resolution or a provision of a similar rank or a Tax Tribunal resolution as referred to in Article 154.

The interest that it is inappropriate to assess is that accrued from the day following the due date of the tax obligation up until ten (10) business days following the publication of the clarification in the Official Gazette El Peruano. Regarding penalties, those relating to offenses originating in the misinterpretation of the provision up until the expiration of the above-mentioned term will not be assessed.

2. The Tax Administration has had a duplication of criteria in the application of the provision and only with respect to the facts produced, while the previous criterion was in force.<sup>1505</sup>

724. Two points are worth mentioning. *First*, the “reasonable doubt” argument applies in two specific situations. As Drs. Bravo and Picón explain, a taxpayer may seek a waiver of penalties and interest on the basis of “reasonable doubt” when (i) there is an interpretation of a norm that has been changed as a result of a formal ruling that the prior interpretation was incorrect (*e.g.*, SUNAT interpreted a rule one way but then issued a second, different ruling

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<sup>1503</sup> Exhibit CA-14, Tax Code, at Art. 92(g).

<sup>1504</sup> Exhibit CA-14, Tax Code, at Art. 170. Respondent notes that the pre-December 2016 version had been in force since 2004. *See id.* Thus, there are two versions of Article 170 that were in force at some point between 2004 and the present. Claimant does not appear to take a position on which version of Article 170 applied to which proceeding, *see* Claimant’s Memorial at para. 403, Exhibit CER-3, Hernández Report at paras. 97 *et seq.*, but cites to the version in force between 2004 and 2016 that Respondent quotes above, *see, e.g.*, Claimant’s Memorial at para. 403 n.1121, Exhibit CER-3, Hernández Report at para. 97 n.130. For the avoidance of doubt (and as Claimant seems to implicitly concede), the question of which version of Article 170 applied to which proceeding appears to be irrelevant for the Tribunal’s purposes here as the 2016 amendment did not substantively change the relevant provisions of the Article that Respondent discusses above. *See* Exhibit CA-14, Tax Code, at Art. 170.

<sup>1505</sup> Exhibit CA-14, Tax Code, at Art. 170 (emphasis added).

stating that the first interpretation was incorrect).<sup>1506</sup> Further, Drs. Bravo and Picón explain that, according to Article 170, this clarification must “expressly provide that it is issued for purposes of Article 170 of the Tax Code” and must be published in *El Peruano* (the official newspaper in Peru).<sup>1507</sup> And (ii), “reasonable doubt” can apply when SUNAT has inconsistently applied a rule over the course of time (*e.g.*, SUNAT simultaneously applies a rule one way with one taxpayer and another way with another taxpayer, notwithstanding the fact that the taxpayers are similarly situated).<sup>1508</sup> “Reasonable doubt” therefore requires an objective analysis. The question is not whether the taxpayer had a good faith, subjective belief about the tax obligation in question; the question is only whether there existed either (i) an official clarification or (ii) SUNAT decisions that interpret the relevant provision inconsistently. If not, “reasonable doubt” under Article 170 simply does not apply. Thus, “reasonable doubt” should not be understood in a broad, colloquial sense, but, rather, as a narrow rule of Peruvian tax law that applies only in these two specific situations. Neither of those situations was applicable here.

725. *Second*, Claimant misunderstands the obligations of the Tax Tribunal and Peruvian courts. Claimant argues that, when there is reasonable doubt, the government “must” clarify the rule and waive penalties and interest.<sup>1509</sup> But that is not what the Tax Code provides. As Drs. Bravo and Picón explain, when there is an official clarification pursuant to Article 170(1) that is published in *El Peruano* (*i.e.*, the first situation noted above), then the Tax Tribunal and the courts are indeed required to waive interest and penalties. There is no discretion. However, Article 170 does not impose any obligation to publish such an official

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<sup>1506</sup> Exhibit RER-3, Bravo and Picón Report at paras. 72-73.

<sup>1507</sup> Exhibit RER-3, Bravo and Picón Report at para. 73.

<sup>1508</sup> Exhibit RER-3, Bravo and Picón Report at para. 76.

<sup>1509</sup> Claimant’s Memorial at para. 403(c) (emphasis omitted). Notably, Claimant’s expert, Mr. Hernandez, is not as definitive as Claimant on this point, qualifying his view by saying that he “consider[s] that SUNAT, the Tax Tribunal and the Judicial Branch have the obligation to consider sua sponte whether a taxpayer is entitled to a waiver of penalties and interest for reasonable doubt, irrespective of whether the taxpayer requests it.” Exhibit CER-3, Hernández Report at para. 103 (emphasis added).

clarification. That is discretionary. As Claimant notes in its Memorial, certain Peruvian bodies are “empowered to clarify the scope” of a law,<sup>1510</sup> but such clarification is not mandatory (*i.e.*, certain Peruvian bodies “may” clarify, not, *e.g.*, “shall” clarify, a rule).<sup>1511</sup>

(b) “Reasonable Doubt,” Under Article 170, Did Not Apply to SMCV’s Failure to Pay its Obligations

726. As discussed above, the circumstances under which a party may successfully raise a “reasonable doubt” argument to seek waiver of penalties and interest are limited and do not apply to the circumstances at issue in this case. Claimant has not pointed to either (i) an official clarification published in in *El Peruano* that clarified a provision on which SMCV relied in not paying its obligations or (ii) a series of SUNAT decisions that applied in a contrary manner a tax or royalty provision on which SMCV relied. That is the end of the matter. Under Peruvian law, “reasonable doubt” under Article 170 does not apply, and SMCV was not entitled to request or obtain a waiver of interest and penalties.

727. Claimant makes a number of arguments for why, in the colloquial sense, SMCV had reasonable doubt about its tax and royalty obligations. But these arguments miss the point. SMCV’s subjective beliefs are irrelevant. And, even if SMCV were permitted under Peruvian law to make a “reasonable doubt” argument in these circumstances, as explained below, there was no reasonable doubt here about whether activities related to the SMCV’s Concentrator Plant incurred royalties. The Mining Law and its Regulations are clear: stability guarantees extend only to the investment project defined in the stability agreement and its feasibility study. Perú has been consistent on this point, and made it clear to SMCV. SMCV cannot now feign ignorance.

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<sup>1510</sup> Claimant’s Memorial at para. 403(c).

<sup>1511</sup> Exhibit CA-14, Tax Code, at Art. 170 (emphasis added).

728. *First*, Claimant argues that the positions taken by the single Contentious Administrative Court in the 2008 Royalty Assessment case that decided in SMCV’s favor (albeit then reversed by the Superior Court on appeal), the single Superior Court judge who dissented in the 2006-2007 Royalty Assessment case, and the two Supreme Court justices who dissented in the 2006-2007 Royalty Assessment case combine to show that SMCV had grounds for legitimate, reasonable doubt as to the proper interpretation of the Mining Law and its Regulations.<sup>1512</sup> But the first of these decisions (the Contentious Administrative Court decision) was issued on December 17, 2014—after SMCV filed its tax returns for all of the fiscal years at issue in this case.<sup>1513</sup> Thus, even if Claimant’s understanding of the “reasonable doubt” waiver process were accurate (it is not), then these post-hoc decisions could not have formed a basis for SMCV to have reasonable doubt when actually filing its tax returns.

729. Moreover, Claimant misconstrues the dissents. Superior Court Judge Reyes Ramos dissented in the 2006-2007 Royalty Assessment case, because he disagreed with the majority’s approach on “how laws must be interpreted,” which he explicitly noted “must precede any discussion on the merits of the case”—a discussion that he did not reach.<sup>1514</sup> Thus, his opinion had no bearing on whether there may have been reasonable doubt about the proper interpretation of the Mining Law and its Regulations. And, similarly, the two Supreme Court justices who would have voted to vacate the Superior Court’s decision explained that they took that position because of disagreements with the appellate court’s approach (namely, that the Superior Court’s ruling did not contain a discussion of certain arguments).<sup>1515</sup> They did not

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<sup>1512</sup> See Claimant’s Memorial at paras. 405(a)-(c).

<sup>1513</sup> See, e.g., Exhibit CE-278, SUNAT Fine Resolution No. 0120020034409 (Income Tax for 2013), December 28, 2020, at p.2 (showing that SMCV filed its FY2013 tax return on March 31, 2014, *i.e.*, over eight months before the lone Contentious Administrative Court decision in its favor).

<sup>1514</sup> Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017, at para. 8.5 of dissent (p. 36).

<sup>1515</sup> Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018, at para. 2.17 of dissent.

indicate agreement with (or even had occasion to consider) the merits of SMCV’s interpretation. But, equally important, neither a dissent, nor a trial court decision that was reversed on appeal, can create doubt about the status of the law; the law is determined by the decision of the highest court to decide the issue (regardless of whether that decision is reached by consensus or majority).

730. *Second*, Claimant rests its claim in significant part on its misguided arguments regarding its flawed interpretation of the Mining Law and Regulations. Perú has already addressed these points in Sections II.A and II.A.3.a.

731. *Third*, Claimant argues that, in enacting the 2014 and 2019 amendments to the Mining Law and Regulations, respectively, Perú “itself took the position that the prior versions of those provisions were ambiguous and imprecise”<sup>1516</sup>—which Claimant takes as proof that reasonable doubt existed in earlier years. Claimant quotes the draft bill establishing Article 83-B which states a goal to create a “clearer” framework.<sup>1517</sup> But the stated goal of creating a “clearer regulatory framework” was not referring to any specific amendment (including to any of the articles relevant here), but rather was referring generally to the “various proposed changes to the General Mining Law.”<sup>1518</sup> Moreover, as a general matter, making a law “clearer” does not necessarily mean that the law was unclear to begin with; such changes are often made to simply to foreclose frivolous claims such as those raised by SMCV and Claimant. In fact, to the contrary, the Peruvian courts held that the law was clear on the scope of stability agreements.

732. In addition, Claimant’s quote from the Statement of Legislative Intent accompanying the 2019 amendment to Article 22 of the Mining Regulations is misleading. Claimant quotes the portion of the Statement explaining that Article 22 “could misleadingly lead

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<sup>1516</sup> Claimant’s Memorial at para. 407.

<sup>1517</sup> Claimant’s Memorial at para. 407(a).

<sup>1518</sup> Exhibit CE-823, Congress, Draft Bill Law No. 30230, at para. 5.

one to consider that the contractual guarantees benefit the owner of the mining activity for any investment it makes in the concessions or EAUs, in which case, for example, tax stability would favor all the concessions or EAUs as a whole.”<sup>1519</sup> Claimant, however, conspicuously leaves out the last phrase that ends the quoted sentence: “without considering the provisions of Articles 79, 83, 83-B of the Single Unified Text of the LGM.”<sup>1520</sup> That is, the Statement mentions that Article 22, on its own, could be misleading if the reader does not also consider Articles 79, 83, and 83-B of the Mining Law—with the clear implication that, if consulted, those Articles of the Mining Law would have cleared up any misunderstanding that might have resulted from the face of the previous version of Article 22, standing alone. Thus, instead of helping SMCV’s “reasonable doubt” argument, the Statement in fact establishes that a reasonably diligent company (or at least its lawyers) who read the rest of the relevant Articles in addition to Article 22 would not have been confused. Claimant and SMCV ought to be expected to carry out reasonable legal diligence.

733. *Fourth*, and finally, Claimant argues that SMCV’s interpretation was consistent with the conduct of the Peruvian government officials until MINEM’s interpretation purportedly changed, giving SMCV reasonable grounds to take the position that it did.<sup>1521</sup> Perú has already addressed each of Claimant’s repetitive points<sup>1522</sup> and will not repeat those discussions here. Suffice it to say: Claimant is wrong, Peruvian officials have consistently held the position that

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<sup>1519</sup> Claimant’s Memorial at para. 407(b) (emphasis omitted). The full passage is: “The literalness of the text of the first paragraph of Article 22 could misleadingly lead one to consider that the contractual guarantees benefit the owner of the mining activity for any investment it makes in the concessions or EAUs, in which case, for example, tax stability would favor all the concessions or EAUs as a whole, without considering the provisions of Articles 79, 83, 83-B of the Single Unified Text of the LGM.” Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at p. 18 of PDF.

<sup>1520</sup> Exhibit CA-246, Supreme Decree No. 021-2019-EM, December 28, 2019, at p. 18 of PDF.

<sup>1521</sup> See Claimant’s Memorial at para. 408.

<sup>1522</sup> See *supra* at Section II.D.

the scope of the 1998 Stabilization Agreement is limited, and Peruvian officials made that clear to both the public and SMCV.

(c) The Tax Tribunal and the Contentious Administrative Courts Did Not Arbitrarily Refuse to Consider the Merits of SMCV's Waiver Request in the 2006-2007 and 2008 Royalty Assessment Cases

734. Claimant next complains that the Tax Tribunal and the Contentious Administrative Courts arbitrarily and unreasonably refused to reach the merits of SMCV's penalty and interest waiver requests in the 2006-2007 and 2008 Royalty Assessment cases.<sup>1523</sup> But, as Perú has explained both above and in Section II.G.2.b, these decisions were reasonable and in accordance with Peruvian law.

735. To recall, at the end of June and at the beginning of July 2013, respectively, SMCV filed requests before the Tax Tribunal asking that it waive the penalties and interest that SUNAT had applied to the unpaid 2006-2007 and 2008 Royalty Assessments.<sup>1524</sup> As Claimant readily admits in its Memorial, SMCV did not file its requests with the Tax Tribunal until after the Tax Tribunal had issued its decisions upholding SUNAT's Assessments.<sup>1525</sup> According to Article 147 of the Peruvian Tax Code, appellants must raise at the outset of their complaints all issues they wish the Tax Tribunal to consider.<sup>1526</sup> Thus, SMCV was obliged to raise its objections regarding the application of penalties and interest with the Tax Tribunal at the time it filed its appeals against SUNAT's Assessment(s). It did not. As a result, SMCV waived its right to challenge the portions of those Assessments in which SUNAT had applied penalties and interest for SMCV's failure to pay the royalties otherwise due.<sup>1527</sup>

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<sup>1523</sup> See Claimant's Memorial at paras. 409 *et seq.*

<sup>1524</sup> See *supra* at Section II.G.2.b.

<sup>1525</sup> See Claimant's Memorial at para. 212.

<sup>1526</sup> See Exhibit CA-14, Tax Code, Art. 147.

<sup>1527</sup> Exhibit RER-3, Bravo and Picón Report at paras. 120-22.

736. Relying on the report of Mr. Hernández, Claimant argues that under Peruvian law a taxpayer cannot waive an objection to penalties and interest by procedural default, because the Tax Tribunal had an obligation to consider the issue *sua sponte*.<sup>1528</sup> But, as discussed above, that is not what the Tax Code says. Had an official clarification been issued, the Tax Tribunal would have had an obligation to implement it—but no such clarification existed. Article 170 provides that certain Peruvian bodies are “empowered to clarify the scope” of a law,<sup>1529</sup> but, again, such clarification is not mandatory (*i.e.*, certain Peruvian bodies “may” clarify, not “shall” clarify, a rule). There was no obligation for the Tax Tribunal to act as Claimant alleges.

737. Claimant next argues that the first-instance Contentious Administrative Courts “arbitrarily accepted the Tax Tribunal’s erroneous conclusion [*i.e.* about the untimeliness of SMCV’s waiver requests] without any independent analysis whatsoever.”<sup>1530</sup> But the courts’ decisions were not arbitrary at all. It is a routine, and well-founded, practice that appellate courts, generally, do not enlarge the scope of a case on appeal. It cannot be arbitrary that a court of appeals would not consider an issue that was not properly raised before the court below. An appellate court is not meant to decide a case in the first instance; it is meant to review the lower court or tribunal’s decision under the appropriate standard of review. Considering on appeal an issue that was not properly raised below would undermine that structure and, in effect, turn the appellate court into a first-instance or trial court, for which it is not procedurally equipped. Claimant concedes that SMCV did not properly raise the issue below.<sup>1531</sup> As the courts held, under Peruvian law, SMCV therefore waived its right to seek waiver of the penalties and interest

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<sup>1528</sup> See Claimant’s Memorial at para. 410(a).

<sup>1529</sup> Claimant’s Memorial at para. 396(c).

<sup>1530</sup> Claimant’s Memorial at para. 411.

<sup>1531</sup> See Claimant’s Memorial at para. 409 (“In the 2006-2007 and 2008 Royalty Cases, SMCV requested that the Tax Tribunal waive penalties and interest immediately after it was notified of the Tax Tribunal’s decisions in those cases.” (emphasis added)).

on those two Assessments. Claimant cannot fault Perú for SMCV’s own failure to timely raise its claims.

738. Finally, Claimant cites to *Lion Mexico* to argue that “attempts to cure substantive injustices through local court proceedings should not be summarily dismissed based on ‘dubious formalistic nuances of local procedural law.’”<sup>1532</sup> But *Lion Mexico* does not stand for the proposition that a domestic court can never decline to consider the merits because of any procedural issue; such a proposition would nullify all rules of civil procedure and cannot be taken seriously. And, in any event, *Lion Mexico* is completely inapposite.

739. In *Lion Mexico*, a business associate of the claimant initiated certain domestic court proceedings (one of which the associate initiated fraudulently on claimant’s behalf), presented forged documents (in particular, a settlement agreement) to the court, and used deception to prevent the claimant from ever even being made aware of the proceedings. Mexican domestic courts in later proceedings refused to admit evidence of the forged documents—despite acknowledging that the associate was then in jail for the forgery—because the relevant court document seeking admission of the evidence “had not been properly signed on behalf of Lion: it should have been signed by Lion’s legal representative and not by the attorney empowered by Lion to act on its behalf in the *Amparo* proceedings.”<sup>1533</sup> The tribunal considered this a “very minor” “procedural requirement” that “did not apply in other circumstances” and did not find it sufficient to deny the claimant the right to present evidence to support its case, particularly where that evidence was so strong and determinative: the tribunal was “convinced that the [settlement agreement was] in fact a forgery.”<sup>1534</sup>

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<sup>1532</sup> See Claimant’s Memorial at para. 412 (citing Exhibit CA-286, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, September 20, 2021 (“*Lion Mexico v. Mexico*, Award”).

<sup>1533</sup> Exhibit CA-286, *Lion Mexico v. Mexico*, Award at para. 153.

<sup>1534</sup> Exhibit CA-286, *Lion Mexico v. Mexico*, Award at paras. 103, 503.

740. The procedural issue here, by contrast—a party failing to timely raise an argument before the tribunal—is not “very minor” or akin to simply having the wrong representative of the party signing a court document; timely raising arguments is a routine requirement that, by definition, cannot be cured after the time to raise the issue has passed. Moreover, unlike in *Lion Mexico* where procedural defect barred the introduction of evidence on what would have been a meritorious issue, here, as discussed, considering the merits of the Article 170 argument would have been futile because SMCV was not entitled to the waiver of penalties and interest. And, finally, the *Lion Mexico* tribunal “note[d] that Mexico, while refusing to outright admit that fraud had indeed been perpetrated by the [business associate and his entities], argues that the ‘alleged multilevel fraud’ was so complex and sophisticated that its judicial system could not withstand it”<sup>1535</sup>; Mexico essentially conceded that its judicial system did not provide the claimant with justice. This is simply not the case here. SMCV was afforded due process throughout this entire process and availed itself of the Peruvian administrative and judicial system all the way up to the Peruvian Supreme Court. That SMCV lost is indicative of its weak case, not that it was denied justice.

(d) The Tax Tribunal and SUNAT Acted Reasonably and Consistently with Peruvian Law in Rejecting SMCV’s Waiver Requests for Penalties and Interest on the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments

741. Claimant also objects that “SUNAT and the Tax Tribunal still refused to comply with their obligation to waive penalties and interest relying on flimsy and pretextual grounds that were likewise arbitrary and unreasonable”<sup>1536</sup> with respect to penalties and interest applied by SUNAT to five other Assessments. Specifically, Claimant argues that the Tax Tribunal and

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<sup>1535</sup> Exhibit CA-286, *Lion Mexico v. Mexico*, Award at para. 94.

<sup>1536</sup> Claimant’s Memorial at para. 413.

SUNAT “refused to engage with the clear evidence of ‘reasonable doubt.’”<sup>1537</sup> And Claimant argues that “SUNAT’s claim that even any ‘ambiguity in the rule’ if it existed, would not be an enabling assumption for the application of the ‘reasonable doubt’ because Article 170 requires the misinterpretation of the rule to be ‘clarified in the manner provided for in the second subsection of [Article 170] paragraph 1’ simply made no sense.”<sup>1538</sup> Each of these arguments is meritless and stems from Claimant’s fundamental misunderstanding of how “reasonable doubt” operates under Article 170.

742. Claimant’s last argument, with respect to SUNAT Resolution No. 0150140013036 (on the 2010-2011 Royalty Assessments), is particularly illustrative. As Claimant notes, SUNAT rejected SMCV’s request for waiver of penalties and interest, in part, because “the alleged ‘ambiguity in the rule’, if it existed, would not be an enabling assumption for the application of the ‘reasonable doubt’ referred to in paragraph 1 of Article 170 of the Tax Code, since this rule requires the misinterpretation of a rule and which has been clarified in the manner provided for in the second subsection of the aforementioned paragraph 1.”<sup>1539</sup> Claimant argues that SUNAT’s reasoning makes “no sense” but, to the contrary, SUNAT’s reasoning is entirely consistent with Article 170, Drs. Bravo and Picón’s report, and Perú’s explanation here of how Article 170 operates. SUNAT said, in effect, that “reasonable doubt” under Article 170 is not the same as “ambiguity in the rule” in the colloquial sense. Rather, as Article 170 provides, “reasonable doubt” only applies to waive interest and penalties where (i) there was a misinterpretation that has been clarified in an official clarification published in *El Peruano*, or (ii) there is inconsistency in the application or interpretation of a rule in SUNAT or Tax Tribunal decisions. SUNAT, here, is discussing point (i) and explaining that SMCV has failed to establish

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<sup>1537</sup> Claimant’s Memorial at para. 415.

<sup>1538</sup> Claimant’s Memorial at para. 416.

<sup>1539</sup> Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016, at p. 129.

“reasonable doubt” under Article 170 because, even assuming the Mining Law or Regulations were ambiguous, there has been no official clarification published in *El Peruano*. Article 170(1) therefore, by its terms, could not apply.

743. Claimant’s failure to grasp this point of Peruvian law pervades each of its “reasonable doubt” arguments. For instance, Claimant complains that SUNAT and the Tax Tribunal were wrong to consider the “SMCV’s extensive voluntary and GEM contributions as irrelevant” to the “‘reasonable doubt’ analysis” “even though those agreements and contributions were evidence of both the Government and SMCV interpreting the Mining Law to cover entire units and of their shared understanding that SMCV did not owe royalties.”<sup>1540</sup> But again, this just shows Claimant’s misunderstanding of Article 170. Claimant is again applying a subjective, colloquial understanding of “reasonable doubt,” not the limited, objective “reasonable doubt” analysis that is required under Article 170. Under the latter, correct analysis, SMCV’s voluntary and GEM contributions were irrelevant. Those contributions could not establish the existence either of an official clarification published in *El Peruano* (Article 170(1)) or of inconsistent SUNAT or Tax Tribunal decisions (Article 170(2)). SMCV’s argument, therefore, had no bearing on whether “reasonable doubt” under Article 170 applied.

744. The other decision on which Claimant relies (in support of its argument that the Tax Tribunal and SUNAT refused to engage with the “clear evidence” of “reasonable doubt”<sup>1541</sup>) is Tax Tribunal Decision No. 06575-1-2018 (also regarding the 2010-2011 Royalty Assessments).<sup>1542</sup> But, again, the Tax Tribunal in that decision notes that there has been no official clarification under Article 170(1) before considering (and rejecting) whether there are inconsistent SUNAT or Tax Tribunal decisions that could give rise to a finding of “reasonable

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<sup>1540</sup> See Claimant’s Memorial at para. 415(c) (emphasis omitted).

<sup>1541</sup> Claimant’s Memorial at para. 415(c).

<sup>1542</sup> See Claimant’s Memorial at para. 415(c) n.1180; Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018, August 28, 2018.

doubt” under Article 170(2).<sup>1543</sup> The Tax Tribunal properly considered SMCV’s arguments, applied the law, and correctly determined that application of Article 170 was inappropriate.

745. In sum, SUNAT and the Tax Tribunal considered SMCV’s arguments against penalties and interest, properly applied Peruvian law as described herein, and determined that there was no “reasonable doubt” under Article 170.

(e) SMCV Is Responsible for the Amount of Interest and Penalties, Not Perú

746. Claimant’s fifth and final interest-and penalties-related claim might be its most audacious: that Perú is somehow responsible for SMCV’s failure to timely pay its tax and royalty obligations.<sup>1544</sup> Claimant asserts, and is correct, that a significant portion of SMCV’s total tax liability is comprised of interest and penalties.<sup>1545</sup> But that is because SMCV did not pay its obligations for years. If SMCV wanted to avoid this, it could have timely paid its tax debts.<sup>1546</sup> Then, if SMCV had succeeded in its challenges to the various Royalty Assessments, SUNAT would have refunded those payments, with interest.<sup>1547</sup> But SMCV chose not to do that. SMCV chose instead to wait, not pay, and risk being charged with significant interest and penalties if it lost its various challenges (as it ultimately did). Nevertheless, Claimant creatively tries to put that choice, and its entirely foreseeable consequences, at Perú’s feet.

747. *First*, Claimant complains about “extensive and undue delays” in SUNAT issuing the Assessments and in the Tax Tribunal issuing its resolutions.<sup>1548</sup> As discussed in Section II.G.3.a, above, during the period of time when SMCV’s challenges to SUNAT’s Royalty Assessments were being considered by the Tax Tribunal, the volume of cases before the

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<sup>1543</sup> Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018, August 28, 2018, at p. 39.

<sup>1544</sup> See Claimant’s Memorial at paras. 417 *et seq.*

<sup>1545</sup> See Claimant’s Memorial at para. 418.

<sup>1546</sup> See Exhibit RER-3, Bravo and Picón Report at para. 61; Exhibit CA-14, Tax Code, at Art. 38.

<sup>1547</sup> See Exhibit RER-3, Bravo and Picón Report at para. 61; Exhibit CA-14, Tax Code, at Art. 38.

<sup>1548</sup> Claimant’s Memorial at para. 418.

Tax Tribunal was extraordinarily high. Thus, it simply took time for the Tax Tribunal to process all of the cases before it.<sup>1549</sup> There was nothing nefarious about the delay, nor was it specific to SMCV.

748. In any case, SMCV affirmatively chose to not pay the Royalty Assessments on activities related to the Concentrator Plant notwithstanding its full knowledge that the government interpreted the 1998 Stabilization Agreement as only applying to the Leaching Plant Project. As discussed in Section II.D, SMCV knew or should have known that that was the government's position by the time of the June 2005 publicly-televised Congressional hearing at the latest.<sup>1550</sup> In refusing to pay royalties from tax years 2006 up through 2013, SMCV took the risk that SUNAT would not agree with SMCV's interpretation of the 1998 Stabilization Agreement and that SMCV would therefore be subject to penalties and interest on its eventual assessments. SMCV could have paid the obligations when they were due and then challenged the Assessments (which would both protect its rights and, in the event it lost, prevent any interest or penalties from accruing).<sup>1551</sup> It chose not to do that and to take the risk instead. And it lost. Perú should not be held liable for SMCV's risky decision.

749. *Second*, Claimant argues that Perú applied the wrong interest rate (the 14.6 percent statutory interest rate, instead of Claimant's preferred CPI rate, which is about 2 percent) for challenges that were pending before the Tax Tribunal for more than 12 months.<sup>1552</sup> Specifically, Claimant relies on Article 33 of the Tax Code,<sup>1553</sup> which does provide for the

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<sup>1549</sup> Exhibit RWS-5, Olano Statement at paras. 26-27.

<sup>1550</sup> At an absolute minimum, SMCV knew SUNAT's position after receiving its first Royalty Assessment for the 2006-2007 years on August 17, 2009. *See* Claimant's Memorial at para. 170. SMCV therefore could have complied with SUNAT's position in filing returns after that date, under protest (and paid any outstanding obligations for already filed returns), and then challenged SUNAT's position through the appropriate administrative and judicial means.

<sup>1551</sup> *See* Exhibit RER-3, Bravo and Picón Report at para. 61; Exhibit CA-14, Tax Code, at Art. 38.

<sup>1552</sup> *See* Claimant's Memorial at para. 420.

<sup>1553</sup> *See* Claimant's Memorial at para. 420(a).

suspension of statutory interest on taxes during the pendency of Tax Tribunal proceedings that exceed certain deadlines.<sup>1554</sup> However, as Drs. Bravo and Picón explain, a mining royalty is not treated as a tax for such purposes; it represents consideration for the exploitation of mineral resources.<sup>1555</sup> And it is regulated, not by the general Tax Code, but, rather, by the Mining Royalty Law and accompanying regulations. Drs. Bravo and Picón further explain that:

mining royalties are subject to a stable regulatory framework that determines their characteristics, their amount, the consequences of failing to comply with their payment, etc. Consequently, problems that could arise from their application, settlement, compliance or non-compliance must be governed by the specific regulations referring to royalties, i.e., the Royalties Law [and, *inter alia*] its Regulation . . . . Article 6.3 of the Royalties Law provides that “non-payment of mining royalties generates the sanction established by the regulations.” As a complement to the above, Article 7.3 of the Regulation of the Royalties Law stipulates that “[t]he amount of the royalty not paid by the established deadline will accrue a monthly interest, which will be equivalent to the Statutory Interest Rate for tax obligations administered or collected by SUNAT.”<sup>1556</sup>

750. The specific Mining Law and its Regulations take priority over the general Tax Code with respect to mining royalties, and the Mining Law and Regulations apply monthly interest equivalent to the default interest rate to unpaid mining royalties. SUNAT therefore applied the proper interest rate.

751. In sum, Perú did not act arbitrarily in denying SMCV’s requests to waive interest and penalties. To the contrary, the various Peruvian bodies acted reasonably and consistent with Peruvian law. Moreover, even if Claimant or the Tribunal disagrees with the merits of any decision, such disagreement is insufficient to find a breach of the FET provision. There is simply no basis to find that Perú’s actions were “opposed to the rule of law” or constituted “a

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<sup>1554</sup> Exhibit CA-14, Tax Code, at Art. 33.

<sup>1555</sup> Exhibit RER-3, Bravo and Picón Report at para. 130.

<sup>1556</sup> Exhibit RER-3, Bravo and Picón Report at paras. 130-31 (citations omitted).

wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”<sup>1557</sup>

(iii) *Perú Did Not Breach Its Fair and Equitable Treatment Obligations by Refusing to Refund Certain of SMCV’s GEM Payments*

752. Claimant claims that Perú breached Article 10.5 “when it refused to reimburse SMCV’s GEM overpayments for Q4 2011 through Q4 2012 with respect to its operations in the Concentrator.”<sup>1558</sup> Claimant argues that this was “arbitrary and unsupported by Peruvian law.”<sup>1559</sup> To the contrary, SUNAT dutifully followed Peruvian law and approved SMCV’s request for a refund that was made within the statute of limitations. SUNAT rejected only an SMCV request that was untimely, because it was filed outside the statute of limitations. Notably, the time-barred request was made a year later than other GEM refund requests from SMCV. Those earlier, timely requests were approved and the refunds were issued without any problems. Claimant offers no reason why SMCV waited an entire year to submit its second request. Perú cannot be held liable for SMCV’s failure to act in a timely manner.

753. Moreover, even if Claimant or the Tribunal disagree with SUNAT’s decision, again, such disagreement simply does not rise to an FET breach. Claimant cannot credibly say that a decision enforcing a statute of limitations that SMCV was or should have been aware of is “opposed to the rule of law,” is “a wilful disregard of due process of law,” or is “an act which shocks, or at least surprises, a sense of judicial propriety.”<sup>1560</sup> To the contrary, the fact that SUNAT refunded all timely requested GEM payments shows that it was acting reasonably and,

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<sup>1557</sup> Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (quoting Exhibit RA-72, *ELSI* Judgment at para. 128) (emphasis added).

<sup>1558</sup> Claimant’s Memorial at para. 421.

<sup>1559</sup> Claimant’s Memorial at para. 424.

<sup>1560</sup> Exhibit RA-63, *El Paso v. Argentina*, Award at para. 319 (quoting Exhibit RA-72, *ELSI* Judgment at para. 128).

if anything, declining to apply the statute of limitations for SMCV, and treating SMCV differently as compared to other taxpayers, would be opposed to the rule of law.

754. As explained in Section II.E.3.b, on December 28, 2017, SMCV first submitted to SUNAT its requests for refunds for GEM Contributions made in relation to the Concentrator Plant Project with respect to payments for the periods of Q4 2012 to Q4 2013.<sup>1561</sup> Those requests were timely,<sup>1562</sup> and SUNAT approved the refunds.<sup>1563</sup>

755. Inexplicably, SMCV did not submit its second set of refund requests until December 28, 2018, an entire year later. Those requests were for a refund of the GEM payments made in relation to the Concentrator Plant Project for the period Q4 2011 to Q3 2012.<sup>1564</sup> SUNAT denied the requests, because the statute of limitations to submit those requests had expired.<sup>1565</sup> Specifically, pursuant to Articles 43.3 and 44.5 of the Tax Code, a taxpayer has four years to request a refund for overpayment, counting from January 1st of the year after the payment was made.<sup>1566</sup> SMCV made the payments related to Q4 2011 to Q3 2012 in 2012; thus, the statute of limitations to request any refunds started to run on January 1, 2013<sup>1567</sup> and expired on January 1, 2017.

756. Claimant makes three arguments as to why the Tribunal should nevertheless find that SUNAT's actions—which were entirely consistent with the Peruvian law—constitute a violation of Perú's FET obligations.<sup>1568</sup> Each of these arguments is without merit.

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<sup>1561</sup> See Claimant's Memorial at para. 264.

<sup>1562</sup> As explained above, under Articles 43.3 and 44.5 of the Tax Code, a taxpayer has four years to request a refund for overpayment, counting from January 1st of the year after the payment was made. See Exhibit CA-14, Tax Code, at Arts. 43, 44.3. For the Q4 2012 to Q4 2013 GEM payments, the clock therefore started to run on January 1, 2014, and expired on January 1, 2018. SMCV's December 2017 request was therefore timely and, accordingly, approved.

<sup>1563</sup> See Claimant's Memorial at para. 264.

<sup>1564</sup> See Claimant's Memorial at para. 265.

<sup>1565</sup> See Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019, at p. 4.

<sup>1566</sup> See Exhibit CA-14, Tax Code, at Arts. 43, 44.3.

<sup>1567</sup> See Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019, at p. 4.

<sup>1568</sup> Claimant's Memorial at paras. 422-24.

757. *First*, Claimant argues that “SMCV agreed to pay the highest amount of GEM on the understanding that it was not obliged to pay royalties—an understanding that the Government repeatedly encouraged in inducing SMCV’s significant GEM payments.”<sup>1569</sup> This is both wrong and irrelevant to the handling of SMCV’s GEM refund requests. Perú has already addressed Claimant’s assertions with respect to the Mining Society categorizing SMCV as a stabilized company<sup>1570</sup> and the discussions leading up to the signing of the GEM Agreement.<sup>1571</sup> And Claimant’s assertions that SUNAT did not issue any additional Royalty Assessments while SMCV was making the GEM payments<sup>1572</sup> or explicitly tell SMCV it should deduct the Concentrator-related royalty payments<sup>1573</sup> are irrelevant. Claimant knew SUNAT’s position—SUNAT had been arguing it before the Tax Tribunal and various courts since 2010.

758. Once the Superior Court issued its decision on appeal (in January 2016) agreeing with SUNAT’s position, as Claimant notes, SUNAT issued Royalty Assessments shortly thereafter, in April 2016. Notably, if SMCV had then issued its request for a refund for the Concentrator-related GEM payments, it would have been within the statute of limitations period for all of the GEM payments. Any blame for the fact that Claimant chose not to do so, nor even to seek to protect its rights (*e.g.*, through a temporary injunction) during the pendency of litigation over the 2008 Royalty Assessment must lie with SMCV and Claimant, not Perú.

759. *Second*, Claimant argues that Perú unfairly reaped a windfall by retaining GEM payments and the Royalty Assessments with respect to the Concentrator Plant Project for the period Q4 2011 to Q3 2012.<sup>1574</sup> While it may be that the Peruvian Treasury retained both the

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<sup>1569</sup> Claimant’s Memorial at para. 423.

<sup>1570</sup> *See supra* at Section II.E.3.a.

<sup>1571</sup> *See supra* at Section II.E.3.a.

<sup>1572</sup> Claimant’s Memorial at para. 423(d).

<sup>1573</sup> Claimant’s Memorial at para. 423(c).

<sup>1574</sup> *See* Claimant’s Memorial at para. 424.

GEM payments and the Royalty Assessments, that is only because SMCV sat on its rights. And, in any case, that argument has no bearing on the fact that SUNAT acted entirely consistently with Peruvian law. As Claimant acknowledges, SUNAT granted SMCV's initial, and timely, refund request made on December 28, 2017 (for the Q4 2012 to Q4 2013 GEM payments). This shows that Perú was not trying to retain unfairly all of SMCV's overpayments; SUNAT acted in accordance with Peruvian law (not arbitrarily or unreasonably).

760. Claimant's argument that "SUNAT then arbitrarily refused to repay the remaining overpayments" because of a "procedural defect" is ridiculous.<sup>1575</sup> What Claimant calls a "procedural defect" could also be called "unlawful." SMCV made a request that SUNAT could not grant in compliance with Peruvian law. If anything, SUNAT would be acting in an arbitrary manner if it afforded SMCV special treatment and disregarded the law on its behalf, to the detriment of Peruvian taxpayers.

761. And, notably, Claimant never explained why SMCV waited an entire year after its first request (which was granted)—and more than a year after the Supreme Court's August 2017 decision—to make its second request. Nor does Claimant explain why SMCV took no legal action to protect its rights on an interim basis, either. SMCV knew that SUNAT had imposed Royalty Assessments on the basis that the Concentrator Plant Project was not covered by the 1998 Stabilization Agreement, knew that a Court of Appeals had agreed with SUNAT, and knew, or should have known, that the statute of limitations to request a refund of the corresponding GEM payments was running.

762. Claimant implies that SMCV was waiting for the Supreme Court to decide<sup>1576</sup> (though, even if so, SMCV's second request inexplicably came more than a year after the

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<sup>1575</sup> Claimant's Memorial at para. 424(b).

<sup>1576</sup> See Claimant's Memorial at para. 424(a) ("SMCV first submitted a reimbursement request for the Q4 2012 to Q4 2013 period shortly after the Supreme Court dismissed SMCV's challenge on the 2008 Royalty Assessments, seeking to minimize further harm to the company." (citation omitted)).

Supreme Court’s decision). But, if so, that was SMCV’s folly. Parties often have rights or claims that could potentially expire during the pendency of litigation, and courts have procedures to protect those rights when requested. Perú cannot be held responsible for the fact that SMCV did not make a timely request, and instead rolled the dice that it would win at the Supreme Court. That is on SMCV, not Perú.

763. *Third*, and finally, Claimant argues that SUNAT misinterpreted the statute of limitations and that “the statute of limitations on a claim does not begin to run until the claimant learns that the challenged payment was improper.”<sup>1577</sup> Claimant is incorrect, that is not what the Tax Code provides. Article 43 of the Tax Code states that “[a]ctions aimed at requesting compensation or making compensation, as well as actions involving request for refunds, expire after four (4) years.”<sup>1578</sup> And Article 44.5 states that the clock starts on “January First (1st) following the date on which the payment that was undue or excessive was made or became such, in the case of the action referred to in the last paragraph of the previous article.”<sup>1579</sup> The provisions are clear: the statute of limitations begins running on the first January 1 after the date of the over-payment (or after the date on which circumstances changed to make the payment excessive), and it expires four years later. This is confirmed by Drs. Bravo and Picón.<sup>1580</sup>

764. In its footnote citing to Article 44.5, Claimant adds an emphasis to the phrase “or on which it became such.”<sup>1581</sup> It is unclear what import Claimant thinks these words might have. To the extent Claimant is suggesting that the Supreme Court’s decision changed the circumstances such that the GEM payment did not become an overpayment until the decision was issued, that argument does not hold up. The Supreme Court’s August 2017 decision—

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<sup>1577</sup> Claimant’s Memorial at para. 424(c) (citation omitted)

<sup>1578</sup> Exhibit CA-14, Tax Code, at Art. 43.

<sup>1579</sup> Exhibit CA-14, Tax Code, at Art. 44.5.

<sup>1580</sup> Exhibit RER-3, Bravo and Picón Report at para. 205.

<sup>1581</sup> See Claimant’s Memorial at para. 424(c) n.1211 (emphasis omitted).

affirming the Superior Court—merely confirmed that the circumstances were always as SUNAT and MINEM said: the 1998 Stabilization Agreement did not cover the Concentrator-related activities. The Supreme Court’s decision made no change.

765. Claimant also cites to Article 1993 of the Civil Code for “the general Peruvian Law principle that the prescription period ‘starts counting from the day on which the action can be brought.’”<sup>1582</sup> Claimant does not explain how this quote referring, generally, to the statute of limitations on bringing civil law claims into court applies here, where a different right of action and limitations period are in play. Claimant’s rights under discussion here are specific rights under the Tax Code to seek refunds for overpayment of certain taxes (as specifically set out in Tax Code Articles 43 and 44). And in any event, the quoted language does not define “the day on which the action can be brought.”

766. Here, SMCV could have requested a refund the day after it made its GEM overpayment. Claimant argues that this is “completely illogical,” because it means “that a taxpayer would have to know that GEM payments were improper and that it would be double-charged royalties and SMT at the time it made the payments.”<sup>1583</sup> But Perú’s interpretation of the statute of limitations is not illogical at all; SMCV’s basis for requesting the overpayment is not the only (or necessarily most common) basis. The provision allows a taxpayer to correct a mistake (which may have been entirely inadvertent), but provides that he or she must do so within four years. Claimant’s (entirely unsupported) interpretation that the statute of limitations should only start running once the taxpayer subjectively learns of his or her error would completely undermine the entire purpose of a statute of limitations, which is to provide certainty and finality. On Claimant’s theory, a taxpayer could discover tomorrow that he or she made an

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<sup>1582</sup> Claimant’s Memorial at para. 424(c) n.1211; *see also* Exhibit CA-39, Peruvian Civil Code, Legislative Decree No. 295, July 24, 1984, at Art. 1993.

<sup>1583</sup> Claimant’s Memorial at para. 424(c) (footnote omitted).

overpayment in, *e.g.*, 1975, and then he or she could request a refund anytime within the next four years after January 1, 2023. That, not Perú’s explanation, is “completely illogical.”

767. In sum, the Tribunal cannot find that Perú acted arbitrarily in violation of its FET obligations by following Peruvian law and applying the statute of limitations. Claimant knew as early as 2004, and certainly by 2005/2006, that Perú took the position that the Concentrator-related activities were not covered by the 1998 Stabilization Agreement; moreover, SUNAT started issuing assessments against SMCV on that basis in 2009,<sup>1584</sup> and SUNAT argued that position to the Tax Tribunal and various courts starting in 2010. Despite that, Claimant chose not to account for the royalty payments it owed for the Concentrator-related activities in determining its GEM payments; Claimant chose not to request refunds for its GEM overpayments until December 2017 and December 2018; and Claimant chose to do nothing to obtain any interim protection of its refund rights during the pendency of the 2008 Royalty Assessment litigation. When Claimant made a timely request for certain refunds, Perú granted it. But when—an entire year later—SMCV made a second, untimely request, Perú, of course, rejected it. There was nothing unfair, unequitable, or arbitrary—and certainly nothing even close to violative of the TPA—about SUNAT’s actions. SUNAT simply complied with Peruvian law.

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768. For the reasons explained above, Perú has not breached its FET obligations, limited to the minimum standard of treatment.

## V. DAMAGES

769. The Tribunal should not reach the question of damages because, as discussed in the foregoing Sections, Perú did not breach the 1998 Stabilization Agreement or violate Article 10.5 of the TPA. Nevertheless, even if the Tribunal were to disagree and proceed to consider

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<sup>1584</sup> See Claimant’s Memorial at para. 170.

quantum, it still must disregard Claimant's calculation of its damages, because that damages calculation suffers from numerous defects.

770. Claimant's experts Dr. Spiller and Ms. Chavich (of Compass Lexecon) calculated Claimant's damages using the free cash flow to equity approach, under which they (i) "first calculate the nominal cash flows that SMCV lost as a result of the Measures[;]" and (ii) "then assess damages to SMCV based on the impact of the Measures on the value of SMCV's equity, as reflected by its lost equity distributions."<sup>1585</sup> Dr. Spiller and Ms. Chavich model "the lost equity distributions as the additional dividend payments that would have resulted from SMCV's lost cash flows" and claim to "follow the timing of SMCV's actual dividend distributions during the relevant period."<sup>1586</sup> As the last step, Dr. Spiller and Ms. Chavich "update and discount such distributions to the Valuation Date at SMCV's cost of equity."<sup>1587</sup>

771. Claimant applies this methodology to two alternative scenarios: its "main claim" and its "alternative claim." Claimant values its main claim at US \$909 million (including US \$96.6 million in pre-award interest) resulting from: "(i) Peru's breaches of the Stability Agreement with respect to the final and enforceable 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments, the Tax Assessments listed in Annex A, and related penalties and interest; (ii) Peru's breaches of Article 10.5 with respect to upholding and enforcing the 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments and related penalties and interest; and (iii) Peru's breaches of Article 10.5 resulting from its failure to afford due process in relation to the final and enforceable 2006-2007 and 2008 Royalty Assessments and related penalties and interest."<sup>1588</sup>

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<sup>1585</sup> Exhibit CER-1, Expert Report of Pablo T. Spiller and Carla Chavich of Compass Lexecon, October 19, 2021 ("Compass Lexecon Report"), at para. 82.

<sup>1586</sup> Exhibit CER-1, Compass Lexecon Report at para. 82.

<sup>1587</sup> Exhibit CER-1, Compass Lexecon Report at para. 82.

<sup>1588</sup> Claimant's Memorial at para. 438 (emphasis excluded).

772. For its alternative claim, Claimant alleges that it suffered US \$682.1 million (including US \$51.6 million in pre-award interest) in damages “due to Peru’s other breaches of the Stability Agreement and the TPA, including Peru’s arbitrary failure to waive penalties and interest.”<sup>1589</sup> Specifically, Claimant includes in its alternative claim: (i) “losses to SMCV resulting from Peru’s arbitrary refusal to waive penalties and interest”<sup>1590</sup> (an Article 10.5 issue that Respondent has addressed in Section IV.B.2.b.ii); (ii) “losses to SMCV resulting from Peru’s arbitrary refusal to reimburse the GEM payments that SMCV made for the Q4 2011 to Q3 2012 period”<sup>1591</sup> (an Article 10.5 issue that Respondent has addressed in Section IV.B.2.b.iii); and (iii) losses related to Peru’s alleged misapplication of the non-stabilized regime to certain Leaching Project activities, resulting in certain higher taxes.<sup>1592</sup> Notably, as discussed in Section V.E below, Claimant has not actually argued that Peru’s conduct regarding this third point breached either the 1998 Stabilization Agreement or Article 10.5 of the TPA.

773. For the convenience of the Tribunal, Respondent largely proceeds according to the main claim/alternative claim structure that Claimant has set forth. However, Respondent notes that Claimant’s main and alternative damages claims blur the lines between its breach-of-contract and TPA Article 10.5 legal claims, and Respondent therefore distinguishes between main-claim damages for Claimant’s breach-of-contract legal claim and its main-claim damages for its TPA Article 10.5 legal claim where necessary.<sup>1593</sup>

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<sup>1589</sup> Claimant’s Memorial at para. 438.

<sup>1590</sup> Claimant’s Memorial at para. 458(a).

<sup>1591</sup> Claimant’s Memorial at para. 458(b).

<sup>1592</sup> Claimant’s Memorial at para. 458(c).

<sup>1593</sup> Respondent expects that, despite Claimant’s description, the alternative damages claim would likely only be relevant were the Tribunal to agree with Respondent that it did not breach the 1998 Stabilization Agreement and, thus, is only applicable to certain aspects of Claimant’s Article 10.5 claim.

774. As Respondent’s damages expert, Ms. Isabel Kunsman of Alix Partners, identifies in her expert report,<sup>1594</sup> and as discussed below, Claimant’s calculations of its damages for both its main and alternative claims are inflated. In particular, Claimant and Dr. Spiller and Ms. Chavich have (1) improperly included (in step (i) of their calculation) amounts that SMCV has never paid (Subsection A); (2) assumed, without evidentiary support, that in the but-for scenario SMCV would have almost immediately distributed 100 percent of the Assessments as dividends to its shareholders (*i.e.*, skipped a step that affects step (ii) of its calculation) (Subsection B); (3) inappropriately used SMCV’s cost of equity as the pre-award interest rate<sup>1595</sup> and discount rate in its calculation (Subsection C); (4) ignored SMCV’s failure to mitigate its damages (Subsection D); (5) improperly included damages related to certain Tax Assessments against SMCV that, as discussed in Section III.D, are precluded by the TPA (Subsection E); and (6) made certain other errors (Subsection F). In Subsection G, Perú summarizes the necessary adjustments for the defects described in Subsections A-F.<sup>1596</sup>

775. Before addressing the specific errors in Claimant’s damages calculation, however, Perú has two points that apply to Claimant’s damages analysis, generally. *First*, Perú notes that Claimant has calculated its damages assuming either that all of the Assessments, including penalties and interest (for its main claim) are deemed to violate the 1998 Stabilization Agreement and/or the TPA, or that, in its alternative claim, all of the penalties and interest and unrefunded GEM payments violate the Treaty.<sup>1597</sup> As noted, Perú’s discussion in this Section responds to

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<sup>1594</sup> Exhibit RER-5, Expert Valuation Report of Isabel Kunsman of AlixPartners, May 4, 2022 (“Alix Partners Report”).

<sup>1595</sup> Claimant also argues that the Tribunal should use SMCV’s cost of equity for any post-award interest as well. *See* Claimant’s Memorial at para. 454. As Claimant notes, “the same principles apply” to both pre- and post-award interest. *Id.* Perú agrees that the same methodology should apply for pre- and post-award interest but, for the reasons discussed in Section V.C.1, that interest rate cannot be SMCV’s cost of equity.

<sup>1596</sup> Claimant also notes that it intends to request costs and fees. *See* Claimant’s Memorial at para. 463. Perú intends to do the same and will address the costs and fees issue when appropriate.

<sup>1597</sup> *See* Exhibit RER-5, Alix Partners Report at para. 35.

Claimant's analysis and, therefore, for convenience only, proceeds in the same manner. Of course, the Tribunal will have to carefully consider separately the merits of each of Claimant's claims of breach, which, particularly as to Claimant's Article 10.5 claims, rest on different factual foundations and even different legal theories for different challenged SUNAT Assessments. Perú believes that the Tribunal should not find any liability with respect to any Assessment or any aspects of any Assessments. Nevertheless, in the event that the Tribunal were to find that Perú breached the 1998 Stabilization Agreement and/or the TPA only with respect to certain Assessments or certain portions of certain Assessments, then, of course, Claimant's damages would have to be limited to the amounts specifically linked to any such breaching Assessments, as well.

776. *Second*, Perú needs to warn the Tribunal of the important fact that Claimant's damages are, in part, duplicative of those requested by SMM Cerro Verde Netherlands B.V. ("SMM Cerro Verde"), a minority shareholder (21%), in ICSID Case No. ARB/20/14 (the "SMM Cerro Verde Arbitration").<sup>1598</sup> SMM Cerro Verde initiated that arbitration based on the same facts at issue in this case. Of great importance for purposes of any damages award, SMM Cerro Verde is claiming for its (21%) share of SMCV's lost cash flows.<sup>1599</sup> That amount obviously overlaps with Claimant's claim here for 100% of damages suffered by SMCV. Were this Tribunal to award full damages to be paid to Claimant and/or SMCV, and were the tribunal in the SMM Cerro Verde Arbitration to award SMM Cerro Verde the damages that it seeks, Perú would be faced with double-paying the 21% attributable to SMM Cerro Verde. And if the award were to be paid to SMCV, some of SMCV's equity holders would double-recover when SMCV

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<sup>1598</sup> Exhibit RER-5, Alix Partners Report at para. 36.

<sup>1599</sup> See Exhibit RER-5, Alix Partners Report at para. 36. With a view to point 25.1 of PO1, Respondent has not sought to introduce claimant SMM Cerro Verde's expert report on quantum into these proceedings, as Respondent does not expect Claimant (who is represented by the same counsel team as SMM Cerro Verde) to contest this high-level statement of the claims being pursued in the parallel case. Given the importance of the issue and the risk of double liability, however, Respondent will apply to introduce those documents if Claimant tries to deny or disavow these facts.

pays out this award to its shareholders in dividends. If it were to contemplate any award to Claimant, this Tribunal (and, to be sure, the *SMM Cerro Verde* tribunal on its part as well) will need to take great care to avert any such obviously unfair and inappropriate outcomes.

777. Respondent turns now to specific defects in Claimant’s calculation, which are also discussed in greater detail in the expert report of Ms. Isabel Santos Kunsman of Alix Partners (Exhibit RER-5).

**A. CLAIMANT IMPROPERLY INCLUDED UNPAID OBLIGATIONS IN ITS DAMAGES CALCULATIONS**

778. Claimant candidly states that “[t]he total liabilities [Peru owes to SMCV] include US\$1,170.6 million in paid amounts and US\$36.9 million in still outstanding amounts, which Dr. Spiller and Ms. Chavich assume are paid as of 19 October 2021.”<sup>1600</sup> This statement cites to paragraph 86 of Dr. Spiller and Ms. Chavich’s report, the footnote to which simply states, in turn, that “[o]utstanding liabilities include 2006 GST NR<sup>1601</sup> (USD 156,286), related Statutory Interest (USD 222,988) and Additional PTU<sup>1602</sup> (USD 36.6 million)” and that “[w]e assume that SMCV will pay the outstanding liabilities on October 19, 2021, and, thus, compute interest up to that date. For GST NR 2006 amounts, the CPI applies instead of the Statutory Interest since July 14, 2015 given that the Assessments have been pending before the Tax Tribunal for more than 12 months. We convert payments that SMCV is expected to make in PEN to USD using the latest available exchange rate as of the date of this report. The outstanding liabilities will continue to accrue interest until the actual date of payment.”<sup>1603</sup>

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<sup>1600</sup> Claimant’s Memorial at para. 442 (emphasis added) (citing Exhibit CER-1, Compass Lexecon Report at para. 86, Figure 7); *see also* Exhibit CER-1, Compass Lexecon Report at para. 86 n.117.

<sup>1601</sup> “GST NR” is a general sales tax for services provided by non-residents. *See* Exhibit RER-5, Alix Partners Report at para. 40.

<sup>1602</sup> “PTU” is an employee profit-sharing obligation. *See* Claimant’s Memorial at para. 272.

<sup>1603</sup> Exhibit CER-1, Compass Lexecon Report at para. 86 n.117.

779. But neither Claimant, nor Dr. Spiller and Ms. Chavich, explain why these obligations remain unpaid, nor why—if Claimant were to succeed on its main claim that Perú improperly imposed the Assessments on SMCV—SMCV should be assumed to then pay these outstanding liabilities while simultaneously receiving a damages award on that amount. Of course, if SMCV never makes those “assumed” payments, but proceeds to receive an award of those same amounts, then SMCV would receive an improper windfall for damages that it never actually suffered.

780. To Perú’s knowledge, Claimant’s experts’ assumption has already proven false: SMCV did not make a US \$36.9 million payment of the outstanding amounts on or before October 19, 2021. It is far more plausible that SMCV will continue to withhold payment and that SMCV would pay these outstanding liabilities only if Perú prevails (in which case, neither Claimant nor SMCV would be entitled to any damages).

781. In fact, as Ms. Kunsman notes, certain of these obligations have been accruing since 2006.<sup>1604</sup> Ms. Kunsman therefore states that, “[i]n my view, the USD 36.9 million should not be incorporated into the damages quantification since these damages have not materialized as of the Valuation Date of 19 October 2021.”<sup>1605</sup> Ms. Kunsman also provides a chart outlining the various unpaid obligations that should be excluded from any damages award:

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<sup>1604</sup> See Exhibit RER-5, Alix Partners Report at para. 64.

<sup>1605</sup> Exhibit RER-5, Alix Partners Report at para. 65.

Table 6. Outstanding Liabilities<sup>1606</sup>

USD Million	Tax Period	Liabilities	Tax Interest	Total	Due Date	Description
Employee Profit Sharing	2006	0.9	0.4	1.3	Should be recognized at the end of each tax year (2006-2013)	8% Contribution of SMCV's taxable income during 2006-2013 period for the benefit of employees.
	2007	0.3	0.2	0.5		
	2008	1.2	0.5	1.8		
	2009	7.3	2.9	10.2		
	2010	7.1	2.6	9.8		
	2011	5.6	1.9	7.5		
	2012	6.8	2.0	8.8		
	2013	1.4	0.4	1.8		
	PTU Paid	(5.1)	-	(5.1)		
	Currency Exchange	0.0	-	0.0		
<b>TOTAL</b>	<b>25.6</b>	<b>11.0</b>	<b>36.6</b>			
General Sales Tax - Non Residents	2006-01	0.02	0.04	0.07	10-Feb-06	Based on the value of sales of goods and services, excluding exports. - Underpayment of GST for services provided by non-residents (GST NR Assessments) of 0.38 million in 2006
	2006-02	0.02	0.03	0.04	13-Mar-06	
	2006-03	0.02	0.03	0.05	17-Apr-06	
	2006-04	0.01	0.02	0.03	16-May-06	
	2006-05	0.02	0.03	0.04	16-Jun-06	
	2006-06	0.02	0.02	0.04	18-Jul-06	
	2006-07	0.01	0.01	0.02	18-Aug-06	
	2006-08	0.01	0.01	0.02	21-Sep-06	
	2006-09	0.01	0.01	0.03	23-Oct-06	
	2006-10	0.01	0.01	0.02	10-Nov-06	
	2006-11	0.01	0.01	0.01	12-Dec-06	
	2006-12	0.01	0.01	0.01	12-Jan-07	
<b>TOTAL</b>	<b>0.16</b>	<b>0.22</b>	<b>0.38</b>			
<b>TOTAL Outstanding Liabilities</b>	<b>25.8</b>	<b>11.2</b>	<b>36.9</b>			

782. The same problem exists, albeit on a smaller scale, in Claimant's alternative claim for penalties, interest, and reimbursement of certain GEM payments. In Table 8 (at paragraph 115) of their report, showing the alleged damages to Claimant under its alternative claim, Dr. Spiller and Ms. Chavich include US \$1.3 million in "Outstanding Liabilities."<sup>1607</sup> Ms. Kunsman confirms that "[u]nder the Alternative Claim the damages claimed of USD 682.1 million decreases to USD 680.7 million" when the unpaid obligations are excluded.<sup>1608</sup> Thus, even if Claimant were successful only on its alternative claim, and therefore SMCV still had to pay the outstanding Assessments but not the penalties or interest, there is still a portion of Claimant's damages calculation that includes a refund of amounts SMCV had never and likely would never pay.

<sup>1606</sup> Exhibit RER-5, Alix Partners Report at para. 63, Table 8.

<sup>1607</sup> Exhibit CER-1, Compass Lexecon Report at para. 115, Table 8.

<sup>1608</sup> Exhibit RER-5, Alix Partners Report at para. 65.

783. And that is really the essence of what Claimant is seeking by including these outstanding liabilities—a refund for monies that SMCV never paid and just as likely never would pay. The Tribunal should exclude these unpaid amounts from any award. Doing so reduces Claimant’s damages by approximately US \$27.7 million under its main claim and US \$1.3 million under its alternative claim.<sup>1609</sup>

**B. CLAIMANT ASSUMED, WITHOUT EVIDENTIARY SUPPORT, THAT IN THE BUT-FOR SCENARIO SMCV WOULD HAVE DISTRIBUTED AS DIVIDENDS 100 PERCENT OF THE ASSESSMENTS ACTUALLY IMPOSED**

784. In addition to improperly including outstanding obligations, Claimant’s damages calculation assumes, without adequate foundation, that in the but-for scenario SMCV would have distributed as dividends 100 percent of the Assessment amounts, and would have done so immediately (between 2018-2022) on the next available dividend distribution date.<sup>1610</sup> As Ms. Kunsman explains and as detailed below, these assumptions are unsupported by the record and could inflate Claimant’s damages calculation.<sup>1611</sup>

785. Dr. Spiller and Ms. Chavich state that “SMCV has a well-established practice of equity distributions in the form of dividends, except, however, during years in which the company was accumulating cash for major capital investments.”<sup>1612</sup> Relying primarily on SMCV’s financial statements, Dr. Spiller and Ms. Chavich further state that “SMCV distributed dividends from 2005 to 2010, except in 2006 when it was carrying out its investment to construct the Concentrator and from 2011 to 2017 due to the expansion of the Concentrator and the construction of a second concentrator,” that “SMCV resumed dividend distribution in April 2018

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<sup>1609</sup> See Exhibit RER-5, Alix Partners Report at para. 65.

<sup>1610</sup> See Claimant’s Memorial at paras. 448-49.

<sup>1611</sup> Exhibit RER-5, Alix Partners Report at paras. 83-87.

<sup>1612</sup> Exhibit CER-1, Compass Lexecon Report at para. 93.

and April 2019,” and that “SMCV suspended dividend payments in 2020 due to the COVID-19 pandemic and resumed dividend distributions in April 2021.”<sup>1613</sup>

786. The fact that SMCV distributed some dividends in these years does not prove that SMCV distributed all available cash for each of the distributions. Furthermore, Dr. Spiller and Ms. Chavich seem to gloss over the fact that SMCV has apparently not made any dividend distributions in more than half of the last 15 years (*i.e.*, since Claimant became a shareholder), which undermines (not supports) their assumption that SMCV would distribute 100 percent of available cash immediately at the next distribution date.

787. Moreover, neither Claimant nor its experts discuss SMCV’s distribution policies, although Claimant’s damages experts list SMCV’s Amended and Restated Corporate By-Laws as one of the documents on which they rely in writing their report.<sup>1614</sup> SMCV’s Amended and Restated Corporate By-Laws at Article 50 states only that “[d]ividends may only be declared as a result of profits that are actually obtained or from reserves in cash that are freely disposable, provided that the Company’s net equity is not less than its paid in capital stock.”<sup>1615</sup> This article of SMCV’s By-Laws limits when dividends can be distributed (“may only be declared”); it does not mandate that any dividends be distributed, let alone that 100 percent of all available cash holdings be distributed. And, while the table of contents for the 2005 Participation Agreement mentions a “Dividend Distribution Policy” at Exhibit 1, Claimant did not include that document in the exhibit (Exhibit CE-906).<sup>1616</sup>

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<sup>1613</sup> Exhibit CER-1, Compass Lexecon Report at para. 93 (footnotes omitted).

<sup>1614</sup> Exhibit CER-1, Compass Lexecon Report at Appendix A.

<sup>1615</sup> Exhibit CE-480, SMCV, Amended and Restated Corporate By-Laws, 2005, at Art. 50.

<sup>1616</sup> Exhibit CE-906, Participation Agreement among Sumitomo Metal Mining Co., LTD., Sumitomo Corporation, Summit Global Management B.V., Compañía de Minas Buenaventura S.A.A., Phelps Dodge Corporation, Cyprus Amax Minerals Company, Cyprus Metals Company, Cyprus Climax Metals Company, and Societed Minera Cerro Verde S.A.A., March 16, 2005, at p. iii.

788. Neither Claimant nor its experts actually analyze SMCV’s financial situation and explain how it could have impacted the company’s decisions to declare dividends, when, and in what amounts. As Ms. Kunsman explains, while “[i]t is likely that the amount of additional cash that is distributed as dividends (and the timing of such distributions) will affect Claimant’s damages claim,” “it is not possible to quantify any impact this may have until Claimant provides more information about SMCV’s dividend distribution history and its actual policy.”<sup>1617</sup> Claimant simply has not substantiated the amount of its assumed dividend distributions or their timing.

**C. CLAIMANT IMPROPERLY USED SMCV’S COST OF EQUITY AS ITS PRE-AWARD INTEREST RATE AND ITS DISCOUNT RATE**

789. Claimant also erred in calculating its damages, because it inappropriately uses SMCV’s cost of equity<sup>1618</sup> as its pre-award interest rate<sup>1619</sup> (Subsection 1) and the rate used to discount certain future amounts in its calculation (Subsection 2).

**1. SMCV’s Cost of Equity Is Not an Appropriate Interest Rate in This Case**

790. Claimant improperly inflates its claims by using SMCV’s cost of equity as its pre-award interest rate. Doing so overcompensates SMCV’s equity holders (including Claimant) because there is no evidence that, but for the Assessments, SMCV’s equity holders would have earned the interest rate Claimant proposes. And, more importantly, the TPA explicitly provides for “interest at a commercially reasonable rate.”<sup>1620</sup>

791. Specifically, Article 10.7.3 provides that “[i]f the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be

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<sup>1617</sup> Exhibit RER-5, Alix Partners Report at para. 87.

<sup>1618</sup> See Claimant’s Memorial at para. 451.

<sup>1619</sup> This argument applies with equal force to any post-award interest rate, as noted above. See *supra* at para. 774 n.1595.

<sup>1620</sup> Exhibit CA-10, US-Perú TPA at Art. 10.7.3.

no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.”<sup>1621</sup> Although Article 10.7.3 deals with expropriation, investment treaties (or investment chapters of free trade agreements) often include the interest provision in the expropriation section (e.g., the ECT<sup>1622</sup> and the NAFTA<sup>1623</sup>) and tribunals commonly find that the interest provision in the expropriation section provides guidance for the interest awarded for non-expropriation breaches of the treaty.<sup>1624</sup> Claimant and its damages experts, however, entirely ignore Article 10.7.3. Instead, Claimant seeks to increase its damages by arguing for SMCV’s cost of equity, which, as discussed below, is both illogical and unsupported in this case.

792. Claimant begins its analysis by stating that “[c]ost of equity is an equity investor’s opportunity cost of capital; it represents the opportunity cost that an investor bears when it makes a particular equity investment.”<sup>1625</sup> This is partly true—however, as Claimant acknowledges, (1) it is the “equity investor’s” cost of equity that is relevant, not SMCV’s cost of equity, and (2) the relevant issue is the “equity investor’s opportunity cost of capital,” *i.e.*, what the equity investor allegedly missed out on because of the Measures. Claimant then states that “SMCV’s cost of

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<sup>1621</sup> Exhibit CA-10, US-Perú TPA at Art. 10.7.3 (emphasis added).

<sup>1622</sup> Exhibit RE-168, Consolidated Energy Charter Treaty (ECT), Last Updated on January 15, 2016, at Art. 13(1) (“Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.”).

<sup>1623</sup> Exhibit RE-113, North American Free Trade Agreement (NAFTA), signed on December 8, 1993, entered into force on January 1, 1994, at Arts. 1110(4), 1110(5) (providing for interest “at a commercially reasonable rate” “from the date of expropriation until the date of actual payment”).

<sup>1624</sup> See, e.g., Exhibit RA-89, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, November 21, 2007, at para. 296 (applying a “commercially reasonable rate” (as provided in NAFTA Article 1110, on expropriation) to a compensation due for breach of Article 1102 NAFTA (national treatment) and 1106 NAFTA (performance requirements)); Exhibit CA-286, *Lion Mexico v. Mexico*, Award, at paras. 873-74 (finding that the “commercially reasonable rate” (as provided in NAFTA Article 1110, on expropriation) guides the interest rate that the tribunal should apply for damages awarded for a breach of Article 1105 (fair and equitable treatment)); Exhibit RA-90, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, February 15, 2018, at paras. 844-46 (applying “a commercial and risk-free yield interest rate” on damages award for breach of the FET obligation in Article 10(1) of the ECT after noting the interest provision in Article 13(1) of the ECT).

<sup>1625</sup> Claimant’s Memorial at para. 451 (emphasis added).

equity is the rate of return that its shareholders would require to justify making an equity investment in SMCV.”<sup>1626</sup> But SMCV’s cost of equity is irrelevant. To voluntarily delay receiving the dividends, SMCV’s equity holders would require a rate of return that is at least equal to their best investment opportunity that they would miss out on because of the Measures. That figure depends on the equity holder’s investment opportunities (and their corresponding rates of returns) and the equity holder’s alternative means of accessing capital.

793. To recall, Claimant argues that, but for the Assessments, SMCV would have obtained greater cash flows and would have distributed that cash to its shareholders as dividends; those lost dividends are the alleged damages. Thus, under Claimant’s theory of damages, the money to which pre-award interest is to be applied is money that would have been in Claimant’s pocket, not in SMCV’s. As Ms. Kunsman explains, however, “[b]y using SMCV’s Cost of Equity, Compass Lexecon is implicitly assuming that Peru’s alleged breaches deprived SMCV’s equity holders of cash flows that would have otherwise earned SMCV’s Cost of Equity.”<sup>1627</sup> In other words, Claimant assumes that funds in its (and the other equity holders’) hands nevertheless would have earned SMCV-level returns, despite no longer being invested in the SMCV business. As Ms. Kunsman explains, this assumes that, but-for the Measures, SMCV’s equity holders would have either invested “in another project similar to the Cerro Verde operation or reinvest[ed] in SMCV.”<sup>1628</sup> This assumption is not supported by any evidence and does not make sense in these circumstances.

794. *First*, there is no evidence on the record that SMCV’s equity holders would have reinvested the dividends they received back into SMCV. As Ms. Kunsman explains, Dr. Spiller and Ms. Chavich have “not shown that the equity holders had reinvested or were reinvesting any

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<sup>1626</sup> Claimant’s Memorial at para. 451.

<sup>1627</sup> Exhibit RER-5, Alix Partners Report at para. 102 (emphasis added).

<sup>1628</sup> Exhibit RER-5, Alix Partners Report at para. 103.

capital back into SMCV” after their initial investment.<sup>1629</sup> And, in fact, doing so would be illogical—it would mean SMCV distributing the money to its equity holders, the equity holders were paying taxes on dividends received, and then turning around and giving the after-tax money right back to SMCV.

795. *Second*, as Ms. Kunsman explains, there is no evidence available to indicate that SMCV’s equity holders had alternative investments available to them that would have yielded comparable annual returns, *i.e.*, comparable to SMCV’s returns from 2018 to 2021 by investing another project similar to the Cerro Verde operation.<sup>1630</sup> In fact, as Ms. Kunsman explains, “[n]ot only has Compass Lexecon not provided such evidence for SMCV’s equity holders, but it has not done so even for the Claimant.”<sup>1631</sup>

796. *Third*, as Ms. Kunsman elaborates, “[e]ven if Compass Lexecon had demonstrated such a project were available to the equity holders, it would have to demonstrate that the Measures prevented the equity holders from raising capital to invest in said project through equity or debt.”<sup>1632</sup> Neither Claimant nor its experts have shown this either.

797. And *fourth*, according to Ms. Kunsman, using a long-term rate, such as SMCV’s cost of equity, is generally inappropriate in these circumstances.<sup>1633</sup> As Ms. Kunsman explains, the “[c]ost of equity represents the average return investors expect to earn from investments in the common shares of companies over a multi-decade period of time.”<sup>1634</sup> But, under both Claimant’s main and alternative claims, SMCV’s equity holders would have had the capital in hand only for three and a half years, or less. In essence, “[u]sing the Cost of Equity as a pre-

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<sup>1629</sup> Exhibit RER-5, Alix Partners Report at para. 105.

<sup>1630</sup> See Exhibit RER-5, Alix Partners Report at para. 103.

<sup>1631</sup> Exhibit RER-5, Alix Partners Report at para. 103.

<sup>1632</sup> Exhibit RER-5, Alix Partners Report at para. 104.

<sup>1633</sup> See Exhibit RER-5, Alix Partners Report at paras. 108-12.

<sup>1634</sup> Exhibit RER-5, Alix Partners Report at para. 108 (emphasis added).

award interest rate assumes that very long-term rates of return can be earned over very short periods of time.”<sup>1635</sup> As Ms. Kunsman explains, that is not an appropriate or realistic assumption.<sup>1636</sup>

798. Claimant contends that “[i]nternational investment authorities have consistently recognized that the appropriate rate at which to update historical lost cash flows is the claimant’s opportunity cost of capital and that the cost of equity is the most appropriate rate in cases exclusively involving lost cash flows to equity.”<sup>1637</sup> But prior case decisions do not go so far. True, tribunals have held that the interest rate should compensate claimant for its lost opportunity to use the money over the time period during which it was deprived of the funds. However, the cases do not uniformly hold as a matter of principle that “the cost of equity is the most appropriate rate in cases exclusively involving lost cash flows to equity.”<sup>1638</sup> Rather, the cases that Claimant cites turn on the specific circumstances in each case.

799. For instance, in *ConocoPhillips v. Venezuela*, one of the cases cited by Claimant,<sup>1639</sup> the tribunal determined that “the Claimants are to be restored to the position they would have had if the collection of dividends had not been interrupted through the expropriation and they would have decided willingly to retain those dividends within the Project.”<sup>1640</sup> The tribunal’s decision to award interest based on the claimants’ cost of equity in investing in the project makes sense given that, in the but-for scenario in that specific case, the tribunal found that the claimants would have continued to invest the money in the project. But that is not the

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<sup>1635</sup> Exhibit RER-5, Alix Partners Report at para. 108.

<sup>1636</sup> See Exhibit RER-5, Alix Partners Report at paras. 108-12.

<sup>1637</sup> Claimant’s Memorial at para. 452.

<sup>1638</sup> Claimant’s Memorial at para. 452.

<sup>1639</sup> See Claimant’s Memorial at para. 452 n.1285.

<sup>1640</sup> Exhibit CA-242, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V., and ConocoPhillips Company v. Venezuela*, ICSID Case No. ARB/07/30, Award, March 8, 2019, at para. 819 (emphasis added).

case here; as discussed above, there is no evidence that SMCV's equity holders would have reinvested any dividends they would have received back into SMCV.

800. In *Vivendi II*, another case cited by Claimant,<sup>1641</sup> the tribunal actually rejected the claimants' proposal for a "rate of 9.7%, corresponding to the discount rate applied in Claimants' DCF analysis and the quoted rate on the Argentine Treasury bond 'Argentina Rep 17' on 27 November 1997" because "[t]he Tribunal [was] not persuaded that Claimants would have earned 9.7%, compounded, on their respective shares of damages awarded, had such sums been timely paid at the date of Argentina's expropriation of the concession."<sup>1642</sup> Instead, the tribunal considered a series of factors, including "Claimants' business of investing in and operating water concessions, to the anticipated 11.7% rate of return on investment reflected in the Concession Agreement (which the parties had agreed to be appropriate having regard to the nature of the business, the term and the risk involved) and the generally prevailing rates of interest since September 1997," and concluded "that a 6% interest rate represents a reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost in the Tucumán concession."<sup>1643</sup>

801. Even the article to which Claimant cites,<sup>1644</sup> "Interest as Damages," acknowledges that "there is not an easy answer or straight answer" to the question of how to select the interest rate under the opportunity cost approach.<sup>1645</sup> Contrary to Claimant's rigid application of SMCV's cost of equity to funds to be received by Claimant, the article notes that the interest rate "depends on the investment type, the business governance structure of the claimant and

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<sup>1641</sup> See Claimant's Memorial at para. 452 n.1285.

<sup>1642</sup> Exhibit CA-140, *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ("*Vivendi v. Argentina II*, Award"), at para. 9.2.7.

<sup>1643</sup> Exhibit CA-140, *Vivendi v. Argentina II*, Award at para. 9.2.8.

<sup>1644</sup> See Claimant's Memorial at para. 452 n.1285.

<sup>1645</sup> Exhibit CA-152, T. J. Senechal and J. Y. Gotanda, "Interest as Damages," in 47 *Columbia J. Transnat'l L.* 491 (2009), at p. 527.

respondent (whether the business is privately or publicly held), the proportion of debt (leverage), the tax environment, etc.”<sup>1646</sup> This is entirely consistent with Perú’s argument.

802. Finally, Claimant’s attempt to “demonstrate the reasonableness” of using SMCV’s cost of equity<sup>1647</sup> is entirely irrelevant. Claimant focuses on the outcome of certain other approaches. But how the outcome of using SMCV’s cost of equity compares to the outcome of using certain other, cherry-picked approaches has no bearing on the question of what rate is most appropriate under, or required by, the TPA, international law, and logic.<sup>1648</sup> Notably, Claimant does not even argue that these other approaches are actually appropriate here (and Ms. Kunsman explains in her report that they are not<sup>1649</sup>).

803. As discussed above, the TPA mandates the use of a “commercially reasonable rate,” for which Ms. Kunsman proposes a 1-Year US Treasury Bill (US T-Bill) rate plus 2%, compounded annually, to calculate pre-award interest.<sup>1650</sup> Table 13 of her report compares the average of this rate for each year of 2018-2021 against SMCV’s cost of equity calculated by Compass Lexecon.

Table 7. SMCV Cost of Equity and 1-Year US T-Bill Rates<sup>1651</sup>

%	2018	2019	2020	2021
Compass Lexecon Cost of Equity	8.6%	7.9%	7.9%	7.9%
1-Year US T-Bill + 2%	4.4%	4.0%	2.4%	2.1%

<sup>1646</sup> Exhibit CA-152, T. J. Senechal and J. Y. Gotanda, “Interest as Damages,” in 47 *Columbia J. Transnat’l L.* 491 (2009), at p. 527.

<sup>1647</sup> Claimant’s Memorial at para. 455.

<sup>1648</sup> See Claimant’s Memorial at para. 455.

<sup>1649</sup> See Exhibit RER-5, Alix Partners Report at para. 98 n.74.

<sup>1650</sup> See Exhibit RER-5, Alix Partners Report at para. 115.

<sup>1651</sup> Exhibit RER-5, Alix Partners Report at para. 115, Table 13.

804. And Table 14 of her report shows the impact of applying that more appropriate rate to Claimant’s alleged damages. It reduces the accrued interest on the main claim by US \$61.5 million and on the alternative claim by US \$32.2 million.

Table 8. Impact of Alternative Pre-Award Interest Rate on Damages<sup>1652</sup>

USD Million, %		Main Claim	Alternative Claim
<b>Compass Lexecon</b>	<b>Damages</b>	<b>909.0</b>	<b>682.1</b>
<b>1-Year US T-Bill + 2%</b>	<b>Damages</b>	<b>847.5</b>	<b>649.9</b>
	Change in Damages	(61.5)	(32.2)
	% Change	-6.8%	-4.7%

**2. SMCV’s Cost of Equity Is Also Not an Appropriate Rate to Discount Certain Future Amounts (Depreciation Mitigation)**

805. Claimant also improperly deploys SMCV’s cost of equity for another aspect of Claimant’s damages calculation—the discounting of future sums related to depreciation that are projected to offset, and therefore reduce, Claimant’s damages. As Ms. Kunsman explains:

To calculate their taxable base, companies include a deduction related to the depreciation of their assets (“Depreciation Deduction”). For fiscal years 2006 to 2011, SMCV calculated the Depreciation Deduction for the Concentrator based on the stabilized tax depreciation rates (“Stabilized Depreciation Rates”) in the Stability Agreement of up to 20% per year (i.e., a depreciation over five years). On the grounds that the investment in the Concentrator Plant was not stabilized, SUNAT calculated the Depreciation Deduction for the Concentrator in the Assessments using the lower Non-Stabilized Depreciation Rates with the longest depreciation over 20 years. This had the effect of increasing SMCV’s annual taxable base for the initial five years but decreasing it for the remaining useful life of the assets under the non-stabilized regime. Due to the time value of money, the Stabilized Depreciation Rates benefit SMCV because it pays less in taxes in the initial 5 years even though it then pays higher taxes in the remaining useful life of the assets.

In December 2017 and December 2018, SMCV filed amended tax filings for 2012 and 2013, adopting the Non-Stabilized Depreciation Rates for the Concentrator which it then adopted starting with the 2017 tax filings. Compass Lexecon refers to the reduction in income taxes (for the post-2011 tax years) from the Depreciation Deduction using the Non-Stabilized Depreciation Rates as Depreciation

<sup>1652</sup> Exhibit RER-5, Alix Partners Report at para. 116, Table 14.

Mitigation. Compass Lexecon calculates a Depreciation Mitigation for the amended tax filings and for each year between 2017 and 2026 as follows: Depreciation Deduction with Non-Stabilized Depreciation Rates x Income Tax Rate.<sup>1653</sup>

806. As Ms. Kunsman notes, the Depreciation Deduction extends out until the tax year 2026. Therefore, Dr. Spiller and Ms. Chavich had to discount the future depreciation's impacts on cash flows back to the Valuation Date of October 19, 2021.<sup>1654</sup> Dr. Spiller and Ms. Chavich again applied SMCV's cost of equity to discount these future depreciation impacts.<sup>1655</sup> But, this approach "assumes that the cash flows related to the future Depreciation Mitigation has the risk equivalent to SMCV's operations," when, in reality, as Ms. Kunsman notes, "the risk profile of the cash flows related to the depreciation offset is significantly lower than the risk profile of SMCV."<sup>1656</sup> Specifically, "the estimated cash flows from the future Depreciation Mitigation are exposed to the uncertainty in SMCV's ability to depreciate the disputed assets as assumed by Compass Lexecon, not the uncertainty in SMCV's operations."<sup>1657</sup> Because Claimant's discount rate is predicated on a too-high risk profile (and therefore the discount rate itself is too high), Claimant over-discounts the future positive amounts that are to be offset against its damages, making the offset smaller and keeping its damages claims (improperly) larger.

807. Ms. Kunsman determined that a more appropriate discount rate is the statutory rate published by SUNAT for refunds of incorrectly calculated tax payments—a simple rate of 0.25% per month since 1 April 2020.<sup>1658</sup> The correction of this discount rate reduces Claimant's

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<sup>1653</sup> Exhibit RER-5, Alix Partners Report at paras. 47-48 (footnotes omitted).

<sup>1654</sup> See Exhibit RER-5, Alix Partners Report at para. 120.

<sup>1655</sup> See Exhibit RER-5, Alix Partners Report at para. 120.

<sup>1656</sup> Exhibit RER-5, Alix Partners Report at para. 121.

<sup>1657</sup> Exhibit RER-5, Alix Partners Report at para. 122.

<sup>1658</sup> See Exhibit RER-5, Alix Partners Report at para. 123.

calculated damages by US \$13.6 million for its main claim and US \$0.4 million for its alternative claim.<sup>1659</sup>

#### **D. SMCV FAILED TO MITIGATE ITS DAMAGES**

808. As the *CME* tribunal emphasized, “[o]ne of the established general principles in arbitral case law is the duty of the party to mitigate its losses.”<sup>1660</sup> As discussed in Section IV.B.2.b.ii.e, SMCV failed to mitigate its damages when it did not diligently pay its obligations, choosing instead to rack up penalties and interest in the process—for which Claimant now wants SMCV to be reimbursed.

809. Even putting aside the many instances in which MINEM officials made clear MINEM’s position on the scope of the 1998 Stabilization Agreement, at an absolute minimum, SMCV knew SUNAT’s position after receiving its first Royalty Assessment for the 2006-2007 years on August 18, 2009.<sup>1661</sup> SMCV therefore could have filed all returns after that date in compliance with the government’s position, under protest (and paid any outstanding obligations for already filed returns), and then challenged SUNAT’s position through the appropriate administrative and judicial means.<sup>1662</sup> If SMCV had won, then it would have been reimbursed for the amount of overpayment with interest. If SMCV lost (as it did repeatedly), then it would have at least avoided all penalties and interest after that date. SMCV chose not to take this fairly obvious step and, instead, took the risk that SUNAT, the Tax Tribunal, and/or the courts would disagree with SMCV’s interpretation of the 1998 Stabilization Agreement and that SMCV would

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<sup>1659</sup> See Exhibit RER-5, Alix Partners Report at para. 123.

<sup>1660</sup> Exhibit RA-85, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003, at para. 482; see also Exhibit RA-86, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, October 7, 2003, at para. 10.6.4; Exhibit RA-87, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, at para. 167.

<sup>1661</sup> See *infra* at Annex A, p. 1.

<sup>1662</sup> See Exhibit RER-3, Bravo and Picón Report at para. 61 (“SMCV could have paid the amounts and penalties it was assessed and, at the same time, dispute[d] their collection, requesting reimbursement in the event SUNAT or the Tax Tribunal agreed with its interpretation of the Stabilization Agreement and the Mining Law.”); Exhibit CA-14, Tax Code, at Arts. 38, 136.

therefore be subject to penalties and interest on its eventual Assessments. SMCV has to bear the cost of that choice. Perú should not be held liable for SMCV's unnecessarily risky decision.

810. Excluding the penalties and interest that SMCV had an obligation to mitigate reduces Claimant's calculated damages by US \$ 556.3 million for its main claim and US \$ 495.1 million for its alternative claim.<sup>1663</sup>

**E. CLAIMANT HAS IMPROPERLY INCLUDED DAMAGES FOR TAX ASSESSMENTS EXPLICITLY EXCLUDED UNDER THE TPA**

811. As discussed in Section III.D, Article 22.3 of the TPA expressly excludes taxation measures from the scope of protection under the TPA.<sup>1664</sup> Nevertheless, Claimant has improperly included in its FET claim (and, therefore, its damages calculation) certain penalties and interest relating to Tax Assessments against SMCV (not just Royalty Assessments). Excluding these amounts reduces Claimant's calculated damages by US \$ 370 million for its main damages claim with respect to its Article 10.5 legal claim (it does not affect the main damages claim for Claimant's breach-of-contract legal claim<sup>1665</sup>) and US \$ 245.4 million for its alternative claim.<sup>1666</sup>

812. In addition, as discussed in Ms. Kunsman's expert report,<sup>1667</sup> Claimant also made certain tax adjustments in calculating its damages for its alternative claim.<sup>1668</sup> These adjustments related to Claimant's argument in Section III.Q of its Memorial that the non-stabilized regime was improperly applied to certain Leaching Project activities. As explained in Section II.I above, that argument has no merit because, to the extent that SUNAT applied the non-stabilized

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<sup>1663</sup> See Exhibit RER-5, Alix Partners Report at para. 133.

<sup>1664</sup> See Exhibit CA-10, US-Perú TPA at Art. 22.3.

<sup>1665</sup> See Exhibit CA-10, US-Perú TPA at Art. 22.3.6.

<sup>1666</sup> See Exhibit RER-5, Alix Partners Report at para. 136.

<sup>1667</sup> See Exhibit RER-5, Alix Partners Report at paras. 66-82.

<sup>1668</sup> See Claimant's Memorial at para. 458(c).

regime to any stabilized activities, it did so only because SMCV (by its own admission<sup>1669</sup>) failed to keep separate accounts and therefore did not provide SUNAT with the information it needed to separate the stabilized and non-stabilized activities.

813. However, as a threshold matter, Claimant never actually argued in its Memorial that Perú breached the 1998 Stabilization Agreement or violated Article 10.5 of the TPA with respect to the taxes that Claimant seeks to adjust. It is therefore unclear on what basis Claimant believes it is entitled to damages for these adjustments—but, regardless, Claimant’s failure to prove its entitlement to these damages demands their exclusion. Moreover, to the extent that Claimant seeks damages related to these taxes for an alleged violation of Article 10.5, as discussed above and in Section III.D, these taxes would be excluded from the Article 10.5 protections pursuant to Article 22.3. If the Tribunal agrees with Perú on this point, as Ms. Kunsman explains, that would further reduce Claimant’s damages calculation for its alternative claim by US \$27.6 million.<sup>1670</sup>

#### **F. OTHER ERRORS IN CLAIMANT’S DAMAGES CALCULATION**

814. In addition to the corrections discussed above, Ms. Kunsman makes two further material corrections to Dr. Spiller and Ms. Chavich’s damages calculation. *First*, Ms. Kunsman corrects the amount of short-term interest that SMCV would have accrued prior to distributing the dividends in the but-for scenario.<sup>1671</sup> To recall, in Dr. Spiller and Ms. Chavich’s modeling, SMCV is assumed to earn some short-term interest between the date that SMCV actually paid SUNAT and the date that SMCV claims that, but for the Assessments, it would have distributed the money to its shareholders.<sup>1672</sup> But, as Ms. Kunsman explains, Claimant improperly calculates the short-term interest for this period by ending the interest accrual on the dividend

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<sup>1669</sup> See Exhibit CWS-4, Choque Statement at para. 23.

<sup>1670</sup> See Exhibit RER-5, Alix Partners Report at para. 76.

<sup>1671</sup> See Exhibit RER-5, Alix Partners Report at paras. 88-93.

<sup>1672</sup> See Exhibit CER-1, Compass Lexecon Report at para. 94.

distribution date, whereas the interest should properly be calculated until the date the distribution is declared (generally a month or so before the distribution date) and the amount of the distribution is set.<sup>1673</sup> Correcting this error reduces Claimant’s damages by US \$0.02 million for both its main claim its alternative claim.<sup>1674</sup>

815. *Second*, Ms. Kunsman corrects an error that Dr. Spiller and Ms. Chavich made in calculating the cash flows relating to payments for Additional Income Tax (“AIT”) for the tax year 2011.<sup>1675</sup> As Ms. Kunsman explains, Dr. Spiller and Ms. Chavich erroneously treated certain payments relating to AIT made in December 2017 as if they were paid in October 2012 and, therefore, calculated the short-term deposit interest on the December 2017 payments for five-and-a-half years (from October 2012 to April 2018, the assumed next dividend distribution date) instead of four months (from December 2017 to April 2018).<sup>1676</sup> Correcting for this error reduces Claimant’s damages by approximately US \$0.04 million for the main claim and US \$0.03 for the alternative claim.<sup>1677</sup>

**G. CORRECTING FOR THE AFOREMENTIONED ERRORS, CLAIMANT’S DAMAGES ARE MATERIALLY REDUCED**

816. In total, as discussed above, Ms. Kunsman makes eight corrections to Compass Lexecon’s damages calculation: (1) excluding damages for alleged losses that have not yet materialized (*i.e.*, the unpaid obligations); (2) removing Compass Lexecon’s tax adjustments (for the alternative claim); (3) correcting the dividend amounts by using the dividend declaration date as the cut-off for short-term interest (on that distribution) as opposed to the actual dividend date; (4) using an appropriate pre-award interest rate; (5) using an appropriate rate to discount future

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<sup>1673</sup> See Exhibit RER-5, Alix Partners Report at para. 91. To be clear, Perú assumes that any additional interest that accrued between the declaration and distribution dates would remain in SMCV’s hands and would not be distributed until the next distribution.

<sup>1674</sup> See Exhibit RER-5, Alix Partners Report at para. 93.

<sup>1675</sup> See Exhibit RER-5, Alix Partners Report at paras. 124-26.

<sup>1676</sup> See Exhibit RER-5, Alix Partners Report at paras. 125-26.

<sup>1677</sup> See Exhibit RER-5, Alix Partners Report at para. 126.

depreciation mitigation; (6) correcting the short-term interest on the cash flows relating to December 2017 payments for AIT for the tax year 2011; (7) reducing the amount of damages to account for the amount of penalties and interest that SMCV should have mitigated, at the latest, once it received its first Assessment from SUNAT; and (8) for the FET claim, specifically, removing certain Tax Assessments and related Penalties and Interest (*i.e.*, not Royalty Assessments) that are explicitly carved out from the TPA.<sup>1678</sup> The standalone impact on damages for each of the eight corrections is summarized in Table 20 of her report:

Table 9. Impact of AlixPartners' Corrections on Compass Lexecon's Damage Calculation – Standalone<sup>1679</sup>

USD Million, %		SMCV Equity Holders (100%)		Freeport (53.56%)		
		Main Claim	Alternative Claim	Main Claim	Alternative Claim	
<b>Compass Lexecon</b>		<b>Damages</b>	<b>909.0</b>	<b>682.1</b>	<b>486.9</b>	<b>365.3</b>
<b>A. "Outstanding Liabilities"</b>	Damages	<b>881.3</b>	<b>680.7</b>	<b>472.0</b>	<b>364.6</b>	
	Change in Damages	(27.7)	(1.3)	(14.8)	(0.7)	
	% Change	-3.0%	-0.2%	-3.0%	-0.2%	
<b>B. "Tax Correction"</b>	Damages	<b>909.0</b>	<b>654.5</b>	<b>486.9</b>	<b>350.5</b>	
	Change in Damages	-	(27.6)	-	(14.8)	
	% Change	0.0%	-4.0%	0.0%	-4.0%	
<b>C. "Dividend Declaration Date"</b>	Damages	<b>909.0</b>	<b>682.1</b>	<b>486.8</b>	<b>365.3</b>	
	Change in Damages	(0.0)	(0.0)	(0.0)	(0.0)	
	% Change	0.0%	0.0%	0.0%	0.0%	
<b>D. "Pre-Award and Post-Award Interest"</b>	Damages	<b>847.5</b>	<b>649.9</b>	<b>453.9</b>	<b>348.1</b>	
	Change in Damages	(61.5)	(32.2)	(32.9)	(17.2)	
	% Change	-6.8%	-4.7%	-6.8%	-4.7%	
<b>E. "Depreciation Mitigation Discount"</b>	Damages	<b>895.4</b>	<b>681.7</b>	<b>479.6</b>	<b>365.1</b>	
	Change in Damages	(13.6)	(0.4)	(7.3)	(0.2)	
	% Change	-1.5%	-0.1%	-1.5%	-0.1%	
<b>F. "AIT Cash Flows"</b>	Damages	<b>909.0</b>	<b>682.0</b>	<b>486.8</b>	<b>365.3</b>	
	Change in Damages	(0.0)	(0.0)	(0.0)	(0.0)	
	% Change	0.0%	0.0%	0.0%	0.0%	
<b>G. "Mitigation of Penalties and Interest"</b>	Damages	<b>352.7</b>	<b>186.9</b>	<b>188.9</b>	<b>100.1</b>	
	Change in Damages	(556.3)	(495.1)	(298.0)	(265.2)	
	% Change	-61.2%	-72.6%	-61.2%	-72.6%	
<b>H. "Taxes Not Allowed for Damages Claim under the Treaty"</b>	Damages	<b>539.0</b>	<b>436.7</b>	<b>288.7</b>	<b>233.9</b>	
	Change in Damages	(370.0)	(245.4)	(198.2)	(131.4)	
	% Change	-40.7%	-36.0%	-40.7%	-36.0%	

817. Because of interactions in the modeling, the combined impact of the corrections (or any subset of them) is not simply additive. When Ms. Kunsman makes all eight of the corrections together (for the Article 10.5 breaches), Claimant's damages for its main claim are reduced from US \$909 million to US \$120.1 million and its damages for its alternative claim are

<sup>1678</sup> Exhibit RER-5, Alix Partners Report at paras. 138-45.

<sup>1679</sup> Exhibit RER-5, Alix Partners Report at para. 146, Table 20.

reduced from US \$682.1 million to US \$71.1 million.<sup>1680</sup> This is summarized in Table 21 of Ms. Kunsman’s report, reproduced below:

Table 10. Impact of AlixPartners’ Corrections on Compass Lexecon’s Damage Calculation under the Treaty Claim – Combined<sup>1681</sup>

USD Million, %		SMCV Equity Holders (100%)		Freeport (53.56%)	
		Main Claim	Alternative Claim	Main Claim	Alternative Claim
<b>Compass Lexecon</b>	<b>Damages</b>	<b>909.0</b>	<b>682.1</b>	<b>486.9</b>	<b>365.3</b>
<b>AlixPartners’ Corrections (A, B, C, D, E, F, G and H)</b>	<b>Damages</b>	<b>120.1</b>	<b>71.1</b>	<b>64.3</b>	<b>38.1</b>
	Change in Damages	(788.9)	(611.0)	(422.6)	(327.2)
	% Change	-86.8%	-89.6%	-86.8%	-89.6%

818. When Ms. Kunsman makes the first seven of the corrections together (for breach of the 1998 Stabilization Agreement)—excluding the correction that would have removed certain Tax Assessments and the related Penalties and Interest (not Royalty Assessments) that are explicitly carved out from the TPA—Claimant’s damages for its main claim are reduced from US \$909 million to US \$295.4 million and its damages for its alternative claim are reduced from US \$682.1 million to US \$165.9 million.<sup>1682</sup> This is summarized in Table 22 of Ms. Kunsman’s report, reproduced below:

Table 11. Impact of AlixPartners’ Corrections on Compass Lexecon’s Damage Calculation under the Stability Agreement Claim – Combined<sup>1683</sup>

USD Million, %		SMCV Equity Holders (100%)		Freeport (53.56%)	
		Main Claim	Alternative Claim	Main Claim	Alternative Claim
<b>Compass Lexecon</b>	<b>Damages</b>	<b>909.0</b>	<b>682.1</b>	<b>486.9</b>	<b>365.3</b>
<b>AlixPartners’ Corrections (A, B, C, D, E, F and G)</b>	<b>Damages</b>	<b>295.4</b>	<b>165.9</b>	<b>158.2</b>	<b>88.9</b>
	Change in Damages	(613.6)	(516.1)	(328.6)	(276.4)
	% Change	-67.5%	-75.7%	-67.5%	-75.7%

819. In sum, even if the Tribunal were to determine that Perú violated Article 10.5 of the TPA and that Claimant is entitled to damages for each and every one of SUNAT’s Assessments (which it should not), the Tribunal should award no more than US \$120.1 million under Claimant’s main claim or US \$71.1 million under Claimant’s alternative claim. And even

<sup>1680</sup> See Exhibit RER-5, Alix Partners Report at para. 147, Table 21.

<sup>1681</sup> Exhibit RER-5, Alix Partners Report at para. 147, Table 21.

<sup>1682</sup> See Exhibit RER-5, Alix Partners Report at para. 149.

<sup>1683</sup> Exhibit RER-5, Alix Partners Report at para. 149, Table 22.

if the Tribunal were to determine that Perú breached the 1998 Stabilization Agreement and that Claimant is entitled to damages for each and every one of SUNAT's Assessments (which it should not), then the Tribunal should award no more than US \$295.4 million under Claimant's main claim or US \$165.9 million under Claimant's alternative claim

820. However, Perú reiterates that these figures are the maximum that SMCV should be awarded and do not yet take into account Perú's argument in Section V.B, above, that the evidence currently on the record does not support Claimant's assumptions that in the but-for scenario SMCV would have distributed as dividends 100 percent of the Assessment amounts, and would have done so immediately (between 2018-2022) on the next available dividend date.

821. Further, as noted above, these figures assume either that all of the Assessments, including penalties and interest (for its main claim), are deemed to violate the 1998 Stabilization Agreement and/or the TPA, or that, in its alternative claim, all of the penalties and interest and unrefunded GEM payments and non-adjustment to certain taxes violate the Treaty. But if the Tribunal determines that, *e.g.*, the imposition of only certain Assessments violate the 1998 Stabilization Agreement and/or the TPA, the damages would have to be reduced accordingly.

822. And, finally, Perú again notes that any award in this arbitration may need to take into account an award in the SMM Cerro Verde Arbitration.

## **VI. REQUEST FOR RELIEF**

823. For the foregoing reasons, Respondent respectfully requests that the Tribunal find that it does not have jurisdiction over Claimant's claims or, in the alternative, that Claimant's

claims have no merit, and award Respondent the costs and fees, including attorneys' fees, it has incurred in this arbitration.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'SA', is positioned above the typed name of Stanimir A. Alexandrov.

Stanimir A. Alexandrov  
**Stanimir A. Alexandrov PLLC**

Jennifer Haworth McCandless  
Marinn Carlson  
María Carolina Durán  
**Sidley Austin LLP**

*Counsel for Respondent*

**Annex A**  
**ADMINISTRATIVE AND JUDICIAL PROCEEDINGS**

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
<b>ROYALTIES</b>													
2006-2007 Royalty	17/08/09 <sup>1</sup>	18/08/09 <sup>2</sup>	15/09/09 <sup>3</sup>	31/03/10 <sup>4</sup>	22/04/10 <sup>5</sup>	30/05/13 <sup>6</sup>	20/06/13 <sup>7</sup>	23/07/13 <sup>8</sup>	--	14/04/16 <sup>9</sup>	12/07/17 <sup>10</sup>	20/11/18 <sup>11</sup> 10/07/2020 <sup>12</sup> (withdrawal granted)	29/04/14 to 29/10/19 <sup>13</sup>
2008 Royalty	01/06/10 <sup>14</sup>	18/06/10 <sup>15</sup>	15/07/10 <sup>16</sup>	31/01/11 <sup>17</sup>	17/02/11 <sup>18</sup>	21/05/13 <sup>19</sup>	20/06/13 <sup>20</sup>	23/07/13 <sup>21</sup>	--	17/12/14 <sup>22</sup>	29/01/16 <sup>23</sup>	18/08/17 <sup>24</sup>	29/04/14 to 29/10/19 <sup>25</sup>
2009 Royalty	27/06/11 <sup>26</sup>	08/07/11 <sup>27</sup>	09/08/11 <sup>28</sup>	21/12/11 <sup>29</sup>	26/12/11 <sup>30</sup>	15/08/18 <sup>31</sup>	28/09/18 <sup>32</sup>	--	11/01/19 <sup>33</sup>	--	--	--	30/04/19 to 09/08/21 <sup>34</sup>
2010-2011 Royalty	13/04/16 <sup>35</sup>	13/04/16 <sup>36</sup>	11/05/16 <sup>37</sup>	29/12/16 <sup>38</sup>	01/03/17 <sup>39</sup>	28/08/18 <sup>40</sup>	18/09/18 <sup>41</sup>	--	11/01/19 <sup>42</sup>	--	--	--	30/04/19 to 09/08/21 <sup>43</sup>
Q4 2011 Royalty	29/12/17 <sup>44</sup>	18/01/18 <sup>45</sup>	15/02/18 <sup>46</sup>	12/10/18 <sup>47</sup>	30/10/18 <sup>48</sup>	18/11/19 <sup>49</sup>	04/12/19 <sup>50</sup>	--	--	--	--	--	26/12/19 <sup>51</sup>
2012 Royalty	28/03/18 <sup>52</sup>	18/04/18 <sup>53</sup>	17/05/18 <sup>54</sup>	11/01/19 <sup>55</sup>	23/01/19 <sup>56</sup>	--	--	--	--	--	--	--	28/08/19 to 13/08/21 <sup>57</sup>
2013 Royalty	28/09/18 <sup>58</sup>	10/10/18 <sup>59</sup>	07/11/18 <sup>60</sup>	28/05/19 <sup>61</sup>	28/05/19 <sup>62</sup>	--	--	--	--	--	--	--	30/01/20 to 13/08/21 <sup>63</sup>

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
<b>TAXES</b>													
<b>General Sales Tax (“GST”)</b>													
2005 GST	28/12/09 <sup>64</sup>	30/12/09 <sup>65</sup>	28/01/10 <sup>66</sup>	25/10/10 <sup>67</sup>	25/11/10 <sup>68</sup>	22/08/18 <sup>69</sup>	16/11/18 <sup>70</sup>	--	--	--	--	--	--
2005 GST on Non-Residents	28/12/09 <sup>71</sup>	30/12/09 <sup>72</sup>	28/01/10 <sup>73</sup>	30/09/10 <sup>74</sup>	22/10/10 <sup>75</sup>	27/02/20 <sup>76</sup> (partial withdrawal filed)	--	--	--	--	--	--	01/03/21 <sup>77</sup>
2006 GST	29/12/10 <sup>78</sup>	30/12/10 <sup>79</sup>	27/01/11 <sup>80</sup>	27/07/11 <sup>81</sup>	24/08/11 <sup>82</sup>	22/08/18 <sup>83</sup>	16/11/18 <sup>84</sup>	--	--	--	--	--	26/12/18 <sup>85</sup>
2006 GST on Non-Residents	29/12/10 <sup>86</sup>	30/12/10 <sup>87</sup>	27/01/11 <sup>88</sup>	30/09/11 <sup>89</sup>	28/10/11 <sup>90</sup>	27/02/20 <sup>91</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2007 GST and Additional Income Tax	27/12/11 <sup>92</sup>	29/12/11 <sup>93</sup>	26/01/12 <sup>94</sup>	27/09/12 <sup>95</sup>	12/10/12 <sup>96</sup>	30/10/18 <sup>97</sup>	20/11/18 <sup>98</sup>	--	--	--	--	--	26/04/21 <sup>99</sup>
2008 GST and Additional Income Tax	20/12/12 <sup>100</sup>	27/12/12 <sup>101</sup>	25/01/13 <sup>102</sup>	24/10/13 <sup>103</sup>	04/11/13 <sup>104</sup>	27/02/20 <sup>105</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2009 GST	27/12/13 <sup>106</sup>	30/12/13 <sup>107</sup>	28/01/14 and 22/07/14 <sup>108</sup>	27/10/14 <sup>109</sup>	14/11/14 <sup>110</sup>	27/02/20 <sup>111</sup> (partial withdrawal filed)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2009 GST (penalties)	27/12/13 <sup>112</sup> 24/06/14 <sup>113</sup> (additional penalties)	24/06/14 <sup>114</sup>	28/01/14 and 22/07/14 <sup>115</sup>	27/10/14 <sup>116</sup>	14/11/14 <sup>117</sup>	--	--	--	--	--	--	--	28/01/14 <sup>118</sup>
2010 GST	24/06/14 <sup>119</sup>	24/06/14 <sup>120</sup>	22/07/14 <sup>121</sup>	27/04/15 <sup>122</sup>	09/06/15 <sup>123</sup>	27/02/20 <sup>124</sup> (partial withdrawal filed)	--	--	--	--	--	--	08/07/14 <sup>125</sup>
2010 GST (penalties)	24/06/14 <sup>126</sup> 24/06/14 <sup>127</sup> (additional penalties)	24/06/14 <sup>128</sup>	22/07/14 <sup>129</sup>	27/04/15 <sup>130</sup>	09/06/15 <sup>131</sup>	--	--	--	--	--	--	--	--
2011 GST	29/09/17 <sup>132</sup>	--	08/11/17 and 15/11/17 <sup>133</sup>	27/06/18 <sup>134</sup>	18/07/18 <sup>135</sup>	27/02/20 <sup>136</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2011 GST (penalties)	29/09/17 <sup>137</sup> 29/09/17 <sup>138</sup> (additional penalties)	19/10/17 and 10/10/17 <sup>139</sup>	08/11/17 and 15/11/17 <sup>140</sup>	27/06/18 <sup>141</sup>	18/07/18 <sup>142</sup>	27/02/20 <sup>143</sup> (partial withdrawal filed)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
<b>Income Tax</b>													
2006 Income Tax	27/05/11 <sup>144</sup>	03/06/11 <sup>145</sup>	04/07/11 <sup>146</sup>	30/03/12 <sup>147</sup>	11/04/12 <sup>148</sup>	22/08/18 <sup>149</sup>	16/11/18 <sup>150</sup>	--	--	--	--	--	26/12/18 <sup>151</sup>
2006 Income Tax (penalties)	26/05/11 <sup>152</sup> 26/05/11 <sup>153</sup> (additional penalties)	03/06/11 <sup>154</sup>	25/07/11 <sup>155</sup>	30/03/12 <sup>156</sup>	--	22/08/18 <sup>157</sup>	--	--	--	--	--	--	--
2007 Income Tax	28/03/12 <sup>158</sup>	11/04/12 <sup>159</sup>	10/05/12 <sup>160</sup>	25/01/13 <sup>161</sup>	18/02/13 <sup>162</sup>	22/08/18 <sup>163</sup>	16/11/18 <sup>164</sup>	--	--	--	--	--	--
2007 Income Tax (penalties)	28/03/12 <sup>165</sup> 28/03/12 <sup>166</sup> (additional penalties)	11/04/12 <sup>167</sup>	10/05/12 <sup>168</sup>	25/01/13 <sup>169</sup>	18/02/13 <sup>170</sup>	22/08/18 <sup>171</sup>	19/11/18 <sup>172</sup>	--	--	--	--	--	23/11/18 <sup>173</sup>
2008 Income Tax	21/08/13 <sup>174</sup>	02/09/13 <sup>175</sup>	30/09/13 <sup>176</sup>	30/05/14 <sup>177</sup>	10/06/14 <sup>178</sup>	27/02/20 <sup>179</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2008 Income Tax (penalties)	21/08/13 <sup>180</sup> 19/08/13 <sup>181</sup> (additional penalties)	02/09/13 <sup>182</sup>	30/09/13 <sup>183</sup>	30/05/14 <sup>184</sup>	10/06/14 <sup>185</sup>	27/02/20 <sup>186</sup> (partial withdrawal filed)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2009 Income Tax and Additional Income Tax	30/10/14 <sup>187</sup> and 26/11/14 <sup>188</sup>	30/10/14 <sup>189</sup> and 27/11/14 <sup>190</sup>	27/11/14 <sup>191</sup> and 26/12/14 <sup>192</sup>	23/06/15 <sup>193</sup>	07/08/15 <sup>194</sup>	27/02/20 <sup>195</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2009 Income Tax (penalties)	30/10/14 <sup>196</sup> 26/11/14 <sup>197</sup> (additional penalties)	27/11/14 <sup>198</sup>	27/11/14 <sup>199</sup> and 26/12/14	23/06/15 <sup>200</sup>	07/08/15 <sup>201</sup>	27/02/20 <sup>202</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2010 Income Tax and Additional Income Tax	13/02/15 <sup>203</sup>	13/02/15 <sup>204</sup>	13/03/15 and 23/03/15 <sup>205</sup>	04/11/15 <sup>206</sup>	06/11/15 <sup>207</sup>	27/02/20 <sup>208</sup> (partial withdrawal filed)	--	--	--	--	--	--	23/07/21 <sup>209</sup>
2010 Income Tax (penalties)	13/02/15 <sup>210</sup> 18/02/15 <sup>211</sup> (additional penalties)	23/02/15 <sup>212</sup>	13/03/15 and 23/03/15 <sup>213</sup>	04/11/15 <sup>214</sup>	06/11/15 <sup>215</sup>	27/02/20 <sup>216</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2011 Income Tax and Additional Income Tax	31/10/17 <sup>217</sup>	15/11/17 <sup>218</sup>	14/12/17 <sup>219</sup>	10/08/18 <sup>220</sup>	22/08/18 <sup>221</sup>	27/02/20 <sup>222</sup> (partial withdrawal filed)	--	--	--	--	--	--	20/01/21 <sup>223</sup>

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2011 Income Tax (penalties)	31/10/17 <sup>224</sup> 31/10/17 <sup>225</sup> (additional penalties)	15/11/17 <sup>226</sup>	14/12/17 <sup>227</sup>	10/08/18 <sup>228</sup>	22/08/18 <sup>229</sup>	27/02/20 <sup>230</sup> (partial withdrawal filed)	--	--	--	--	--	--	--
2012 Income Tax	26/11/19 <sup>231</sup>	28/11/19 <sup>232</sup>	26/12/19 <sup>233</sup>	27/02/20 <sup>234</sup> (partial withdrawal filed) 12/11/20 <sup>235</sup> (partial withdrawal granted)	--	--	--	--	--	--	--	--	--
2012 Income Tax (penalties)	26/11/19 <sup>236</sup> 26/11/19 <sup>237</sup> (additional penalties)	28/11/19 <sup>238</sup>	26/12/19 <sup>239</sup>	27/02/20 <sup>240</sup> (partial withdrawal filed)	--	--	--	--	--	--	--	--	--
2012 Additional Income Tax	26/11/19 <sup>241</sup>	28/11/19 <sup>242</sup>	26/12/19 <sup>243</sup>	27/02/20 <sup>244</sup> (full withdrawal filed)	--	--	--	--	--	--	--	--	07/10/20 <sup>245</sup>
2013 Income Tax	28/12/20 <sup>246</sup>	29/12/20 <sup>247</sup>	--	--	--	--	--	--	--	--	--	--	20/01/21 <sup>248</sup>

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2013 Income Tax (penalties)	28/12/20 <sup>249</sup> 28/12/20 <sup>250</sup> (additional penalties)	29/12/20 <sup>251</sup>	--	--	--	--	--	--	--	--	--	--	20/01/21 <sup>252</sup>
2013 Additional Income Tax	28/12/20 <sup>253</sup>	29/12/20 <sup>254</sup>	--	--	--	--	--	--	--	--	--	--	20/01/21 <sup>255</sup>
<b>Temporary Tax on Net Assets (“TTNA”)</b>													
2009 TTNA	27/12/13 <sup>256</sup>	30/12/13 <sup>257</sup>	28/01/14 <sup>258</sup>	27/08/14 <sup>259</sup>	15/09/14 <sup>260</sup>	27/02/20 <sup>261</sup> (full withdrawal filed) 27/02/20 <sup>262</sup> (withdrawal granted)	--	--	--	--	--	--	--
2009 TTNA (penalties)	27/12/13 <sup>263</sup>	30/12/13 <sup>264</sup>	28/01/14 <sup>265</sup>	27/08/14 <sup>266</sup>	15/09/14 <sup>267</sup>	27/02/20 <sup>268</sup> (full withdrawal filed) 27/02/20 <sup>269</sup> (withdrawal granted)	--	--	--	--	--	--	--

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2010 TTNA	14/08/15 <sup>270</sup>	14/08/15 <sup>271</sup>	10/09/15 <sup>272</sup>	29/02/16 <sup>273</sup>	16/03/16 <sup>274</sup>	27/02/20 <sup>275</sup> (full withdrawal filed) 03/03/20 <sup>276</sup> (withdrawal granted)	--	--	--	--	--	--	--
2010 TTNA (penalties)	14/08/15 <sup>277</sup>	14/08/15 <sup>278</sup>	10/09/15 <sup>279</sup>	29/02/16 <sup>280</sup>	16/03/16 <sup>281</sup>	27/02/20 <sup>282</sup> (full withdrawal filed)	--	--	--	--	--	--	--
2011 TTNA	27/07/16 <sup>283</sup>	27/07/16 <sup>284</sup>	25/08/16 <sup>285</sup>	--	--	27/02/20 <sup>286</sup> (full withdrawal filed)	--	--	--	--	--	--	--
2011 TTNA (penalties)	27/07/16 <sup>287</sup>	27/07/16 <sup>288</sup>	-- <sup>289</sup>	--	--	27/02/20 <sup>290</sup> (full withdrawal filed)	--	--	--	--	--	--	--
2012 TTNA	--	--	--	--	--	--	--	--	--	--	--	--	21/12/17 <sup>291</sup>

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2013 TTNA	20/11/19 <sup>292</sup>	20/11/19 <sup>293</sup>	18/12/19 <sup>294</sup> and 30/10/17 <sup>295</sup>	13/05/20 <sup>296</sup>	27/02/20 <sup>297</sup> (full withdrawal filed)  13/05/20 <sup>298</sup> (withdrawal granted)	--	--	--	--	--	--	--	19/02/19 to 20/12/19 <sup>299</sup>
2013 TTNA (penalties)	26/09/17 <sup>300</sup>	03/10/17 <sup>301</sup>	30/10/17 <sup>302</sup>	28/06/18 <sup>303</sup>	19/07/18 <sup>304</sup>	14/12/18 <sup>305</sup>	04/01/19 <sup>306</sup>	--	--	--	--	--	19/02/19 <sup>307</sup>
<b>Special Mining Tax (“SMT”) and Complementary Mining Pension Fund (“CMPF”)</b>													
Q4 2011-2012 SMT	29/12/17 <sup>308</sup>	18/01/18 <sup>309</sup>	15/02/18 <sup>310</sup>	12/10/18 <sup>311</sup>	30/10/18 <sup>312</sup>	20/06/19 <sup>313</sup>	26/07/19 <sup>314</sup>	--	--	--	--	--	27/02/20 to 25/06/20 <sup>315</sup>
2013 SMT	28/09/18 <sup>316</sup>	10/10/18 <sup>317</sup>	07/11/18 <sup>318</sup>	28/05/19 <sup>319</sup>	28/05/19 <sup>320</sup>	--	--	--	--	--	--	--	30/01/20 to 25/06/20 <sup>321</sup>

Assessment	SUNAT issued Assessment	SUNAT Assessment notified to SMCV	SMCV filed <i>Recurso de Reclamación</i> with SUNAT	SUNAT issued <i>Resolución de Intendencia</i>	SUNAT <i>Resolución de Intendencia</i> notified to SMCV	Tax Tribunal decision date	Tax Tribunal decision notified to SMCV	Tax Tribunal denial of request for expansion or clarification notified to SMCV	Tax Tribunal denial of request for interest recalculation notified to SMCV	Contentious Administrative First Instance Court decision date	Contentious Administrative Appeal Court decision date	Supreme Court decision date	Payments by SMCV
2013 CMPF	20/12/19 <sup>322</sup>	23/12/19 <sup>323</sup>	22/01/20 <sup>324</sup>	27/02/20 <sup>325</sup> (full withdrawal filed)  13/05/20 <sup>326</sup> (withdrawal granted)	--	--	--	--	--	--	--	--	--
<b>Gravamen Especial a la Minería (“GEM”) – Refund Requests by SMCV</b>													
Q4 2011 to Q3 2012	28/12/18 <sup>327</sup> (SMCV refund requests)	04/03/19 <sup>328</sup> (SUNAT denial of refund requests)			22/03/19 <sup>329</sup> (SUNAT denial of refund requests notified to SMCV)		23/04/19 <sup>330</sup> (SMCV filed <i>Recurso de Reclamación</i> )		31/07/19 <sup>331</sup> (SUNAT denial of <i>Recurso de Reclamación</i> )		31/07/19 <sup>332</sup> (SUNAT denial of <i>Recurso de Reclamación</i> notified to SMCV)		

<sup>1</sup> Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009.

<sup>2</sup> Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009).

<sup>3</sup> Exhibit CE-32, SMCV Request for Reconsideration, 2006/07 Royalty Assessments (received by SUNAT on September 15, 2009).

<sup>4</sup> Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010.

<sup>5</sup> Exhibit CE-38, SUNAT Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments, March 31, 2010 (notified to SMCV on April 22, 2010).

<sup>6</sup> Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013.

<sup>7</sup> Exhibit CE-88, Tax Tribunal Decision No. 08997-10-2013, May 30, 2013 (notified to SMCV on June 20, 2013); *see also* Exhibit CE-89, Receipt Notice of the Resolutions 08252-1-2013 and 08997-10-2013, June 20, 2013, p. 2 pdf.

<sup>8</sup> Exhibit RE-117, Notification of Tax Tribunal Resolution No. 11667-10-2013 to SMCV, July 23, 2013; *see also* Exhibit CE-91, Tax Tribunal Decision No. 11667-10-2013, July 15, 2013.

<sup>9</sup> Exhibit CE-98, SMCV Administrative Court Appeal of the Tax Tribunal’s Decision, 2006/07 Royalty Assessment, September 27, 2013; Exhibit CE-689, Contentious Administrative Court, Decision, No. 07649-2013 (2006/07 Royalty Assessments), April 14, 2016.

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- <sup>10</sup> Exhibit CE-144, SMCV Appellate Court Appeal of the Administrative Court Decision, May 2, 2016; *see also* Exhibit CE-274, Appellate Court Decision No. 48, File No. 7649-2013, July 12, 2017.
- <sup>11</sup> Exhibit CE-697, SMCV, Appeal to the Supreme Court of the Appellate Court Decision (2006/07 Royalty Assessment), August 9, 2017; *see also* Exhibit CE-739, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments), November 20, 2018; Exhibit CA-203, Single Unified Text of the Organic Law of the Judiciary, Arts. 141, 144 (“In the event of failure to achieve a majority vote . . . the Judge with the casting vote shall be called upon through the expedited procedure and a date and time shall be set for the hearing of the case by said Judge.”).
- <sup>12</sup> Exhibit CE-789, Supreme Court, Resolution Approving SMCV’s Withdrawal, No. 18174-2017 (2006/07 Royalty Assessment), October 7, 2020 (SMCV filed withdrawal before a final decision was issued).
- <sup>13</sup> Exhibit CE-830, SMCV, Payment Receipt (2006-2008 Royalty Assessments).
- <sup>14</sup> Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010.
- <sup>15</sup> Exhibit CE-39, SUNAT 2008 Royalty Assessments, June 1, 2010 (notified to SMCV on June 18, 2010).
- <sup>16</sup> Exhibit CE-600, SMCV, Request for Reconsideration (2008 Royalty Assessment), July 15, 2010.
- <sup>17</sup> Exhibit CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011.
- <sup>18</sup> Exhibit CE-46, SUNAT Resolution No. 055-014-0001394/SUNAT, 2008 Royalty Assessments, January 31, 2011 (notified to SMCV on February 17, 2011).
- <sup>19</sup> Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013; *see also* Exhibit CE-92, Tax Tribunal Decision No. 11669-1-2013, July 15, 2013.
- <sup>20</sup> Exhibit CE-83, Tax Tribunal Decision No. 08252-1-2013, May 21, 2013 (notified to SMCV on June 20, 2013); *see also* Exhibit CE-89, Receipt notice of the Resolutions 08252-1-2013 and 08997-10-2013, June 20, 2013, p. 1 of PDF.
- <sup>21</sup> Exhibit RE-118, Notification of Tax Tribunal Resolution No. 11669-1-2013 to SMCV, July 23, 2013; *see also* Exhibit CE-92, Tax Tribunal Decision No. 11669-1-2013, July 15, 2013.
- <sup>22</sup> Exhibit CE-97, SMCV Administrative Court Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments, September 18, 2013; *see also* Exhibit CE-122, Administrative Court Decision, No. 07650-2013-CA, 2008 Royalty Assessment, December 17, 2014.
- <sup>23</sup> Exhibit CE-137, Appellate Court Decision No. 7650-2013, January 29, 2016.
- <sup>24</sup> Exhibit CE-153, Supreme Court Decision No. 5212-2016, 2008 Royalty Assessment, August 18, 2017.
- <sup>25</sup> Exhibit CE-830, SMCV, Payment Receipt (2006-2008 Royalty Assessments).
- <sup>26</sup> Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011.
- <sup>27</sup> Exhibit CE-54, SUNAT 2009 Royalty Assessments, June 27, 2011 (notified to SMCV on July 8, 2011).
- <sup>28</sup> Exhibit CE-55, SMCV Request for Reconsideration, 2009 Royalty Assessments, August 9, 2011.
- <sup>29</sup> Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011.
- <sup>30</sup> Exhibit CE-58, SUNAT Resolution No. 055-014-0001495/SUNAT, December 21, 2011 (notified to SMCV on December 26, 2011).
- <sup>31</sup> Exhibit CE-188, Tax Tribunal Chamber 2 Decision No. 06141-2-2018, August 15, 2018.
- <sup>32</sup> Exhibit RE-119, Notification of Tax Tribunal Resolution No. 06141-2-2018 to SMCV, September 28, 2018.
- <sup>33</sup> Exhibit CE-213, Tax Tribunal Decision No. 00019-Q-2019, January 4, 2019 (notified to SMCV on January 11, 2019); *see also* Claimant’s Memorial at Annex A.
- <sup>34</sup> Exhibit CE-831, SMCV, Payment Receipt (2009 Royalty Assessments).

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- <sup>35</sup> Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016; *see also* Exhibit CE-688, SUNAT, Fine Resolution No. 052-002-0006603 to 052-002-0006645 (2010/11 Royalty Assessments), April 13, 2016.
- <sup>36</sup> Exhibit CE-142, SUNAT 2010/11 Royalty Assessment, April 13, 2016 (notified to SMCV on April 13, 2016).
- <sup>37</sup> Exhibit CE-146, SMCV Reconsideration Request of SUNAT, 2010/11 Royalty Assessments, May 11, 2016.
- <sup>38</sup> Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016.
- <sup>39</sup> Exhibit CE-150, SUNAT, Resolution No. 0150140013036, 2010/11 Royalty Assessments, December 29, 2016 (notified to SMCV on March 1, 2017).
- <sup>40</sup> Exhibit CE-194, Tax Tribunal Decision No. 06575-1-2018, August 28, 2018.
- <sup>41</sup> Exhibit RE-120, Notification of Tax Tribunal Resolution No. 06575-1-2018 to SMCV, September 18, 2018.
- <sup>42</sup> Exhibit CE-214, Tax Tribunal Decision No. 00036-Q-2019, January 7, 2019 (notified to SMCV on January 11, 2019); *see also* Claimant's Memorial at Annex A.
- <sup>43</sup> Exhibit CE-832, SMCV, Payment Receipt (2010-2011 Royalty Assessments).
- <sup>44</sup> Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017; *see also* Exhibit CE-701, SUNAT, Fine Resolution No. 012-002-0031073 (Q4 2011 Royalty Assessment), December 29, 2017; Exhibit CE-702, SUNAT, Fine Resolution No. 012-002-0031074 (Q4 2011 Royalty Assessment), December 29, 2017.
- <sup>45</sup> Exhibit CE-700, SUNAT, Assessment No. 012-003-0092685 (Q4 2011 Royalty Assessment), December 29, 2017 (notified to SMCV on January 18, 2018).
- <sup>46</sup> Exhibit CE-175, SMCV Request for Reconsideration, 4Q 2011 Royalty Assessments, February 15, 2018.
- <sup>47</sup> Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018.
- <sup>48</sup> Exhibit CE-200, SUNAT Resolution No. 0150140014440, October 12, 2018 (notified to SMCV on October 30, 2018).
- <sup>49</sup> Exhibit CE-269, Tax Tribunal Decision, No. 10574-9-2019, November 18, 2019.
- <sup>50</sup> Exhibit RE-121, Notification of Tax Tribunal Resolution No. 10574-9-2019 to SMCV, December 4, 2019.
- <sup>51</sup> Exhibit CE-775, SMCV, Payment Receipt (Q4 2011 Royalty Assessment), December 26, 2019; *see also* Exhibit CE-776, SMCV, Payment Receipt No. 756189230 (Q4 2011 Royalty Penalty), December 26, 2019; Exhibit CE-777, SMCV, Payment Receipt No. 756189231, (Q4 2011 Royalty Penalty), December 26, 2019.
- <sup>52</sup> Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018.
- <sup>53</sup> Exhibit CE-176, SUNAT 2012 Royalty Assessments, March 28, 2018 (notified to SMCV on April 18, 2018).
- <sup>54</sup> Exhibit CE-178, SMCV Request for Reconsideration, 2012 Royalty Assessments, May 17, 2018.
- <sup>55</sup> Exhibit CE-215, SUNAT Resolution No. 0150140014560, January 11, 2019.
- <sup>56</sup> Exhibit CE-215, SUNAT Resolution No. 0150140014560, January 11, 2019 (notified to SMCV on January 23, 2019).
- <sup>57</sup> Exhibit CE-833, SMCV, Payment Receipt (2012 Royalty Assessments).
- <sup>58</sup> Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018.
- <sup>59</sup> Exhibit CE-195, SUNAT 2013 Royalty Assessments, September 28, 2018 (notified to SMCV on October 10, 2018).
- <sup>60</sup> Exhibit CE-203, SMCV Request for Reconsideration, 2013 Royalty Assessments, November 7, 2018.

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- <sup>61</sup> Exhibit CE-220, SUNAT Resolution No. 0150140014816, May 28, 2019.
- <sup>62</sup> Exhibit RE-122, Notification of SUNAT Resolution No. 0150140014816 to SMCV, May 28, 2019.
- <sup>63</sup> Exhibit CE-834, SMCV, Payment Receipt (2013 Royalty Assessments).
- <sup>64</sup> Exhibit CE-35, SUNAT Assessments No. 052-003-0005626 to No. 052-003-0005637, December 28, 2009; *see also* Exhibit CE-37, SUNAT Fine Resolutions No. 052-002-0003816 to No. 052-002-0003827, December 29, 2009.
- <sup>65</sup> Exhibit RE-123, Notifications of SUNAT Resolutions No. 052-003-0005626 to 052-003-0005637 to SMCV, December 30, 2009; *see also* Exhibit RE-124, Notifications of SUNAT Resolutions No. 052-002-0003816 to 052-002-0003827 to SMCV, December 30, 2009.
- <sup>66</sup> *See* Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010 (first paragraph).
- <sup>67</sup> Exhibit CE-42, SUNAT Resolution No. 055-014-0001369, October 25, 2010.
- <sup>68</sup> Exhibit RE-125, Notification of SUNAT Resolution No. 055-014-0001369 to SMCV, November 25, 2010.
- <sup>69</sup> Exhibit RE-173, Tax Tribunal Resolution No. 06365-2-2018, August 22, 2018.
- <sup>70</sup> Exhibit RE-126, Notification of Tax Tribunal Resolution No. 06365-2-2018 to SMCV, November 16, 2018.
- <sup>71</sup> Exhibit CE-36, SUNAT Assessments No. 052-003-0005642 to 052-003-0005653, December 28, 2009.
- <sup>72</sup> Exhibit RE-127, Notifications of SUNAT Resolutions No. 052-003-0005642 to 052-003-0005653 to SMCV, December 30, 2009.
- <sup>73</sup> *See* Exhibit CE-41, SUNAT Resolution No. 055-014-0001358, September 30, 2010 (first paragraph).
- <sup>74</sup> Exhibit CE-41, SUNAT Resolution No. 055-014-0001358, September 30, 2010.
- <sup>75</sup> Exhibit CE-41, SUNAT Resolution No. 055-014-0001358, September 30, 2010 (notified to SMCV on October 22, 2010).
- <sup>76</sup> Exhibit CE-246, Partial Withdrawal, General Sales Tax on Non-Residents 2005, Docket No. 2382-2011, February 27, 2020.
- <sup>77</sup> Exhibit CE-805, SMCV, Payment Receipt (GST NR Nov-Dec 2005), March 1, 2021.
- <sup>78</sup> Exhibit CE-43, SUNAT Assessments No. 052-003-006737 to 052-003-006744 and No. 052-003-006777 to 052-003-006780, December 29, 2010; *see also* Exhibit CE-44, SUNAT Fine Resolutions No. 052-002-0004402 to No. 052-002-0004413, December 29, 2010.
- <sup>79</sup> Exhibit RE-172, Notifications of SUNAT Resolutions No. 052-003-006737 to 052-003-006744 and 052-003-006777 to 052-003-006780 to SMCV, December 30, 2010; *see also* Exhibit RE-128, Notifications of SUNAT Resolutions No. 052-002-0004402 to 052-002-0004413 to SMCV, December 30, 2010.
- <sup>80</sup> *See* Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 (first paragraph).
- <sup>81</sup> Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 (notified to SMCV August 24, 2011); *see also* Exhibit CE-744, SUNAT, Resolution No. 0150150001832 (GST 2006), December 17, 2018.
- <sup>82</sup> Exhibit CE-604, SUNAT, Resolution No. 055-014-0001431 (GST for 2006), July 27, 2011 (notified to SMCV August 24, 2011).
- <sup>83</sup> Exhibit CE-190, Tax Tribunal Resolution No. 06366-2-2018, August 22, 2018.
- <sup>84</sup> Exhibit RE-155, Notification of Tax Tribunal Resolution No. 06366-2-2018 to SMCV, November 16, 2018.
- <sup>85</sup> Exhibit CE-844, SMCV, Payment Receipt (GST 2006), December 26, 2018.

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- <sup>86</sup> Exhibit CE-206, SUNAT Assessments No. 052-003-0006753 to No. 052-003-0006764, December 29, 2010.
- <sup>87</sup> Exhibit RE-156, Notifications of SUNAT Resolutions No. 052-003-0006753 to 052-003-0006764 to SMCV, December 30, 2010.
- <sup>88</sup> *See* Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011 (first paragraph).
- <sup>89</sup> Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011.
- <sup>90</sup> Exhibit CE-56, SUNAT Resolution No. 055-014-0001444, September 30, 2011 (notified to SMCV on October 28, 2011).
- <sup>91</sup> Exhibit CE-247, Partial Withdrawal, General Sales Tax on Non-Residents 2006, Docket No. 1891-2012, February 27, 2020.
- <sup>92</sup> Exhibit CE-60, SUNAT Assessments No. 052-003-0008024 to No. 052-003-0008035, December 27, 2011; *see also* Exhibit CE-59, SUNAT Fine Resolution No. 052-002-0005053 to No. 052-002-0005064, December 27, 2011; Exhibit CE-61, SUNAT Assessments No. 052-003-0008036 to No. 052-003-0008046, December 27, 2011.
- <sup>93</sup> Exhibit CE-60, SUNAT Assessments No. 052-003-0008024 to No. 052-003-0008035, December 27, 2011 (notified to SMCV on December 29, 2011).
- <sup>94</sup> *See* Exhibit CE-72, SUNAT Resolution No. 055-014-0001662, September 27, 2012 (first paragraph).
- <sup>95</sup> Exhibit CE-72, SUNAT Resolution No. 055-014-0001662, September 27, 2012.
- <sup>96</sup> Exhibit RE-129, Notification of SUNAT Resolution No. 055-014-0001662 to SMCV, October 12, 2012.
- <sup>97</sup> Exhibit CE-202, Tax Tribunal Resolution No. 08470-2-2018, October 30, 2018.
- <sup>98</sup> Exhibit RE-130, Notification of Tax Tribunal Resolution No. 08470-2-2018 to SMCV, November 20, 2018.
- <sup>99</sup> Exhibit CE-845, SMCV, Payment Receipt (GST 2007).
- <sup>100</sup> Exhibit CE-75, SUNAT Assessments No. 052-003-0009549, No. 052-003-0009591 to No. 052-003-0009602, and 2012 SUNAT Assessment, Annex 2, December 20, 2012; *see also* Exhibit CE-74, SUNAT Fine Resolutions No. 052-002-0005664, No. 052-002-0005679, No. 052-002-0005680, No. 052-002-0005682 to No. 052-002-0005687, and No. 052-002-0005691 to No. 052-002-0005693, December 20, 2012; Exhibit CE-76, SUNAT Assessments No. 052-003-0009550 to No. 052-003-0009554, No. 052-003-0009562 to No. 052-003-0009564, No. 052-003-0009580 to No. 052-003-0009581, No. 052-003-0009589, No. 052-003-0009594, December 20, 2012.
- <sup>101</sup> Exhibit RE-131, Notifications of SUNAT Resolutions No. 052-003-0009591 to 052-003-0009602 to SMCV, December 27, 2012; *see also* Exhibit RE-132, Notifications of SUNAT Resolutions No. 052-003-0009562, 052-003-0009589, 052-003-0009563, 052-003-0009550 to 052-003-09554, 052-003-0009580, 052-003-0009564, 052-003-0009581, 052-003-0009594, to SMCV, December 27, 2012.
- <sup>102</sup> *See* Exhibit CE-100, SUNAT Resolution No. 055-014-0001810, October 24, 2013 (first paragraph).
- <sup>103</sup> Exhibit CE-100, SUNAT Resolution No. 055-014-0001810, October 24, 2013.
- <sup>104</sup> Exhibit CE-100, SUNAT Resolution No. 055-014-0001810, October 24, 2013 (notified to SMCV on November 4, 2013).
- <sup>105</sup> Exhibit CE-253, Partial Withdrawal, General Sales Tax 2008 and Additional Income Tax, Docket No. 4457-2014, February 27, 2020.
- <sup>106</sup> Exhibit CE-102, SUNAT Assessments No. 052-003-0011235 to No. 052-003-0011245, December 27, 2013.
- <sup>107</sup> Exhibit CE-102, SUNAT Assessments No. 052-003-0011235 to No. 052-003-0011245, December 27, 2013 (notified to SMCV on December 30, 2013).
- <sup>108</sup> *See* Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014 (first paragraph).
- <sup>109</sup> Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014.
- <sup>110</sup> Exhibit RE-133, Notification of SUNAT Resolution No. 055-014-0001988 to SMCV, November 14, 2014.

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- <sup>111</sup> Exhibit CE-243, Partial Withdrawal, General Sales Tax 2009, Docket No. 2929-2015, February 27, 2020.
- <sup>112</sup> Exhibit CE-105, SUNAT Fine Resolutions No. 052-002-0006017 to No. 052-002-0006027, December 27, 2013.
- <sup>113</sup> Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014.
- <sup>114</sup> Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014 (notified to SMCV on June 24, 2014).
- <sup>115</sup> *See* Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014 (first paragraph).
- <sup>116</sup> Exhibit CE-114, SUNAT Resolution No. 055-014-0001988, October 27, 2014.
- <sup>117</sup> *See* Claimant's Memorial at Annex A.
- <sup>118</sup> Exhibit CE-669, SMCV, Payment Receipt (GST 2009), January 28, 2014.
- <sup>119</sup> Exhibit CE-110, SUNAT Assessments No. 052-003-0011478 to No. 052-003-0011483, No. 052-003-0011485 to No. 052-003-0011490, and 2014 SUNAT Assessment, Annex 2, June 24, 2014.
- <sup>120</sup> Exhibit CE-110, SUNAT Assessments No. 052-003-0011478 to No. 052-003-0011483, No. 052-003-0011485 to No. 052-003-0011490, and 2014 SUNAT Assessment, Annex 2, June 24, 2014 (notified to SMCV on June 24, 2014).
- <sup>121</sup> *See* Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (first paragraph).
- <sup>122</sup> Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015.
- <sup>123</sup> Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (notified to SMCV on June 9, 2015).
- <sup>124</sup> Exhibit CE-244, Partial Withdrawal, General Sales Tax 2010, Docket No. 16744-2015, February 27, 2020.
- <sup>125</sup> Exhibit CE-674, SMCV, Payment Receipt (GST 2010), July 8, 2014.
- <sup>126</sup> Exhibit CE-111, SUNAT Fine Resolutions No. 052-002-0006087 to No. 052-002-0006089, and No. 052-002-0006092 to No. 052-002-0006100, June 24, 2014.
- <sup>127</sup> Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014.
- <sup>128</sup> Exhibit CE-111, SUNAT Fine Resolutions No. 052-002-0006087 to No. 052-002-0006089, and No. 052-002-0006092 to No. 052-002-0006100, June 24, 2014 (notified to SMCV on June 24, 2014); *see also* Exhibit CE-112, SUNAT Fine Resolutions No. 052-002-0006091 and No. 052-002-0006101, No. 052-002-0006102 and No. 052-002-0006090, June 24, 2014 (notified to SMCV on June 24, 2014).
- <sup>129</sup> *See* Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015 (first paragraph).
- <sup>130</sup> Exhibit CE-130, SUNAT Resolution No. 055-014-0002103, April 27, 2015.
- <sup>131</sup> Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).
- <sup>132</sup> Exhibit RE-40, SUNAT, Assessments No. 012-003-0089360 to 012-003-0089371 (GST for 2011), September 29, 2017.
- <sup>133</sup> *See* Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (first paragraph).
- <sup>134</sup> Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018.
- <sup>135</sup> Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).
- <sup>136</sup> Exhibit CE-245, Partial Withdrawal, General Sales and Other Taxes 2011, Docket No. 13002-2018, February 27, 2020.
- <sup>137</sup> Exhibit CE-155, Fine Resolutions No. 012-002-0030760 to No. 012-002-0030770, September 29, 2017.

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- <sup>138</sup> Exhibit CE-154, Fine Resolution No. 012-002-0030759, September 29, 2017.
- <sup>139</sup> Exhibit CE-155, Fine Resolutions No. 012-002-0030760 to No. 012-002-0030770, September 29, 2017 (notified to SMCV on October 19, 2017); Exhibit CE-154, Fine Resolution No. 012-002-0030759, September 29, 2017 (notified to SMCV on October 10, 2017).
- <sup>140</sup> See Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (first paragraph).
- <sup>141</sup> Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018.
- <sup>142</sup> Exhibit CE-182, SUNAT Resolution No. 0150140014204, June 27, 2018 (notified to SMCV on July 18, 2018).
- <sup>143</sup> Exhibit CE-245, Partial Withdrawal, General Sales and Other Taxes 2011, Docket No. 13002-2018, February 27, 2020.
- <sup>144</sup> Exhibit CE-51, SUNAT Assessment No. 052-003-0007147, May 27, 2011.
- <sup>145</sup> Exhibit CE-51, SUNAT Assessment No. 052-003-0007147, May 27, 2011 (notified to SMCV on June 3, 2011).
- <sup>146</sup> Exhibit CE-617, SMCV, Request for Reconsideration (Income Tax for 2006), July 4, 2011.
- <sup>147</sup> Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400, March 30, 2012; *see also* Exhibit CE-745, SUNAT, Resolution No. 0150150001833 (Income Tax for 2006), December 17, 2018.
- <sup>148</sup> Exhibit RE-134, Notification of SUNAT Resolution No. 0550140001556 to SMCV, April 11, 2012.
- <sup>149</sup> Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018, August 22, 2018.
- <sup>150</sup> Exhibit RE-135, Notification of Tax Tribunal Resolution No. 06367-2-2018 to SMCV, November 16, 2018.
- <sup>151</sup> Exhibit CE-849, SMCV, Payment Receipt (Income Tax for 2006), December 26, 2018.
- <sup>152</sup> Exhibit CE-52, SUNAT Fine Resolution No. 052-002-0004617, May 26, 2011.
- <sup>153</sup> Exhibit CE-50, SUNAT Fine Resolutions No. 052-002-0004614 and No. 052-002-0004616, May 26, 2011.
- <sup>154</sup> Exhibit CE-50, SUNAT Fine Resolutions No. 052-002-0004614 and No. 052-002-0004616, May 26, 2011 (notified to SMCV on June 3, 2011).
- <sup>155</sup> Exhibit CE-617, SMCV, Request for Reconsideration (Income Tax for 2006), July 4, 2011. As Claimant indicated, “unless otherwise noted, SMCV challenged the “Additional Penalties” related to certain tax assessments in the same proceedings as the underlying assessments.” *See* Claimant’s Memorial at Annex A, n. 1.
- <sup>156</sup> Exhibit CE-69, SUNAT Report on Record No. 0550140001556 - No. 326-P-2012-SUNAT/2J0400, March 30, 2012; *see also* Exhibit CE-745, SUNAT, Resolution No. 0150150001833 (Income Tax for 2006), December 17, 2018.
- <sup>157</sup> Exhibit CE-191, Tax Tribunal Resolution No. 06367-2-2018, August 22, 2018; *see also* Exhibit CE-750, SMCV, Contentious Administrative Court Claim (Income Tax 2006), February 15, 2019.
- <sup>158</sup> Exhibit CE-66, SUNAT Assessment No. 052-003-0008345, March 28, 2012.
- <sup>159</sup> Exhibit CE-66, SUNAT Assessment No. 052-003-0008345, March 28, 2012 (notified to SMCV on April 11, 2012).
- <sup>160</sup> See Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013, at p. 1.
- <sup>161</sup> Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013.
- <sup>162</sup> Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013).
- <sup>163</sup> Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018, August 22, 2018.

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- <sup>164</sup> Exhibit RE-136, Notification of Tax Tribunal Resolution No. 06369-2-2018 to SMCV, November 16, 2018.
- <sup>165</sup> Exhibit CE-67, SUNAT Fine Resolution No. 052-002-0005166, March 28, 2012.
- <sup>166</sup> Exhibit CE-68, SUNAT Fine Resolutions No. 052-002-0005167 and No. 052-002-0005168, March 28, 2012.
- <sup>167</sup> Exhibit CE-68, SUNAT Fine Resolutions No. 052-002-0005167 and No. 052-002-0005168, March 28, 2012 (notified to SMCV on April 11, 2012).
- <sup>168</sup> *See* Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013, at p. 1.
- <sup>169</sup> Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013.
- <sup>170</sup> Exhibit CE-77, SUNAT Resolution No. 055-014-0001701, January 25, 2013 (notified to SMCV on February 18, 2013).
- <sup>171</sup> Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018, August 22, 2018.
- <sup>172</sup> Exhibit CE-192, Tax Tribunal Resolution No. 06369-2-2018, August 22, 2018 (notified to SMCV on November 19, 2018); *see also* Claimant's Memorial at Annex A.
- <sup>173</sup> Exhibit CE-861, SMCV Income Tax 2007 Additional Penalties Payment Receipts, November 23, 2018.
- <sup>174</sup> Exhibit CE-95, SUNAT Assessment No. 052-003-0010790, August 21, 2013.
- <sup>175</sup> Exhibit RE-137, Notification of SUNAT Resolution No. 052-002-0005884 to SMCV, September 2, 2013.
- <sup>176</sup> Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (first paragraph).
- <sup>177</sup> Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014.
- <sup>178</sup> Exhibit RE-138, Notification of SUNAT Resolution No. 055-014-0001907 to SMCV, June 10, 2014.
- <sup>179</sup> Exhibit CE-248, Partial Withdrawal, Income Tax 2008, Docket No. 2633-2016, February 27, 2020.
- <sup>180</sup> Exhibit CE-94, SUNAT Fine Resolution No. 052-002-0005884, August 21, 2013.
- <sup>181</sup> Exhibit CE-93, SUNAT Fine Resolutions No. 052-002-0005882 and 052-002-0005883, August 19, 2013; *see also* Exhibit CE-661, SUNAT, Fine Resolution No. 052-002-0005881 to 052-002-0005883 (Income Tax 2010-2012), August 19, 2013.
- <sup>182</sup> Exhibit RE-139, Notification of SUNAT Resolutions No. 052-002-0005882 and 052-002-0005883 to SMCV, September 2, 2013.
- <sup>183</sup> Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (first paragraph).
- <sup>184</sup> Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014.
- <sup>185</sup> Exhibit CE-109, SUNAT Resolution No. 0550140001907, May 30, 2014 (notified to SMCV on June 10, 2014); *see also* Claimant's Memorial at Annex A.
- <sup>186</sup> Exhibit CE-248, Partial Withdrawal, Income Tax 2008, Docket No. 2633-2016, February 27, 2020.
- <sup>187</sup> Exhibit CE-115, SUNAT Assessment No. 052-003-00011921, October 30, 2014.
- <sup>188</sup> Exhibit CE-121, SUNAT Assessments No. 052-003-0012000 to No. 052-003-0012002, No. 052-003-0012007 to No. 052-003-0012010, No. 052-003-0012013 to No. 052-003-0012016, and No. 052-003-0012018, November 26, 2014.
- <sup>189</sup> Exhibit CE-115, SUNAT Assessment No. 052-003-00011921, October 30, 2014 (notified to SMCV on October 30, 2014).
- <sup>190</sup> Exhibit CE-121, SUNAT Assessments No. 052-003-0012000 to No. 052-003-0012002, No. 052-003-0012007 to No. 052-003-0012010, No. 052-003-0012013 to No. 052-003-0012016, and No. 052-003-0012018, November 26, 2014

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(notified to SMCV on November 27, 2014).

<sup>191</sup> See Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (first paragraph).

<sup>192</sup> Exhibit CE-678, SMCV, Request for Reconsideration (Income Tax for 2009), December 26, 2014.

<sup>193</sup> Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015.

<sup>194</sup> Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015).

<sup>195</sup> Exhibit CE-249, Partial Withdrawal, Income Tax 2009, Docket No. 16697-2015, February 27, 2020.

<sup>196</sup> Exhibit CE-116, SUNAT Fine Resolution No. 052-002-006238, October 30, 2014.

<sup>197</sup> Exhibit CE-119, SUNAT Fine Resolution No. 052-002-0006260, November 26, 2014; *see also* Exhibit CE-120, SUNAT Fine Resolution No. 052-002-0006267, November 26, 2014; Exhibit CE-118, SUNAT Fine Resolution No. 052-002-0006272, November 26, 2014.

<sup>198</sup> Exhibit CE-119, SUNAT Fine Resolution No. 052-002-0006260, November 26, 2014 (notified to SMCV on November 27, 2014).

<sup>199</sup> See Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (first paragraph).

<sup>200</sup> Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015.

<sup>201</sup> Exhibit CE-131, SUNAT Resolution No. 055-014-0002145, June 23, 2015 (notified to SMCV on August 7, 2015).

<sup>202</sup> Exhibit CE-249, Partial Withdrawal, Income Tax 2009, Docket No. 16697-2015, February 27, 2020.

<sup>203</sup> Exhibit CE-123, SUNAT Assessment No. 052-003-0012411, February 13, 2015; *see also* Exhibit CE-124, SUNAT Assessments No. 052-003-0012396, No. 052-003-0012400 to No. 052-003-0012403, No. 052-003-0012408 to No. 052-003-0012410, and No. 052-003-0012415 to No. 052-003-0012418, February 13, 2015.

<sup>204</sup> Exhibit CE-123, SUNAT Assessment No. 052-003-0012411, February 13, 2015 (notified to SMCV on February 13, 2015).

<sup>205</sup> See Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (first paragraph).

<sup>206</sup> Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015.

<sup>207</sup> Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015).

<sup>208</sup> Exhibit CE-250, Partial Withdrawal, Income Tax 2010, Docket No. 3201-2016, February 27, 2020.

<sup>209</sup> Exhibit CE-809, SMCV, Payment Receipt (AIT 2010), July 23, 2021.

<sup>210</sup> Exhibit CE-125, SUNAT Fine Resolution No. 052-002-0006347, February 13, 2015.

<sup>211</sup> Exhibit CE-126, SUNAT Fine Resolutions No. 052-002-0006355 and No. 052-002-0006356, February 18, 2015; *see also* Exhibit CE-127, SUNAT Fine Resolution No. 052-002-0006357, February 18, 2015.

<sup>212</sup> Exhibit CE-126, SUNAT Fine Resolutions No. 052-002-0006355 and No. 052-002-0006356, February 18, 2015 (notified to SMCV on February 23, 2015).

<sup>213</sup> See Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (first paragraph).

<sup>214</sup> Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015.

<sup>215</sup> Exhibit CE-134, SUNAT Resolution No. 0550140002255, November 4, 2015 (notified to SMCV on November 6, 2015).

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- <sup>216</sup> Exhibit CE-250, Partial Withdrawal, Income Tax 2010, Docket No. 3201-2016, February 27, 2020.
- <sup>217</sup> Exhibit CE-157, SUNAT Assessment No. 012-003-0090355, October 31, 2017; *see also* Exhibit CE-159, SUNAT Assessments No. 012-003-0090368 to No. 012-003-0090378, October 31, 2017.
- <sup>218</sup> Exhibit CE-157, SUNAT Assessment No. 012-003-0090355, October 31, 2017 (notified to SMCV on November 15, 2017).
- <sup>219</sup> Exhibit CE-698, SMCV, Request for Reconsideration (Income Tax for 2011), December 14, 2017.
- <sup>220</sup> Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018.
- <sup>221</sup> Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018 (notified to SMCV on August 22, 2018).
- <sup>222</sup> Exhibit CE-251, Partial Withdrawal, Income Tax 2011, Docket No. 13393-2018, February 27, 2020.
- <sup>223</sup> Exhibit CE-862, SMCV 2011 Income Tax Payment Receipt Order 957156446, January 20, 2021.
- <sup>224</sup> Exhibit CE-160, SUNAT Fine Resolutions No. 012-002-0030879 to No. 012-002-0030893, October 31, 2017.
- <sup>225</sup> Exhibit CE-161, SUNAT Fine Resolutions No. 012-002-0030892 and No. 012-002-0030893, October 31, 2017.
- <sup>226</sup> Exhibit CE-161, SUNAT Fine Resolutions No. 012-002-0030892 and No. 012-002-0030893, October 31, 2017; *see also* Exhibit CE-160, SUNAT Fine Resolutions No. 012-002-0030879 to No. 012-002-0030893, October 31, 2017 (notified to SMCV on November 15, 2017).
- <sup>227</sup> Exhibit CE-698, SMCV, Request for Reconsideration (Income Tax for 2011), December 14, 2017.
- <sup>228</sup> Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018.
- <sup>229</sup> Exhibit CE-187, SUNAT Resolution No. 0550140014311, August 10, 2018 (notified to SMCV on August 22, 2018).
- <sup>230</sup> Exhibit CE-251, Partial Withdrawal, Income Tax 2011, Docket No. 13393-2018, February 27, 2020.
- <sup>231</sup> Exhibit CE-232, SUNAT Assessment No. 012-003-0108051, November 26, 2019.
- <sup>232</sup> Exhibit RE-140, Notification of SUNAT Assessment No. 012-003-0108051 to SMCV, November 28, 2019.
- <sup>233</sup> Exhibit CE-773, SMCV, Request for Reconsideration (Income Tax for 2012), December 26, 2019.
- <sup>234</sup> Exhibit CE-252, Partial Withdrawal, Income Tax 2012, Docket No. 0150340017563, February 27, 2020.
- <sup>235</sup> Exhibit CE-791, SUNAT, Resolution No. 0150140015674 (Income Tax for 2012), November 12, 2020.
- <sup>236</sup> Exhibit CE-235, SUNAT Fine Resolution No. 012-002-0033157, November 26, 2019.
- <sup>237</sup> Exhibit CE-233, SUNAT Fine Resolution No. 012-002-0033155, November 26, 2019; *see also* Exhibit CE-234, SUNAT Fine Resolution No. 012-002-0033156, November 26, 2019
- <sup>238</sup> Exhibit RE-142, Notification of SUNAT Fine Resolution No. 012-002-0033155 to SMCV, November 28, 2019.
- <sup>239</sup> Exhibit CE-773, SMCV, Request for Reconsideration (Income Tax for 2012), December 26, 2019.
- <sup>240</sup> Exhibit CE-252, Partial Withdrawal, Income Tax 2012, Docket No. 0150340017563, February 27, 2020.
- <sup>241</sup> Exhibit CE-231, SUNAT Assessment No. 012-003-0108050, November 26, 2019.
- <sup>242</sup> Exhibit RE-143, Notification of SUNAT Assessment No. 012-003-0108050 to SMCV, November 28, 2019.

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- <sup>243</sup> Exhibit CE-774, SMCV, Request for Reconsideration (AIT for 2012), December 26, 2019.
- <sup>244</sup> Exhibit CE-259, Withdrawal, Additional Income Tax 2012, Docket No. 0150340017566, February 27, 2020.
- <sup>245</sup> Exhibit CE-790, SMCV, Payment Under Protest Letter (AIT 2012), October 7, 2020; *see also* Exhibit CE-795, SMCV, Payment Receipt (AIT 2013), January 20, 2021.
- <sup>246</sup> Exhibit CE-277, SUNAT Assessment No. 0120030113991 (Income Tax for 2013), December 28, 2020.
- <sup>247</sup> Exhibit RE-144, Notification of SUNAT Assessment No. 0120030113991 to SMCV, December 29, 2020; *see also* Exhibit RE-145, Notification of SUNAT Fine Resolution No. 0120020034409 to SMCV, December 29, 2020.
- <sup>248</sup> Exhibit CE-282, SMCV Payments Under Protest (Income Tax and AIT for 2013), February 5, 2021; *see also* Exhibit CE-796, SMCV, Payment Receipt No. 957149445, January 20, 2021; Exhibit CE-797, SMCV, Payment Receipt No. 957156446, January 20, 2021; Exhibit CE-798, SMCV, Payment Receipt (Income Tax for 2013), January 20, 2021; Exhibit CE-799, SMCV, Payment Receipt (Income Tax for 2013, Assessment No. 012-003-0113991), January 20, 2021.
- <sup>249</sup> Exhibit CE-278, SUNAT Fine Resolution No. 0120020034409 (Income Tax for 2013), December 28, 2020; *see also* Exhibit CE-279, SUNAT Fine Resolution No. 0120020034411 (Income Tax for 2013), December 28, 2020; Exhibit CE-280, SUNAT Fine Resolution No. 0120020034412 (Income Tax for 2013), December 28, 2020.
- <sup>250</sup> Exhibit CE-280, SUNAT Fine Resolution No. 0120020034412 (Income Tax for 2013), December 28, 2020.
- <sup>251</sup> Exhibit RE-146, Notification of SUNAT Fine Resolution No. 0120020034412 to SMCV, December 29, 2020.
- <sup>252</sup> Exhibit CE-799, SMCV, Payment Receipt (Income Tax for 2013, Assessment No. 012-003-0113991), January 20, 2021; *see also* Exhibit CE-863, SMCV Income Tax 2013 Additional Penalties Payment Receipts, January 20, 2021.
- <sup>253</sup> Exhibit CE-281, SUNAT Assessment No. 0120030114004 (AIT for 2013), December 28, 2020; *see also* Exhibit CE-854, SUNAT 2013 Income Tax Assessment, December 28, 2020.
- <sup>254</sup> Exhibit RE-147, Notification of SUNAT Assessment No. 0120030114004 to SMCV, December 29, 2020.
- <sup>255</sup> Exhibit CE-795, SMCV, Payment Receipt (AIT 2013), January 20, 2021.
- <sup>256</sup> Exhibit CE-103, SUNAT Assessment No. 052-003-0011208, December 27, 2013.
- <sup>257</sup> Exhibit CE-103, SUNAT Assessment No. 052-003-0011208, December 27, 2013 (notified to SMCV on December 30, 2013).
- <sup>258</sup> *See* Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (first paragraph).
- <sup>259</sup> Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014.
- <sup>260</sup> Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (notified to SMCV on September 15, 2014); *see also* Claimant's Memorial at Annex A.
- <sup>261</sup> Exhibit CE-255, Withdrawal, Temporary Tax on Net Assets 2009, Docket No. 18065-2014, February 27, 2020; *see also* Exhibit CE-780, SMCV, Withdrawal of Appeal to Tax Tribunal (TTNA for 2009), February 25, 2020.
- <sup>262</sup> Exhibit CE-875, Tax Tribunal, Resolution No. 02213-2-2020 (TTNA for 2009), February 27, 2020 (notified to SMCV on March 3, 2020).
- <sup>263</sup> Exhibit CE-104, SUNAT Fine Resolution No. 052 002-0006004, December 27, 2013.
- <sup>264</sup> Exhibit CE-104, SUNAT Fine Resolution No. 052 002-0006004, December 27, 2013 (notified to SMCV on December 30, 2013).
- <sup>265</sup> *See* Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014 (first paragraph).
- <sup>266</sup> Exhibit CE-113, SUNAT Resolution No. 055-014-0001946, August 27, 2014.
- <sup>267</sup> Exhibit RE-148, Notification of SUNAT Resolution No. 055-014-0001946 to SMCV, September 15, 2014.
- <sup>268</sup> Exhibit CE-255, Withdrawal, Temporary Tax on Net Assets 2009, Docket No. 18065-2014, February 27, 2020.

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- <sup>269</sup> Exhibit CE-875, Tax Tribunal, Resolution No. 02213-2-2020 (TTNA for 2009), February 27, 2020 (notified to SMCV on March 3, 2020); *see also* Claimant’s Memorial at Annex A.
- <sup>270</sup> Exhibit CE-132, SUNAT Assessment No. 052-003-0012908, August 14, 2015.
- <sup>271</sup> Exhibit CE-132, SUNAT Assessment No. 052-003-0012908, August 14, 2015 (notified to SMCV on August 14, 2015).
- <sup>272</sup> *See* Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 16, 2016 (first paragraph).
- <sup>273</sup> Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016.
- <sup>274</sup> Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016).
- <sup>275</sup> Exhibit CE-256, Withdrawal, Temporary Tax on Net Assets 2010, Docket No. 5721-2016, February 27, 2020.
- <sup>276</sup> Exhibit CE-877, Tax Tribunal Resolution No. 02247-5-2020 (TTNA for 2010) (notified to SMCV March 9, 2020); *see also* Claimant’s Memorial at Annex A.
- <sup>277</sup> Exhibit CE-133, SUNAT Fine Resolution No. 052-002-0006448, August 14, 2013.
- <sup>278</sup> Exhibit CE-133, SUNAT Fine Resolution No. 052-002-0006448, August 14, 2013 (notified to SMCV on August 14, 2015).
- <sup>279</sup> *See* Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (first paragraph).
- <sup>280</sup> Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016.
- <sup>281</sup> Exhibit CE-140, SUNAT Resolution No. 055-014-0002356, February 29, 2016 (notified to SMCV on March 16, 2016).
- <sup>282</sup> Exhibit CE-256, Withdrawal, Temporary Tax on Net Assets 2010, Docket No. 5721-2016, February 27, 2020.
- <sup>283</sup> Exhibit CE-147, SUNAT Assessment No. 052-003-0014319, July 27, 2016.
- <sup>284</sup> Exhibit CE-147, SUNAT Assessment No. 052-003-0014319, July 27, 2016 (notified to SMCV on July 27, 2016).
- <sup>285</sup> On August 25, 2016, SMCV appealed the 2011 TTNA Assessment and fine resolution before SUNAT (a copy of this appeal was not provided by Claimant in this arbitration). Pursuant to Art. 144 of the Tax Code, SMCV proceeded to appeal the Assessment and fine resolution directly before the Tax Tribunal (according to Art. 144 of the Tax Code, a taxpayer may deem its appeal with SUNAT dismissed and re-file the same appeal directly with the Tax Tribunal as long as nine (9) months have elapsed since the filing of the “reclamation” with SUNAT without a decision from the same tax authority. *See* Exhibit CE-695, SMCV, Appeal to Tax Tribunal (TTNA for 2011), June 27, 2017.
- <sup>286</sup> Exhibit CE-257, Withdrawal, Temporary Tax on Net Assets 2011, Docket No. 8937-2017, February 27, 2020.
- <sup>287</sup> Exhibit CE-148, Fine Resolution No. 052-002-0006693, July 27, 2016.
- <sup>288</sup> Exhibit CE-148, Fine Resolution No. 052-002-0006693, July 27, 2016 (notified to SMCV on July 27, 2016).
- <sup>289</sup> On August 25, 2016, SMCV appealed the 2011 TTNA Assessment and fine resolution before SUNAT (a copy of this appeal was not provided by Claimant in this arbitration). Pursuant to Art. 144 of the Tax Code, SMCV proceeded to appeal the Assessment and fine resolution directly before the Tax Tribunal (according to Art. 144 of the Tax Code, a taxpayer may deem its appeal with SUNAT dismissed and re-file the same appeal directly with the Tax Tribunal as long as nine (9) months have elapsed since the filing of the “reclamation” with SUNAT without a decision from the same tax authority. *See* Exhibit CE-695, SMCV, Appeal to Tax Tribunal (TTNA for 2011), June 27, 2017.
- <sup>290</sup> Exhibit CE-257, Withdrawal, Temporary Tax on Net Assets 2011, Docket No. 8937-2017, February 27, 2020.
- <sup>291</sup> Exhibit CE-162, Tax Return for Temporary Taxes on Net Assets and Payment Receipt, December 21, 2017. SMCV voluntarily self-declared and paid 2012 TTNA amounts under protest in December 2017 “to avoid further penalties and interest.” (Claimant’s Memorial at para. 283).
- <sup>292</sup> Exhibit CE-230, Assessment Resolution No. 012-003-0107987, November 20, 2019.

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- <sup>293</sup> Exhibit RE-149, Notification of SUNAT Assessment No. 012-003-0107987 to SMCV, November 20, 2019.
- <sup>294</sup> Exhibit CE-236, Written Claim to SUNAT No. 0150340017533, December 15, 2019.
- <sup>295</sup> *See* Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (first paragraph).
- <sup>296</sup> Exhibit CE-879, SUNAT Resolution No. 0150140015385 (TTNA Assessment for 2013), May 13, 2020.
- <sup>297</sup> Exhibit CE-258, Withdrawal, Temporary Tax on Net Assets 2013, Docket No. 0150340017533, February 27, 2020.
- <sup>298</sup> Exhibit CE-879, SUNAT Resolution No. 0150140015385 (TTNA for 2013), May 13, 2020 (notified to SMCV May 14, 2020).
- <sup>299</sup> Exhibit CE-865, SMCV 2013 TTNA Payment Receipt Order 756045257, December 20, 2019; *see also* Exhibit CE-772, SMCV, Payment Receipt (TTNA for 2013), December 20, 2019.
- <sup>300</sup> Exhibit CE-156, Fine Resolution No. 011-002-0022011, September 26, 2017.
- <sup>301</sup> Exhibit CE-156, Fine Resolution No. 011-002-0022011, September 26, 2017 (notified to SMCV on October 3, 2017).
- <sup>302</sup> Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (first paragraph).
- <sup>303</sup> Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018.
- <sup>304</sup> Exhibit CE-724, SUNAT, Resolution No. 0150150014218 (TTNA for 2013), June 28, 2018 (notified to SMCV on July 19, 2018).
- <sup>305</sup> Exhibit CE-743, Tax Tribunal, Resolution No. 10372-9-2018 (TTNA Fines for 2013), December 14, 2018.
- <sup>306</sup> Exhibit RE-150, Notification of Tax Tribunal Resolution No. 10372-9-2018 to SMCV, January 4, 2019.
- <sup>307</sup> Exhibit CE-864, SMCV 2013 TTNA Penalty Payment Support, February 19, 2019.
- <sup>308</sup> Exhibit CE-163, Assessment No. 012-003-0092658, December 29, 2017; *see also* Exhibit CE-164, Assessment No. 012-003-0092961, December 29, 2017; Exhibit CE-165, Assessment No. 012-003-0092962, December 29, 2017; Exhibit CE-166, Assessment No. 012-003-0092963, December 29, 2017; Exhibit CE-167, Assessment No. 012-003-0092964, December 29, 2017.
- <sup>309</sup> Exhibit CE-163, Assessment No. 012-003-0092658, December 29, 2017 (notified to SMCV on January 18, 2018).
- <sup>310</sup> *See* Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (first paragraph).
- <sup>311</sup> Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018.
- <sup>312</sup> Exhibit CE-198, SUNAT Resolution No. 0150140014441, October 12, 2018 (notified to SMCV on October 30, 2018).
- <sup>313</sup> Exhibit CE-223, Tax Tribunal Resolution No. 05634-4-2019, June 20, 2019.
- <sup>314</sup> Exhibit RE-151, Notification of Tax Tribunal Resolution No. 05634-4-2019 to SMCV, July 26, 2019.
- <sup>315</sup> Exhibit CE-836, SMCV, Payment Receipt (SMT for Q4 2011-2012).
- <sup>316</sup> Exhibit CE-196, Assessments No. 012-003-0099078 to No. 012-003-0099081, September 28, 2018.
- <sup>317</sup> Exhibit CE-196, Assessments No. 012-003-0099078 to No. 012-003-0099081, September 28, 2018 (notified to SMCV on October 10, 2018).
- <sup>318</sup> *See* Exhibit CE-221, SUNAT Resolution No. 0150140014815, May 28, 2019 (first paragraph).
- <sup>319</sup> Exhibit CE-221, SUNAT Resolution No. 0150140014815, May 28, 2019.

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<sup>320</sup> Exhibit RE-152, Notification of SUNAT Resolution No. 0150140014815 to SMCV, May 28, 2019.

<sup>321</sup> Exhibit CE-868, SMCV, Payment Receipt (SMT for 2013).

<sup>322</sup> Exhibit CE-237, Assessment Resolution No. 012-003-0109172, December 20, 2019.

<sup>323</sup> Exhibit RE-153, Notification of SUNAT Assessment No. 012-003-0109172 to SMCV, December 23, 2019.

<sup>324</sup> Exhibit CE-238, Written Claim to SUNAT No. 0150340017649, January 22, 2020.

<sup>325</sup> Exhibit CE-254, Withdrawal, Complementary Mining Pension Fund Tax 2013, Docket No. 0150340017649, February 27, 2020.

<sup>326</sup> Exhibit CE-878, SUNAT Resolution No. 0150140015384 (CMPF for 2013), May 13, 2020; *see also* Claimant's Memorial at Annex A.

<sup>327</sup> Exhibit CE-208, SMCV Reimbursement Request, 4Q 2011, December 28, 2018; Exhibit CE-209, SMCV Reimbursement Request, GEM Q1 2012, December 28, 2018; Exhibit CE-210, SMCV Reimbursement Request, GEM 2Q 2012, December 28, 2018; Exhibit CE-211, SMCV Reimbursement Request, GEM 3Q 2012, December 28, 2018.

<sup>328</sup> Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019.

<sup>329</sup> Exhibit CE-218, SUNAT, Resolution No. 012-180-0018640/SUNAT, March 4, 2019 (notified to SMCV on March 22, 2019).

<sup>330</sup> Exhibit CE-874, SUNAT, Resolution No. 0150140014950/SUNAT (GEM Q4 2011-Q3 2012), July 31, 2019, at p. 1.

<sup>331</sup> Exhibit CE-874, SUNAT, Resolution No. 0150140014950/SUNAT (GEM Q4 2011-Q3 2012), July 31, 2019; *see also* Claimant's Memorial at Annex A.

<sup>332</sup> Exhibit RE-154, Notification of SUNAT Resolution No. 0150140014950 to SMCV, July 31, 2019.