

**In the Arbitration under the Convention on the Settlement of Investment Disputes
between States and Nationals of Other States and the
United States-Peru Trade Promotion Agreement**

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

Claimant

— v. —

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/20/08

CLAIMANT'S REPLY AND COUNTER-MEMORIAL ON JURISDICTION

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ABBREVIATED TERMS

1972 Feasibility Study	Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972)
1994 Stability Agreement	Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994)
1996 Feasibility Study	Fluor Daniel Wright Ltd., Cerro Verde Expansion Project: Leach Feasibility Study (1996)
1996 Mill Feasibility Study	ICF Kaiser Engineers Inc., Feasibility Study Analysis for the Cerro Verde Project (1 June 1996)
1998 Mill Feasibility Study	Bateman Engineering Inc., Primary Sulfide Ore Mill Expansion: Feasibility Study (16 March 1998)
2004 Feasibility Study	Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004)
AIT	Additional Income Tax
APOYO	Apoyo Consultoría
Centromín	Empresa Minera del Centro del Perú
CEPRI	Special Committee to Promote Private Investment in Production Units
CMPF	Complementary Mining Pension Fund Tax
COPRI	Commission to Promote Private Investment
CPI	Consumer Price Index
Cyprus	Cyprus Amax Minerals Company
DGM	Directorate General of Mining
EAU	Economic-Administrative Unit
EGASA	Empresa de Generación Arequipa S.A.
EIS	Environmental Impact Study
GEM	<i>Gravamen Especial a la Minería</i>
GEM Agreement	Agreement for the Assessment of <i>Gravamen Especial a la Minería</i> Approved by Law No. 29790 (28 February 2012)
GST	General Sales Tax
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
L.D. 109	General Mining Law, Legislative Decree No. 109 (12 June 1981)
L.D. 662	Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 (29 August 1991)

L.D. 708	Promotion of Investment in the Mining Sector, Legislative Decree No. 708 (6 November 1991)
L.D. 757	Framework Law for Private Investment Growth, Legislative Decree No. 757 (13 November 1991)
LGAP	Law on General Administrative Procedure
MDT	Municipal Development Tax
MEF	Ministry of Economy and Finance
MINCETUR	Ministry of Foreign Trade and Tourism
MINEM	Ministry of Energy and Mines
Minero Perú	Empresa Minero del Perú S.A.
Mining Law	Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (3 June 1992)
Mining Society	National Society of Mining and Petroleum Engineers
MOF	Manual of the Operation and Functions of the Tax Tribunal
MT/d	Metric Tons per Day
NAFTA	North American Free Trade Agreement
OSINERGMIN	MINEM's Supervisory Agency for Investment in Energy and Mining
PDAC	Prospectors & Developers Association of Canada
Phelps Dodge	Phelps Dodge Mining Corporation
PMSP	Mining Program of Solidarity with the People
PTU	Profit-Sharing Obligation
RAF Plan	<i>Régimen de aplazamiento y/o fraccionamiento de las deudas tributarias administradas por la SUNAT</i>
Regulations	Regulations of Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM
Roundtable Discussion Agreement	Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV (2 August 2006)
Settlement Agreement	Out-of-Court Settlement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001)
Share Purchase Agreement	Share Purchase Agreement Between Empresa Minera del Perú S.A. and Cyprus Climax Metals Co. (17 March 1994)
SMCV	Sociedad Minera Cerro Verde S.A.A.
SMM Cerro Verde	SMM Cerro Verde Netherlands B.V.
SMT	Special Mining Tax

Stability Agreement	Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998)
SUNAT	National Superintendence of Customs and Tax Administration
SX/EW	Solvent Extraction and Electrowinning
TPA	U.S.-Peru Trade Promotion Agreement
TTNA	Temporary Tax on Net Assets
UIT	Taxation Unit
Voluntary Contribution Agreement	Voluntary Contribution Agreement (18 January 2007)

I. INTRODUCTION

1. Peru's Counter-Memorial and its document production further confirm that Peru sought to avoid its obligation to grant Sociedad Minera Cerro Verde S.A.A ("SMCV") stability guarantees for its US\$850 million investment in a concentrator plant at Cerro Verde (the "Concentrator") by arbitrarily devising and then enforcing a new and restrictive position on the scope of stability guarantees that denied stability coverage to the Concentrator. Peru did so even though its new position violated the applicable legal framework, Peru's contractual obligations and assurances to SMCV and Peru's consistent practice of applying stability guarantees to all investments and activities within a concession or mining unit.

2. When Peru suffered from a deep financial, political and security crisis in the early 1990s, the Government reformed Peru's Mining Law to attract much needed foreign investment in the mining sector. The new Mining Law provided investors with broad stability guarantees. To qualify for a stability agreement granting these guarantees, mining companies had to make a minimum investment, which they had to demonstrate by submitting a feasibility study. The stability guarantees covered all investments and activities within the concessions or mining units in which the qualifying minimum investment was made. Specifically, the Regulations implementing the Mining Law provided that the stability guarantees "shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units." And, if a mining company has several concessions or Economic-Administrative Units, the stability guarantees "will only take effect for those concessions or units" that are included in the stability agreement.

3. In 1998, SMCV entered into a Stability Agreement that, in accordance with the Mining Law and Regulations, extended the stability guarantees to SMCV's Mining Concession and its Beneficiation Concession, which together formed the Cerro Verde Mining Unit. In 2004, SMCV considered making a US\$850 million investment in the Concentrator—an investment the Government had long sought to obtain because it would prolong the life of the mine by more than thirty years, create thousands of new jobs and triple tax revenues for the Government. Peru's Ministry of Energy and Mines ("MINEM") assured SMCV that the Concentrator would be covered by the Stability Agreement because it formed part of the Cerro Verde Mining Unit and would be included in the stabilized Beneficiation Concession. SMCV and its then-owner, Phelps Dodge, Claimant Freeport-McMoRan Inc.'s ("Freeport" or Claimant") predecessor, thus proceeded with the investment in the Concentrator in reliance on the Stability Agreement.

4. But despite its assurances, MINEM then changed its mind. With rising copper prices, members of Congress and local politicians started to attack stability agreements and demanded that the

newly adopted Royalty Law should also apply to companies with stability agreements, such as SMCV. The pressure increased when MINEM approved SMCV's request for a tax benefit to reinvest parts of its profits to construct the new Concentrator—a benefit that was only available under its Stability Agreement. Much of the ire was targeted at Minister of Energy and Mines Glodomiro Sánchez Mejía, who was threatened with a constitutional complaint if he failed to impose royalties against SMCV.

5. As the document discovery has further confirmed, Minister Sánchez Mejía ultimately succumbed to the intense political pressure and announced to Congress and the press that SMCV's Concentrator would not be entitled to stability guarantees. To support the Minister's politically opportunistic move, MINEM's Director General of Legal Affairs Felipe Isasi Cayo devised a new position under which stability guarantees were limited to the initial "investment project" set out in the feasibility study submitted to obtain the stability agreement—a position that flatly contradicted his own previous opinion that stability guarantees applied to concessions or mining units. MINEM's *volte-face* had no basis in the text of the Mining Law and Regulations or the Stability Agreement. It also contradicted MINEM's previous assurances to SMCV and over a decade of consistent practice by Peru in applying stability guarantees to all investments and activities within the covered concessions or mining units. It also made no commercial sense as it would result in a patchwork of different fiscal regimes within a single integrated mining unit that would be difficult to disentangle and result in significant administrative burdens and legal uncertainty—exactly what the reform of the Mining Law had sought to avoid.

6. MINEM did not share its new position with SMCV, even though SMCV had several face-to-face meetings with Mr. Isasi and other MINEM officials. It did so for a reason: MINEM not only wanted SMCV to pay hundreds of millions of dollars in royalties and additional taxes it did not owe under the Stability Agreement, but also hundreds of millions more in "voluntary payments"—payments that SMCV made in the belief that it was exempted from royalties.

7. MINEM then forwarded its new position to Peru's Tax Authority, the National Superintendence of Customs and Tax Administration ("SUNAT"). Starting in 2009, SUNAT issued Royalty and Tax Assessments against SMCV based on MINEM's novel position that SMCV's Concentrator was not covered by the Stability Agreement. SUNAT also arbitrarily assessed extraordinarily punitive penalties and interest, which exceed the amount of royalties and additional taxes assessed, even though Peru had an obligation to waive them. As of the date of this filing, the Assessments against SMCV total US\$1.2 billion.

8. Peru's own tax law expert, Jorge Luis Picón Gonzales, has called SUNAT's Assessments against SMCV and eight other major companies "absurd" and "generated by poorly interpreted

formalities.” And even SUNAT itself appears not to have been sold on MINEM’s novel position despite relying on it for each of the Royalty and Tax Assessments SUNAT issued against SMCV. In fact, three years after SUNAT issued its first Royalty Assessment against SMCV, SUNAT advised mining companies in a report that “mining-activity owners that have signed [stability agreements] will enjoy a stabilized tax system applicable solely *to the concession or economic-administrative unit for which said agreement has been signed.*”

9. But when SMCV challenged SUNAT’s Assessments before the Tax Tribunal, the final administrative decision-maker in tax and royalty payments, the Tax Tribunal President, Zoraida Olano Silva, intervened to ensure that the Tax Tribunal would confirm SUNAT’s Assessments. The President, who is an MEF employee with no authority to decide cases and who reports directly to the Minister of Economy and Finance, directed her own administrative assistant to draft the resolution rejecting SMCV’s challenge to the 2008 Royalty Case. Then other Tax Tribunal Chambers copy-pasted the resolution to reject SMCV’s challenges in other cases.

* * *

10. In its Counter-Memorial, Peru does not dispute many of the key facts and it offers no meaningful legal or evidentiary response. If anything, Peru’s assertions further confirm that Peru has breached the obligations it owed to SMCV under the Stability Agreement and to Freeport and SMCV under Article 10.5 of the TPA.

11. For example, Peru relies on the testimony of its witness César Augusto Polo Robilliard that, when participating in the drafting of the Mining Law’s stability provisions, he “intended” to limit the stability guarantees to the “investment project” set forth in the feasibility study submitted to obtain the stability agreement. But Mr. Polo’s supposed “intention” was nowhere reflected in the text of the Mining Law. Mr. Polo’s supposed “intention” is also completely unsupported by any contemporaneous document. Even though Peru is in the possession of the Mining Law’s legislative history and agreed to produce relevant documents, it provided nil. Mr. Polo’s supposed “intention” also would have run counter to the instructions of his superior, Minister of Energy and Mines Sánchez Albavera, who spearheaded the reforms to the Mining Law and sought to provide broad stability protections and simple procedures to attract much needed foreign investment. And Mr. Polo’s supposed “intention” is further contradicted by the testimony of María Chappuis Cardich, who also participated in the drafting of the Mining Law and who testifies that “Mr. Polo never told me at the time that he intended to limit stability guarantees to a particular ‘investment project,’ a term that he never mentioned.”

12. Mr. Polo’s supposed “intention” also flies in the face of more than a decade of consistent practice by Peruvian authorities applying stability guarantees to concessions or mining units. There is not a single shred of evidence in the record of Peru having applied stability guarantees to “investment projects” set forth in the feasibility study—rather than concessions and mining units—before SMCV started to construct the Concentrator.

13. Peru largely ignores its consistent practice up until this point and instead quibbles whether certain MINEM documents created *after* SMCV started to construct the Concentrator support its novel position. In particular, Peru goes to great lengths to argue that all internal reports prepared by MINEM’s Legal Director Mr. Isasi supported its novel position. They clearly do not. Peru’s assertions are contradicted by its own shifting position on Mr. Isasi’s April 2005 Report in which Mr. Isasi unequivocally confirmed that stability guarantees extend to the *concessions* in which the initial investment was made. MINEM never shared that Report with SMCV and fought hard not to disclose it in response to a request under its own Transparency Law. Peru’s arbitration counsel then advised the Government not to disclose the Report because “at first glance, [the Report] appears to support” Freeport’s position and “could negatively impact the arbitration proceedings.” Peru’s Special Commission further cautioned that disclosure “would put Peru’s legal defense at risk and would lead to international liability for breach of international investment treaties.” But Peru’s Transparency Tribunal nevertheless ordered disclosure. With the April 2005 Report in the record, Peru now tells the Tribunal that “the April 2005 report did not support Claimant’s interpretation of the scope of the stability guarantees.”

14. Even though Mr. Isasi and other MINEM officials did not share with SMCV in multiple face-to-face meetings MINEM’s new position that stability guarantees only applied to the qualifying “investment project,” Peru argues that SMCV “should have known” that the Government was withholding that information from it because SMCV could have watched on the Congress’s closed-circuit TV two speeches by Minister Sánchez Mejía and Mr. Isasi before a Congressional Committee and Working Group in which they allegedly explained MINEM’s novel position. But it was the Government’s obligation to be fair and transparent, not SMCV’s obligation to distrust the Government and investigate what MINEM was really up to. Moreover, SMCV was not invited to attend the Committee and Working Group sessions, and Peru has not provided any proof that these sessions broadcast to the public, as it asserts, even though the Tribunal ordered Peru to do so. And the transcripts of the 2005 Congressional Committee session reveal that, in fact, Minister Sánchez Mejía said nothing that would support Peru’s position in this arbitration. To the contrary, he announced that stabilized “mining projects” were exempt from royalties—a term that MINEM used to refer to mining units, not “investment projects.”

15. Peru also argues that it did nothing wrong when it rejected SMCV's requests to waive the hundreds of millions of dollars in penalties and interest, an amount that was further compounded by the Tax Tribunal's excessive delays in deciding the challenges. Peru first asserts that there was no reasonable doubt about the interpretation of the scope of the stability guarantees in the Mining Law and Regulations, an assertion that, in light of the overwhelming record to the contrary, only further highlights the arbitrary nature of the Government's conduct. Peru then argues that, even if there was reasonable doubt, the Government could not issue a waiver because the Government did not first issue a required "clarification" confirming the application of the waiver. But Peru cannot excuse its Treaty breach by its own arbitrary failure to issue a "clarification."

16. Peru further attempts to portray the serious due process violations SMCV experienced at the Tax Tribunal as nothing but "normal, administrative activities." That the Tax Tribunal President interfered in the decision-making of the Chamber hearing the 2008 Royalty Case by directing her own assistant to draft the resolution confirming SUNAT's 2008 Royalty Assessment was simply a "routine administrative act[]" to handle a staff shortage. That the Tax Tribunal President interfered with the Chamber hearing the 2006-2007 Royalty Case to have it adopt a copy-paste version of the resolution drafted by her assistant was "coordination" that "was not only appropriate, but, rather, necessary." That the Tax Tribunal President drafted the resolution of the plenary rejecting SMCV's challenge to the clearly conflicted *vocal ponente* Mejía Ninacondor in the 2010-2011 Royalty Case *before* the plenary had deliberated and voted was "nothing out of the ordinary" and "normal procedure." And that the President's assistant who drafted the 2008 Royalty Case resolution, and in the meantime had been promoted, was the *vocal ponente* in SMCV's Q4 2011 Royalty Case was a "realit[y] of administrative practice." If Peru is correct that these grave due process violations constitute "normal practice" at the Tax Tribunal, then this is a shocking indictment of the Tax Tribunal's procedures.

* * *

17. Through its conduct, Peru repeatedly breached the Stability Agreement when it failed to comply with its obligations to apply stability guarantees to the entirety of SMCV's mining unit, including the Concentrator. Peru also breached its obligations under the Stability Agreement when it arbitrarily applied certain taxes against *all* of SMCV's operations, including those that even Peru admitted were stabilized.

18. Faced with the myriad evidence demonstrating that Peru was required to apply stability guarantees to the entirety of SMCV's Mining and Beneficiation Concessions during the Stability Agreement's term, Peru argues that the Tribunal should simply disregard this evidence. In particular, Peru argues that this Tribunal should be bound by the Peruvian Supreme Court's rejection of SMCV's

administrative challenge to the 2008 Royalty Assessments. But there is simply no basis for the Tribunal to abdicate its authority to decide Freeport's Stability Agreement Claims, since among others, none of the basic requirements for *res judicata* or collateral estoppel are met in this case. And tellingly, neither SUNAT nor the Tax Tribunal—and not even the Supreme Court itself—treated the Supreme Court decision in the 2008 Royalty Case as having any binding effect.

19. Peru's unlawful and arbitrary conduct also repeatedly breached its obligation under Article 10.5 to provide fair and equitable treatment to Freeport's investment each time the Royalty Assessments became final and enforceable. Peru's breaches were the result of its arbitrary, inconsistent, and non-transparent conduct, its violation of Freeport's and SMCV's legitimate expectations, and the Tax Tribunal's serious due process violations. Peru also breached Article 10.5 of the Treaty each time it arbitrarily failed to waive the penalties and interest assessed on each of the Royalty and Tax Assessments, despite being required to do so under both Peruvian law and fundamental principles of fairness and equity. In addition, Peru breached Article 10.5 when it arbitrarily and unreasonably refused to fully reimburse SMCV for the GEM payments that Peru had induced SMCV to make on the understanding that these payments were in lieu of royalties, resulting in a windfall to Peru.

* * *

20. In an attempt to avoid liability for its Stability Agreement and Article 10.5 breaches, Peru raises a number of meritless jurisdictional objections to Freeport's claims. Peru argues that: (i) most of Freeport's claims are time-barred under Article 10.18.1 of the TPA; (ii) most of Freeport's claims for breach of the Stability Agreement are barred by Article 10.18.4 because SMCV filed administrative challenges to the Assessments before SUNAT and the Tax Tribunal; (iii) most of Freeport's claims are barred because they allegedly require retroactive application of the TPA; (iv) Freeport's Article 10.5 claims for penalties and interest on the Tax Assessments are barred by the tax exclusion in Article 22.3.1; and (v) Freeport cannot bring claims for breaches of the Stability Agreement on behalf of SMCV because Freeport has allegedly failed to demonstrate that Freeport relied on the Stability Agreement when it established or acquired its covered investments.

21. In support of its objections, Peru contends that—to submit claims to treaty arbitration—an investor that has received a SUNAT assessment would have to forgo its right to request the Peruvian tax administration to reconsider the assessment and, where appropriate, correct or annul it. What is more, an investor would have to submit to treaty arbitration claims for breaches that are based on future SUNAT assessments that might never be rendered, for fiscal periods that have not yet commenced, and for

amounts that cannot yet be determined. In other words, it is Peru's case that investors would have to file claims that are not yet ripe for adjudication. This is a remarkable position for a Government to take.

22. Unsurprisingly, Peru's jurisdictional arguments cannot be squared with the plain terms of the TPA. For example, Peru argues that Freeport should have submitted claims for losses SMCV "would incur" in the future. But Article 10.18.1 of the TPA refers to losses that have been "*incurred*" in the past. Peru argues that Freeport's claims for breaches of the Stability Agreement are barred if SMCV previously submitted administrative challenges that "share the same fundamental basis." But Article 10.18.4 only bars claims if an investor previously submitted claims for the "*same alleged breach*" to an administrative tribunal, court, or other binding dispute settlement procedure. Peru argues that, to bring claims for breach of the Stability Agreement, Freeport must show that both Freeport and SMCV relied on the Stability Agreement in making a covered investment. But Articles 10.16.1 and 10.28 are clear that, when an investor submits a claim for breach of an investment agreement on behalf of an enterprise it owns or controls, the investor must show only reliance by the enterprise on the investment agreement.

23. Some of Peru's jurisdictional arguments cannot even be squared with Peru's own position on liability and quantum. In support of its time-bar objection, Peru contends that "SUNAT's stated interpretation of the 1998 Stabilization Agreement in th[e] 2006-2007 Royalty Assessments was the same legal basis for all the royalty, tax, penalty and interest assessments that followed." But elsewhere Peru asserts that "SUNAT had no power to establish or interpret the scope of the Stabilization Agreement." Peru also argues that SMCV "had incurred" damages resulting from all of the Assessments in 2009—eleven years before the last Assessment was rendered. But for damages purposes, Peru argues that certain yet unpaid liabilities resulting from final and enforceable Assessments have not yet "materialized." Peru argues that Freeport "cannot use a court decision (in this case, SUNAT's and Tax Tribunal's decisions)" "to toll the limitations period." But elsewhere Peru acknowledges that SUNAT's decisions on reconsideration requests, and the Tax Tribunal resolutions, are part of the administrative process.

24. All of Freeport's claims for breaches of the Stability Agreement and Article 10.5 of the TPA have been properly submitted to arbitration and fall within the scope of Peru's consent to arbitrate. *First*, all of Freeport's claims for breaches of the Stability Agreement are timely under Article 10.18.1 because Freeport submitted its claims within three years of when it acquired or should have acquired knowledge of each of Peru's breaches and the resulting loss or damage. Peru breached the Stability Agreement and SMCV incurred loss or damage only once each Assessment became final and enforceable and SMCV had an obligation to pay. Likewise, Freeport submitted each of its claims for breaches of Article 10.5 within three years of the date of each breach, with the exception of Freeport's claims for

breach of due process in the 2006-2007 and 2008 Royalty Cases, which are still timely because Freeport submitted those claims within three years of acquiring knowledge of those breaches.

25. *Second*, Article 10.18.4 of the TPA does not apply to any of Freeport's claims for breaches of the Stability Agreement because SMCV did not submit the "same alleged breach[es]" to an administrative tribunal of Peru or binding dispute settlement procedures. SMCV submitted administrative law challenges to SUNAT and the Tax Tribunal, not contract claims for breach of the Stability Agreement. Moreover, the proceedings before SUNAT's Claims Division and the Tax Tribunal are not proceedings before "an administrative tribunal" or "binding dispute settlement procedures" under Article 10.18.4 of the TPA.

26. *Third*, Freeport's claims comply with Article 10.1.3 of the TPA as all of the breaches that Freeport alleges occurred after the TPA entered into force. *Fourth*, Article 22.3.1 does not bar Freeport's Article 10.5 claims for penalties and interest on the Tax Assessments because penalties and interest are not "taxation measures" under Peruvian law. *Finally*, Freeport can submit claims for breaches of the Stability Agreement on behalf of SMCV under Article 10.16.1(b)(i)(C) because SMCV relied on the Stability Agreement in making its investment in the Concentrator.

* * *

27. As a result of Peru's breaches of the Stability Agreement and Article 10.5 of the TPA, as of 13 September 2022, Freeport and SMCV have suffered damages of US\$ 942.4 million, inclusive of pre-Award interest, an amount that will have increased by the date of the Award, plus post-award interest.

28. Peru "does not resist" Freeport's approach to assessing damages. However, Peru asserts that, even if it breached the Stability Agreement and Article 10.5 of the TPA, it should be permitted to retain over 60% of the ill-gotten gains resulting from the penalties and interest because SMCV allegedly failed to sufficiently mitigate those damages. But Peru's argument is not only factually and legally wrong, it is also plainly absurd: it is Peru's obligation to fully compensate SMCV for the gains it received as a result of its breaches.

29. For the above reasons, Freeport respectfully requests that the Tribunal dismiss each of Peru's objections to jurisdiction and declare that it has jurisdiction over each of Freeport's claims, declare that Peru violated the Stability Agreement and Article 10.5 of the TPA, and order compensation for the significant loss and damage that Freeport and SMCV have suffered as a result of Peru's breaches.

II. PERU BREACHED ITS OBLIGATIONS UNDER THE TREATY

A. SMCV WAS ENTITLED TO STABILITY FOR THE CONCENTRATOR UNDER THE STABILITY AGREEMENT

30. In its Memorial, Freeport explained that SMCV was legally entitled to stability guarantees for the Concentrator because (i) under the Mining Law and Regulations in force at the time, stability guarantees applied to all investments and activities made within the concessions or mining units in which the mining company made its qualifying investment; (ii) the Stability Agreement had to strictly implement the stability guarantees set out in the Mining Law and Regulations, and could not deviate from the scope of guarantees established therein; (iii) SMCV's Stability Agreement applied to all of SMCV's investments and activities made within its Mining Concession and Beneficiation Concession, which were explicitly included in the Stability Agreement; and (iv) the Concentrator was part of the Beneficiation Concession included in the Stability Agreement.

31. Peru agrees that the Mining Law and Regulations governed the scope of stability guarantees.¹ Peru also does not, and cannot, contest that the Concentrator was part of SMCV's Beneficiation Concession. So if it is established that the Mining Law and Regulations applied stability guarantees to concessions, there should be no dispute that SMCV's Concentrator was entitled to the stability guarantees.

32. To escape that conclusion, Peru argues that the Mining Law and Regulations did not extend stability guarantees to concessions or mining units but solely to the specific "investment project" set forth in the feasibility study that a mining company had to submit to demonstrate that it met the qualifications for stability. But to make that argument Peru faces the insurmountable hurdle that the Mining Law and Regulations expressly extended stability guarantees to concessions or mining units and nowhere mention investment projects. Peru also largely ignores over a decade of its own consistent practice applying stability guarantees to concessions and mining units. Peru further attempts to reframe the relevant issue whether SMCV was legally entitled to stability guarantees for the Concentrator into the entirely irrelevant issue of whether SMCV "knew or should have known" that the Government intended to repudiate its obligations under the Stability Agreement and require SMCV to pay royalties and additional taxes for the Concentrator. But Peru's attempts cannot evade the fact that the evidence clearly demonstrates SMCV's legal entitlement to stability for the Concentrator.

¹ See, e.g., Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction (4 May 2022) ("Counter-Memorial"), § II.A.2-3.

1. Peru’s Argument that Stability Agreements Apply Only to Specific “Investment Projects” Contradicts the Plain Text of the Mining Law and Regulations

33. In its Memorial, Freeport demonstrated that the Mining Law and Regulations granted stability guarantees to the entire concessions or mining units in which a mining company made its qualifying minimum investment.² In its Counter-Memorial, Peru asserts that the Mining Law and Regulations granted stability guarantees only to specific “investment projects” set out in the feasibility study.³ Peru’s assertion is completely detached from the text of the Mining Law and Regulations, which nowhere mentioned “investment projects.”

i. Article 83 of the Mining Law and Articles 2 and 22 of the Regulations Confirm that Stability Guarantees Applied to Entire Concessions or Mining Units, Not “Investment Projects”

34. As Freeport explained in its Memorial, the text of the Mining Law and Regulations made clear that stability guarantees applied to the concessions or mining units in which the mining company made the initial qualifying minimum investment.⁴ Among others:

- (a) The plain text of Article 83 provided that the stability guarantees “apply exclusively to the *activities of the mining company* in whose favor the investment is made.”⁵
- (b) Article 22 of the Regulations, which implemented Article 83, provided that the stability guarantees “shall benefit the mining activity titleholder exclusively for the investments that it makes in the *concessions or Economic-Administrative Units*.”⁶
- (c) Article 2 of the Regulations provided that, when the mining company with a stability agreement “is the titleholder of several concessions or Economic-Administrative Units, the qualification *will only take effect for those concessions or units* that are supported by . . . the [stability] agreement.”⁷

35. By contrast, Peru’s assertion that stability 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” finds absolutely no support in the Mining Law or Regulations, which

² See Claimant’s Memorial (19 October 2021) (“Memorial”) § IV.A.2(i).

³ See Counter-Memorial §§ II.A.2-II.A.3.

⁴ See Memorial § IV.A.2(i)(a).

⁵ See **CA-1**, Single Unified Text of the General Mining Law, Supreme Decree No. 014-92-EM (as amended) (3 June 1992) (“Mining Law”) Article 83 (emphasis added).

⁶ See **CA-2**, Regulations to Title Nine of the General Mining Law, Supreme Decree No. 024-93-EM (7 June 1993) (“Regulations”), Article 22 (emphasis added).

⁷ See **CA-2**, Regulations, Article 2 (emphasis added).

until their amendments in 2014 and 2019 respectively did not even mention the term “investment projects.”⁸ With the text of the Mining Law and Regulations contradicting its position, Peru relies heavily on Mr. Polo’s unsupported testimony that he “intended” the Mining Law to be restricted to specific “investment project[s]”—testimony that is nowhere reflected in the wording of the Mining Law and flatly contradicted by Ms. Chappuis’s testimony.⁹ Peru also has not submitted a single document from the drafting history of the Mining Law to support Mr. Polo’s statement, despite voluntarily agreeing to do so.¹⁰ Peru’s assertion that the Mining Law and Regulations limited stability guarantees to “investment projects” is thus entirely unsupported.

36. *First*, there is simply no basis to conclude that in enacting the Mining Law, Peru sought to restrict the “contractual benefit”—*i.e.*, the stability guarantees—to “investment projects.”¹¹ In particular:

- (a) The term “investment project”—which according to Peru is the basic unit for stability and purportedly defines the scope of all the stability guarantees extensively detailed in Title Nine of the Mining Law—*does not even appear* in the applicable text of the Mining Law or Regulations.¹² If stability guarantees were restricted to specific “investment projects,” it is simply inconceivable that this term would not be defined in the Mining Law or Regulations, let alone omitted. Tellingly, the term “investment projects” appeared for the first time in the 2014 amendments to the Mining Law, which implemented Peru’s new and restrictive position on the scope of stability agreements.¹³

⁸ Cf. Counter-Memorial ¶¶ 34-36.

⁹ **RWS-1**, Witness Statement of César Augusto Polo Robilliard (18 April 2022) (“Polo”), ¶¶ 19-20; **CWS-14**, Reply Witness Statement of María Chappuis Cardich (13 September 2022) (“Chappuis II”), ¶¶ 8-19; *see also* **CWS-18**, Reply Witness Statement of Hans Flury (13 September 2022) (“Flury II”) ¶ 13.

¹⁰ Counter-Memorial ¶ 562; *see also* **RWS-1**, Polo, ¶¶ 9-10, 15-20.

¹¹ *See* **CER-10**, Reply Expert Report of María del Carmen Vega (13 September 2022) (“Vega II”), ¶ 10. Cf. **RER-2**, Expert Report of Rómulo Morales Hervias (4 May 2022) (“Morales”), ¶ 25 (“the Mining Law . . . expressly restrict the scope of the stability benefits granted through mining stabilization agreements to the activities related to the *investment projects* for which the agreement was entered into.”) (emphasis added); **RER-3**, Expert Report of Jorge Bravo and Jorge Picón (4 May 2022) (“Bravo & Picón”), ¶ 42 (“The provisions of the Mining Law and its Regulation governing stabilization agreements of the mining sector limit the scope of their application to the specific *investment project* a company undertakes in a mining project.”) (emphasis added); **RER-1**, Expert Report of Francisco Eguiguren Praeli (4 May 2022) (“Eguiguren”), ¶ 59 (noting that under the Mining Law the stability “guarantees are not generically conferred to a company or its mining concessions, but rather to the company’s specific *investment projects*, duly approved by the GMD and expressly incorporated into the text of the *contrato ley* agreement.”) (emphasis added and in original).

¹² *See generally* **CA-1**, Mining Law.

¹³ **CA-1**, Mining Law, Article 83-B (“The contractual benefits shall only apply to the activities of the mining company in favor of which 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

(b) Peru’s attempt to rely on the Mining Law’s use of the term “investment program” by claiming that it should be defined as “a detailed description of the investment project that the mining company is going to undertake” is likewise unavailing.¹⁴ The Mining Law did not mention the “investment program” when defining the scope of stability guarantees. Instead, it defined “investment program” as the qualifying plan that mining companies had to submit as a prerequisite to obtaining a 10 or 15-year stability agreement.¹⁵ In particular, Article 81 of the Mining Law confirmed that to obtain a 10-year stability agreement, the mining activity titleholder must “submit . . . as a sworn statement, an *investment program* with an implementation period.”¹⁶ Article 18(d) of the Regulations likewise defined the “Investment Program” as a document that must be submitted in writing to MINEM’s Directorate General of Mining (“DGM”) to obtain a 10-year stability agreement.¹⁷ Article 83 of the Mining Law also made clear that mining companies holding a concession “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.”¹⁸ An investment program thus is one of the prerequisites to obtain a stability agreement, but it does not define the scope of its guarantees.¹⁹

37. *Second*, Peru’s argument that Article 83 of the Mining Law limited stability guarantees to the “investment project” specifically set out in the feasibility study is largely based on Mr. Polo’s unsupported testimony that he “intended” for this provision to “make[] absolutely clear that the stability

additional activities performed after the execution of the Investment Program, provided such activities are performed within one or more concessions or in one or more Economic-Administrative Units where the *investment project* that is the subject matter of the agreement entered into with the State is being developed.”) (emphasis added); *see also* **CER-10**, Vega II, ¶ 10.

¹⁴ *Cf.* Counter-Memorial ¶¶ 49-50; **RER-2**, Morales, ¶ 25; **RER-1**, Eguiguren, fn. 22.

¹⁵ *See* **CA-1**, Mining Law, Article 81.

¹⁶ **CA-1**, Mining Law, Article 81.

¹⁷ **CA-2**, Regulations, Article 18(d) (“Persons or companies wishing to avail themselves of the provisions of Articles 78 and 82 of the Single Unified Text shall so request to the Directorate General of Mining and will submit it in writing, indicating the data and attaching the following information and documentation . . . The Investment Program with the completion dates in the case of Article 78 of the Single Unified Text.”).

¹⁸ **CA-1**, Mining Law, Article 83 (emphasis added).

¹⁹ *See, e.g.*, **CA-1**, Mining Law, Article 83; *id.* Article 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 the preceding article.”) (emphasis added).

regime benefited solely and exclusively the investment for which the contract had been signed.”²⁰ However, as is readily apparent, Article 83 contained no such limitation:

- (a) As Freeport explained in its Memorial, Article 83 stated 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.”²¹ Article 83 thus applied the stability guarantees to “the *activities* of the mining company.”²² Under the Mining Law, these “activities” were not limited to specific “beneficiation” activities or to a specific processing method, as Peru would like this Tribunal to believe. Instead they comprised, among others, “the exploration, exploitation, beneficiation, general work and mining transport activities,” which had to be carried out “through the concession system.”²³ Nor did Article 83 distinguish between initial and subsequent investments—like the entirety of the Mining Law at the time, it did not mention the term “investment project” at all.²⁴
- (b) The only limitation Article 83 imposed, other than the 15-year duration, was that stability guarantees applied exclusively to the “activities of the mining company in whose favor the investment is made.”²⁵ The term “in whose favor” refers to the “mining company”—and not to the “activities” as Peru wrongly asserts—as the phrase is in the singular (“*en favor de la cual*”) and not in the plural (*en favor de las cuales*).²⁶ And even if the phrase “in whose favor the investment is made” referred to the “activities,” which it clearly did not, this would not establish that the stability guarantees were limited only to the activities “related to the investment project for which the agreement was approved.”²⁷

²⁰ Counter-Memorial ¶ 53 (citing **RWS-1**, Polo, ¶ 18 (discussing **CA-41**, Decree 708, Article 11); **RWS-1**, Polo, ¶ 20.

²¹ Memorial ¶ 53(b); *see also* **CA-1**, Mining Law, Articles 79, 83.

²² **CA-1**, Mining Law, Article 83.

²³ **CA-1**, Mining Law, Article 7 (“The exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons *through the concession system*.”) (emphasis added); *see also* Memorial ¶ 303(b); **CER-5**, Expert Report of María del Carmen Vega (19 October 2021) (“Vega I”), ¶¶ 48, 65.

²⁴ *See* **CA-1**, Mining Law, Article 83; Memorial ¶ 303(b); **CER-10**, Vega II, ¶ 10.

²⁵ **CA-1**, Mining Law, Article 83; *see also* Memorial ¶ 303(b); **CWS-3**, Witness Statement of María Chappuis (19 October 2021) (“Chappuis I”), ¶ 21 (“[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.”); **CER-5**, Vega I, ¶ 39 (“The purpose of Article 83 was to ensure that stability guarantees would extend only to the mining unit benefitting from the company’s minimum investment of at least US\$20 million in new activities or of at least US\$50 million in existing activities.”).

²⁶ **CA-1**, Mining Law, Article 83; *see also* **CER-10**, Vega II, ¶ 8.

²⁷ *Cf.* Counter-Memorial ¶ 53 (citing **RWS-1**, Polo, ¶ 18).

Under the Mining Law, “mining activities” were authorized, quantified, and regulated not per “investment project,” but per *concession*.²⁸ Thus, the activities “in whose favor the investment is made” would still equate to all activities in the concession in which the qualifying minimum investment was made.

(c) Peru’s argument that Freeport’s interpretation renders the word “exclusively” “superfluous” makes no sense.²⁹ Article 83 limited stability guarantees “exclusively” to the activities of the mining company that made the qualified investment within its concession or mining unit.³⁰ It thus “exclu[ded]” any non-mining activities, activities of other mining companies, and mining activities carried out in other concessions or mining units.³¹ In fact, Peru agrees that Article 83 “undoubtedly” “intended to exclude a conglomerate’s other mining units or non-mining activities,” but contends that this does not affect its interpretation because Article 83 “can both exclude a conglomerate’s other mining units and the company’s mining activities that are not part of the specific investment project.”³² But Article 83 did not exclude mining activities that were not part of the “specific investment project.” If it had, it would have applied stability guarantees “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*”—but Peru added that limitation only in its 2014 amendment to the Mining Law, ten years *after* SMCV decided to construct the Concentrator.³³

(d) Finding no support in the language of Article 83 of the Mining Law, Peru relies on Mr. Polo’s testimony that when participating in the drafting of Article 83, “the stabilization agreements were only intended to provide stability to the investment project for which the agreement was signed.”³⁴ Peru even goes so far as to suggest that Mr. Polo’s “explanation of his intent in proposing that provision . . . is *determinative*.”³⁵ It is not. The text of Article 83 is determinative. Even if Mr. Polo had really intended to

²⁸ CA-1, Mining Law, Article 7.

²⁹ Cf. Counter-Memorial ¶ 53.

³⁰ CA-1, Mining Law, Article 83.

³¹ CA-1, Mining Law, Article 7.

³² Counter-Memorial ¶ 565 (emphasis original).

³³ CA-1, Mining Law, Article 83-B (amended).

³⁴ Counter-Memorial ¶ 562; *see also* RWS-1, Polo, ¶ 20.

³⁵ Counter-Memorial ¶ 563 (emphasis added).

limit the stability guarantees to the “investment project,” he did not reflect his supposed intention in the text he and Ms. Chappuis were proposing. But Mr. Polo’s testimony is contradicted by Ms. Chappuis, who because of her prior experience with stability agreements, was recruited by Minister Sánchez Albavera—the Minister of Energy and Mines who spearheaded and oversaw the drafting of L.D. 708—to join Mr. Polo in drafting what would become the Mining Law’s stability guarantee provisions, including Article 83.³⁶ Ms. Chappuis testifies that “Mr. Polo never told [her] at the time that he intended to limit stability guarantees to a particular ‘*investment project*,’ a term that he never mentioned and that does not even appear in the text of L.D. 708.”³⁷ She further states that “[i]f he had, I would have told him that this made absolutely no sense.”³⁸

- (e) Ms. Chappuis also testifies that the term “exclusively” refers to the “activities of the mining company” and not to the qualifying “investment” because the drafters “wanted to ensure that an investor could not obtain stability for *all* of [its] activities, including non-mining activities, based on an investment in a mining unit.”³⁹ Ms. Chappuis explains that this concern was driven by Mr. Polo’s experience with the privatization of the state-owned company Empresa Minera del Centro del Perú (“Centromín”), which operated not only mines but had significant non-mining activities, including hydropower stations, drilling factories, and reagents plants.⁴⁰
- (f) Mr. Polo’s supposed “intention” also runs counter to the instructions of his superior, Minister Sánchez Albavera, who in his own words sought to “radically change the orientation of the tax regime that had prevailed over the last two decades” and “mak[e] our legislation as attractive as or more so than the legislation prevailing in countries with a similar mining potential” through the “consolidation of the principle of tax stability.”⁴¹

38. *Third*, the Government itself confirmed that Article 83 of the Mining Law applied stability guarantees to concessions or mining units—and not to “investment projects”—when a year after the adoption of the Mining Law it approved the Regulations implementing the Mining Law’s stability

³⁶ See **CWS-14**, Chappuis II, ¶ 6; see also **CWS-18**, Flury II, ¶ 13 (“Limiting stability guarantees to specific investments would have contradicted Minister Sánchez Albavera’s goal of creating a simple and attractive stability regime to attract foreign investment by broadening L.D. 109.”).

³⁷ **CWS-14**, Chappuis II, ¶ 10 (emphasis in original).

³⁸ **CWS-14**, Chappuis II, ¶ 10.

³⁹ See **CWS-14**, Chappuis II, ¶¶ 9-10; see also **CA-46**, Promotion of Investments in the Mining Sector, Legislative Decree No. 708 (6 November 1991), Article 11.

⁴⁰ See **CWS-14**, Chappuis II, ¶ 9.

⁴¹ **Ex. CE-311**, Fernando Sánchez Albavera, *THE CARDS ON THE TABLE* (1992), p. 77.

guarantee regime. In particular, Articles 2 and 22 of the Regulations—which Peru largely ignores—leave no doubt that stability guarantees applied to the entire concessions or economic-administrative units (“EAU”) in which the investor made the qualifying minimum investment.

- (a) Article 22 of the Regulations, which Peru agrees “echoes the language of ... Article 83 of the Mining Law,” provided that the contractual guarantees will “benefit the mining activity titleholder *exclusively for the investments that it makes in the concessions or Economic-Administrative Units.*”⁴² Article 2 of the Regulations provided that stability guarantees “apply as of right to all mining activity titleholders, defined as the natural or legal persons that perform mining activities *in a concession or in concessions grouped in an Economic Administrative Unit,*” provided that they meet the relevant qualifications.⁴³
- (b) Articles 2 and 22 of the Regulations then go on to define what mining activities were *excluded* in stability agreements: “[the] mining activity titleholder that has *other concessions or Economic-Administrative Units* shall keep independent accounts and reflect them in separate earnings statements.”⁴⁴ And when the mining company “is the titleholder of several concessions or Economic-Administrative Units, the qualification will *only take effect for those concessions or units* that are supported by the declarations or by the agreement referred to in this Article.”⁴⁵
- (c) Hence, Articles 2 and 22 of the Regulations, in accordance with Article 83 of the Mining Law, provided that the stability guarantees applied to the concessions and EAUs in which the investor made the qualifying minimum investment. Like Article 83 of the Mining Law, they nowhere limited the stability guarantees to “investment projects.” They also made clear that a mining company could have stabilized or non-stabilized activities, or activities subject to different stabilization regimes and hence might have to keep separate accounts—but not as between specific investments within one and the same concession—as Peru now argues—but as between different concessions or EAUs.

39. *Fourth*, Articles 2 and 22 of the Regulations are fatal to Peru’s case, and Peru knows it well. In its Counter-Memorial, Peru thus (i) seeks to downplay the importance of the provisions; (ii) ignores the express language and reads into the provisions language that does not exist; and (iii) contends that, in any event, the Regulations must be interpreted “in a manner consistent” with Peru’s

⁴² Counter-Memorial ¶ 59; CA-2, Regulations, Article 22 (emphasis added).

⁴³ CA-2, Regulations, Article 2; *see also* CER-10, Vega II, ¶ 38.

⁴⁴ CA-2, Regulations, Articles 2, 22 (emphasis added).

⁴⁵ CA-2, Regulations, Article 2.

new restrictive position regarding the scope of stability guarantees.⁴⁶ Each of Peru’s arguments is not credible.

- (a) Peru first seeks to largely ignore or downplay Articles 2 and 22 of the Regulations even though they are key provisions defining the scope of stability guarantees. Peru’s only mention of Article 2 in its Counter-Memorial is to briefly characterize it as “provid[ing] 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.”⁴⁷ But Article 2 not only provided the conditions, it also clearly stated that once a mining company satisfies these conditions, the stability guarantees “will only take effect *for those concessions or units*” supported by the stability agreement.⁴⁸ Peru also completely disregards the second paragraph of Article 22, which required mining companies that have “other concessions or Economic-Administrative Units”—*i.e.*, other than those covered by a stability agreement—to keep independent accounts and reflect them in separate earnings statements.⁴⁹ Article 22 thus clearly recognized that stability guarantees applied to *concessions or EAUs*. It did not require a company to keep independent accounts for different “investment projects.”
- (b) Peru then attempts to argue that the first paragraph of Article 22 must be understood to “limit the scope of the stabilization agreements to *a specific investment project*.”⁵⁰ But this assertion contorts or simply rewrites the actual text of Article 22, which nowhere mentioned the “specific investment project.”⁵¹ Peru once again relies heavily on the testimony of Mr. Polo—even though he did not play any role in drafting the Regulations—who asserts that Article 22 “could not be clearer: stability guarantees apply to the *investment* that the mining company makes in a *specific project*.”⁵² While Mr. Polo is correct that Article 22 “could not be clearer,” it is so because it expressly states that stability guarantees apply to concessions and Economic-Administrative Units. Contrary to Mr. Polo’s distorted reading, Article 22 plainly stated that stability agreements apply to

⁴⁶ Counter-Memorial ¶¶ 57-58.

⁴⁷ Counter-Memorial ¶ 57; CA-2, Regulations, Article 2.

⁴⁸ CA-2, Regulations, Article 2.

⁴⁹ CA-2, Regulations, Article 22; *see also* Memorial ¶ 304(d).

⁵⁰ Counter-Memorial ¶ 59 (emphasis added).

⁵¹ *See* CA-2, Regulations, Article 22.

⁵² RWS-1, Polo, ¶ 33 (emphasis added).

“*the investments*” in the plural, not to “*the investment*” in the singular; and it nowhere refers to investments made “*in a specific project*” or to the “*investment project*” but to the investments the mining company makes “*in the concessions or Economic-Administrative Units*.”⁵³

- (c) Peru also has not provided any documents in support of its implausible interpretation of Article 22, despite agreeing to produce any “documents related to the drafting of the Regulations that are related to stabilization agreements or stability guarantees.”⁵⁴
- (d) Finally, and tellingly, Peru’s attempt to avoid the plain language of the Regulations by stating that they must be interpreted “in a manner consistent with” the Mining Law—which Peru wrongly characterizes as limiting stability guarantees to the investment project set out in the feasibility study—is entirely circular.⁵⁵ What Peru appears to suggest is that the express text of Articles 2 and 22 of the Regulations should simply be discarded where it does not satisfy Peru’s incorrect interpretation of the Mining Law. But this ignores the fact that the Regulations were drafted specially for the purpose of implementing the Mining Law’s stability regime.
- (e) Under the Peruvian Constitution in force at the time, Peru’s President had the power to “regulate laws without transgressing or distorting them” and issue decrees “within such limits.”⁵⁶ The Regulations were thus passed to further “regulate” the stability guarantee provisions in Title IX of the Mining Law, and were endorsed by both the Minister of Energy and Mines and the Minister of Economy and Finance only a year after the Mining Law was enacted.⁵⁷ In addition to being binding, they reflect the Government’s contemporaneous understanding of the scope of the stability guarantee provisions under the Mining Law. Articles 2 and 22 of the Regulations implemented Article 83 of the Mining Law, and in doing so confirmed that Article 83’s reference to the “activities of the mining company” entitled to stability guarantees upon making a qualified investment were those performed in the concessions or EAUs included in stability agreements.⁵⁸ If

⁵³ **CA-2**, Regulations, Article 22 (emphasis added); *see also* **CER-5**, Vega I, ¶ 46.

⁵⁴ Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 14 (Peru’s Response).

⁵⁵ *Cf.* Counter-Memorial ¶¶ 56-60; **RER-1**, Eguiguren, ¶ 41.

⁵⁶ **CA-294**, Political Constitution of Peru (12 July 1979), Article 211(11) (“The powers and duties of the President of the Republic include . . . To exercise the authority to regulate laws without transgressing or distorting them; and within such limits, to issue decrees and resolutions.”).

⁵⁷ **CER-10**, Vega II, ¶ 21.

⁵⁸ **CA-2**, Regulations, Articles 2, 22; *see also* Memorial ¶ 312.

the plain meaning of Articles 2 and 22 of the Regulations is “inconsistent with” Peru’s current interpretation of the Mining Law, this is only further evidence that Peru’s interpretation of the Mining Law is simply wrong.

40. *Finally*, that Article 83 of the Mining Law and Article 22 of the Regulations applied stability guarantees to concessions or mining units is further confirmed by the fact that Peru had to later amend these provisions to implement its novel and restrictive position.⁵⁹

41. The 2014 amendment to the Mining Law is powerful confirmation that the original text of the Mining Law did not limit stability guarantees to the investment program contained in the feasibility study or to an “investment project.”⁶⁰ The amendment, which became Article 83-B of the Mining Law in force today, now provides that, in cases of 15-year stability agreements granted under that article for investments over US\$500 million,

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 one or more concessions or in one or more Economic-Administrative Units 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 . . .⁶¹

42. This is what the original Article 83 would have looked like if it had limited the stability guarantees to the investment program contained in the feasibility study or to an “investment project,” as Peru now asserts it did. But the original Article 83 did not include any reference “to the investments expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the Stability Agreement” or to “additional activities that are performed after execution of the investment program.”⁶² The revised language in Article 83-B would have been entirely unnecessary if the original

⁵⁹ See Memorial ¶¶ 341-43 (citing **CA-1**, Mining Law, Art. 83-B; **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22).

⁶⁰ See Memorial ¶ 342 (citing **CA-1**, Mining Law, Art. 83-B); **CER-5**, Vega I, ¶ 52 (the “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”).

⁶¹ **CA-1**, Mining Law, Article 83-B (emphasis added).

⁶² **CA-1**, Mining Law, Article 83-B.

text of Article 83 had already limited the scope of 15-year stability agreements to the investments contained in the feasibility study.⁶³

43. Likewise, the 2019 amendments to Article 22 of the Regulations confirmed that the original version in force at the relevant time did not limit stability guarantees to “investment projects” but, as it expressly stated, to “concessions or Economic-Administrative Units.”⁶⁴ The 2019 amendment instead provided that stability guarantees applied exclusively to “*the investments set out in the agreement* that it implements in the concessions or Economic-Administrative Units.”⁶⁵ Again, this amendment would have been completely unnecessary if Article 22 had said what Peru argues it said.⁶⁶

44. Notwithstanding these clear changes to *restrict* the scope of stability guarantees, Peru argues that the 2014 and 2019 amendments actually constitute an *expansion* of stability guarantees, and that Freeport “missed” or “misread” the relevant amendments.⁶⁷ These arguments are unavailing.

(a) Peru asserts that because the 2014 amendment added language allowing mining companies to apply stability guarantees to “additional activities that are performed after the execution of the investment program,” provided they met certain qualifications—language also echoed in the 2019 amendment to Article 39 of the Regulations—these revisions supposedly demonstrate that *prior* to the amendment, only the initial investment program was covered.⁶⁸ Peru’s argument is misplaced. These so-called “expansions” have no bearing on the main revisions to the language of Article 83 of the Mining Law and Article 22 of the Regulations, which included for the first time the clear limitations “provided that said investments are expressly mentioned in the Investment Program contained in the Feasibility Study that is part of the Stability Agreement,” and “to the investments set out in the agreement.”⁶⁹

⁶³ See Memorial ¶ 342; **CER-5**, Vega I, ¶ 52.

⁶⁴ **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22.

⁶⁵ **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22.

⁶⁶ See Memorial ¶ 343; **CER-3**, Expert Report of Luis Hernández (19 October 2021) (“Hernández I”), ¶ 115 (“The Government would only have found it necessary to amend Article 22 of the Regulations to expressly limit the scope of the mining stability agreement to the investments ‘*set out in the agreement*’ if before that date stability agreements covered all the investments made in concessions or EAUs.”) (emphasis in original); **CER-5**, Vega I, ¶ 47 (“[T]he amendment to Article 22, which limited the scope of stability guarantees to investments ‘set out in the agreement,’ would have been unnecessary if the original text had limited stability guarantees to the investments mentioned in the stability agreement.”).

⁶⁷ Counter-Memorial ¶¶ 601-05.

⁶⁸ Counter-Memorial ¶¶ 601-05; **RER-1**, Eguiguren, ¶¶ 94-95; **RER-3**, Bravo & Picón, ¶¶ 105-11.

⁶⁹ **CA-1**, Mining Law, Article 83-B; **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22.

- (b) Peru’s reliance on its own “Explanatory Memorandum” to the 2014 amendment to claim that the amendments reflect an expansion to the previous law, rather than a retraction, is likewise unpersuasive.⁷⁰ The Memorandum is self-serving as it was drafted at a time when the original text of the Mining Law had already been put into issue in litigation with SMCV. Moreover, Peru’s own expert Prof. Eguiguren agrees that the 2014 amendments “certainly may not be applied retroactively, let alone for the interpretation of the 1998 Agreement.”⁷¹ Peru cannot rely on its own *post hoc* and self-serving explanation of the amendment to retroactively limit the scope of the original text of the Mining Law.⁷²
- (c) The so-called “expansions” that Peru highlights also demonstrate that Peru’s restrictive interpretation would be wholly deficient in practice. Notably, the amendment allowed investors to extend stability guarantees to additional investments of a certain size, upon approval by MINEM, provided that they are “*performed within one or more concessions or in one or more Economic-Administrative Units where the investment project that is the subject matter of the agreement entered into with the State is being developed*” and “related to the purpose of the Investment Project.”⁷³ So despite its stance against SMCV, even Peru recognized the impracticability of its restrictive interpretation and adjusted it accordingly—by allowing mining companies to request an extension of the stability guarantees to additional investments within the same concession or EAU in certain circumstances.

ii. Other Provisions of the Mining Law and Regulations Confirm that Stability Guarantees Applied to Entire Concessions or Mining Units, Not “Investment Projects”

45. In its Memorial, Freeport explained that various other provisions of the Mining Law and Regulations support the conclusion that stability guarantees applied to all investments and activities in the covered concessions or mining units. Peru’s arguments to the contrary are mistaken, and its attempts to argue that other provisions in fact *support* Peru’s interpretation are unfounded.

⁷⁰ Counter-Memorial ¶ 604; **RER-1**, Eguiguren, ¶ 94.

⁷¹ **RER-1**, Eguiguren, ¶ 93; *see also id.*, ¶ 92 (noting that “[o]ne fact unrelated to the specific stabilization agreements entered into by SMCV, but directly impacting the way in which their scopes must be interpreted, was the approval of Law No. 30230”); *see also CER-10*, Vega II, ¶ 27 (under Peruvian Law, “the Government cannot apply new laws—either directly or as a means of interpretation—to rights arising from the existing legislation”).

⁷² **RER-3**, Bravo & Picón, ¶¶ 36-37.

⁷³ **CA-1**, Mining Law, Article 83-B.

46. *First*, as Freeport explained, Articles 72, 80, and 84 of the Mining Law demonstrate that stability guarantees applied to entire concessions or mining units, because they confirmed that it was the “mining activity titleholder” that was entitled to tax stability and other benefits—making clear that those benefits apply to the mining company’s relevant mining titles, *i.e.*, its concessions.⁷⁴ Articles 1, 4, 5, 14, and 15 of the Regulations likewise confirm that stability guarantees were granted to “mining activity titleholders.”⁷⁵ Peru does not meaningfully rebut this argument.

(a) Peru’s only argument in response is to claim that these Articles simply confirmed that having title to a concession was a prerequisite to enter into a stability agreement.⁷⁶ This misses the point. It is not only that a mining company must have a concession to apply for stability guarantees; the mining company was granted those guarantees in its capacity as *titleholder of the concession* to which those guarantees applied. Importantly, Articles 72, 80, and 84 of the Mining Law did not provide that the stability guarantees were granted to the “company performing the investment project.”⁷⁷

(b) Granting stability guarantees to the concession holder makes sense: concessions are the standard by which the Mining Law operates and allow companies to perform mining activities.⁷⁸ As Ms. Vega explains, concessions are “the defined unit by which Peru regulates *all* economic activities in the mining industry,” and that by referencing the “mining activity titleholder” as the recipient of stability guarantees, the Mining Law reinforces that it “is the *concession* that is the relevant unit for purposes of defining the scope of stability.”⁷⁹

47. *Second*, Freeport explained that Article 82 of the Mining Law created a special definition of EAUs “for the purposes of the [stability] agreement,” which it defined as a “set of mining concessions located within the limits set forth in Article 44 of this Law, the processing plants, and the other assets that

⁷⁴ Memorial ¶ 303(c); *see also* CA-1, Mining Law, Articles 72, 80, and 84; *id.* Article 9 (“the mining concession grants its holder the right to explore and exploit mineral resources granted . . .”); *id.*, Article 18 (“The beneficiation concession grants the holder the right to extract or concentrate the valuable part of an uprooted mineral.”); Counter-Memorial ¶ 54 (conceding that the term “mining title” equates to “concession”).

⁷⁵ *See* CA-2, Regulations, Articles 1, 4, 5, 14, and 15.

⁷⁶ Counter-Memorial ¶ 54.

⁷⁷ *See* CA-1, Mining Law, Articles 72, 80, and 84.

⁷⁸ *See* CA-1, Mining Law, Article 7 (“The exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons through the concession system.”); CER-10, Vega II, ¶ 30; *see also* CE-917, Fernando Sánchez Albavera et al., Latin America Mining Panorama: Investment in the 1990s, in UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, ENVIRONMENT AND DEVELOPMENT SERIES (1998), p. 59 (“Mining reforms, on the other hand, have been aimed at guaranteeing the security of mining rights and modernizing concession regimes.”).

⁷⁹ *See* CER-10, Vega II, ¶ 16 (emphasis in original); *see also* CER-5, Vega I, ¶ 41.

constitute *a single production unit* due to sharing supply, administration, and services.”⁸⁰ Article 82 thus made clear that EAUs are a necessary concept for applying stability guarantees, contrary to Peru’s assertion that they are simply an “administrative construct” irrelevant to the scope of stability guarantees.⁸¹ In particular:

- (a) Article 82 set the relevant criteria to determine the scope of the EAU specifically for purposes of applying stability guarantees to investments that the mining activity titleholder makes “in the Economic-Administrative Units,” in accordance with Articles 2 and 22 of the Regulations.⁸² In particular, it confirmed that the relevant concessions and processing facilities must constitute a “single production unit.”⁸³
- (b) Article 82 also confirmed that the purpose of granting stability guarantees to “mining activity titleholders” was to promote investments aimed at increasing the capacity of EAUs to not less than 5,000 MT/day.⁸⁴
- (c) Peru argues that Article 82 defined EAUs solely to demonstrate whether the mining company satisfies this 5,000 MT/day capacity requirement.⁸⁵ This makes no sense: Article 82 clearly defined EAUs “for the purposes of the [stability] agreement,” meaning it is also the relevant definition for establishing the scope of guarantees as explicitly stated in Articles 2 and 22 of the Regulations.⁸⁶
- (d) Peru also argues that SMCV’s Mining Unit “ha[d] not been declared an [EAU]” under Article 44 of the Mining Law.⁸⁷ But this is simply irrelevant. While Article 44 defined “EAU” for general purposes, Article 82 defined what constituted an EAU for purposes of stability agreements.⁸⁸ Contrary to Peru’s suggestion, the EAUs under Article 82 did not

⁸⁰ See Memorial ¶ 303(a) (citing CA-1, Mining Law, Article 82).

⁸¹ See CA-1, Mining Law, Article 82.

⁸² See CA-1, Mining Law, Article 82; CA-2, Mining Regulations, Article 2 (“The provisions contained in Title Nine of the Single Unified Text shall apply as of right to all mining activity titleholders, defined as the natural or legal persons that perform mining activities in a concession or in concessions grouped in an Economic administrative Unit.”); *id.* Article 22 (“The contractual guarantees shall benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic-Administrative Units.”).

⁸³ See CER-10, Vega II, ¶ 38; CER-5, Vega I, ¶ 38; RWS-1, Polo, ¶¶ 29-30.

⁸⁴ See CA-1, Mining Law, Article 82.

⁸⁵ Counter-Memorial ¶¶ 47-48.

⁸⁶ CA-1, Mining Law, Article 82.

⁸⁷ Counter-Memorial ¶ 45.

⁸⁸ Compare CA-1, Mining Law, Article 44, with *id.* Article 82.

require an “approving resolution” from the DGM similar to that of Article 44.⁸⁹ Rather, the DGM could qualify an integrated production unit as an EAU without following any particular form.⁹⁰ This explains why MINEM consistently referred to Cerro Verde as an EAU even though SMCV never obtained an approving resolution from the DGM.⁹¹

48. *Third*, Freeport explained that both Articles 18 and 25 of the Regulations support its interpretation. Peru denies that this is the case, but fails to meaningfully address Freeport’s arguments.

(a) Freeport explained that Article 18 of the Regulations confirms that stability guarantees extended to concessions because it required titleholders to submit the “[n]ame of the *mining rights* set out in the application.”⁹² Peru offers no explanation why this reference does not confirm that mining companies apply to enter into stability agreements for the stability guarantees to apply to their *mining rights*, *i.e.*, their concessions.

(b) Freeport also explained that Article 25 acknowledged that a mining company could undertake “expansion of facilities or new investments that contractually enjoy the guarantee of legal stability,” thus making clear that the stability agreement also applied to “expansions” or “new investments” and plainly contradicting Peru’s argument that stability guarantees only extended to the qualifying initial investment.⁹³ Peru again denies that this provision supports Freeport’s argument, but provides no explanation why.

49. *Fourth*, Peru attempts to paint various provisions of the Mining Law and Regulations as supporting its position that stability guarantees are limited to specific “investment projects” simply because they referenced the feasibility study or the qualifying minimum investment. But Peru fundamentally misstates the purpose of those provisions.

⁸⁹ See **CA-1**, Mining Law, Article 82.

⁹⁰ See **CER-10**, Vega II, ¶ 39; compare **CA-1**, Mining Law, Article 44 (“The grouping of mining concessions constitutes an economic administrative unit and requires approving resolution from the Directorate General of Mining.”) with *id.*, Article 82 (“For the purposes of the agreement referred to in the preceding paragraph, the term Economic-Administrative Unit means . . . which in each case the Directorate General of Mining will qualify.”).

⁹¹ See, e.g., **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru S.A. (17 March 1994), Definitions (referring to “Cerro Verde Production Unit”); **Ex. CE-356**, MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997) (referring to Cerro Verde EAU); **Ex. CE-587**, OSINERGMIN, Report No. 597-2009-OS-GFM (14 April 2009) (referring to “Cerro Verde Mining Unit”); **Ex. CE-591**, OSINERGMIN, Report No. 902-2009-OS-GFM (3 June 2009) (same); **Ex. CE-589**, OSINERGMIN, Report No. 876-2009-OS-GFM (1 June 2009) (same); **Ex. CE-590**, OSINERGMIN, Report No. GFM 266-2009 (1 June 2009) (same); **Ex. CE-592**, OSINERGMIN, Report No. 1551-2009-OS-GFM (29 September 2009) (same).

⁹² See Memorial ¶¶ 56(b); 304(c), 337(b); **CA-2**, Regulations, Article 18; see also **CER-5**, Vega I, ¶ 45.

⁹³ See Memorial ¶ 304(e); **CA-2**, Regulations, Article 25. Cf. Counter-Memorial ¶ 57.

- (a) For example, Peru asserts that the fact that Articles 78 and 82 of the Mining Law relied on the date on which MINEM accredits the “execution of the investment or expansion” to fix the stability regime and commence stability guarantees shows a “link” between the stability agreement’s scope and the underlying investment.⁹⁴ But Peru’s assertion demonstrates the logical flaw at the heart of its argument. There is no question that the investment program set out in the feasibility study played a key role for the investor to *access* the stability regime: as Freeport already explained in its Memorial, the investment program allowed the mining company to demonstrate that it met the relevant qualifications to trigger its entitlement to stability guarantees under the Mining Law and Regulations.⁹⁵ But the fact that the investment program served this critical gatekeeping function simply has no bearing on its relevance to the resulting stability agreement’s scope, and nothing in these provisions suggests otherwise.
- (b) Peru likewise attempts to paint Article 18 of the Regulations as supporting its interpretation because it reaffirmed the requirement to submit a feasibility study and thus confirmed that a feasibility study “is a *key requirement to qualify* to apply for a stabilization agreement.”⁹⁶ That is undoubtedly true, but the fact that a feasibility study was a “key requirement” for qualification is entirely immaterial to the scope of that agreement, which is a separate question.⁹⁷
- (c) Peru’s argument regarding Article 19 of the Regulations is equally misguided. According to Peru, Article 19 confirmed its restrictive interpretation because it required the feasibility study to provide detailed information of the qualifying minimum investment, which Peru argues would be “superfluous” if stability agreements applied to all investments made within concessions or mining units.⁹⁸ This makes no sense: the qualifying minimum investment was critical to determining whether a mining company qualified for stability guarantees.⁹⁹ If the investment met the requirements, the

⁹⁴ Counter-Memorial ¶ 559. *See also* Counter-Memorial ¶ 55; **RWS-1**, Polo, ¶ 24.

⁹⁵ Memorial ¶ 337; *see also* **CWS-14**, Chappuis II, ¶¶ 18-19; **CWS-3**, Chappuis I, ¶ 22.

⁹⁶ Counter-Memorial ¶ 59.

⁹⁷ *See* **CER-5**, Vega I, ¶ 50 (explaining that feasibility studies “demonstrated that the mining company’s investment program met the initial minimum investment requirement to receive stability guarantees, and that it was technically and economically feasible” and that “once the DGM determined that the feasibility study included in the investment program complied with the necessary requirements, only then could the investment serve as the basis on which to sign a 15-year stability agreement.”); **CWS-3**, Chappuis I, ¶ 22.

⁹⁸ Counter-Memorial ¶ 59.

⁹⁹ *See* **CWS-14**, Chappuis II, ¶ 19 (stating that feasibility studies were relevant because they ensured the proposed investment program “would meet the qualifying investment amount”); **CER-10**, Vega II, ¶ 34

Government *had to* grant those guarantees to the investor.¹⁰⁰ It is thus not surprising the Government would require detailed information to ensure that it correctly makes that threshold determination of eligibility.

- (d) Peru’s argument regarding Article 24 of the Regulations is even more attenuated. Article 24 required the DGM to submit to the Vice-Minister of Mines’ Office the record and the Directorial Resolution approving the Feasibility Study or Investment Program, “which will serve as the basis to determine the investments set out in the agreement,” in order to proceed with signing the agreement.¹⁰¹ Peru argues that Article 24 should be translated as referencing “the investments *that are the subject matter of the agreement*” instead of “set out in the agreement,” and contends that this revised translation somehow unequivocally confirms that the scope of the agreement was limited to the investment program.¹⁰² It does no such thing.
- (e) First of all, like the other provisions on which Peru relies, Article 24 related to the mining company’s *qualifications* to enter into a stability agreement, not to the agreement’s scope, and made clear that the underlying investment could only serve as the basis to sign an agreement once it had been approved by the DGM.¹⁰³ Further, Peru’s reliance on its amended translation is a red herring. Not only is Freeport’s translation more accurate, but the original Spanish text “*inversiones materia del contrato*” is *identical* to that found in Article 18. There, the phrase was used to refer to the *mining rights* “set out in” (or “that are the subject matter of”) the application to receive stability guarantees.¹⁰⁴ So Peru’s argument that this language on its own confirms that the stability guarantees applied only to the qualifying minimum investment cannot be right, because Article 18 uses identical language in reference to the “mining rights.”
- (f) Finally, neither Article 18, nor Article 19, nor Article 24 of the Regulations was even mentioned in MINEM’s model contract for 15-year stability agreements, indicating that

(“while feasibility studies had zero relevance in determining the scope of stability guarantees, they were essential to the Government’s decision to execute stability agreements—and thus it made perfect sense to require them.”); *see also* CER-5, Vega I, ¶ 50.

¹⁰⁰ *See* CA-2, Regulations, Article 2; CER-10, Vega II, ¶ 36.

¹⁰¹ CA-2, Regulations, Article 24.

¹⁰² Counter-Memorial ¶ 59.

¹⁰³ *See* CER-5, Vega I, ¶ 50; *see also* CER-10, Vega II, ¶ 26.

¹⁰⁴ *Cf.* CA-2, Regulations, Article 18(b) *with Id.*, Article 24; *see also* Ex. CE-4, Share Purchase Agreement between Cyprus Climax Metals Company and Empresa Minera del Peru S.A. (17 March 1994), Clause 4.1 (translating “*inversiones materia de esta cláusula*” as “investment schedule set forth below.”).

they are not relevant to its scope—unlike Article 22 of the Regulations, which was expressly referenced in the Clause related to “Contractual Guarantees.”¹⁰⁵

iii. Limiting Stability Guarantees to “Specific Investment Projects” Is Commercially Unreasonable, Administratively Burdensome, and Undermines the Purpose of the Law

50. Peru’s interpretation also makes absolutely no sense. Contrary to Peru’s arguments, limiting stability guarantees to the “investment project” specifically designated in the feasibility study is totally divorced from the commercial realities of how mining projects operate in practice. It also creates significant and unnecessary administrative burdens and legal uncertainty. Given that the entire purpose of granting stability guarantees was to promote sustained and continuing investment, the Mining Law and Regulations’ drafters could not possibly have sought to establish such a restrictive regime.

51. *First*, Peru’s argument that investments must be specifically included in the feasibility study to benefit from stability guarantees is illogical in light of the fact that the qualifying minimum investment almost always involves improvements or expansions that are impossible to segregate from the existing operation, and which make no sense to stabilize on their own. For example, SMCV entered into its 1994 10-year stability agreement by virtue of a US\$ 2.26 million investment concerning the purchase of a few trucks, improvements to the crushing infrastructure, and the installation of a conveyor belt to transport minerals.¹⁰⁶ Similarly, the mining company Compañía Minera Milpo S.A.A. (“Milpo”) signed a 10-year stability agreement by virtue of a US\$14.16 million investment to construct an extension of an access ramp and improvements to its processing facilities.¹⁰⁷ It would be absurd to think that mining companies expected to receive a separate stability regime solely for these relatively minor investments—yet that is exactly what Peru argues.¹⁰⁸

¹⁰⁵ **Ex. CE-778**, Model Stability Agreement, Supreme Decree No. 04-94-EM (3 February 1994), Clause 9 (“The State hereby guarantees to the owner, in accordance with Articles 72, 80 and 84 of the Single Unified Text and Articles 14, 15, 16, 17 and 22 of the Regulations and, for the term referred to in 8.1 and without prejudice to the content of 8.2 and 8.3, the following.”); *see also* **CA-2**, Regulations, Articles 14, 15, 16, 17, and 22 (describing the content and scope of stability agreements).

¹⁰⁶ **Ex. CE-344**, Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994), Clauses 4 and 5.

¹⁰⁷ **Ex. CE-924**, Compañía Minera Milpo S.A.A.-Cerro Lindo Stability Agreement (26 March 2002) (26 March 2002), Clauses 4 and 5.

¹⁰⁸ *Cf.* Counter-Memorial ¶ 62 (arguing that SMCV’s 1994 stability agreement applied to a “US\$2.2 million investment project to install a new sorting plant and chutes and to add improvements to the existing leaching plant to allow three crushers to work simultaneously and to compile the end product in one location.”). *See* **CWS-14**, Chappuis II, ¶ 12 (“Neither MINEM nor the mining companies could have expected to create a separate stability regime for such minor investments, which would have been incapable of generating autonomous and segregated profits.”).

52. *Second*, requiring investors to implement multiple stabilization regimes within a single concession or mining unit would create significant administrative burdens and result in legal uncertainties.

- (a) If stability guarantees were limited to the qualifying minimum investment, mining companies making new investments within the same concession or mining unit would either have to apply for *additional* stability agreements—if the investment was large enough—or proceed with smaller investments that would not be stabilized.¹⁰⁹ This approach would thus deter continued investment and further capital expenditures within mining projects by raising both transaction costs and uncertainty.¹¹⁰ This would also make financing more difficult, contrary to the stated purpose of stability agreements in Article 82 to facilitate the financing of mining projects. This approach would further be totally at odds with the way mining projects operate in practice. To maximize the development of a mining resource, it is not only the initial investment that is critical but also the sustained and continued investments that the mining company makes over time—for example, to do further exploration, maintain and improve facilities, acquire new equipment, adopt new technologies, make environmental or security improvements, or to adjust production based on market conditions and technological advances—which often cannot be predicted in advance.¹¹¹ Mining companies periodically update their mine plans, by which they determine which parts of the ore body to extract and process and in what sequence, taking into account a broad variety of factors, including commodity prices, developments in local infrastructure, and a more comprehensive understanding of the ore body through additional exploration and extraction.¹¹²
- (b) Peru’s approach would create a patchwork of fiscal regimes within a single concession or mining unit. That patchwork might be difficult or impossible to disentangle given that

¹⁰⁹ See **CWS-14**, Chappuis II, ¶ 11 (“Limiting stability guarantees to the initial investment would have significantly reduced the attractiveness of those guarantees to mining companies at the outset and discouraged further investment once a mining project was underway, since any new investments would not enjoy the stabilized regime.”).

¹¹⁰ **CER-9**, Reply Expert Report of James Otto (13 September 2022) (“Otto II”), ¶ 4 (“the nature of mining investments (*e.g.*, high up-front costs, capital intensive, immobile, commodity price sensitivity) makes stability an important factor in mining investment decisions, especially for investments in developing countries.”).

¹¹¹ See **CER-4**, Expert Report of James Otto (19 October 2021) (“Otto I”), ¶¶ 23-24; **CER-9**, Otto II, ¶ 19(a); see also **CWS-1**, Witness Statement of Ramiro Aquino (19 October 2021) (“Aquino I”), ¶¶ 52-62 (summarizing mine planning at SMCV, updated annually using models based on new information from drilling operations, geological field analysis, and market price of copper).

¹¹² See **CER-4**, Otto I, ¶¶ 23-24; **CER-9**, Otto II, ¶ 19(a); **CWS-1**, Aquino I, ¶ 51.

the various investments may be totally intertwined from an operational standpoint.¹¹³ For example, under Peru’s interpretation, certain upgraded mining equipment, access roads, expansions to processing facilities, and even studies for a single production unit might all have different stability regimes—an absurd result that cannot possibly be what Peru intended in reforming its stability regime.¹¹⁴

- (c) The patchwork of different fiscal regimes would require companies to maintain multiple accounting systems within the same concession or mining unit.¹¹⁵ Mining companies would need to determine which assets or costs should be allocated to which account, and how assets or costs that are common to various investments should be allocated between the accounts—a process that would be difficult and costly.¹¹⁶ Moreover, to do so, mining companies would require specific rules and regulations on how these assets and costs should be allocated and divided as all material aspects of a tax law must be “clearly and expressly defined in law.”¹¹⁷ Peru did not have those rules when it decided to impose its new position on SMCV, and though it insists that SMCV was required to keep separated accounts, Peru has not identified a single instance where a mining company with a single stabilized unit kept separate accounts for multiple specific “investment projects” within that concession or unit.¹¹⁸ It was not until the 2019 amendments to the Regulations—ten years after SUNAT issued its first Royalty Assessment against SMCV—that the

¹¹³ **CER-10**, Vega II, ¶ 11 (“restricting stability guarantees to the initial investment would be completely unreasonable and impractical as it would potentially create multiple fiscal regimes within a single concession or production unit—potentially applicable only to relatively small initial investments, such as those for upgrading transport equipment or replacing loading and hauling machinery.”); **CER-9**, Otto II, ¶ 28 (“Limiting stability guarantees to processing operations that present the same economic proposition or that present economic propositions that became viable at the same time is also inconsistent with the purpose of stability.”).

¹¹⁴ See **CWS-4**, Witness Statement of Pedro Choque (19 October 2021) (“Choque I”), ¶ 33(a) (explaining that “maintaining two accounts in different currencies for operations and assets within the same integrated Mining Unit would have imposed significant costs and administrative burdens on SMCV.”).

¹¹⁵ See **CER-9**, Otto II, ¶ 33; **CWS-13**, Reply Witness Statement of Ramiro Aquino (13 September 2022) (“Aquino II”) ¶ 12 (noting that SMCV’s “leaching and flotation facilities have shared costs” because “the Mining and Beneficiation Concessions share auxiliary transportation, power, and water infrastructure and the associated costs.”); see also **RER-4**, Expert Report of Stephen Ralbovsky (4 May 2022) (“Ralbovsky”), ¶ 90 (admitting that it would be “tedious and costly” to differentiate between costs in an integrated mining operation).

¹¹⁶ See **CER-9**, Otto II, ¶ 33; **CWS-13**, Aquino II, ¶ 12; see also **RER-4**, Ralbovsky, ¶ 87 (admitting that it would be “tedious and costly” to differentiate between costs in an integrated mining operation).

¹¹⁷ **CER-8**, Reply Expert Report of Luis Hernández (13 September 2022) (“Hernández II”), ¶ 17; **CA-53**, Political Constitution of Peru, Art. 74; **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Rule VIII.

¹¹⁸ **CER-3**, Hernández I, ¶¶ 70, 73, 79; **CER-8**, Hernández II, ¶¶ 7, 17-18; **CWS-4**, Choque I, ¶¶ 14-16; **CWS-15**, Reply Witness Statement of Pedro Choque Ticona (13 September 2022) (“Choque II”), ¶ 12.

Government even made a first attempt to provide any rules on the allocation of common costs in the amended Article 22.¹¹⁹ In the absence of such, if a mining company attempted to divide its common costs and assets without proper legal support, SUNAT could disagree and assess taxes and penalties against it.¹²⁰

- (d) Allocating and dividing assets and costs that are common to various investments among different fiscal regimes within the same mining unit would create significant accounting burdens for the mining company.¹²¹ For example, mining companies would need to implement a sophisticated system to identify, label, and track common assets and activities to then allocate them to each account.¹²² Achieving this in highly integrated mining units that have thousands of pieces of equipment that are constantly replaced, would not only be very costly but also extremely time consuming.¹²³ Identifying a rationale for allocating costs to new investments involving additional labor and services, such as transport, electricity, water, accounting, marketing, exploration, and so forth would add an additional layer of complexity.
- (e) It would also require a much larger degree of supervision by the Government's tax authorities, which would be required to spend a substantial amount of time auditing the labeling and tracking system of each mining company, to verify compliance with the applicable rules and regulations.¹²⁴ The administrative burden of auditing separate accounts within each mining unit cannot be overstated. If multiple fiscal regimes applied within each mining unit, the Government would have to monitor and perhaps audit hundreds of additional tax returns. Given that many, perhaps most, mines invest

¹¹⁹ See **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22.

¹²⁰ See **CWS-15**, Choque II, ¶ 12.

¹²¹ See **CWS-15**, Choque II, ¶ 13; **CER-9**, Otto II, ¶ 33.

¹²² **CWS-15**, Choque II, ¶ 13.

¹²³ See **CER-9**, Otto II, ¶ 33 (noting that “if the Government expected a taxpayer to undergo this tedious and costly exercise, it would provide reasoned, detailed rules on how to do so for each of the relevant taxes”); **RER-4**, Ralbovsky, ¶ 87 (“[I]t would be tedious and costly to specifically differentiate those shared costs.”); **CWS-1**, Aquino I, ¶ 57 (explaining that “[m]ost importantly, we do not divide mining costs between the processing facilities because it would be virtually impossible to figure out what share of our mining costs generate ore for the leaching facilities versus the concentrator.”).

¹²⁴ **CER-9**, Otto II, ¶ 19(c) (explaining that “[t]o properly administer a system that applied different fiscal regimes within a single mining unit, Peru would have had to bear significant regulatory and administrative costs, including the cost of developing detailed guidance on dividing costs shared among operations in a mining unit, and monitoring and auditing multiple fiscal regimes applicable within a mining unit Peru was unable to overcome this administrative challenge after it adopted the position that the Stability Agreement did not apply to the Concentrator”).

substantial sums in their mining unit on an ongoing basis, the number of new fiscal regimes would be substantial as would the burden on the tax authority.

- (f) The resulting administrative and bureaucratic burden and legal uncertainty would not only be contrary to the plain text of Article 22 of the Regulations but also precisely what the drafters of L.D. 708 sought to avoid. Mr. Hans Flury, the former Minister of Energy and Mines, explains that L.D. 708 sought to “de-bureaucratize the sector” by, among others, “simplify[ing] administrative procedures in the existing legislation.”¹²⁵ And Minister Sánchez Albavera, who led the drafting of L.D. 708, explains in his memoir that L.D. 708 “introduces the principles of administrative simplification to expedite matters procedurally” and to make “the supervision of mining operations more effective.”¹²⁶ As a result, the Mining Law and Regulations could not possibly have limited the stability guarantees to “specific investment projects” within a concession. Instead, they ensured the “administrative simplification” and more effective supervision by granting the stability guarantees to concessions and mining units.

53. *Fourth*, limiting stability guarantees only to a specific investment and not to all investments within a concession or mining unit would undermine the purpose of the Mining Law and the Stability Agreement to promote investment.¹²⁷

- (a) As Peru’s witness Mr. Polo acknowledges, the 1991 reforms to the Mining Law took place in a period of economic turmoil and political instability that had deterred foreign investment.¹²⁸ Annual inflation reached nearly 7,500% in 1990 and real GDP growth was erratic, with the economy contracting by 17% between 1988 and 1990.¹²⁹ Given its long-term, capital-intensive structure, the mining industry was particularly hard hit as a result of these developments, and was further impacted by threats of violence from armed

¹²⁵ **CWS-18**, Flury II, ¶¶ 10-11. *See also* **CA-1**, Mining Law, Article 72 (“In order to promote private investment in mining activity, the following benefits are granted to the titleholders of such activity . . . Administrative simplification to accelerate procedures, based on the presumption of veracity and positive administrative silence in administrative procedures.”); *id.*, Preamble (“The State evaluates and preserves natural resources, having to develop a basic information system for the promotion of investment; regulate the mining activity nationally; and oversee that activity according to the basic principle of administrative simplification.”); **CWS-14**, Chappuis II, ¶ 13.

¹²⁶ **Ex. CE-311**, Fernando Sánchez Albavera, *CARDS ON THE TABLE* (1992), p. 83.

¹²⁷ *See* Memorial ¶¶ 308-12.

¹²⁸ Memorial ¶ 43; *see also* **CER-5**, Vega I, ¶ 22.

¹²⁹ Memorial ¶ 43; *see also* World Bank, Inflation, Consumer Prices (Annual %)—Peru, <https://perma.cc/N5KC-RUGA>; Central Reserve Bank of Peru, Price Index for Metropolitan Lima (Monthly %), 1988-1990, <https://perma.cc/3AQ7-UNFH>; World Bank, GDP Growth (Annual %)—Peru, <https://perma.cc/JZD6-YZXJ>; **CWS-18**, Flury II, ¶ 5.

militant groups.¹³⁰ The Government’s reforms to the mining law thus sought to attract foreign investment in the mining sector, which the Government viewed as critical to Peru’s economic development.¹³¹ Stability agreements were a critical factor in reducing the country risk for mining investors.¹³²

(b) While Peru agrees that the purpose of the Mining Law “was to promote private investment in the mining sector,” it argues that “offering stability guarantees with regard to specific investment projects still significantly incentivized investment and furthered Peru’s goal.”¹³³ However, restricting stability agreements to initial investments plainly discourages new and continuing investments in mining projects—investments which are critical to both maintaining existing operations, optimizing operations in light of prices and new technologies, and expanding those operations.¹³⁴ As explained above, Peru’s interpretation would discourage these critical continuing investments by depriving small investments of stability entirely and forcing companies to sign new stability agreements for larger investments, leading to costly administrative burdens associated with managing multiple stability regimes for one integrated operation.

(c) Further, Peru’s argument that the Mining Law’s purpose was “to encourage *specific* investment projects” to carefully assess its “impacts” and that such goal “does not tell us anything about the limits or parameters of Peru’s actions taken to further that goal (*i.e.*, the scope of the stability guarantees)” is counterintuitive.¹³⁵ At the very essence, the execution of a stability agreement entails a “public-private win-win,” where the Government grants stability guarantees to mining companies in exchange for

¹³⁰ Memorial ¶ 43; *see also* **Ex. CE-681**, Kevin Ross & Juan Alonso Peschiera, Explaining the Peruvian Growth Miracle, PERU: STAYING THE COURSE OF ECONOMIC SUCCESS (International Monetary Fund, Alejandro Santos and Alejandro Werner eds. 2015), p. 39, Figure 3.2.

¹³¹ *See* Memorial ¶ 44 (citing **Ex. CE-681**, Kevin Ross & Juan Alonso Peschiera, Explaining the Peruvian Growth Miracle, PERU: STAYING THE COURSE OF ECONOMIC SUCCESS (International Monetary Fund, Alejandro Santos and Alejandro Werner eds. 2015), pp. 40-42, 51-53; **CWS-10**, Witness Statement of Milagros Silva-Santisteban (19 October 2021) (“Silva”), ¶¶ 8-9).

¹³² *See* Memorial ¶ 65; **CER-4**, Otto I, ¶ 22; **CER-9**, Otto II, ¶ 5.

¹³³ Counter-Memorial ¶¶ 36, 573 (“The main purpose of these agreements is to encourage specific kinds of investment project.”).

¹³⁴ *See* **CER-4**, Otto I, ¶¶ 21-28 (explaining that in order to promote investment, it is critical for stability guarantees to apply to the entire mining unit or concession and that if 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).

¹³⁵ Counter-Memorial ¶ 573.

investments.¹³⁶ Contrary to Peru’s argument, the Government *benefits* from these investments through the creation of skilled jobs, technology transfer, and higher output resulting in more cash flows to the Government in the form of taxes and contributions.¹³⁷ So it is perfectly reasonable to assume that the Government will also benefit from any ensuing investments.¹³⁸ For example, SMCV’s investments in Cerro Verde generated a yearly average of 1,654 direct and 9,808 indirect jobs in Arequipa, Peru between 2005 and 2010,¹³⁹ and SMCV’s yearly average tax payments more than tripled after the Concentrator investment.¹⁴⁰

(d) Peru and its expert Mr. Ralbovsky’s argument that “Claimant greatly overstates the relative importance of stabilization agreements, or tax concerns generally, in an investor’s decision of whether to invest” and that “other factors have been found to be equally, if not more, important” is unsupported and also simply misses the point.¹⁴¹ Stability guarantees need not be the *only* or *most important* factor in an investor’s decision-making process to be a “critical” factor in determining whether an initial or continuing investment will take place.¹⁴² In fact, the studies that Mr. Ralbovsky relies on demonstrate that stability is “an important factor in mining investment.”¹⁴³

¹³⁶ CER-4, Otto I, ¶¶ 18, 23; CER-9, Otto II, ¶¶ 9-10.

¹³⁷ CER-9, Otto II, ¶¶ 9-10.

¹³⁸ CER-9, Otto II, ¶ 10.

¹³⁹ Memorial ¶¶ 8, 117.

¹⁴⁰ Memorial ¶ 4; CWS-21, Reply Witness Statement of Julia Torreblanca (13 September 2022) (“Torreblanca II”), ¶ 49; CWS-16, Reply Witness Statement of Randy L. Davenport (13 September 2022) (“Davenport II”), ¶ 12 (the Concentrator investment “would bring to the local community in Arequipa and Peru generally . . . economic benefits the Government had long sought to achieve through a primary sulfide expansion,” including “increase[s] in copper production and 25 additional years of productivity . . . increasing the Government’s collection of fiscal revenues,” and “350 new direct jobs and over 1,000 new indirect jobs,” as well as “1,500 contract positions”).

¹⁴¹ Counter-Memorial ¶ 575; *see also* RER-4, Ralbovsky, ¶¶ 33-34 (noting 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” and 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.”).

¹⁴² CER-4, Otto I, ¶¶ 19-21.

¹⁴³ CER-9, Otto II, ¶ 6; *see* RER-4, Ralbovsky ¶ 25; Ex. RE-44, Jairo Yunis & Elmira Aliakbari, *Survey of Mining Companies 2020*, Fraser Institute, pp. 8, 16 (concluding that a “fully stable mining regime” is a critical best practice necessary to allow a country to reach its full mineral potential); Ex. RE-45, IGF/OECD Program to Address BEPS in Mining, *Tax Incentives in Mining: Minimising Risks to Revenue*, 2018, p. 12 (stating that mining companies have a “preference . . . for a *consistent and predictable fiscal regime*” over tax incentives) (emphasis added).

54. *Finally*, Peru’s position that stability guarantees extend only to the initial investment would also put Peru at odds with the practice in other major mining jurisdictions. Peru’s argument that the international practice of applying stability guarantees to entire concessions or mining units is “irrelevant to interpreting the Mining Laws and Regulations applicable in Perú” is plainly disproven by the record.¹⁴⁴

- (a) As Freeport has demonstrated, “international practice confirms that stability guarantees typically apply to entire mining units—unsurprisingly, since governments worldwide implement stability guarantees for the same purpose, namely, to ‘attract investment.’”¹⁴⁵ Prof. Otto explains that he is “not aware of any jurisdiction, law, or agreement that grants stability to just a part of the activities performed within a mining unit.”¹⁴⁶ Neither Peru nor Mr. Ralbovsky offers any substantive rebuttal to Mr. Otto’s testimony that Peru’s argument would render Peru’s Mining Law an outlier with standard international practice at the time.
- (b) The record confirms that the practice of other mining jurisdictions, with which Peru was competing for investment, was a relevant factor to the Mining Law’s drafters. For example, Minister Sánchez Albavera emphasized that “he wanted to implement a legal framework that was as attractive or more attractive than that of other countries with mining potential.”¹⁴⁷ Peru’s own witness, Mr. Polo, acknowledges that Peru was experiencing economic and political instability in the early 1990s and looked to “competitor[s]” “in terms of mining investment,” including Chile, to design the stability regime in Peru. Mr. Polo further asserts that Peru sought to develop a regime, “no less favorable” than Chile’s.¹⁴⁸ Prof. Otto explains that Chile’s regime applied stability to the mining company that made the investment, meaning that it applied to the entirety of the investor’s “economic project” or line of business—which in the case of mining companies, meant the entire mining unit.”¹⁴⁹ Hence, if Peru wanted to provide a stability

¹⁴⁴ Counter-Memorial ¶ 581.

¹⁴⁵ Memorial ¶ 312.

¹⁴⁶ **CER-4**, Otto I, ¶ 32.

¹⁴⁷ **CWS-7**, Witness Statement of Hans Flury (19 October 2021) (“Flury I”), ¶¶ 15-16; *see also* **CWS-3**, Chappuis I, ¶ 16 (explaining that Minister Albavera sought input on L.D. 708 from engineers and industry representatives to ensure that it would have the practical effect of promoting investment); **CER-4**, Otto I, ¶ 36 (explaining that limiting stability guarantees to specific investment projects would also have limited Peru’s international competitiveness, given the global norm of granting stability guarantees to the entire mining unit).

¹⁴⁸ **RWS-1**, Polo I, ¶ 10.

¹⁴⁹ **CER-4**, Otto I, ¶ 36(b); *see* **CWS-19**, Reply Witness Statement of Cristián Morán (13 September 2022) (“Morán II”), ¶ 9.

regime that was “no less favorable than Chile’s,” it had at a minimum to extend the stability guarantees to concessions or mining units and not limit them to a “specific investment project.”

iv. Peru’s Implementation of SMCV’s Stability Agreement Demonstrates the Flaws in Peru’s Position

55. The impracticability and serious flaws of Peru’s restrictive position are further demonstrated by its own implementation of SMCV’s Stability Agreement—where it first clearly did *not* apply its own position that stability guarantees only extend to the “investment project” set forth in the feasibility study, and then struggled and failed to apply its novel position coherently.

56. *First*, Peru concedes that it applied stability guarantees to (i) multiple investments that SMCV made in its mining unit that were *not* included in the 1996 Feasibility Study; and (ii) SMCV’s existing operations at the time it made the qualifying minimum investment for the 1998 Stability Agreement. Peru’s attempts to explain these inconsistencies in applying its novel position only further highlight the shortcomings of its position.¹⁵⁰

(a) As Freeport explained, the Government applied stability guarantees to multiple investments that SMCV made in its mining unit that were *not* included in the feasibility study. These investments included (i) a US\$4.5 million investment in used mining equipment to increase daily ore extraction in 1999, (ii) a US\$10 million investment in implementing a revised mine plan to optimize leaching and SX/EW circuits and expand production of copper cathodes in 2001, and (iii) a US\$15 million investment to expand the leaching facility’s Pad-2, which expanded leaching circuit processing capacity in 2001 and 2002.¹⁵¹ None of these investments were included in the 1996 Feasibility Study, and so under Peru’s restrictive application should not have been stabilized—demonstrating that this was actually not Peru’s practice at the time. Moreover, at the time SMCV made the qualifying minimum investment set forth in the 1996 Feasibility Study, SMCV already had significant assets. Under Peru’s restrictive application, these prior investments would also not be stabilized as they did not form part of the new qualifying minimum investment, yet Peru also treated them as stabilized.

(b) Peru does not contest that it treated these investments as stabilized. Instead, Peru attempts to explain this inconsistency with its own position by asserting first that “these

¹⁵⁰ Counter-Memorial ¶ 612.

¹⁵¹ Memorial ¶ 350.

investments were . . . made pursuant to a settlement agreement between Phelps Dodge and Minero Perú.”¹⁵² But Peru provides no explanation why the fact that the investments that were made pursuant to a settlement agreement would entitle those investments to stability under Peru’s own restrictive theory.¹⁵³ And if it did, this argument would be fatal to Peru’s case, since the settlement agreement required Cyprus to carry out, among others, “tasks intended to continue evaluating economically reasonable ways for the exploitation and processing of primary sulfides at Cerro Verde”—*i.e.*, to continue pursuing the Concentrator investment.¹⁵⁴

(c) Peru next argues that the investments were stabilized because they “were for the Leaching Project” and “intended to further the goal for the Leaching Project outlined in the feasibility study.”¹⁵⁵ But this argument is totally inconsistent with Peru’s theory that stability agreements extend stability to a “*specific investment* described in the Investment Program” and that granting stability to a “*specific investment*” allows the Government to “know[] the amount of taxes that it expects to collect during the time of the agreement,” by “analyz[ing] the size of the investment and its expected revenue, including its projected profits.”¹⁵⁶ The fact that Peru has to expand its position to explain its conduct with respect to SMCV’s later investments only demonstrates how impractical Peru’s claimed theory would actually be. And Peru’s explanation makes no sense. Peru appears to suggest that the Government would evaluate on a case by case basis *every* investment made within a concession, no matter the size, to determine whether it should be treated as stabilized, depending on whether the new investment was “intended to further the goal” set out in the feasibility study. Such a plan would be unworkable in practice and result in

¹⁵² Counter-Memorial ¶ 612.

¹⁵³ Counter-Memorial ¶ 612.

¹⁵⁴ **Ex. CE-17**, Out-of-Court Settlement Between Cyprus Climax Metals Co. and Empresa Minera del Perú S.A. (30 March 2001), Clause 2.3 (“The parties also state that it is in their common interest for CYPRUS to continue searching for ways and new technologies, as the case may be, rendering it possible in the future to exploit the Cerro Verde mining project in an economically profitable way, as well as making additional investments to generate greater efficiency in the operation of this mining project.”); *id.* Clause 3.2.(B) (“CYPRUS undertakes to continue carrying out, within the aforementioned period, the research and technological development tasks intended to continue evaluating economically reasonable ways for the exploitation and processing of primary sulfides at Cerro Verde.”).

¹⁵⁵ Counter-Memorial ¶ 612.

¹⁵⁶ Counter-Memorial ¶ 38.

significant legal uncertainty. Moreover, Peru produces absolutely no evidence that it ever evaluated SMCV's investments—or any others—on those terms.¹⁵⁷

57. *Second*, as Freeport explained, when Peru did attempt to implement its novel position against SMCV, it did so in a haphazard and erratic manner that only underscores that the stability guarantees were never intended to operate with multiple stabilization regimes within a single concession or mining unit. For example, in fiscal years 2009, 2010, and 2011, SUNAT treated all of SMCV's fixed assets as non-stabilized for the purposes of calculating TTNA, but then treated only fixed assets related to the Concentrator as non-stabilized for Income Tax—meaning that the same fixed assets were treated as stabilized for one purpose but non-stabilized for another.¹⁵⁸ Then in 2012 and 2013, SUNAT treated *all* fixed assets as non-stabilized for Income Tax purposes, which meant that certain specific assets related to the leaching facilities—which even Peru admitted was entitled to stability—were assessed under different legal regimes for Income Tax purposes depending on the year.¹⁵⁹ And when Peru was unable to figure out how to apply both the stabilized and non-stabilized regime within SMCV's mining unit for a particular tax—again, even though it conceded that at least the leaching facilities were entitled to stability—it repeatedly took the arbitrary approach of treating the *entire* mining unit as non-stabilized.¹⁶⁰ Peru's difficulties in applying its novel position and the haphazard and erratic manner in which it sought to apply its novel position are thus further confirmation that Peru's novel position is impracticable, creates enormous administrative burdens and was not intended by the drafters of the Mining Law and Regulations.

v. Peru's Assertion that Freeport's Interpretation is "Unlimited" is Nonsensical

58. Instead of providing any compelling argument for why the text and purpose of the Mining Law and Regulations support its case, Peru seeks to characterize Freeport's arguments as resulting in an "unlimited, blanket agreement" with an "unlimited scope," which would result in mining companies operating concessions in "too unbounded" conditions and over "too-unpredictable range of activities, equipment, and plants."¹⁶¹ But this parade of horrors bears no resemblance to Freeport's arguments, in theory or in practice.

¹⁵⁷ See **CWS-14**, Chappuis II, ¶ 16.

¹⁵⁸ See Memorial ¶ 349.

¹⁵⁹ See Memorial ¶ 349.

¹⁶⁰ See Memorial ¶ 349.

¹⁶¹ Counter-Memorial ¶ 39; see also **RER-1**, Eguiguren, ¶ 39.

59. *First*, Peru’s attempt to characterize Freeport’s arguments as resulting in an “unlimited, blanket agreement” with an “unlimited scope” is nonsensical.¹⁶²

- (a) Stability guarantees are not “unlimited” in scope. Rather, they are limited to the mining activities performed within a concession or mining unit.¹⁶³ This is the same limitation found throughout the Mining Law, where all mining activities are exercised “through the concession system.”¹⁶⁴
- (b) Stability agreements are also limited by time. Depending on the type of stability agreement, the mining company will have either 10 or 15 years to enjoy the stabilized regime with respect to future investments and activities, but will not enjoy the stability guarantees once the stability agreement ceases to be in force.¹⁶⁵
- (c) Stability agreements are also limited by the type of activities that a company can carry out within its concessions or mining units. For example, a company cannot enjoy stability for non-mining activities, and the mining activities it can carry out within its concessions are limited by, among others, the total production capacity authorized by MINEM.¹⁶⁶
- (d) Peru’s argument that granting stability guarantees for all investments in a mining unit would be an “illogical” “self-imposed restriction on its important, sovereign powers to tax and to regulate”¹⁶⁷ is also inconsistent with Peru’s own practice concerning other types of stability agreements available under Peruvian laws—specifically Legislative Decree No. 662 (“L.D. 662”) and Legislative Decree No. 757 (“L.D. 757”).¹⁶⁸ These provisions offered 10-year legal stability agreements to local companies receiving qualifying investments and covered *all* of the company’s subsequent activities within Peru—despite the fact that the Government could not possibly “know[] in advance the

¹⁶² Counter-Memorial ¶¶ 8, 69; *see also* **RER-1**, Eguiguren, ¶ 39; **RER-4**, Ralbovsky, ¶¶ 47, 94.

¹⁶³ *See supra* §§ II.A.1(i)-(ii).

¹⁶⁴ *See* **CER-10**, Vega II, ¶ 7; **CA-1**, Mining Law, Article 7 (“The exploration, exploitation, beneficiation, general work and mining transport activities are carried out by national or foreign natural and legal persons through the concession system.”).

¹⁶⁵ **CA-1**, Mining Law, Article 78, 82.

¹⁶⁶ *See* **CWS-3**, Chappuis I, ¶¶ 20-21.

¹⁶⁷ Counter-Memorial ¶¶ 37, 162. *See* **CER-10**, Vega II, ¶¶ 29-32; **RER-1**, Eguiguren, ¶ 39 (“It would be illogical for the State to enter into one of these agreements blindly by granting unlimited benefits for any potential investment that the mining company decides to carry out.”).

¹⁶⁸ *See* **CER-10**, Vega II, ¶ 32; **Ex. CE-304**, Legal Stability Regime for Foreign Investment by Recognizing Certain Guarantees, Legislative Decree No. 662 (29 August 1991); **Ex. CE-306**, Framework Law for Private Investment Growth, Legislative Decree No. 757 (13 November 1991). *Cf.* Counter-Memorial ¶ 38.

consequences of what it [was] agreeing to” or “the scale of that impact on fiscal collection.”¹⁶⁹

60. *Second*, contrary to Peru’s assertion, Freeport’s position does not lead to a “too-unpredictable range of activities, equipment, and plants.”¹⁷⁰ Peru’s argument ignores that, in addition to the restrictions described above, the Government maintains continuing control over a mining company’s ability to make additional investments.¹⁷¹

(a) The Mining Law established strict requirements for mining companies to perform mining activities, and maintains several levels of review.¹⁷² For example, to commence processing activities to “extract or concentrate the valuable part of an aggregate of minerals,” mining companies must obtain a beneficiation concession.¹⁷³ To do so, they need to submit detailed information to the DGM, including a brief descriptive report of the processing plant, an environmental impact study, and water use authorization issued by the Ministry of Agriculture.¹⁷⁴ If the DGM finds the application well supported, it will issue notices for publication in the official gazette “*El Peruano*” and local newspapers to allow interested parties to raise objections.¹⁷⁵ Absent any challenge, the DGM evaluates whether the application “conforms to the legal provisions on safety, housing, health, mining welfare and environmental impact” and issues a resolution within 30 business days.¹⁷⁶ Finally, once the plant’s construction and installation are complete, the company must notify the DGM “to order an inspection to verify that it has been carried out in accordance with the original project with regard to mining safety and health and environmental impact.”¹⁷⁷ If the inspection is favorable, “the [DGM] will authorize the operation of the plant.”¹⁷⁸ In short, contrary to Peru’s assertions, the process to build a new processing plant is hardly “unpredictable.”

¹⁶⁹ See **CER-10**, Vega II, ¶ 32. Cf. Counter-Memorial ¶ 38.

¹⁷⁰ Counter-Memorial ¶ 39.

¹⁷¹ Counter-Memorial ¶ 39.

¹⁷² See **CA-1**, Mining Law, Preamble VII (stating that mining activities are “accessed under procedures that are matters of public policy”).

¹⁷³ See **CA-1**, Mining Law, Articles 17-18.

¹⁷⁴ **CA-48**, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Article 35.

¹⁷⁵ **CA-48**, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Article 36.

¹⁷⁶ **CA-48**, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Article 38.

¹⁷⁷ **CA-48**, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Article 38.

¹⁷⁸ **CA-48**, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Article 38.

(b) Moreover, the Government also maintains continuing control over new investments that seek to *increase* processing capacity. For example, MINEM decides whether the new investment may be carried out within the mining company’s existing stabilized beneficiation concession.¹⁷⁹ If so, MINEM decides whether to approve the expansion of the processing capacity of the beneficiation concession after reviewing the relevant technical information submitted by the mining company.¹⁸⁰ This is exactly what MINEM did in SMCV’s case.¹⁸¹ Moreover, MINEM also maintains authority over whether investments that require the mining company to obtain *new* concessions can be incorporated into an existing stability agreement pursuant to clause 3, paragraph 2 of the model stability agreement.¹⁸²

61. *Finally*, Peru’s argument that granting stability guarantees to a specific “investment project” allows the Government to analyze “the amount of taxes that it expects to collect during 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” is totally divorced from how the stability regime actually operates.¹⁸³

(a) The Government cannot assess the tax collections it may forgo, because they will result from future changes to the legal or administrative framework that cannot be foreseen at the time the Government enters into the agreement.¹⁸⁴ Moreover, the Government may not “forgo” collections at all, because future changes may consist of the Government lowering or abolishing taxes.¹⁸⁵ This is exactly why companies enter into stability agreements: they trade the certainty of the current regime for the uncertainty of future changes.¹⁸⁶ Article 88 of the Mining Law also granted mining companies the right to opt

¹⁷⁹ See **CWS-14**, Chappuis II, ¶ 15; see also **CWS-3** Chappuis I, ¶ 7 (explaining that the functions of the DGM included “evaluating and issuing opinions on applications for concessions or authorizations to carry out beneficiation, general works, and ore transportation activities, as well as on other matters within the DGM’s competence.”); **CA-55**, Supreme Decree No. 027-93-EM (18 June 1993), Article 41; **CA-100**, MINEM, Organic Structure and Regulation of Organization and Functions, Supreme Decree No. 025-2003-EM (26 June 2003), Articles 40, 41.

¹⁸⁰ See **CA-48**, Regulations on Mining Procedures, Supreme Decree No. 018-92-EM (7 September 1992), Articles 35-38.

¹⁸¹ **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM (26 October 2004).

¹⁸² See **CWS-14**, Chappuis II, ¶ 15.

¹⁸³ Counter-Memorial ¶ 38.

¹⁸⁴ See **CER-7**, Reply Expert Report of Alfredo Bullard (13 September 2022) (“Bullard II”), ¶ 25; **CER-9**, Otto II, ¶¶ 12-13.

¹⁸⁵ See **CER-9**, Otto II, ¶ 12.

¹⁸⁶ See **CER-9**, Otto II, ¶ 5.

out of the stabilized regime and reset the stabilized regime as of the date of the opt out for the remainder of the agreement, further confirming the Government’s inability to control “the amount of taxes that it expects to collect.”¹⁸⁷ Peru has also not submitted a single piece of evidence demonstrating that the Government regularly undertook such assessments, and has submitted *no* evidence demonstrating that it assessed its projected tax collections in relation to SMCV’s Stability Agreement, despite agreeing to produce documents related to that issue in the document production phase.¹⁸⁸

- (b) Further, even if it *could* assess tax impacts in advance, the Government has no right to deny stability guarantees based on a determination that any loss of taxes would outweigh the benefits of the stability agreement. This is so because the Mining Law grants stability *as of right* to any mining investor that meets the relevant qualifications.¹⁸⁹
- (c) Similarly, Peru’s argument that feasibility studies were “carefully assessed and defined at the time the agreement is signed” and thus showed the Government’s determination to calculate the one-time impact of stability guarantees, is irreconcilable with Article 85 of the Mining Law, which—as Peru does not and cannot deny—provided for the default approval of the feasibility study after ninety calendar days.¹⁹⁰ If, as Peru argues, the feasibility studies defined the scope of the stability guarantees—and thus needed to be carefully reviewed by MINEM to assess the fiscal impact of the stability guarantees—the

¹⁸⁷ See **CWS-14**, Chappuis II, ¶ 16; see also **CA-1**, Mining Law, Article 88 (“At any time, mining activity titleholders that have entered into the agreements referred to in this Title may choose, if they deem it more favorable, the common tax regime for a single and definitive time, which shall constitute the new stabilized framework and shall remain unchangeable for the remaining term of the agreement, in which case they must communicate it to the [SUNAT] and the [MINEM].”).

¹⁸⁸ See Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 11; see also **CER-9**, Otto II, ¶ 23; **CWS-14**, Chappuis II, ¶ 11.

¹⁸⁹ E.g., **CA-1**, Mining Law, Article 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.”) (emphasis added); *id.* Article 79; see **CER-9**, Otto II, ¶¶ 20-23; **CWS-14**, Chappuis II, ¶ 16 (explaining that “L.D. 708 did not foresee any circumstance in which MINEM could reject feasibility studies on the ground that the investment would be disadvantageous for the State.”); **CER-10**, Vega II, ¶¶ 34-36.

¹⁹⁰ **CA-1**, Mining Law, Article 85 (“To enjoy the guaranteed benefits, mining activity titleholders that fall within the scope of Articles 82 and 83 of this Law shall submit a technical-economic feasibility study, which shall have the nature of a sworn statement and must be approved by the Directorate General of Mining within a maximum term of ninety calendar days. If the Directorate General of Mining does not issue any statement, it shall automatically be approved on this last day, which will be the one that applies for purposes of fixing the date of the tax regime stability and the guarantees that were applicable as of the indicated date.”).

Mining Law would not have provided for their default approval 90 days after the feasibility study is submitted.¹⁹¹

2. Until It Reversed Course Against SMCV, Peru Applied Stability Guarantees Consistently to Concessions or Mining Units

62. Since Peru can find no support in the provisions of the Mining Law and Regulations, the core of Peru’s argument rests not on the plain text of the applicable legal framework but on its alternative narrative that allegedly the Government has “consistently” limited stability guarantees to the specific investment set out in the feasibility study’s investment program. Not only is this clearly incorrect, as Freeport demonstrated in its Memorial, but the “evidence” on which Peru relies actually confirms that, prior to the Government’s *volte-face* in response to political pressure, Peru consistently applied stability guarantees to entire concessions or mining units.¹⁹²

i. Peru’s Practice Confirms Stability Guarantees Applied to Entire Concessions or Mining Units Before Peru Changed Its Position

63. In its Memorial, Freeport demonstrated that, before the Concentrator investment, Peru had consistently applied stability guarantees on the basis of entire concessions or mining units.¹⁹³ Peru’s attempts to rebut this evidence fall short—and, in some cases, Peru does not even try. Moreover, additional examples that Peru introduced in its Counter-Memorial support the same conclusion.

64. *First*, Peru offers no serious response to MINEM’s 2001 decisions concerning Parcoy, a mining unit in northern Peru owned by Consorcio Minero Horizonte S.A., in which both MINEM’s DGM and the Mining Council—an administrative body within MINEM in charge of “standardiz[ing] administrative jurisprudence regarding mining issues”—confirmed that stability guarantees applied to the entire Parcoy EAU.¹⁹⁴ Peru does not contest these statements, but instead presents several arguments why the Tribunal should not give them their proper weight—none of which is convincing.¹⁹⁵

(a) Peru’s argument that “Claimant does not assert . . . that it knew about or relied on [the Parcoy] resolution when forming its understanding of the scope of the 1998 Stabilization Agreement” and thus “the content of the resolution cannot have formed the basis of any

¹⁹¹ See **CER-10**, Vega II, ¶ 36; **RER-1**, Eguiguren, ¶ 71.

¹⁹² See Memorial ¶¶ 313-19.

¹⁹³ See Memorial ¶¶ 313-19.

¹⁹⁴ **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p.1 (“tax stability [is applicable to] the Parcoy EAU, which is where the investments of the Parcoy Project were made. . .”); *id.*, p. 2 (“[t]he concessions created in the Parcoy EAU and the Parcoy Plant beneficiation concession . . . are subject to the [s]tability [a]greement.”); see **CA-1**, Mining Law, Art. 94(5).

¹⁹⁵ *Cf.* Counter-Memorial ¶ 136.

expectation (legitimate or not)” is totally irrelevant.¹⁹⁶ Whether Freeport or SMCV knew about the 2001 decisions has no bearing on their relevance in demonstrating Peru’s application of stability guarantees to entire concessions or mining units before its *volte-face* against SMCV.

- (b) Further, Peru’s attempt to discount the relevance of these decisions “because the Council was considering a different issue when it made those statements” is unpersuasive.¹⁹⁷ Even though Parcoy sought to incorporate new “mining rights” to its stability agreement rather than making new investments within the same stabilized concessions or mining units, the DGM and the Mining Council still had to assess the current scope of the relevant stability agreement.¹⁹⁸ In so doing, they reached an unambiguous response: stability guarantees cover the entire concessions included in stability agreements.¹⁹⁹
- (c) Peru’s argument that the Mining Council resolution in the Parcoy case is not precedential because it is “applicable only to the parties involved in that dispute” and because “[p]recedent is set only when the Mining Council is interpreting the meaning of legislation,” likewise misses the point.²⁰⁰ Regardless of whether the Mining Council resolution is precedential, it is powerful evidence demonstrating that Peru applied stability guarantees to entire concessions or mining units—a fact that again, Peru does not deny.²⁰¹

65. *Second*, Peru does not rebut Mr. Flury’s testimony that, when serving as Minister of Energy and Mines, he understood that stability guarantees applied to entire concessions or mining units.²⁰²

- (a) Mr. Flury testifies that, during his tenure as Minister of Energy and Mines between July 2003 and February 2004, he signed a stability agreement with BHP Tintaya on behalf of the Government, and “clearly understood that the scope of its stability would apply” to

¹⁹⁶ Cf. Counter-Memorial ¶ 132.

¹⁹⁷ Cf. Counter-Memorial ¶¶ 132-34.

¹⁹⁸ Memorial ¶ 316.

¹⁹⁹ **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001), p.1 (confirming that “tax stability [is applicable to] the Parcoy EAU, which is where the investments of the Parcoy Project were made. . . .”); *Id.*, p. 2 (confirming that stability guarantees covered the mining rights listed in Annex I of the relevant agreement, meaning in this case that “[t]he concessions created in the Parcoy EAU and the Parcoy Plant beneficiation concession . . . are subject to the [s]tability [a]greement”).

²⁰⁰ Cf. Counter-Memorial ¶ 136.

²⁰¹ Counter-Memorial ¶ 134 (confirming that “[t]he 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”); *see also Ex. CE-377*, MINEM, Resolution No. 380-2001-EM-CM (16 November 2001).

²⁰² Memorial ¶ 317; *see also CWS-3*, Chappuis I, ¶ 28; *CWS-7*, Flury I, ¶¶ 33-38.

BHP Tintaya's entire beneficiation concession included in the stability agreement.²⁰³ Mr. Flury's testimony is unrebutted by Peru.

- (b) Mr. Flury's testimony is also confirmed by Ms. Chappuis, who testifies that during her tenure at MINEM from 2001 to 2004, including as Director General of Mining, she always understood that Article 83 granted stability guarantees to an entire mining unit, rather than to the initial qualifying minimum investment.²⁰⁴ She further testifies that she "do[es] not recall any case in which the Government sought to apply different stability regimes to a company for additional investments performed in the same concession or mining unit."²⁰⁵

66. *Third*, contrary to Peru's assertion that "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," the DGM and the Mining Council's assessment of the BHP Tintaya agreement that Mr. Flury signed clearly demonstrates that the agreement covered the concession or mining unit.²⁰⁶

- (a) BHP Tintaya was party to a 1995 stability agreement that covered the Tintaya EAU.²⁰⁷ In 2002, BHP Tintaya made an investment in an "Oxide Industrial Plant" for which it obtained a new beneficiation concession.²⁰⁸ On the basis of that investment, BHP Tintaya requested and obtained approval of its feasibility study to sign a new stability agreement that covered the new beneficiation concession.²⁰⁹ BHP Tintaya then separately submitted a request to the DGM that all of the concessions from its previously-stabilized Tintaya EAU "be included in the Annex" to the new stability agreement.²¹⁰
- (b) The DGM rejected BHP Tintaya's request on the basis that the new beneficiation concession for the new "Oxide Industrial Plant" did not form part of the existing Tintaya

²⁰³ See Memorial ¶ 317; see also **CWS-7** Flury I, ¶ 36 (noting that he "expected that Tintaya would make additional investments in this concession during the 15-year term of its [a]greement, as most mining companies would, in order to keep operations current and productive."); **Ex. CE-414**, Stability Agreement Between BHP Billiton Tintaya and Peru (1 December 2003).

²⁰⁴ **CWS-3**, Chappuis I, ¶¶ 21, 28.

²⁰⁵ **CWS-14**, Chappuis II, ¶ 26.

²⁰⁶ See Memorial ¶ 317(b) (citing **CWS-7**, Flury I, ¶¶ 33-38). Cf. Counter-Memorial ¶ 175.

²⁰⁷ **Ex. CE-914**, Compañía Magma Tintaya Sociedad Anonima Stability Agreement (29 December 1995).

²⁰⁸ **Ex. CE-914**, Compañía Magma Tintaya Sociedad Anonima Stability Agreement (29 December 1995).

²⁰⁹ **Ex. CE-882**, MINEM, Report No. 019-2003-EM-CM (20 January 2003); **Ex. CE-414**, Stability Agreement Between BHP Billiton Tintaya and Peru (1 December 2003).

²¹⁰ **Ex. CE-926**, BHP Billiton Tintaya S.A., Letter No. 1338813 (26 November 2002).

EAU and that, as a result, the existing EAU could not be included in the new stability agreement.²¹¹ In reasoning its decision, the DGM confirmed that stability guarantees extended to entire concessions and EAUs.²¹² The Mining Council likewise confirmed that “[t]he *concessions* that make up the Tintaya [EAU], which have not been targeted by the oxides project investment, *have been benefiting* from a Tax Stability Agreement since 1995 for a 15-year term, which expires in 2009, and thus they cannot be included in the oxides project Tax Stability Agreement.”²¹³

- (c) Ms. Chappuis, who served as the Director General of Mining at the time of BHP Tintaya’s request, testifies that “as per Article 83 of the Mining Law . . . we concluded that the stability guarantees under the new mining stability agreement would ‘exclusively’ benefit the concession or mining unit that was the target of the investment—*i.e.*, the ‘Oxide Industrial Plant’ beneficiation concession—and could not benefit BHP Tintaya’s other concessions or mining unit in which the investment was not made (*i.e.*, the Tintaya EAU).”²¹⁴
- (d) BHP Tintaya’s request and the DGM and Mining Council’s decisions thus are clear that stability agreements applied to entire concessions or mining units. If Peru was correct and the DGM “consistently” took the position that stability guarantees applied to the specific investment set out in the feasibility study’s investment program, there would have been no need for the DGM or the Mining Council to consider whether a specific *concession* or EAU could be “part of the stability agreement” BHP Tintaya was requesting. Nor would the DGM have had to consider whether the new beneficiation concession in which the new investment was made formed part of the existing mining unit, because it could simply have rejected BHP Tintaya’s request on the grounds that the new stability agreement would only stabilize the new specific investment.

²¹¹ **Ex. CE-882**, MINEM, Report No. 019-2003-EM-CM (20 January 2003).

²¹² **Ex. CE-882**, MINEM, Report No. 019-2003-EM-CM (20 January 2003), p. 2 (noting that “there is no legal basis for granting BHP Billiton Tintaya SA’s request that the concessions that are part of its Tintaya EAU and the “Tintaya” beneficiation concession (Sulfides Plant), which are also the subject of a stability agreement in effect until 2009, also be part of the stability agreement that will be signed for the investments in the Copper Oxides Project, since for the purposes of these contracts the oxides plant constitutes a Unit unrelated to the aforementioned concessions”).

²¹³ **Ex. CE-932**, Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003) (emphasis added).

²¹⁴ **CWS-14**, Chappuis II, ¶ 24 (explaining that MINEM also confirmed that the previous concessions were already covered in their entirety by the previous stability agreement); **Ex. CE-882**, DGM Report No. 019-2003-DGM-DPDM (20 January 2003).

(e) Even Peru’s own experts Mr. Bravo and Mr. Picón acknowledge that BHP Tintaya “had two *different EAUs* (Tintaya and Oxidos) in which different stability regimes applied.”²¹⁵ Mr. Bravo and Mr. Picón’s reliance on a 2013 Tax Tribunal resolution for BHP Tintaya stating that stability guarantees “only apply to activities linked to the aforementioned investment, the purpose of which is defined in the Feasibility Study” is misplaced, as this resolution was issued long after the Government adopted its novel position and thus has no bearing on the Government’s understanding of the scope of stability guarantees before its *volte-face* as result of political pressure.²¹⁶

67. *Fourth*, Mr. Camacho’s and Ms. Bedoya’s attempt to characterize other mining companies’ stability agreements as demonstrating that “stabilization agreements do not cover all the activities of a company but rather specific investments over a given period” is simply wrong.²¹⁷ None of the examples they reference—namely, Minera Milpo, Minera Barrick, and Minera Yanacocha—support Peru’s position; to the contrary, they further confirm Peru’s consistent practice of applying stability guarantees to entire concessions or mining units.²¹⁸

(a) Mr. Camacho’s claim that Minera Milpo and Minera Barrick’s examples support Peru’s position because those companies “have signed more than one stabilization agreement” “that have been simultaneously in force” is simply wrong.²¹⁹ While it is correct that these companies had multiple stability agreements, each of these agreements applied to different concessions or mining units, which is entirely consistent with Freeport’s position: stability guarantees only apply to the concessions or mining units that receive the initial qualifying minimum investment.²²⁰

(b) In March 2002, Minera Milpo signed a 15-year stability agreement for the group of concessions making up its Cerro Lindo mining unit based on a US\$63 million investment

²¹⁵ **RER-3**, Bravo & Picón, ¶ 174 (emphasis added).

²¹⁶ **RER-3**, Bravo & Picón, ¶ 173 (citing **Ex. RE-86**, Tax Tribunal Resolution No. 18397-10-2013 (11 December 2003), p. 48).

²¹⁷ See **RWS-6**, Witness Statement of Marco Antonio Camacho Sandoval (18 April 2022) (“Camacho”), ¶ 16; **RWS-4**, Witness Statement of Claudia Gabriela Bedoya Arbañil (18 April 2022) (“Bedoya”), ¶ 61.

²¹⁸ See **RWS-6**, Camacho, ¶ 16 (claiming that Minera Milpo, Minera Yanacocha, and Minera Barrick Misquichilca each “have signed more than one stabilization agreement”); **RWS-4**, Bedoya, ¶¶ 28-29 (claiming that the Yanacocha agreements “established two different stability regimes for different investment projects, but applicable concurrently to a single mining concession named “Chaupiloma Tres”); **RER-3**, Bravo & Picón, ¶¶ 173-174.

²¹⁹ Cf. **RWS-6**, Camacho, ¶ 16 (citing **RE-31**, MINEM, “Investment Promotion and Guarantee Contracts,” available at <http://www.minem.gob.pe/descripcion.php?idSector=1&idTitular=188&idMenu=sub154&idCateg=188>).

²²⁰ See *supra* §§ II.A.1(i)-(ii).

in the construction of a concentrator plant within that mining unit.²²¹ Then in November 2002, Minera Milpo signed a 10-year stability agreement for a group of *unrelated* concessions making up its El Porvenir mining unit based on a US\$14 million investment for the construction of an underground tunnel extension and an access ramp, as well as the expansion of an existing plant within that mining unit.²²²

(c) Likewise, in December 1998, Minera Barrick executed a 15-year stability agreement for the group of seven concessions making up its Pierina mining unit by virtue of a US\$250 million investment for the development of an open-pit mine for the exploitation of gold through leaching facilities.²²³ Then, in December 2004, Minera Barrick executed a second 15-year stability agreement for a group of seven *different* concessions making up its Alto Chicama mining unit (currently known as the “Lagunas Norte” mining unit), based on a US\$142 million investment in the construction of leaching facilities for this new mining project.²²⁴ Neither Peru nor Mr. Camacho provides any evidence that these agreements applied to a specific “investment project” contained in the feasibility studies.

(d) Ms. Bedoya’s assertion that Yanacocha’s case confirms that Peru “negotiated stabilization agreements applicable to investments and not to entire concessions” is likewise based on an incomplete and misleading description of those agreements.²²⁵ Ms. Bedoya asserts that the Yanacocha agreements “established two different stability regimes for different investment projects, but applicable concurrently to a single mining concession named ‘Chupiloma Tres’”²²⁶ and that as a result the operators “understood that stability applies to a specific investment and kept separate accounts within the concession.”²²⁷ What

²²¹ **Ex. CE-924**, Compañía Minera Milpo S.A.A.-Cerro Lindo Stability Agreement (26 March 2002) (executing a 15-year stability agreement for its Cerro Lindo mining unit, located in Lima and Ica by virtue of a US\$ 63 million investment for the construction of a concentrator plant).

²²² **Ex. CE-927**, Compañía Minera Milpo S.A.A.-El Porvenir Stability Agreement (27 November 2002) (executing a 10-year stability agreement for its El Porvenir mining unit, located in Yanacancha, Pasco by virtue of a US\$ 14 million investment for certain improvements to its processing facilities).

²²³ **Ex. CE-921**, Empresa Minera Barrick Misquichilca S.A.-Pierna Stability Agreement (17 December 1998) (executing a 15-year stability agreement in December 1998 for its Pierina mining unit, located in Huaraz, Ancash by virtue of a US\$ 250 million investment for the development of an open-pit mine for the exploitation of gold through leaching facilities).

²²⁴ **Ex. CE-941**, Minera Barrick Misquichilca S.A.-Alto Chicama Stability Agreement (29 December 2004) (executing a 15-year stability agreement for its Alto Chicama mining unit including mining concessions and the “Alto Chicama” beneficiation concession, located in Santiago de Chuco, La Libertad by virtue of a US\$ 142 million investment for improvements to its leaching facilities).

²²⁵ *Cf. RWS-4*, Bedoya, ¶ 29.

²²⁶ *RWS-4*, Bedoya, ¶ 28.

²²⁷ *RWS-4*, Bedoya, ¶ 28.

Ms. Bedoya conveniently leaves out, however, is that the two stability agreements applied to *two different economic administrative units* made up of *multiple* concessions, with the mining concession “Chaupiloma Tres” spanning *both* of the EAUs. In particular, Yanacocha’s 1994 Stability Agreement applied to its “Chaupiloma Sur” EAU, whereas its 1998 Stability Agreement applied to its “Carachugo Sur” EAU.²²⁸ This is further confirmed by a 1998 DGM Report regarding Yanacocha’s stability agreements, which concluded that Yanacocha could sign more than one stability agreement, because “[t]he benefits set forth in the Tax Stabilization Agreement *are for the investments made in the concessions or Economic-Administrative Units included in the application, so that each agreement has its corresponding concessions.*”²²⁹ The DGM further confirmed that “[i]f there are *other concessions or Economic-Administrative Units not included in the Tax Stabilization agreement*, the results of their operations are separated.”²³⁰ The Yanacocha case thus confirms that Peru did not grant stability guarantees to specific *investments*, but rather to specific *mining units*.

68. *Fifth*, Peru fails to meaningfully address the fact that both the structure of the Royalty Law itself and the comments of Government officials during the Law’s initial implementation confirm that stability guarantees applied to entire concessions.

(a) As Freeport explained, and Peru recognizes, the Royalty Law assigned the royalty obligation to “holders of mining concessions” based on the “extraction” of minerals as the triggering event, making clear that the Government assessed royalties on the basis of mining concessions.²³¹ The Royalty Law Regulations similarly confirmed that the reference base for royalty calculations was initially the “mining concession;” however in January 2005 the Government amended the Regulations to include the “Production

²²⁸ Compare **Ex. CE-911**, Compañía Minera Yanacocha S.A.-Charachugo Sur Stability Agreement (19 May 1994), Clause 1.1 (noting as relevant background that Yanacocha applied for stability in relation to the investment in its concessions “constituted in the *EAU Chaupiloma Sur*”) (emphasis added); *id.* Clause 3.1 (the “Yanachocha-Carachugo Sur Project is circumscribed to the EAU “Chaupiloma Sur” constituted from the concessions listed in Annex I”); *id.* Annex I (listing mining rights Chaupiloma Tres, Chaupiloma Cuatro, Chaupiloma Cinco); with **Ex. CE-919**, Minera Yanacocha Sociedad Anonima-Charachugo Sur Stability Agreement (16 September 1998), Clause 1.1 (noting as relevant background that Yanacocha applied for stability in relation to the investment in its concessions “Chaupiloma 1, Chaupiloma 2, and part of the mining right Chaupiloma 3, which form part of the EAU *Carachugo Sur*”)

²²⁹ **Ex. CE-918**, MINEM, Report No. 487-98-EM-DGM/DPDM (18 August 1998) (emphasis added).

²³⁰ **Ex. CE-918**, MINEM, Report No. 487-98-EM-DGM/DPDM (18 August 1998) (emphasis added).

²³¹ See Memorial ¶¶ 129, 319(a); Counter-Memorial ¶ 239; see also **CA-6**, Royalty Law No. 28258 (24 June 2004), Art. 2 (providing that “*holders of mining concessions*” shall pay royalties as consideration for the “*exploitation of metallic and non-metallic mineral resources*”) (emphasis added); **CA-1**, Mining Law, Art. 8 (providing that “*exploitation is the activity of extracting minerals*”) (emphasis added).

Unit”—*i.e.*, a specific group of concessions—as the relevant reference base for royalty calculations.²³²

- (b) Around the time Congress passed the Royalty Law, senior Government officials publicly acknowledged that companies with stability agreements—including SMCV—would be exempt from royalties and specifically recognized that royalties “would apply only to a ‘a minority of companies, since the majority of the big *mining projects* are stabilized in both taxes and charges.”²³³ Accordingly, the Government officials confirmed their understanding that, like the Royalty Law’s obligations, stability guarantees applied to entire concessions or mining units—and not to specific investments or “investment projects” as Peru now argues. Peru’s argument that these statements “do not constitute confirmation that Claimant’s interpretation of the scope of the 1998 Stabilization Agreement is correct” because they meant only that Peru “would . . . respect the stabilization agreements” vastly understates the specificity of these statements.²³⁴ At the time, only a handful of companies had stability agreements, and Government officials were closely familiar with the “mining projects” in question, including that SMCV possessed only one mining unit—Cerro Verde.²³⁵ The repeated confirmation by Government officials that many of the large “mining projects,” including SMCV, were stabilized clearly recognized that the applicable stability guarantees related to entire mining units, not individual investments. Notably, Government officials did not refer to “partially stabilized” mining projects, as they would have done if it were only specific investments or “investment projects” that were stabilized.

²³² See Memorial ¶ 319(a); see also **CA-7**, Royalty Law Regulations, Supreme Decree No. 157-2004-EF (15 November 2004) (“Royalty Law Regulations”), Art. 4 (defining the “reference base for the payment of the mining royalty for the ore extracted from the *mining concessions* in operation”) (emphasis added); see *id.* Art. 7.1 (“The obligated entities must submit a monthly sworn statement in the media, conditions, form and places determined by SUNAT. In the sworn return, the reference base for each *mining concession* in operation must be entered independently.”) (emphasis added); **CA-116**, Amendments to Royalty Law Regulations, Supreme Decree No. 018-2005-EF (28 January 2005), Art. 6 (“The obligated entities must submit a monthly sworn statement in the means, conditions, form and places determined by SUNAT. The sworn statement must state separately the reference base for each *Production Unit*, indicating for each one of them the tonnage of ore treated from each concession.”) (emphasis added).

²³³ **Ex. CE-439**, Minister of Economy of Peru Against Mining Royalties, Agence France Presse (30 May 2004), p.1 (noting remarks by the then-Minister of Economy and Finance Kuczynski that the royalty would apply only to “a minority of companies, since most of the large mining projects are stabilized both in terms of taxes and fees”) (emphasis added); see also Memorial ¶ 319(c).

²³⁴ Counter-Memorial ¶ 144.

²³⁵ See *e.g.*, **Ex. CE-406**, Congress, Draft Law No. 08906-2003-CR (6 November 2003), p. 11 (including SMCV in list of stabilized companies); **Ex. CE-19**, MEF, Evaluation of Royalty Application (11 March 2004), p. 10 (including SMCV on list of mining companies whose stability agreements would preclude application of a new royalty).

69. *Finally*, Peru does not, and cannot, rebut Freeport’s examples of SUNAT’s acknowledgments until as late as 2012 that the Mining Law and Regulations applied stability guarantees to concessions and mining units rather than individual investment projects.

- (a) As Freeport explained, SUNAT repeatedly referred to “concessions or mining units” or “production units” when considering whether royalties had to be paid.²³⁶ For example, in early 2005, Peru’s witness Haraldo Cruz, who was then SUNAT’s Regional Intendent for Arequipa, sent a form letter to SMCV referring to it as a “holder[] of [a] mining concession[]” with instructions on how to submit certain information about its “Production Unit(s)” for purposes of determining royalty payments, thus confirming that the mining unit and concessions were the relevant item for purposes of stability.²³⁷ Mr. Cruz’s letter did not ask for information regarding SMCV’s “investment projects.”
- (b) In May 2006, Superintendent Hirsh and Minister Zavala testified before Congress and explained the process by which the “holders of mining concessions” would be assessed royalty payments.²³⁸ In doing so, they made clear that SUNAT’s view was that stability guarantees applied to entire mining units. For example, Ms. Hirsh confirmed that stabilized and non-stabilized mining companies would equally “file their returns and make their [royalty] payments . . . by *concession*.”²³⁹ In light of these statements, members of Congress inquired about the situation of certain companies with various stability agreements, stressing that they “wanted to know *which of their units are covered by those agreements* and the amounts they are paying for *each of the units*.”²⁴⁰ Minister Zavala noted that “a large number of companies are paying royalties and important amounts, there are also companies that had agreements, but in some units the agreement had already expired. Therefore, *for those units, they already have to start paying*.”²⁴¹ Ms. Hirsh also explained that five of the fifteen mining companies with stability agreements had nevertheless filed returns and made royalty payments.²⁴² She explained that one company paid because its agreement had expired, one because it had not yet

²³⁶ See Memorial ¶ 318.

²³⁷ Memorial ¶ 318(a); see also **Ex. CE-482**, SUNAT, Letter to SMCV (17 February 2005).

²³⁸ See **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006).

²³⁹ See **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript, p. 6 (3 May 2006).

²⁴⁰ See **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript, p. 9 (3 May 2006).

²⁴¹ **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 14 (emphasis added).

²⁴² See **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 8.

entered into force, and one because it only had juridical stability agreements.²⁴³ For the remaining two companies, Ms. Hirsch explained:

In the case of Minera Ares, it *only pays for two that do not have an agreement, although it has three production units*. It should be noted that they pay per [individual] agreement. . . . In the case of Southern, we also see that the *mining units do not have an agreement*.²⁴⁴

- (c) In December 2006, SUNAT issued special instructions to companies with stability agreements so that they could file their tax returns with respect to “each mining concession or Economic-Administrative Unit.”²⁴⁵ These instructions, and the accompanying forms, would have made no sense if SUNAT had intended to apply stability guarantees to specific “investment projects.”
- (d) On 20 November 2007, Marcel Gastón, SUNAT’s National Intendent, asked MINEM to provide a “list of parties obligated to pay mining royalties from June 2004 to date”—*i.e.*, the companies without stability guarantees exempting them from royalties—suggesting that SUNAT’s information was inaccurate, because certain cases “are not included on the list,” or “are included in the list but the information on their mining concessions does not include all the concessions under their responsibility.”²⁴⁶ In response, on 14 December 2007, Alfredo Rodríguez Muñoz, MINEM’s Director General of Mining, replied that MINEM would send the list “approximately in . . . February 2008,” as MINEM needed additional time to assess the “ownership of concessions and [Economic Administrative Units]” due to changes in MINEM’s databases—not because it needed to assess specific “investment projects.”²⁴⁷

²⁴³ See **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 8.

²⁴⁴ **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 8 (emphasis added).

²⁴⁵ See **Ex. CE-966**, SUNAT, Resolution No. 235-2066-SUNAT (28 December 2006), Approval of provisions and forms for the annual sworn income tax return and financial transaction tax returns for the 2006 tax year, Article 13 (“The Tax Return required by the titleholders of the mining activity for their investments made in the concessions or Economic-Administrative Units that comply with the provisions set forth in Article 2 of Supreme Decree No. 024-93-EM [*i.e.*, the Mining Regulations], will be prepared in accordance with the provisions of Article 14.”); Article 14 (stating that mining companies shall submit a special tax return form with the complete information corresponding to “each mining concession or Economic-Administrative Unit referred to in [the Mining Regulations],” to determine the corresponding Tax).

²⁴⁶ **Ex. CE-568**, SUNAT, Official Communication No. 261-2007-SUNAT/2E0000 (20 November 2007).

²⁴⁷ **Ex. CE-570**, MINEM, Document No. 1169-2007-MEM-DGM (14 December 2007), p. 2.

(e) Remarkably, in September 2012—three years after SUNAT had issued the first Royalty Assessment against SMCV—SUNAT confirmed in an advisory report, issued under the Tax Code’s consultation procedure, that “mining-activity owners that have signed [stability agreements] will enjoy a stabilized tax system applicable *solely to the concession or economic-administrative unit for which said agreement has been signed.*”²⁴⁸ SUNAT further stated that “[a] mining-activity owner that has signed [stability agreements], *for one or more of its concessions or economic-administrative units, . . . may offset the tax losses of one or more of its concessions or economic-administrative units by using the profits from the other[.]*” concessions or economic-administrative units, and confirmed that when calculating its payments, “the owner should take into account *the stabilized laws to be applied to each of the concessions or economic-administrative units.*”²⁴⁹ Peru conveniently disregards this report in its Counter-Memorial. In particular, Peru and its witness Ms. Bedoya, an adjudicating auditor of SUNAT’s Major Taxpayers Intendency, provide no explanation why in 2009 and the following years SUNAT assessed royalties for SMCV’s Concentrator that formed part of the Beneficiation Concession covered by the 1998 Stability Agreement while in 2012 issuing a report to taxpayers confirming that stability guarantees applied to the concessions or mining units covered by a stability agreement.

ii. Peru Provides No Evidence of Its So-Called “Consistent” Practice Prior to SMCV’s Decision to Proceed with the Concentrator Investment

70. The evidence in the record thus clearly demonstrates that, in the years leading up to SMCV’s decision to construct the concentrator, the Government consistently interpreted the Mining Law and Regulations as extending stability guarantees to all investments and activities in the concessions or mining units that received the qualifying minimum investment—and at least in the case of SUNAT also many years after.²⁵⁰ Peru nevertheless claims that “[c]ontemporaneous 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.”²⁵¹ In support of this argument, Peru highlights eight examples from “prior to June 2006”—the date of Mr. Isasi’s memo setting out the novel and restrictive

²⁴⁸ Memorial ¶ 326(c); **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 February 2020), p. 3.

²⁴⁹ **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000, (13 September 2012), p. 5, fn 4.

²⁵⁰ See Memorial ¶¶ 321-27.

²⁵¹ Counter-Memorial ¶ 12.

interpretation.²⁵² But only *one* of these examples—a 2002 Report by SUNAT, which in fact does not support Peru’s position—predates the political pressure on MINEM in connection with the Royalty Law discussions.²⁵³ Given that Peru has access to the entirety of MINEM’s and SUNAT’s records related to the application of stability agreements before SMCV proceeded with construction of the Concentrator, this complete lack of evidence supporting Peru’s arguments is telling. This is even more so considering that Peru agreed, and was ordered to, produce such records during the document production phase.²⁵⁴

71. Peru’s remaining examples all date from 2005-2006—*after* SMCV made the decision to invest in and began constructing the Concentrator.²⁵⁵ These examples, most of which Freeport discussed in its Memorial, at most evidence the Government’s *volte-face* in response to the political pressure to take action against SMCV. But even the 2005-2006 examples do *not* provide any evidence to support the claim that Peru “consistently” interpreted the Mining Law as applying stability guarantees to the specific investment or “investment project” contained in the feasibility study’s investment program. Rather, several of these examples affirm that the Government’s practice up to that point was to apply stability guarantees to concessions or mining units—even as various officials tried to deny stability guarantees to SMCV for the Concentrator. Thus, instead of demonstrating “consistent” practice *before* it changed course, the examples on which Peru relies simply reaffirm that Peru created its novel and restrictive interpretation of the scope of stability agreements as a result of political pressure—over a decade after the Mining Law entered into force and *after* SMCV began construction of the Concentrator.

72. *First*, Peru’s argument that SUNAT’s Report No. 263-2002 confirms that “as early as 2002, SMCV (and Claimant) knew or should have known that a new investment project” would not be covered by the Stability Agreement is incorrect and unsupported by the plain text of that document.²⁵⁶

(a) Contrary to Peru’s argument, SUNAT Report No. 263-2002 does not confirm that “stability benefits are granted exclusively to the . . . investment project that was outlined in the feasibility study.”²⁵⁷ If anything, the Report—which assessed an inquiry as to

²⁵² Counter-Memorial ¶ 12; *see also* **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006).

²⁵³ Counter-Memorial ¶ 12; *see also id.* ¶¶ 132-35 (interpreting the 2002 SUNAT Report); **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002; Memorial § IV.B.2(i) (detailing the politically motivated campaign against SMCV, starting in April-May 2005); *infra* § II.C.3 (chronology of targeted political pressure levied against MINEM, MEF, and SUNAT officials to act against SMCV).

²⁵⁴ *See* Procedural Order No. 2 (4 July 2022), Appendix 1, Requests Nos. 1, 3, 4, 5, 6, 8, 11, and 25.

²⁵⁵ *See* Counter-Memorial ¶ 12 (listing examples starting in March 2005); **CWS-5**, Witness Statement of Randy L. Davenport (“Davenport I”), ¶ 41 (“SMCV began constructing the Concentrator in December 2004.”).

²⁵⁶ Counter-Memorial ¶ 141; **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002; *see also* **RER-3**, Bravo & Picón, ¶¶ 109, 113-14.

²⁵⁷ Counter-Memorial ¶ 140.

whether a workers' tax applicable only under a stabilized regime could be applied solely to those of the mining company's workers carrying out "stabilized" activities, as opposed to *all* employees of the mining company—suggests that it is SMCV's interpretation that is correct.²⁵⁸ For example, in assessing this inquiry, SUNAT noted that, pursuant to Article 2 of the Regulations, "when the individual or legal entity is the mining titleholder of several concessions or Administrative Economic Units, the qualification *shall only be effective for those concessions or units that are supported, among others, by the agreement* referred to by said Article."²⁵⁹

- (b) Peru relies on SUNAT's conclusion that stability agreements "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."²⁶⁰ But this sentence nowhere mentions "investment projects" or the specific investment in the feasibility study, it says only "investment activities."²⁶¹ And the meaning of this statement becomes clear when read with the second half of the statement, which Peru conveniently ignores: that the stabilized activities are executed in a "determined concession or [EAU]."²⁶² Moreover, it is curious that Peru attempts to rely so heavily on a SUNAT report given that it takes the position that SUNAT "had no power to establish or interpret the scope of the 1998 Stabilization Agreement."²⁶³

73. *Second*, Peru's assertion that during the Prospectors & Developers Association of Canada ("PDAC") meeting held on 8 March 2005, Mr. Tovar supposedly confirmed to Phelps Dodge representatives that "the Leaching Project would be exempt from royalt[ies]," but that the Concentrator "would have to pay royalties, because it was not stabilized,"²⁶⁴ is completely unsupported.²⁶⁵

- (a) Mr. Tovar's testimony that he explicitly told Phelps Dodge representatives, Red Conger, and external counsel Luis Carlos Rodrigo Prado, that the Concentrator "was not

²⁵⁸ See **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, pp. 1, 3.

²⁵⁹ **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, p. 2 (emphasis in original).

²⁶⁰ Counter-Memorial ¶ 140 (citing **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, 23 September 2002, p. 3 (emphasis Peru's)).

²⁶¹ See **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, p. 3.

²⁶² **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000, September 23, 2002, p. 3.

²⁶³ Counter-Memorial ¶ 170.

²⁶⁴ **RWS-3**, Witness Statement of Oswaldo Tovar Jumpa (18 April 2022) ("Tovar"), ¶ 55; see also Counter-Memorial ¶¶ 172-73.

²⁶⁵ Cf. **RWS-3** Tovar, ¶ 55; Counter-Memorial ¶ 12.

stabilized,” and thus would have to pay royalties, is not credible.²⁶⁶ The documents on which Mr. Tovar relies to allegedly confirm his testimony do not provide any support for his claims but, to the contrary, confirm Freeport’s interpretation of the scope of stability agreements.²⁶⁷

- (b) The first document, an *aide-mémoire* regarding Phelps Dodge, says nothing about royalties or about SMCV’s Stability Agreement, but confirms that Phelps Dodge was “expanding its operation to mine primary sulfides from the deposit” and notes that “[t]he investment is calculated at US\$800 million.”²⁶⁸ The second, another *aide-mémoire* regarding the “Mining Royalty and tax stability agreements,” does not say anything about SMCV or its operations, but states generally that “[t]here are mining concessionaires that have signed administrative and tax stability agreements with the State regarding specific mining projects . . . it is the mining companies’ responsibility to inform the entity tasked with managing and collecting the royalty about the *mining projects and concessions that would be covered* by such guarantees.”²⁶⁹ The *aide-mémoire* thus confirms MINEM’s view that stability guarantees applied to concessions and mining units—and not investment projects. The term “mining projects” was used in the Mining Law and contemporaneous MINEM documents synonymously with “mining unit,” not “investment project.” For example, in MINEM’s contemporaneous annual reports and in presentations prepared by Mr. Isasi, the term “mining project[.]” is used to refer to the Cerro Verde mining unit, which at that time was already operating both the leaching facilities and the Concentrator.²⁷⁰ This is also consistent with the longstanding approach of Proinversion, the Government agency that promotes private investment in “assets, projects, and companies of the State,” which routinely uses the term “mining projects”

²⁶⁶ Cf. **RWS-3** Tovar, ¶ 55.

²⁶⁷ See **Ex. RE-4**, Email from Alicia Polo y La Borda to Oswaldo Tovar, “Ayuda Memoria-reuniones.doc” (with attachment), March 4, 2005; **Ex. RE-5**, Email from César Zegarra to Oswaldo Tovar and César Polo, “Ayuda Memoria” (with attachment), March 8, 2005.

²⁶⁸ **Ex. RE-4**, Email from Alicia Polo y La Borda to Oswaldo Tovar, “Ayuda Memoria-reuniones.doc” (with attachment), March 4, 2005, p. 2.

²⁶⁹ **Ex. RE-5**, Email from César Zegarra to Oswaldo Tovar and César Polo, “Ayuda Memoria” (with attachment), March 8, 2005, p. 2 (emphasis added).

²⁷⁰ See, e.g., **Ex. CE-968**, MINEM, 2006 Annual Mining Report (August 2007), p. 7 (illustrating “mining projects” in Peru and reflecting Cerro Verde as a single “mining project”); **Ex. CE-970**, MINEM, 2007 Annual Mining Report (February 2008), p. 63 (same); **Ex. CE-972**, Felipe Isasi, Mining in Peru (September 2008), slide 10 (same); **Ex. CE-977**, MINEM, 2009 Annual Mining Report (May 2010), Map of Mining Projects (same); see also **RER-3**, Bravo & Picón ¶ 42 (“The provisions of the Mining Law and its Regulation governing stabilization agreements of the mining sector limit the scope of their application to the specific investment project a company undertakes in a *mining project*.”) (emphasis added).

when privatizing multiple concessions collectively organized as mining units.²⁷¹ Moreover, the reference to “mining projects and concessions” in the *aide-mémoire* would not make sense if “mining projects” was intended to mean “specific investment projects within a concession,” since in that case, there would be no “covered” concession.²⁷²

(c) Ms. Torreblanca likewise confirms that neither of the meeting participants relayed Mr. Tovar’s alleged statements to her, and that she does not recall “hearing anything remotely similar,” despite the fact that “[h]ad any Government official made such a categorical statement, it is extremely unlikely that this statement would not have been shared with me.”²⁷³ She also explains that Mr. Tovar’s statements are “highly unlikely given the context of Mr. Conger’s attendance at PDAC.”²⁷⁴ Mr. Conger attended PDAC specifically at the request of MINEM, to give a presentation and assist in promoting Peru as an attractive destination for foreign mining investment.²⁷⁵ Given this context, it “would not have made sense for Mr. Tovar to bring up such a shocking revelation.”²⁷⁶ Moreover, Mr. Conger’s presentation—which he delivered the day after the meeting with Mr. Tovar—is completely incongruous with the information Mr. Tovar supposedly conveyed at their meeting.²⁷⁷ In his presentation, Mr. Conger explained, among others,

²⁷¹ See e.g., **Ex. CE-1004**, ProInversión Manual (2016), pp. 2, 9 (listing payment balances from privatizing mining “projects,” or multiple concessions organized as mining units, including for “project” Las Bambas) **Ex. CE-939**, ProInversión, Terms for International Public Contest No. PRI-80-2003, Las Bambas - Apurímac Department (24 August 2004), p. 8 (organizing the international bidding process for the “Las Bambas Mining Project”—a mining unit comprised of four mining concessions extending over 1,800 hectares); **Ex. CE-980**, ProInversión, Terms for International Public Contest, Minero Magistral (September 2010), p. 15 (organizing the international bidding process for the “Magistral Mining Project,” a mining unit comprised of five mining concessions extending over 250 hectares); **Ex. CE-1010**, ProInversión, Terms for International Public Contest, Yacimientos Cupríferos de Michiquillay (January 2018), p. 16 (organizing the international bidding process for the “Michiquillay Project”—a mining unit comprised of 18 mining concessions extending over 4,000 hectares); see also **CER-10**, Vega II, ¶ 14 (Article 82 “makes clear that ‘mining project’ is a reference to the *entire mining operation* within one or more EAUs—not an individual ‘investment project’—because as explained, it is the ‘mining project’ that must possess the relevant total production capacity” which is consistent with the “Government’s regular use of the term”); **CER-9**, Otto II, ¶ 27 (“[T]he term ‘mining unit’ in Peruvian law and regulations is synonymous with what we would typically refer to in the mining industry as a mining project or mining operation, e.g., the Cerro Verde Mine.”); **CWS-18**, Flury II, ¶ 16 (“When I say ‘mining projects,’ I refer to the mining units where companies would undertake their mining activities, as this was a term that MINEM used interchangeably with mining units.”).

²⁷² **Ex. RE-5**, Email from César Zegarra to Oswaldo Tovar and César Polo, “Ayuda Memoria” (with attachment), March 8, 2005.

²⁷³ **CWS-21**, Torreblanca II, ¶ 25.

²⁷⁴ **CWS-21**, Torreblanca II, ¶ 26.

²⁷⁵ **CWS-21**, Torreblanca II, ¶ 26.

²⁷⁶ **CWS-21**, Torreblanca II, ¶ 26.

²⁷⁷ **CWS-21**, Torreblanca II, ¶ 27.

that Phelps Dodge and SMCV had “initiated preliminary discussions with the government” to obtain “stability contract assurance,” that Phelps Dodge decided to proceed with the investment after “extensive interaction with the Government” and obtaining “certainty of stability contract,” and that SMCV’s “Stability contract provides certainty to make \$850 million investment decision.”²⁷⁸ It is utterly implausible that Mr. Conger would have made these statements if only *one day* prior, Mr. Tovar had repudiated the Government’s agreement and assurances to provide stability guarantees to the Concentrator.

74. *Third*, Peru contends that Mr. Isasi’s April 2005 Report—which as Freeport already explained, confirmed that the Royalty Law would not apply to stabilized *concessions*—reflects the same position as Mr. Isasi’s later June 2006 Report, which for the first time sets forth Peru’s novel position on the Mining Law and Regulations.²⁷⁹ But Peru’s contention is squarely contradicted by the Report’s plain text.

- (a) Mr. Isasi’s April 2005 Report unequivocally confirms that stability agreements applied to the entire concessions or mining units reflected in the agreements.²⁸⁰ Among others, the Report confirms that:

it is not the mining titleholder . . . who will be exempt or not from the payment of royalties, comprehensively as a company, but it will be the *mining concessions of which it is the titleholder, depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of [the Royalty] Law.*²⁸¹

- (b) Peru’s argument that the text of the Report supports Peru’s interpretation appears to rely entirely on the fact that Mr. Isasi uses the term “investment project” three times in the report.²⁸² But read in context, these references clearly confirm that the scope of a stability agreement is granted to the concessions or mining units that benefit from the qualifying minimum investment. For example, Peru relies heavily on the statement that

²⁷⁸ **Ex. CE-945**, Phelps Dodge, Peru and Phelps Dodge: Partners in Progress (9 March 2005), slides 9, 12, 16; *see also* **Ex. CE-1019**, Oswaldo Tovar, Can a Lawyer Resolve What Engineers Cannot Correct?, ENERGIMINAS (11 December 2018); **Ex. CE-1017**, Oswaldo Tovar, Mining for All: History of *Obras por Impuestos* (September 2018).

²⁷⁹ *See* Counter-Memorial ¶¶ 12, 174-81.

²⁸⁰ *See* **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005); Memorial ¶¶ 128, 319(d).

²⁸¹ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17; *see also* **Ex. CE-1022**, Twitter, @felipeisasicayo Search: "consejo de minería" (9 August 2019).

²⁸² *See* Counter-Memorial ¶¶ 174-81.

stability agreements “guarantee the legal regime related to tax, currency exchange and administrative matters of the investment project to which they refer.”²⁸³ However, the following sentences make clear that what is stabilized is not the “investment project,” but the concessions or EAUs benefitting from the investment: the Report first notes that “[i]f a mining titleholder has *economic administrative units or mining concessions that are not part of the project subject to stability*[, it] must keep the accounting of the project separately.”²⁸⁴ The Report goes on to confirm that “it will be the *mining concessions*” that are exempt from royalties, provided they are “part of a project set out in a stability agreement.”²⁸⁵ The same paragraph in the Report then concludes by again affirming that “only the *mining projects* referred to in these agreements will be excluded from the royalty calculation basis”—*i.e.*, only the mining units that are stabilized.²⁸⁶ Similarly, the statement that the “royalty is not applicable to the mineral resources extracted from the *concessions that form part of the contractually stabilized investment project*” makes clear that, while it uses the term investment project, it is the *concessions* that are entitled to stability and, particularly, that the mining royalty is not applicable to stabilized mining concessions.²⁸⁷ Further, and tellingly, there is absolutely no suggestion in the April 2005 Report that a concession could be “partially” stabilized, such that a company would have to pay royalties for one “investment project” or processing method carried out within a single concession but *not* for another.²⁸⁸

- (c) Despite Peru’s argument that Freeport’s interpretation “is directly at odds with the plain language of the report,” Peru primarily relies not on the terms of the April 2005 Report, but on Mr. Isasi’s *post hoc* testimony that “the legal position [he] held in that report is that legal stabilization agreements only covered the specific investment project mentioned in the Agreement, and not the concessions of the company that signs the agreement.”²⁸⁹ This assertion finds no support in the Report itself, which is the best evidence of Mr. Isasi’s legal position at the time. Further, the fact that Mr. Isasi states that the Report

²⁸³ Counter-Memorial ¶ 178 (citing **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17).

²⁸⁴ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17 (emphasis added).

²⁸⁵ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17 (emphasis added).

²⁸⁶ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17 (emphasis added).

²⁸⁷ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 16 (emphasis added).

²⁸⁸ See **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005).

²⁸⁹ Counter-Memorial ¶¶ 174-81; **RWS-2**, Witness Statement of Juan Felipe Guillermo Isasi Cayo (18 April 2022) (“Isasi”), ¶ 14.

“was issued in an abstract and general manner on the subject-matter (not on the specific case of Cerro Verde)” is entirely immaterial²⁹⁰: Freeport’s point is that Peru’s “general” interpretation of the Mining Law and Regulations before its *volte-face* against SMCV was to grant stability guarantees to entire concessions or mining units.²⁹¹

- (d) Peru’s position on Mr. Isasi’s April 2005 Report in this arbitration is in stark contrast with the views expressed by Peru’s arbitration counsel Sidley Austin LLP in communications that Peru’s Court of Transparency and Access to Public Information disclosed in connection with a public information request.²⁹² Peru’s arbitration counsel strongly advised the Government to avoid disclosing Mr. Isasi’s April 2005 Report because disclosure of the Report

would put Peru’s legal defense at risk and, thereby, it could be determined that the State may have incurred international responsibility for breaching certain obligations assumed in international investment treaties, and could be subject to the payment of significant amounts counted in millions of dollars.²⁹³

- (e) Peru’s arbitration counsel similarly recognized that disclosure of the April 2005 Report “could be prejudicial” because “at first glance, [it] appears to support the Claimants’ main argument” that “all activities within a concession or an economic administrative unit are protected by the Stabilization Agreement and therefore do not need to pay royalties for any of those activities,” and “can be interpreted to support” Cerro Verde’s position.²⁹⁴

75. *Fourth*, Peru’s assertion that in a June 2005 presentation before the Energy and Mines Congressional Committee, Minister Sánchez Mejía “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” is misleading and contradicted by the transcripts of that session.²⁹⁵

²⁹⁰ Cf. **RWS-2**, Isasi, ¶ 14.

²⁹¹ See Memorial § IV.A.2(i)(d).

²⁹² See **Ex. CE-884**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021-JUS/TTAIP (16 April 2021); see also Memorial ¶ 323.

²⁹³ **Ex. CE-884**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021-JUS/TTAIP (16 April 2021), p. 15.

²⁹⁴ **Ex. CE-884**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021-JUS/TTAIP (16 April 2021), pp. 13-14.

²⁹⁵ Counter-Memorial ¶ 182 (citing **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee, 8 June 2005).

- (a) Peru relies on two statements made by Minister Sánchez Mejía: first, his explanation that for SUNAT “to determine the reference basis, it must determine which are the stabilized mining projects and which are the non-stabilized projects,” and second, his explanation that “[t]he non-stabilized mining projects pay royalties.”²⁹⁶ However, as already explained, the term “mining project” as used here does not correspond to the “investment project set out in the feasibility study”—rather, it is clearly used more generically to mean “mining unit.” See above at paragraph 65. This is also clear from the presentation that preceded Min. Sánchez Mejía’s, in which Vice-Minister of Mines Romulo Mucho discussed BHP Tintaya’s mining operations in the Espinar province.²⁹⁷ Vice-Minister Mucho stated that “the two *projects* that BHP has are Corocohuayco . . . and Antapacay, the old mine that was called Atalaya”—clearly referring to the mining units as a whole—and pointed to “the map of mining concessions and mining rights in this area.”²⁹⁸
- (b) Tellingly, Peru did not exhibit the slides from Min. Sánchez Mejía’s presentation—a surprising omission given the weight Peru attempts to place on his presentation. But during document discovery Peru disclosed draft “final slides” dated 3 June 2005 that appear very similar to Min. Sánchez Mejía presentation as reflected in the minutes of his presentation. These draft slides were emailed by Mr. Isasi to Min. Sánchez Mejía, noting that they reflected the agreement of Mr. Isasi, Mr. Tovar and another MINEM official.²⁹⁹ These slides confirm that *nothing* in this presentation advanced the novel position that only specific “investment projects” included in a feasibility study were entitled to stability guarantees.³⁰⁰ Rather, they repeatedly emphasize that the stability guarantees are granted to mining investors but do not state that these guarantees apply only to the initial investment. For example, the draft slides state that the “immutability of a legal regime . . . corresponds to *investors* protected by a ‘Contrato-Ley’ [*i.e.*, a stability agreement],” that

²⁹⁶ Counter-Memorial ¶ 184 (citing **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee, 8 June 2005).

²⁹⁷ See **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee, 8 June 2005, pp. 2-6.

²⁹⁸ **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee, 8 June 2005, pp. 2-3 (emphasis added).

²⁹⁹ See **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET) (“Minister: We have coordinated with Mr. Oswaldo Tovar and Dr. César Zegarra. Agreed is the final presentation document, the attached file. We remain at your disposal for internal presentation and any changes that you or the Vice Minister or DGM deem convenient. Best regards, Felipe Isasi.”).

³⁰⁰ See **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET).

“those who enter into a *contrato-ley* with the State are protected against subsequent amendments to the stabilized legal regime,” and that “Administrative Stability [is] granted to some *investors*.”³⁰¹ The draft slides further affirm that “a *Contrato-Ley* with Administrative Stability entered into prior to the Royalty Law does protect against th[e] new [royalty] obligation” and that “Clause 9 of the Model Stability Agreement” “specifically indicates that the guarantees granted” are “applicable to the *investor*.”³⁰² The presentation concludes that “[a]ll mining titleholders” pay royalties, “but not for all their projects,” because “the value of the concentrates extracted for the stabilized project will be excluded from the base for calculating the royalty.”³⁰³ As discussed above, the reference to “projects” clearly refers to “mining projects” and nothing in the presentation remotely suggests otherwise.³⁰⁴

(c) Further, Peru’s argument that “it is not credible” that SMCV “[was] not aware” that it “would only be exempt from paying royalties with respect to the Leaching Project” because the June 2005 “presentation was televised” is irrelevant, not to mention unfounded.³⁰⁵ Whether SMCV could have become “aware” of the presentation is immaterial to whether it supports Peru’s assertion that Peru has *always* interpreted the Mining Law and Regulations as supporting Mr. Isasi’s novel and restrictive position. Peru has also not presented a single piece of evidence supporting its claim that the presentation was televised, neither to support its assertion in the Counter-Memorial nor after agreeing to do so in the context of document production.³⁰⁶ Moreover, SMCV never received notice of the presentation and Peru has submitted no evidence demonstrating

³⁰¹ **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET), slides 27, 28, 31.

³⁰² **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET), slides 31, 32.

³⁰³ **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET), slide 33.

³⁰⁴ **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET), slide 29 (referring to the “mining projects protected by *Contratos-Ley*”).

³⁰⁵ *Cf.* Counter-Memorial ¶ 185; **RWS-2**, Isasi, ¶ 59 (noting SMCV “must have known since at least June 2005 what MINEM’s position was with respect to the scope” of the Stability Agreement and the fact that SMCV “would have to pay royalties on the minerals processed by the [Concentrator]” because he “delivered a presentation in Congress” which was “transmitted by closed-circuit television”).

³⁰⁶ *See* Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 10.

that the specific comments by Minister Sánchez Mejía on which Peru relies were reported in the press.³⁰⁷ And, at the time Mr. Sánchez Mejía gave the presentation, the Concentrator was already under construction.³⁰⁸

76. *Fifth*, neither Mr. Isasi's September 2005 Report nor Min. Sánchez Mejía's October 2005 Letter to Congress demonstrate that Peru "consistently" applied its novel and restrictive interpretation of the scope of stability guarantees under the Mining Law before it did so against SMCV.³⁰⁹ Rather at most, as Freeport already explained, these documents demonstrate how the Government began seeking to justify action against SMCV as a result of political pressure once SMCV had started to construct the Concentrator.³¹⁰

- (a) As Freeport already explained in its Memorial, nothing in Mr. Isasi's September 2005 Report provides any support for Mr. Isasi's testimony that it "adopted the position that stabilization agreements only cover investment projects specifically described in each stabilization agreement."³¹¹ Mr. Isasi does not point to a single quote in the Report suggesting this conclusion, other than noting several references to the referential title of the Agreement, "the Cerro Verde Leaching Project" and the statement that the Concentrator investment must be a "new investment program" to use the reinvestment benefit.³¹² Neither of these statements is remotely sufficient to decode the existence of Mr. Isasi's novel and restrictive interpretation of the scope of stability guarantees under the Mining Law from the Report, no matter what Mr. Isasi now claims his intention was. In particular, the requirement for a "new investment program" simply restates a specific

³⁰⁷ See **CWS-21**, Torreblanca II, ¶¶ 40-41 ("SMCV did not receive any notification of this presentation, or have a representative attend this session Had MINEM's presentation been relevant to the matter at hand, press reports would have singled out that SMCV had to pay royalties for the Concentrator investment. Instead, these contemporaneous press reports focused on the lingering uncertainty surrounding the Government's implementation of the Royalty Law" and "confirmed that the 'Cerro Verde copper pit expansion' was exempt from royalties").

³⁰⁸ See Memorial ¶ 117 ("SMCV began constructing the Concentrator in December 2004.") (citing **CWS-5**, Davenport I, ¶ 41).

³⁰⁹ Cf. Counter-Memorial ¶¶ 186-92; **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005); **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005); see also **RWS-2**, Isasi, ¶¶ 24-38.

³¹⁰ See also Memorial §§ III.H, IV.B.2(ii); *infra* § II.C.3.

³¹¹ See Memorial ¶¶ 134-36 (citing **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005)). Cf. **RWS-2**, Isasi, ¶ 24.

³¹² **RWS-2**, Isasi, ¶¶ 27, 30; see also **RWS-2**, Isasi, ¶¶ 24-26, 28-29, 31-34.

requirement in the Mining Law and Regulations governing the profit reinvestment benefit.³¹³

- (b) Further, as Freeport explained in its Memorial, Min. Sánchez Mejía’s October 2005 Letter provided absolutely no explanation or justification for the conclusion that “the Primary Sulfide Project will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of an Agreement for Promotion and Guarantee of Investment has not been applied for.”³¹⁴ Nor did Mr. Isasi’s September 2005 Report, attached by way of explanation, provide any support for this convenient conclusion, which came on the heels of Congressman Diez Canseco’s threats only two weeks prior that Min. Sánchez Mejía “demand[] that Cerro Verde comply with the payment of royalties,” or else Congressman Diez Canseco would file “a compliance action or process” and “denounce [Minister Sánchez Mejía] constitutionally.”³¹⁵
- (c) Again, rather than demonstrating a “consistent” interpretation of the scope of stability agreements under the Mining Law and Regulations, all the October 2005 Letter demonstrates is a desire to impose royalties against SMCV’s Concentrator—whatever the purported legal basis.³¹⁶ There is no suggestion from either of these documents that Mr. Isasi had already committed to the novel and restrictive interpretation later memorialized in the June 2006 Report—though even if he had, that would still not make it “consistent” with the Government’s prior practice.³¹⁷

77. *Sixth*, Min. Sanchez Mejía’s November 2005 letter to Congressman Diez Canseco—in which he stated that the Government confers stability guarantees “with regard to the specific investment project contemplated by the agreement”—likewise does not reflect Peru’s “consistent position,” as Peru

³¹³ See **CA-2**, Mining Regulations, Article 10 (“[M]ining activity titleholders, shall enjoy the benefit provided for in Article 72, paragraph b), of the Single Unified Text. Non-distributed income shall be applied to the execution of new investment programs that guarantee the increase of production levels of the relevant mining units.”).

³¹⁴ See Memorial ¶¶ 134-36 (citing **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005)). Cf. Counter-Memorial ¶¶ 191-92.

³¹⁵ **Ex. CE-508**, *Minera Cerro Verde Under JDC's Magnifying Glass*, LA REPÚBLICA (16 September 2005); **Ex. CE-509**, Congressman Diez Canseco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties, EL HERALDO (16 September 2005), p. 2; see also Memorial ¶¶ 132-36; *infra* § II.C.3; **CWS-11**, Witness Statement of Julia Torreblanca (“Torreblanca I”), ¶ 42.

³¹⁶ See **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005).

³¹⁷ See **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005); **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005).

asserts.³¹⁸ Instead, it confirms Peru's *volte-face* in the face of political pressure targeted at MINEM and on Min. Sanchez Mejía in particular.

78. *Finally*, Peru's reliance on Mr. Isasi's May 2006 Presentation before the Congressional Working Group as evidence that it "consistently" applied the novel interpretation fails to take account of presentations from that very same day that directly contradict Peru's argument.³¹⁹

(a) Peru conveniently disregards the presentation from Ms. Hirsh, SUNAT's National Superintendent, and Mr. Zavala, the Minister of Economy and Finance, in a Congressional Session before the Energy and Mines Commission on 3 May 2006—the same day as Mr. Isasi's presentation—in which they explained that concessions or mining units were the proper standard for assessing royalties against companies with stability agreements. See above at Section II.A.2(ii). At the end of this session, Mr. Isasi interjected that stability agreements allegedly "only guarantee a particular investment project that is specified in a feasibility study and that is included in a contract."³²⁰ But Ms. Hirsh and Mr. Zavala's statements confirm that even as of May 2006, Mr. Isasi's position was inconsistent with the Government's prior practice and the contemporaneous position of SUNAT and the MEF that stability guarantees applied to entire concessions or mining units.³²¹

(b) Further, it makes no material difference if Mr. Isasi first presented his novel and restrictive interpretation on 3 May 2006 or six weeks later when he issued the 16 June 2006 Report. Either way, these documents merely demonstrate that after many months of sustained political pressure, Peru came up with a purported legal justification to assess royalties against SMCV for its Concentrator operations—a justification which required reversing completely its position on the scope of stability guarantees consistently applied up to that point.

³¹⁸ Cf. Counter-Memorial ¶¶ 195-96; **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005), p. 2.

³¹⁹ Cf. Counter-Memorial ¶¶ 197-205.

³²⁰ **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 28.

³²¹ See *supra* §§ II.A.2(i)-(ii).

3. The Stability Agreement Applied to SMCV's Entire Mining Unit, Made Up of the Mining and Beneficiation Concessions

79. As Freeport explained, while it is the Mining Law and Regulations that define the scope of stability guarantees, the Government grants those guarantees to mining investors by entering into individual stability agreements applicable to the concessions or mining units in which they carry out the qualifying minimum investment.³²² Article 86 of the Mining Law provides that stability agreements “shall incorporate all the guarantees set forth in this Title,” and confirms that they are “adhesion contracts, and their models will be prepared by the Ministry of Energy and Mines.”³²³

80. SMCV's Stability Agreement implemented all stability guarantees under the Mining Law and Regulations and applied those guarantees to all investments made within the concessions set forth in Clause 3, Exhibit I of the Agreement—the Mining Concession and the Beneficiation Concession—which together made up the Cerro Verde Mining Unit.³²⁴ Moreover, as Freeport explained, the Agreement's terms confirm that the stability guarantees apply to all investments in the Mining and Beneficiation Concessions, consistent with Article 83 of the Mining Law and Articles 2 and 22 of the Regulations.³²⁵

81. Peru does not dispute that (i) the Mining Law and Regulations determine the scope of the Stability Agreement; and (ii) the Concentrator formed part of the Beneficiation Concession included in Clause 3, Exhibit I to the Agreement.³²⁶ Hence, since the Mining Law and Regulations extend stability guarantees to concessions and mining units, the Stability Agreement covers the Concentrator, which forms part of the Beneficiation Concession covered by the Stability Agreement.³²⁷ Peru's argument that the Stability Agreement limited its guarantees to the investment project specifically included in SMCV's Feasibility Study is thus entirely a result of Peru's flawed interpretation of the Mining Law and Regulations, and must fail.

³²² See Memorial ¶¶ 302; see also **CWS-3**, Chappuis I ¶ 25; **CER-10**, Vega II ¶ 30; **CER-9**, Otto II ¶ 22.

³²³ **CA-1**, Mining Law, Article 86; see also **CER-7**, Bullard II ¶¶ 13, 17, 58 (interpreting Article 86); **RWS-1**, Polo ¶ 26 (acknowledging that stability agreements “are adhesion contracts”).

³²⁴ **Ex. CE-12**, 1998 Stability Agreement, Clause 3, Exhibit I (implementing Article 82 of the Mining Law by identifying the concessions in which the qualifying minimum investment or expansion was made); see also Memorial ¶¶ 78, 331.

³²⁵ See Memorial ¶¶ 323-24 (citing **Ex. CE-12**, 1998 Stability Agreement, Clauses 3, 9, 10, Exhibit I); **CER-2**, Bullard I ¶¶ 27-31, 36-40; **CER-5**, Vega I, ¶¶ 60-62; **CWS-3**, Chappuis I ¶ 39; **CA-1**, Mining Law, Article 83 (“The effect of the contractual benefit shall apply exclusively to the activities of the mining company in whose favor the investment is made.”); **CA-2**, Regulations, Article 22 (stability guarantees “will benefit the mining activity titleholder exclusively for the investments that it makes in the concessions or Economic Administrative Units”).

³²⁶ See Counter-Memorial § IV.A.2.

³²⁷ See Memorial § IV.A.2; *supra* § II.A.1(i)-(ii).

i. The Parties Agree that the Mining Law and Regulations Determine the Scope of the Stability Guarantees Under the Stability Agreement

82. It is undisputed that the Stability Agreement implements the stability guarantees of the Mining Law and Regulations and cannot derogate from the Mining Law and Regulations.³²⁸

(a) Peru’s expert Prof. Eguiguren states that “the content of the agreement, the benefits, and the guarantees it provides to the investor, as well as the requirements to access this special contractual regime, are predetermined under the law.”³²⁹ Specifically, “Article 86 of the [Mining Law] provide[d] that stabilization agreements will have a model or standard form, prepared and approved by [MINEM], which will incorporate the guarantees set forth under the law.”³³⁰ Prof. Eguiguren further states that “the matters that will be subject to legal stability *are determined under law*, so they do not depend on contractual freedom or the will of the state entity, or on its private counterparty Thus, the content of most contractual stipulations arises from the law, with the private party’s freedom almost confined to accepting whether or not to enter into the agreement.”³³¹

(b) Peru’s expert Prof. Morales similarly agrees “that the Stabilization Agreement is governed by a special legal framework” and that “it reflects the guarantees granted by the Mining Law.”³³²

(c) Mr. Polo likewise concedes that, by signing a stability agreement “the mining company adheres to the stability conditions and guarantees previously provided by law and

³²⁸ See, e.g., **CA-1**, Mining Law, Article 86 (providing that stability agreements “shall incorporate all the guarantees established” in the Mining Law); **Ex. CE-12**, 1998 Stability Agreement, Clause 1.1 (entitling SMCV to “guarantees of the benefits contained” in Articles 72, 80, and 84 of the General Mining Law); Memorial ¶¶ 81, 330-32; **CER-5**, Vega I ¶¶ 31, 53, 59 (the “Stability Agreement implemented the stability guarantees available to SMCV under Title Nine of the Mining Law” “no more, no less”); **CER-10**, Vega II ¶ 9; **CWS-3**, Chappuis I ¶ 26 (“[E]ach stability agreement would secure all the guarantees under the Mining Law without the parties being able to negotiate the agreement’s specific scope of protection—that they would not depend on the official in charge at the time, but on the Law.”); **CER-2**, Bullard I ¶ 20 (Peru “could not have included guarantees that are more restricted or limited than those included in the regulatory framework.”); **CER-7**, Bullard II ¶¶ 17-20 (“Article 86 of the Mining Law established, in no uncertain terms, that stability agreements ‘shall incorporate all the guarantees set forth in this Title[]’ . . . MINEM, which was in charge of preparing the model contract, could not have included guarantees that are more restricted than those included in the regulatory framework. This means that an adhesion to MINEM’s model contract was ultimately equivalent to the adhesion to the provisions of the Mining Law in terms of the content and scope of the stability guarantees.”).

³²⁹ **RER-1**, Eguiguren ¶ 61.

³³⁰ **RER-1**, Eguiguren ¶ 40.

³³¹ **RER-1**, Eguiguren ¶ 35 (emphasis added).

³³² **RER-2**, Morales ¶ 59.

included in the agreement, without the possibility of negotiating them.”³³³ He also notes that stability agreements “eliminate the discretion of the public official,” “considering that stability guarantees and benefits would already be clearly provided in the law.”³³⁴

(d) Mr. Isasi recognized in his June 2006 legal opinion that “the execution of the stability agreement is not subject to prior negotiations between the parties,” and that their terms “will be governed only by the legal rules.”³³⁵

ii. The Stability Agreement Applied to SMCV’s Mining and Beneficiation Concessions

83. As Freeport explained in its Memorial, the Stability Agreement implemented the Mining Law and Regulations to grant stability guarantees to all investments and activities carried out within the Mining Concession and the Beneficiation Concession, which together comprise SMCV’s Mining Unit.³³⁶ Further, while it is the Mining Law and Regulations that define the scope of stability guarantees, Freeport’s expert Prof. Bullard confirmed that “principles of contract interpretation from the Peruvian Civil Code all confirm that SMCV’s Stability Agreement covered all investments that SMCV made within its mining unit during the Agreement’s effective term.”³³⁷ While Peru and its experts agree that the Stability Agreement must implement the scope of guarantees set out in the Mining Law and Regulations, and concur on many aspects of Prof. Bullard’s interpretative approach, they reach quite a different conclusion—namely, that the Stability Agreement must be interpreted as applying solely to the investments specifically set out in the Feasibility Study.³³⁸ Not only is this interpretation at odds with the Mining Law and Regulations, it also disregards basic principles of contract interpretation.

84. Clause 3 of the Stability Agreement—which implemented Article 83 of the Mining Law and Article 22 of the Regulations—limited the Agreement’s scope to the “mining rights” set forth in Exhibit I, *i.e.*, SMCV’s Mining Concession and Beneficiation Concession.³³⁹ Peru contends instead that

³³³ **RWS-1**, Polo ¶ 26.

³³⁴ **RWS-1**, Polo ¶ 27.

³³⁵ **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), ¶ 3.3.

³³⁶ See Memorial § IV.A.2(ii).

³³⁷ **CER-2**, Bullard I ¶ 16; see also Memorial ¶ 333(b).

³³⁸ See Counter-Memorial § IV.A.2; **RER-1**, Eguiguren § II.B; **RER-2**, Morales § III.

³³⁹ See Memorial ¶¶ 77, 323-25; see also **CER-2**, Bullard I ¶ 30 (“[A] literal interpretation of Clause 3 and Exhibit I indicates that the guarantees arising from the Stability Agreement extended to all investments that SMCV made in the Concessions, including the Concentrator, because it is part of the Beneficiation Concession.”); **CER-7**, Bullard II ¶¶ 27-32.

Clause 3 “simply identifie[d] the location where the Leaching Project would be developed.”³⁴⁰ Peru’s reading ignores the plain terms and would render Clause 3 both superfluous and internally contradictory.

(a) The first paragraph of Clause 3, which was titled “Mining Rights,” provided that “the Leaching Project of Cerro Verde is circumscribed to the concessions, related in EXHIBIT I, with the corresponding areas.”³⁴¹ As Freeport and Prof. Bullard explained, Clause 3 thus explicitly limited the scope of the agreement to the concessions set out in Exhibit I of the Agreement, *i.e.*, the Mining Concession and the Beneficiation Concession.³⁴² Clause 3 did not contain any further limitations as to the scope of stability guarantees.³⁴³ Further, the second paragraph of Clause 3 allowed SMCV to “incorporat[e] other mining rights to the Cerro Verde Leaching Project, after approval by the [DGM].”³⁴⁴ By contrast, the second paragraph of Clause 3 did not provide any mechanism to incorporate “additional *investments*,” as would have had to be the case under Peru’s position.³⁴⁵ The second paragraph of Clause 3 thus reaffirmed that the scope of the Stability Agreement was limited to the concessions included in Exhibit I of the Agreement (*i.e.*, the “mining rights”) but granted SMCV a mechanism to incorporate *additional* concessions into the scope of the agreement upon approval.³⁴⁶

(b) Peru’s argument that the first paragraph of Clause 3 “simply identifies the location where the Leaching Project would be developed”—suggesting that it is solely descriptive—and that the second paragraph of Clause 3 merely allowed SMCV to “incorporate additional mining rights in relation only to the Cerro Verde Leaching Project” is inconsistent with the text and also simply makes no sense, because it would render the second paragraph

³⁴⁰ Counter-Memorial ¶¶ 91, 583; *see also* **RWS-3**, Tovar ¶ 26; **RER-1**, Eguiguren ¶ 54; **RER-2**, Morales ¶ 55.

³⁴¹ **Ex. CE-12**, Stability Agreement, Clause 3.

³⁴² *See* Memorial ¶¶ 77, 323, 325; **CER-2**, Bullard I ¶¶ 30-33; *see also* **CER-7**, Bullard II ¶¶ 27-32.

³⁴³ *See* **Ex. CE-12**, Stability Agreement, Clause 3 and Annex I; *see also* **CER-2**, Bullard I ¶ 30 (“Neither Clause 3 nor Exhibit I of the Stability Agreement restricted the stability guarantees for (i) the Mining Concession to the extraction of certain types of minerals (e.g., copper or molybdenum) or to specific types of copper (e.g., oxides, secondary or primary sulfides); or (ii) the Beneficiation Concession to a specific mineral processing method (e.g., leaching versus flotation).”); **CER-7**, Bullard II ¶ 27.

³⁴⁴ **Ex. CE-12**, Stability Agreement, Clause 3.

³⁴⁵ **CER-7**, Bullard II ¶¶ 27, 32; *see* **Ex. CE-12**, Stability Agreement, Clause 3; **CER-2**, Bullard I ¶ 31.

³⁴⁶ *See* **Ex. CE-12**, Stability Agreement, Clause 3 (providing that the identification of the Mining and Beneficiation Concessions “does not prevent the owner from incorporating other mining rights to the Cerro Verde Leaching Project, after approval by the [DGM]”); *see also* Memorial ¶¶ 77, 323; **CER-7**, Bullard II ¶ 27, 32; **CER-2**, Bullard I ¶ 31.

superfluous.³⁴⁷ If, as Peru argues, stability agreements cover only the initial investment, rather than the concessions or mining units identified in the agreement, there would be no reason for a company to incorporate additional *concessions* to the agreement, because the specific concessions listed would have nothing to do with the scope of stability guarantees.³⁴⁸

- (c) Mining companies have therefore relied on the second paragraph of Clause 3 to request the extension of their stability agreements to additional concessions and mining units. For example, in 2001, Consorcio Minero Horizonte relied on the second paragraph of Clause 3 of its stability agreement when it requested the DGM to “inclu[de] within the Parcoy Project, that is, within the group of mining rights benefited by the Stability Agreement, of the other mining rights appurtenant to the Parcoy Project” so that “the tax benefits derived from the Stability Agreement be extended to the mining rights requested to be incorporated.”³⁴⁹ While the DGM denied this specific request because the mining rights included in the request were outside of the Parcoy EAU, it acknowledged that “[t]he tax stability [is applicable to] the Parcoy EAU, which is where the investments of the Parcoy Project were made, with the company being able to include mining rights that correspond to said EAU and that were not included in Annex I of the Stability Agreement.”³⁵⁰ The Mining Council likewise confirmed that “[t]he concessions created in the Parcoy EAU and the Parcoy Plant beneficiation concession, which comprise the Parcoy Project, are subject to the Stability Agreement; and . . . [t]he possibility of incorporating other mining rights to the Parcoy Project, that is, to the Parcoy EAU, is contemplated.”³⁵¹

85. Peru’s argument that Clause 1—which states that SMCV filed its request for stability guarantees “in relation with the *investment* in its concession: Cerro Verde No. 1, No. 2 and No. 3,

³⁴⁷ Cf. Counter-Memorial ¶¶ 91, 93, 583; see also **RWS-3**, Tovar ¶ 26 (“[T]he third clause is defining only where the Leaching Project operations will be carried out.”); **RER-1**, Eguiguren ¶ 54 (“Clause Three sets forth the mining concessions within which the project was to be carried out.”); **RER-2**, Morales ¶ 55.

³⁴⁸ **CER-7**, Bullard II, ¶ 38 (“Under such a reading . . . the second paragraph of Clause 3 would be extraneous: if as Peru claims, it is only the initial investment that was entitled to Stability—not concessions or mining units—there would never be any reason to include additional concessions into the agreement, because those concessions would have nothing to do with the scope of the agreement.”).

³⁴⁹ **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, p. 1.

³⁵⁰ **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, p. 1.

³⁵¹ **Ex. CE-377**, MINEM, Resolution No. 380-2001-EM-CM, November 16, 2001, p. 2.

hereinafter ‘*The leaching project of Cerro Verde*’—“define[s] the investment that is covered by the [Stability] Agreement” is incorrect.³⁵²

- (a) Clause 1 was titled “Background Information” and stated that SMCV complied with the various steps necessary to obtain “the guarantees of the benefits contained” in the Mining Law and Regulations by executing a stability agreement.³⁵³ Specifically, Clause 1 recounted that SMCV had “filed with the Ministry of Energy and Mines the pertinent application[]” to obtain such guarantees and benefits, and had “attached to its application the technical-economic feasibility study.”³⁵⁴ As Prof. Bullard notes, “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.”³⁵⁵
- (b) Clause 1 thus makes clear that the name does not define the scope of the stability guarantees, which is set forth in Clause 3, but has a merely referential character. This is confirmed by the names used in other stability agreements. For example, SMCV obtained its 1994 mining stability agreement based on a US\$2.5 million investment program primarily consisting of investments in new mining equipment, but used the referential name “Cerro Verde Project” in Clause 1.³⁵⁶ SMCV did not use a name that described its qualifying minimum investment, such as the “Caterpillar 992-D and Crawler dozer Caterpillar D 10N” project.³⁵⁷ Similarly, Compañía Minera Sipan signed a stability agreement with the referential name “Sipan Project” after making a US\$29 million investment for improvement of its leaching facilities in a concession named the “María Porfiria II.”³⁵⁸ And Sociedad Minera Refinería Cajamarquilla signed a stability agreement with the name “Cajamarquilla Project and Others” after making an investment for the optimization of its zinc processing capacity and improvements to the zinc

³⁵² Cf. Counter-Memorial ¶¶ 87, 89 (emphasis added).

³⁵³ **Ex. CE-12**, Stability Agreement, Clause 1; see also **CER-2** Bullard I ¶ 32 (“Clause 1 then mentions certain relevant background facts, including that SMCV ‘submitted the corresponding request to [MINEM]’ in order to obtain those guarantees, for which purpose it ‘attached to its application the technical-economic feasibility study’ and that ‘[SMCV] was organized by public deed . . . to carry out the procedure of promotion of private investment . . . in the unit of production of Cerro Verde.’”).

³⁵⁴ **Ex. CE-12**, Stability Agreement, Clause 1; see also **CER-2** Bullard I ¶ 32; **CER-7**, Bullard II ¶¶ 29, 53.

³⁵⁵ **CER-2** Bullard I, ¶ 40(a); see also **CER-7**, Bullard II, ¶ 29.

³⁵⁶ **Ex. CE-344**, 1994 Stability Agreement, Clause 1.1.

³⁵⁷ See **Ex. CE-344**, 1994 Stability Agreement, Annex II (detailing the qualifying investment, which involved investments in, *inter alia*, equipment such as the “Caterpillar 992-D” and “Crawler dozer Caterpillar D 10N”).

³⁵⁸ See **Ex. CE-916**, Compañía Minera Sipan S.A. Stability Agreement (13 November 1996), Clauses 1, 5.

recovery.³⁵⁹ Ms. Chappuis, who during her term as Director General of Mining participated in the execution of stability agreements, confirms that companies freely determined the name because “the Government had no interest over the name: it was simply one of the several blank spaces provided in MINEM’s model contract . . . into which the company could insert the title as they pleased.”³⁶⁰

(c) Moreover, the Stability Agreement implements and cannot diverge from the stability regime of the Mining Law and Regulations.³⁶¹ As a result, Clause 1 cannot be given a meaning that diverges from Article 83 of the Mining Law and Article 22 of the Regulations, which provide that stability guarantees apply to concessions and mining units and not to investment projects.

86. Freeport also explained that other clauses of the Stability Agreement, such as Clauses 9 and 10, reaffirmed that stability extended to all of SMCV’s activities in the Cerro Verde Mining Unit.³⁶² In particular, Clauses 9 and 10 grant the stability guarantees to the “owner” (*el titular*) of the concessions, SMCV.³⁶³ The draft of Min. Sánchez Mejía’s June 2005 presentation acknowledges this language, noting that “Clause Nine of the Model Stability Agreement” “specifically indicates the guarantees granted” are “applicable to the *investor*.”³⁶⁴ Article 2 of the Regulations defines “owner” (*titular*) as the “legal person[] that perform[s] mining activities *in a concession or in concessions grouped in an Economic Administrative Unit, as titleholder*[].”³⁶⁵ Clauses 9 and 10 nowhere limit these stability guarantees to a specific investment or processing method.³⁶⁶ To cite just a few of many examples,

³⁵⁹ See **Ex. CE-913**, Sociedad Minera Refinería Cajamarquilla Stability Agreement (15 February 1995), Clause 1.

³⁶⁰ **CWS-14**, Chappuis II, ¶ 28; see also **CER-7**, Bullard II ¶¶ 29, 31, 53.

³⁶¹ See *supra* § II.A.3(i).

³⁶² See Memorial ¶¶ 80, 324; **CER-2** Bullard I ¶ 37 (interpreting clauses 9 and 10).

³⁶³ See **Ex. CE-12**, Stability Agreement, Clauses 9, 10; **CA-1**, Mining Law, Article 9 (describing rights that “[t]he mining concession grants its holder (*titular*)”); *id.* Article 18 (describing rights that [t]he beneficiation concession grants the holder (*titular*)”); *id.* Sixth Title (describing “Obligations of Holders (*Titulares*) of Concessions”).

³⁶⁴ **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM PET), slide 32; see also **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee, 8 June 2005, p. 25 (“Clause nine of the model contract approved by Supreme Decree No. 04-94-EM exhaustively indicates the guarantees granted, as well as the mechanisms, rates, and legal provisions applicable to the investor, which are stabilized, except for substitute taxes.”).

³⁶⁵ **CA-2**, Mining Regulations, Article 2 (emphasis added).

³⁶⁶ See **Ex. CE-12**, Stability Agreement, Clauses 9, 10; see also Memorial ¶¶ 80, 324; **CER-2** Bullard I ¶ 37 (interpreting Clauses 9 and 10).

- (a) Clause 9.3 allows SMCV as the “owner” (“titular”) of the concessions to apply a 20% depreciation rates to “its fixed assets”—and not to the “fixed assets of its investment project;”
- (b) Clause 9.4 allows SMCV as the “owner” of the concessions to keep “its accounts in dollars”—and not to keep a “separate account for the investment project in dollars;”
- (c) Clause 9.5 grants tax stability to SMCV as the “owner” of the concessions—and not to the “investment project;”
- (d) Clause 9.6.1 preserved the validity fee “of the mining concession,” *i.e.* the administrative fee paid by SMCV to maintain its concession in force, at a rate of US\$2 per hectare per year, as well as that of the “Concession of Beneficiation,” upon payment of the taxation unit (“UIT”) corresponding to its processing capacity, a provision that would not exist if the stability guarantees did not apply to concessions;
- (e) Clause 9.6.2 grants to SMCV as the “owner” of the concessions—and not to the “investment project”—non-discrimination in exchange matters and freedom of transfer; and
- (f) Clause 10 provides that new laws and regulations that “directly or indirectly denaturalize[] the guarantees provided for in” Clause 9 shall not be applied to SMCV as the “owner” of the concessions—not to the “investment project.”

87. Peru has nothing to say about Clauses 9 and 10. Instead of focusing on the Stability Agreement’s provisions that deal with the stability guarantees, Peru seeks to rely on the Agreement’s provisions that recount SMCV’s compliance with submitting a feasibility study to access these guarantees to argue that these provisions somehow reaffirm its interpretation that the Stability Agreement only covers a specific “investment project.”³⁶⁷ Specifically, Peru argues that Clauses 4, 5, 6, 7, and 8 of the Stability Agreement support its argument because “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).”³⁶⁸ But these clauses nowhere limit the effects of the Agreement to the “investment project,” as these provisions have nothing to do with the scope of the Agreement, which is set forth in Clause 3 of the Agreement.³⁶⁹

³⁶⁷ Counter-Memorial ¶ 94.

³⁶⁸ Counter-Memorial ¶ 94; *see also* **RER-1**, Eguiguren ¶¶ 55-57; **RER-2**, Morales ¶ 64.

³⁶⁹ Compare **Ex. CE-12**, Stability Agreement, Clauses 4, 5, 6, 7, and 8, *with id.* Clause 3.

- (a) Clauses 4 and 5 of the Stability Agreement relate to the execution and approval of the investment plan as a *prerequisite* to obtaining stability guarantees.³⁷⁰ Clause 6 identifies the date of entry into production of the investment plan.³⁷¹ Peru offers no explanation for why these provisions should also affect the scope.
- (b) Clause 7 of the Stability Agreement similarly addresses the termination of the investment plan and information that the titleholder must submit to the DGM upon termination of the investment plan.³⁷² Clause 7.2 allowed the DGM to suspend the effects of the Agreement in certain circumstances based on discrepancies between the information submitted to the DGM upon termination and the investment plan.³⁷³ Peru argues that 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” because “[i]f the Agreement’s effects were not defined by the investment that was outlined in the investment plan, such suspension would be unnecessary.”³⁷⁴ But Clause 7 does no such thing. Rather, Clause 7 once again confirms that the investment plan relates to the investor’s *qualification* for stability guarantees, because it allows the DGM to suspend the agreement *in total* if it appears that the investment plan has not been carried out as planned.
- (c) Clause 8 of the Stability Agreement establishes the period of contractual guarantees—*i.e.*, “15 years, counted from the financial period evidencing the investment made” and the DGM’s approval thereof—in accordance with Article 82 of the Mining Law.³⁷⁵ Peru

³⁷⁰ See **Ex. CE-12**, Stability Agreement, Clause 4 (“The Investment Plan included in the Feasibility Study . . . comprises . . . [the] necessary requisitions for the start up or commencement of the actual operation of the Cerro Verde Leaching project.”); *id.* Clause 5 (“The execution of the investment plan requires a total approximate investment of US\$ 237,515,000.00.”); **CER-7**, Bullard II ¶ 32 (“Because the relevant scope of guarantees is the concessions indicated in Clause 3, there would be no reason to enumerate specific investments other than the qualifying investment in Clause 4.”); *id.* ¶ 30 (Clause 4 relates to the “accreditation” of the investment plan); *id.* ¶ 32 (the second paragraph of Clause 4 refers to the execution stage for the approval of stability guarantees, not future investments).

³⁷¹ See **Ex. CE-12**, Stability Agreement, Clause 6 (“Date of entry into production will be understood to be 90th day of continuous operation.”).

³⁷² See **Ex. CE-12**, Stability Agreement, Clause 7 (titled, “Termination of the Investment Plan”).

³⁷³ See **Ex. CE-12**, Stability Agreement, Clause 7.2 (“Under the responsibility of the General Director, if the observations are not dealt with in the period indicated the benefits of *this contract* would be automatically suspended.”) (emphasis added).

³⁷⁴ Counter-Memorial ¶ 94.

³⁷⁵ **Ex. CE-12**, Stability Agreement, Clause 8 (titled “Period of the Contractual Guarantees.”); *id.*, Clause 9 (titled “Of the Contractual Guarantees.”); see also **CA-1**, Mining Law, Article 82 (“In order to promote investment . . . 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

again claims that “[i]f 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” because “[t]he 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.”³⁷⁶ Once again, however, this is wrong: the initial investment confirms the threshold question of whether the investor is entitled to stability guarantees *at all*—so it makes complete sense that the agreement would not commence until the DGM confirms that the qualifications are satisfied.

- (d) Peru’s attempts to read the lack of an express reference to the “Concentrator” or the “Primary Sulfides Project” in the Stability Agreement as determinative to its scope are likewise irrelevant.³⁷⁷ Because the Stability Agreement covered the entire Mining and Beneficiation Concessions for a period of 15 years, there would be no reason to enumerate any specific investments in the agreement other than those necessary to demonstrate that the mining company met the minimum qualifying investment amount.³⁷⁸ Further, at the time SMCV signed the Stability Agreement, it had not yet determined whether the Concentrator would ultimately be economically and financially feasible.³⁷⁹

88. Prof. Morales and Prof. Eguiguren further argue that the Stability Agreement must be read “restrictively” or “narrow[ly]” because stability agreements involve public policy considerations.³⁸⁰ But neither expert explains what term of the Stability Agreement he proposes interpreting restrictively.³⁸¹ That argument lacks any basis in law and contradicts the experts’ own acknowledgement that the Stability

or expansion, as the case may be, is accredited.”); **CER-7**, Bullard II ¶ 30 (Clause 8 and 9 relate to the “term” and “content” of stability guarantees).

³⁷⁶ Counter-Memorial ¶ 94.

³⁷⁷ See Counter-Memorial ¶ 88; **RER-1**, Eguiguren ¶ 59 (“The fact that the ‘Primary Sulfide Project’ is not mentioned in any clause or annex of the Agreement allows us to conclude, unequivocally, that the guarantees and benefits that the State granted to SMCV under the Stabilization Agreement entered into in 1998 referred exclusively to the investment made for the ‘Cerro Verde Leaching Project.’”).

³⁷⁸ See **Ex. CE-12**, Stability Agreement, Clause 4.1 (“This investment plan, properly approved by the General Direction of Mining *for the purposes of the execution of this instrument*, forms an integral part of it as Exhibit II.”). (emphasis added); *id.* Clause 8 (“The period of the guarantees agreed in this contract will extend for 15 years.”).

³⁷⁹ See, e.g., Memorial ¶¶ 88-89 (detailing breakthroughs in water and energy supply, three years after the signing of the Feasibility Study, to Cerro Verde that potentially made construction of the Concentrator economically feasible, leading to the 2004 Feasibility Study).

³⁸⁰ **RER-1**, Eguiguren ¶ 66; **RER-2**, Morales ¶¶ 46-47.

³⁸¹ See **RER-1**, Eguiguren ¶ 66 (referring to “stabilization agreements” generally); **RER-2**, Morales ¶¶ 46-47 (same).

Agreement must strictly implement the guarantees of the Mining Law.³⁸² Instead, any ambiguity in the Stability Agreement must be interpreted in favor of SMCV according to the principle of *contra proferentem*, which applies to adhesion contracts such as the Stability Agreement.

- (a) Because stability agreements are *contratos-ley* that are governed by a special legal framework, they must guarantee what the law itself guarantees—nothing more and nothing less.³⁸³ This means that they cannot be interpreted “restrictively” or “broadly”: the contract must grant exactly the guarantees established by the Mining Law.³⁸⁴
- (b) Prof. Bullard also explains that “interpreting stability agreements narrowly, based on public policies,” “would run contrary to their main function, which is to attract private investment by granting guarantees to investors and reducing the Government’s sovereign powers.”³⁸⁵ For this reason, he concludes that “if the legal framework provides certain guarantees, the Government cannot further limit those guarantees by applying a ‘restrictive’ or ‘narrow’ interpretation.”³⁸⁶
- (c) Instead, as an adhesion contract, the Stability Agreement is subject to *contra-proferentem* interpretation—according to which any lingering ambiguity should be construed in favor of the adhering party, which in this case is SMCV.³⁸⁷ Prof. Eguiguren and Prof. Morales attempt to elide this conclusion by claiming that the Stability Agreement is not a “true”

³⁸² See **RER-1**, Eguiguren ¶ 41 (“The composition of the agreement’s content is determined by law.”); *id.* ¶ 69 (“As a result, the Agreement must be interpreted pursuant to its express provisions and those of the Mining Law.”); **RER-2**, Morales ¶ 16 (“[T]he Stabilization Agreement [] is . . . limited by the Mining Law.”); *id.* ¶ 59 (noting that “the Stabilization Agreement is governed by a special legal framework” and that “it reflects the guarantees granted by the Mining Law”); see also **Ex. CE-1003**, SUNAT, Resolution No. 365-2015 (29 December 2015); **Ex. CE-1007**, *SUNAT: Denouncing Irregularities in the Hiring of Former Minister Francisco Eguiguren*, PERU21 (19 June 2017); **Ex. CE-1031**, Special Commission for Selection of Candidates for Elected Magistrates of the Constitutional Court, Notification No. 031, File No. 059-2021-CETC (1 Dec 2021).

³⁸³ See **CER-7**, Bullard II ¶¶ 17-20; see also **CER-2**, Bullard I ¶¶ 35, 72.

³⁸⁴ See **CER-7**, Bullard II ¶¶ 17-20; see also **CER-2**, Bullard I ¶¶ 35, 72.

³⁸⁵ **CER-7**, Bullard II ¶ 24; see also **CER-2**, Bullard I ¶¶ 18(c), 66.

³⁸⁶ **CER-7**, Bullard II ¶ 24; see also **CER-2**, Bullard I ¶ 18(c).

³⁸⁷ See **CER-7**, Bullard II ¶ 59 (explaining that “SMCV was the adhering party, as it did not play an active role in drafting the Stability Agreement” because “Peru not only prepared the Stability Agreement, but also the statutory provisions that informed its Clauses, *i.e.*, the Mining Law and Regulations, from which provisions the Stability Agreement could not deviate.”); *id.* (explaining that although “there is no lingering ambiguity,” the *contra-proferentem* interpretation confirms that “SMCV’s guarantees under the Stability Agreement extend to all investments SMCV made in its Mining and Beneficiation Concessions”); see also **CER-2**, Bullard I ¶¶ 70-73.

adhesion contract.³⁸⁸ But this is clearly wrong: the Mining Law explicitly confirms that stability agreements are “*adhesion contracts* . . . prepared by [MINEM]” that “incorporate all the guarantees established in [the Mining Law].”³⁸⁹ Peru’s own witness Mr. Polo confirms that “stabilization agreements are adhesion contracts” and that “compan[ies] adhere[] to the stability conditions and guarantees . . . guarantees provided by law . . . without the possibility of negotiating them.”³⁹⁰

4. Peru Explicitly Confirmed that the Concentrator Would Be Entitled to Stability

i. After Receiving Confirmation from Government Officials, SMCV Obtained Approval of the Beneficiation Concession Expansion to Include the Concentrator

89. In its Memorial, Freeport explained that MINEM officials explicitly confirmed that, because the Concentrator would be part of SMCV’s integrated mining unit, SMCV could expand its existing Beneficiation Concession to include the Concentrator—and that doing so would ensure that the Concentrator would be entitled to stability guarantees, because the Stability Agreement covered the entire Beneficiation Concession.³⁹¹ While Peru does not—and cannot—dispute that the Concentrator was part of the Beneficiation Concession, it attempts to disclaim both its representations to SMCV *and* the relevance of its approval of the Beneficiation Concession expansion to SMCV’s stability guarantees.³⁹² Peru’s arguments are incorrect, and also fail to address the fundamental point that, if the entire Beneficiation Concession was entitled to stability, the Concentrator that formed part of it unquestionably was as well.

³⁸⁸ See **RER-2**, Morales ¶¶ 28-38; **RER-1**, Eguiguren, ¶¶ 62, 64-69; see also **CER-7**, Bullard II ¶ 57; see also **Ex. CE-993**, Rómulo Morales, *The Precarious: Is it a Possessor or Holder, the Fourth Plenary Civil Cassation*, 150 DIÁLOGO CON LA JURISPRUDENCIA 13 (September 2013); **Ex. CE-971**, Rómulo Morales, *Invalid Settlement and Uselessness of Estoppel, the First Plenary Cassation in Favor of the Abuse of Freedom of Stipulation*, 116 DIÁLOGO CON LA JURISPRUDENCIA 43 (May 2008).

³⁸⁹ **CA-1**, Mining Law, Article 86.

³⁹⁰ **RWS-1**, Polo ¶ 26; see also **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), ¶ 3.3 (noting that stability agreements are adhesion contracts, which “means that the execution of the stability agreement is not subject to prior negotiations between the parties, thus eliminating the discretionary power of the officials to decide the terms and conditions of the agreement”).

³⁹¹ See Memorial ¶¶ 106-10, 114-16, 328-30; see also **CWS-3**, Chappuis I ¶¶ 50-55; **CER-5**, Vega I ¶¶ 66-68; **CWS-11**, Torreblanca I ¶¶ 25-27; **CE-945**, Phelps Dodge, “Peru and Phelps Dodge: Partners in Progress” (9 March 2005), slides 9, 12, 16 (presenting at the PDAC conference at MINEM’s request on Peru’s investment climate, explaining that Phelps Dodge decided to proceed with the Concentrator investment after “extensive interaction with the Government,” in which they obtained “certainty of stability contract,” for the “\$850 million investment decision”).

³⁹² See Counter-Memorial ¶¶ 154-56.

90. *First*, as Freeport explained, in the second and third quarters of 2004, SMCV representatives met with Ms. Chappuis—the Director General of Mining in charge of granting beneficiation concessions and ensuring compliance with stability agreements.³⁹³ Ms. Chappuis confirmed that the Stability Agreement applied to SMCV’s entire mining unit, made up of the Mining Concession and the Beneficiation Concession, and that SMCV accordingly could rely on the Stability Agreement’s guarantees for its Concentrator investment as long as SMCV asked for, and MINEM approved, the Concentrator to be included in the stabilized Beneficiation Concession.³⁹⁴

- (a) Before deciding to proceed with the US\$850 million investment in the Concentrator, SMCV and Phelps Dodge representatives conducted a series of meetings with MINEM officials, including Ms. Chappuis, the Director General of Mining, to confirm that SMCV would be entitled to stability guarantees for the new investment.³⁹⁵ SMCV requested these meetings in part because during the heated debates of the new Royalty Law, certain members of Congress demanded that the Government impose royalties on mining companies irrespective of whether they had stability agreements.³⁹⁶ Given this charged political context, SMCV sought an assurance from the Government that it would not seek to impose royalties for the Concentrator.³⁹⁷
- (b) Ms. Torreblanca explains that during these meetings, nobody ever suggested that “stability guarantees only applied to the initial investment project but not to concessions or mining units.”³⁹⁸
- (c) MINEM initially questioned whether SMCV’s request was factually similar to a request by BHP Tintaya that the DGM had recently denied.³⁹⁹ As mentioned above, BHP Tintaya had a stability agreement covering its Tintaya EAU.⁴⁰⁰ BHP Tintaya then made an investment in a leaching plant and obtained a new beneficiation concession for that

³⁹³ See Memorial ¶¶ 106-10, 328 (citing **CWS-11**, Torreblanca I ¶¶ 24-27); see also **CWS-5**, Davenport I ¶ 36; **CWS-16**, Davenport II ¶ 11.

³⁹⁴ See Memorial ¶¶ 114-17, 328 (citing **CWS-3**, Chappuis I ¶¶ 53-55).

³⁹⁵ See Memorial ¶¶ 106-110, 328 (citing **CWS-11**, Torreblanca I ¶¶ 24-27); see also **CWS-5**, Davenport I ¶ 36; **CWS-16**, Davenport II ¶ 11.

³⁹⁶ See **CWS-11**, Torreblanca I ¶ 23; **CWS-21**, Torreblanca II, ¶ 12; **CWS-5**, Davenport I ¶ 35; **CWS-16**, Davenport II ¶ 10.

³⁹⁷ See **CWS-11**, Torreblanca I ¶ 23; **CWS-21**, Torreblanca II, ¶ 12; **CWS-5**, Davenport I ¶ 35; **CWS-16**, Davenport II ¶¶ 10-16.

³⁹⁸ **CWS-21**, Torreblanca II, ¶ 19; see also **CWS-16**, Davenport II, ¶ 16.

³⁹⁹ See **CWS-21**, Torreblanca II, ¶¶ 13-16; **CWS-16**, Davenport II, ¶ 11; see also **Ex. CE-932**, Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003).

⁴⁰⁰ See *supra* § II.A.2(i).

plant.⁴⁰¹ On the basis of that investment, BHP Tintaya applied for a new stability agreement covering the new beneficiation concession and requested that the DGM include the existing and already stabilized EAU into the new stability agreement.⁴⁰² The DGM denied that request on the grounds that BHP Tintaya's new beneficiation concession to operate the new plant constituted a *distinct* unit from the existing EAU.⁴⁰³ As Ms. Torreblanca and Mr. Davenport explain, SMCV thus focused on providing detailed information to Ms. Chappuis and others at the DGM to explain that, unlike in the Tintaya case, the Concentrator would form part of an "integrated production unit" together with the leaching plant and all of SMCV's other operations.⁴⁰⁴

(d) Ms. Chappuis testifies that she confirmed that the Concentrator would be entitled to benefit from the existing Stability Agreement, provided that the investment was made within the existing mining unit.⁴⁰⁵ She also explained that SMCV did not need a separate beneficiation concession for the Concentrator.⁴⁰⁶ Instead, she suggested that SMCV apply for the expansion of the *existing* Beneficiation Concession to include the Concentrator.⁴⁰⁷ Ms. Chappuis confirmed that this would ensure that the Concentrator was covered by the Stability Agreement, because the Beneficiation Concession was already included in the Stability Agreement.⁴⁰⁸ SMCV then submitted, and MINEM approved, a formal request to expand the Beneficiation Concession to include the Concentrator.⁴⁰⁹

(e) Ms. Chappuis's confirmation was also consistent with the Government's previous treatment of SMCV's expansions of its Beneficiation Concession. For instance, in 2002, SMCV made a US\$15 million investment to expand the leaching facility's Pad 2, which

⁴⁰¹ See *supra* § II.A.2(i).

⁴⁰² See *supra* § II.A.2(i) (citing **Ex. CE-926**, BHP Billiton Tintaya S.A., Letter No. 1338813 (26 November 2002)).

⁴⁰³ See *supra* § II.A.2(i) (citing **Ex. CE-882**, DGM Report No. 019-2003-DGM-DPDM (20 January 2003)); see also **CWS-14**, Chappuis II, ¶ 24.

⁴⁰⁴ See **CWS-21**, Torreblanca II ¶¶ 14-16; **CWS-16**, Davenport II ¶¶ 11-15.

⁴⁰⁵ See **CWS-3**, Chappuis ¶¶ 52-53; **CWS-14**, Chappuis II, ¶ 37.

⁴⁰⁶ See **CWS-3**, Chappuis I ¶¶ 51-52; **CWS-14**, Chappuis II, ¶ 37.

⁴⁰⁷ See **CWS-3**, Chappuis I ¶ 52; **CWS-14**, Chappuis II, ¶ 37.

⁴⁰⁸ See **CWS-3**, Chappuis I ¶¶ 52-53; **CWS-14**, Chappuis II, ¶ 37; **CWS-11**, Torreblanca I ¶ 25; **CWS-21**, Torreblanca II ¶ 16.

⁴⁰⁹ See **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004); **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004- MEM-DGM/PDM (26 October 2004); **Ex. CE-23**, MEF, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004); see also Memorial ¶¶ 115, 121-23, 336.

expanded leaching circuit processing capacity.⁴¹⁰ The 2002 investment did not form part of the investment program of the 1996 Feasibility Study.⁴¹¹ The Government approved a request to expand the stabilized Beneficiation Concession to include the new investment and as a result treated the 2002 investment as stabilized.⁴¹²

- (f) In light of the DGM's confirmation that the expansion of the Beneficiation Concession would guarantee stability for the Concentrator, SMCV's Board of Directors approved the necessary investment contingent "on obtaining the required permits and the financing necessary for the project."⁴¹³ Ms. Torreblanca explains that the "required permits" referred to the approval of SMCV's request to expand the Beneficiation Concession and approval of the profit reinvestment benefit to partially finance the Concentrator's construction.⁴¹⁴

91. *Second*, Peru's attempts to disclaim its confirmation to SMCV that SMCV was entitled to stability for the Concentrator because it would be included in the stabilized Beneficiation Concession, are unpersuasive and contradicted by the evidence.

- (a) Peru's reliance on Mr. Tovar's claims that Mr. Polo "clearly advised those of us in the DGM . . . that the Concentrator was not covered by the Stabilization Agreement" is unfounded.⁴¹⁵ To start with, as the Director General of Mining, Ms. Chappuis was the authority within MINEM that was responsible for ensuring compliance with stability agreements and granting beneficiation concessions.⁴¹⁶ It was Ms. Chappuis who made the final determination as to whether (i) the Concentrator was part of SMCV's existing mining unit; and thus (ii) whether SMCV was entitled to include it within its stabilized

⁴¹⁰ See Memorial ¶ 87; CWS-5, Davenport I ¶ 23; CWS-11, Torreblanca I ¶ 11; CWS-21, Torreblanca II ¶ 22.

⁴¹¹ See Memorial ¶ 87; CWS-5, Davenport I ¶ 21; CWS-11, Torreblanca I ¶ 11; CWS-21, Torreblanca II ¶ 22.

⁴¹² Ex. CE-382, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002) (approving the request and expanding the Beneficiation Concession); see also Ex. CE-376, SMCV, Petition No. 1341243 to MINEM (30 October 2001); Ex. CE-380, MINEM, Report No. 056-2002-EM-DGM/DPGM (18 February 2002) (recommending that the DGM approve the request); Memorial ¶ 88; CWS-11, Torreblanca I ¶ 11; CWS-21, Torreblanca II ¶ 22.

⁴¹³ Ex. CE-470, SMCV, Board of Directors Meeting Minutes (11 October 2004), p. 1, ¶ 1; see also CWS-11, Torreblanca I ¶ 27; CWS-21, Torreblanca II ¶ 17.

⁴¹⁴ CWS-21, Torreblanca II ¶ 17.

⁴¹⁵ Cf. RWS-3, Tovar ¶ 14.

⁴¹⁶ CA-1, Mining Law, Articles 101(a), (e), (j) (providing that the DGM's specific powers include "[ensuring] compliance with tax stability agreements," "[granting] title to beneficiation . . . concessions" and "[approving] the location, design and operation projects" of beneficiation concessions); see also CWS-14, Chappuis II ¶¶ 35-36, 40-41.

Beneficiation Concession.⁴¹⁷ Ms. Chappuis’s decision as the Director General of Mining could have been appealed to the Mining Council—but not to the Vice-Minister of Mines.⁴¹⁸ Moreover, Ms. Torreblanca testifies that Mr. Polo “refer[red] [SMCV] to the DGM as the competent agency,” and that he “never explained to me or others at SMCV the basis of his position” that the Concentrator would not be covered by the Stability Agreement.⁴¹⁹ Ms. Chappuis similarly testifies that she “do[es] not recall Mr. Polo explaining to me that he believed SMCV’s Stability Agreement was limited to its initial investment.”⁴²⁰ She further testifies that while she “was under the strong impression that Mr. Polo had taken a general position against exempting new investments from royalty payments in response to” political pressure, “[h]e certainly did not advance the view to me in 2004 that under the Mining Law, stability guarantees applied only to the initial investment set out in the feasibility study,” nor did he “instruct[] me not to incorporate the concentrator in SMCV’s existing beneficiation concession or not to assure SMCV that stability would apply to the concentrator.”⁴²¹

- (b) Peru’s argument that MINEM’s approval of the expansion of the Beneficiation Concession to operate the Concentrator could not have “expand[ed]” the Stability Agreement’s scope because that process dealt only with “the construction of a new processing plant” also misses the point.⁴²² MINEM’s expansion approval did not expand the *Stability Agreement’s* scope, it expanded the *Beneficiation Concession*, which was already covered by the Stability Agreement. As Mr. Tovar acknowledges, the expansion “allowed the Concentrator operations to be performed under the same Beneficiation Concession.”⁴²³ By confirming that the Concentrator would be part of the stabilized

⁴¹⁷ CWS-14, Chappuis II, ¶¶ 35-36, 40-41.

⁴¹⁸ See CA-1, Mining Law, Article 94(1), (5) (“The powers of the Mining Council are . . . To hear and resolve in the last administrative instance the appeals for review” and “[t]o standardize administrative jurisprudence regarding mining issues”); see also CWS-14, Chappuis II, ¶ 40 (“[U]ltimately, pursuant to Article 101 of the Mining Law, it was solely my department, the DGM, that would determine whether to approve SMCV’s request to expand its beneficiation concession to include the concentrator.”).

⁴¹⁹ CWS-21, Torreblanca II ¶ 19.

⁴²⁰ CWS-14, Chappuis II, ¶ 40; see also CA-100, Supreme Decree No. 025-2003-EM (2003), Articles 13, 14 (ensuring compliance with stability agreements and granting beneficiation concessions were outside the scope of the Vice Minister’s responsibilities); CWS-3, Chappuis I, ¶ 53.

⁴²¹ CWS-14, Chappuis II, ¶ 40.

⁴²² Cf. Counter-Memorial ¶ 155; RWS-3, Tovar ¶ 22 (“[T]he authorization to expand the Beneficiation Concession resulted from an administrative process concerning the construction of a plant, which is completely separate from any process related to legal stability.”).

⁴²³ See RWS-3, Tovar ¶ 19.

Beneficiation Concession, MINEM’s approval confirmed that the Concentrator fell within the *existing* scope of the Stability Agreement.⁴²⁴

(c) Peru’s argument that because MINEM’s approval of the expansion of the Beneficiation Concession “does not mention the 1998 Stabilization Agreement,” it could not have guaranteed stability for the Concentrator is absurd.⁴²⁵ Because it was the Beneficiation Concession and not the Stability Agreement that was expanded, there was no reason for the approval to mention the Stability Agreement.⁴²⁶ Moreover, the DGM’s approval of SMCV’s previous expansion of the Beneficiation Concession to include SMCV’s 2002 investment to enlarge SMCV’s Pad 2 likewise did not mention the Stability Agreement, but the Government consistently treated the 2002 investment as stabilized—even though it did not form part of the investment program of the 1996 Feasibility Study.⁴²⁷

(d) Peru further attempts to downplay the significance of its approval of the Beneficiation Concession expansion by asserting that “[w]ithout the expansion of the Beneficiation Concession to cover the area where the Concentrator would be located, SMCV could not have operated the plant.”⁴²⁸ Peru is correct that, to operate the Concentrator, SMCV needed a beneficiation concession, which gives a mining company the right to process ore within a daily limit averaged over an operating year.⁴²⁹ But if MINEM had concluded that the Concentrator did not form part of SMCV’s mining unit, it could have granted SMCV a new beneficiation concession and refused to include it in the Stability Agreement under the second paragraph of Clause 3—just as it had done in the case of Tintaya.⁴³⁰ Yet this is not what happened. Instead, MINEM concluded that the

⁴²⁴ See **CWS-14**, Chappuis II, ¶¶ 38-40; **CWS-3**, Chappuis ¶¶ 52-53.

⁴²⁵ Cf. Counter-Memorial ¶ 154.

⁴²⁶ See **CWS-14**, Chappuis II, ¶ 38 (“[A]llowing the new concentrator investment to proceed under the existing stabilized concession did not ‘expand’ the scope of the Stability Agreement, but automatically confirmed that the concentrator fell within the stabilized regime SMCV’s underlying request and DGM’s approval resolution did not have to mention the Stability Agreement: their purpose was to confirm that the investment could proceed in the existing concession. In fact, I do not recall any instance in which DGM referred to a stability agreement in a similar resolution.”); **CWS-21**, Torreblanca II, ¶ 22.

⁴²⁷ See **Ex. CE-382**, MINEM, Directorial Resolution No. 151-2002-EM/DGM (21 May 2002) (approving the request and expanding the Beneficiation Concession); see also **Ex. CE-376**, SMCV, Petition No. 1341243 to MINEM (30 October 2001); **Ex. CE-380**, MINEM, Report No. 056-2002-EM-DGM/DPGM (18 February 2002) (recommending that the DGM approve the request); Memorial ¶ 88; **CWS-5**, Davenport I ¶ 21; **CWS-11**, Torreblanca I ¶ 11; **CWS-21**, Torreblanca II, ¶ 22.

⁴²⁸ Counter-Memorial ¶ 156.

⁴²⁹ See **CA-1**, Mining Law, Article 17; see also **CWS-14**, Chappuis II, ¶ 39.

⁴³⁰ See *supra* § II.A.2(i) (citing **Ex. CE-932**, Mining Council, Resolution No. 182-2003-EM/CM (9 June 2003)).

Concentrator formed part of SMCV’s mining unit and thus approved the expansion of SMCV’s existing Beneficiation Concession to cover the Concentrator and bring it under the protection of the Stability Agreement.⁴³¹

92. *Finally*, Peru’s and Mr. Tovar’s assertion that SMCV “applied to build the Concentrator in a new area and as a *new independent unit* within its concession” is completely false.⁴³²

- (a) As explained above, MINEM included the Concentrator in the existing Beneficiation Concession *precisely because* the Concentrator formed part of SMCV’s existing mining unit.⁴³³ Ms. Chappuis testifies that “if the DGM had considered the concentrator to be an ‘independent unit’ from SMCV’s existing mining unit, we would have required SMCV to apply for a new beneficiation concession instead of expanding the existing one.”⁴³⁴
- (b) Mr. Tovar’s assertion further ignores that the expanded Beneficiation Concession set the daily limit of ore processed within the Concession without distinguishing between processing by leaching and by the Concentrator, which further confirms that MINEM treated the two plants as part of the same mining unit and did not distinguish between the two processing methods.⁴³⁵
- (c) As Ramiro Aquino, SMCV’s Chief Engineer of Long-Term Planning explains, the Concentrator is not a “new independent unit” because “SMCV mines and extracts all three types of ore using the same process, involving shared costs” and “[t]here is no practical way to mine the oxides, secondary sulfides, and primary sulfides separately.”⁴³⁶ He also testifies that “[a]t every stage, SMCV’s mining and processing operations in the

⁴³¹ See **CWS-14**, Chappuis II, ¶ 39 (“[T]he DGM could have requested SMCV to apply for a new beneficiation concession to operate the concentrator” and “[i]f it had done so, and if DGM concluded that that beneficiation concession constituted an independent production unit—as we had concluded for the new leaching plant in the Tintaya case—it would not have been entitled to benefit from the existing Stability Agreement”).

⁴³² Cf. **RWS-3**, Tovar ¶ 18 (emphasis added).

⁴³³ See *supra* § II.A.4(i).

⁴³⁴ **CWS-14**, Chappuis II, ¶ 39.

⁴³⁵ See **CWS-1**, Aquino I ¶ 28 (citing **Ex. CE-352**, Directorial Resolution No. 308-96-EM/DGM (12 August 1996) (setting processing limits, without distinguishing between processing method); **Ex. CE-10**, MINEM, Directorial Resolution No. 339-96-EM/DGM (5 September 1996) (same); **Ex. CE-382**, MINEM, Directorial Resolution No. 339-96-EM/DGM (5 September 1996) (same); **Ex. CE-28**, MINEM, Directorial Resolution No. 056-2007-MEM/DGM (26 February 2007) (same).

⁴³⁶ **CWS-13**, Aquino II ¶ 7; see also **CWS-1**, Aquino I ¶¶ 21, 57; **CER-9**, Otto II ¶¶ 27-29 (explaining that the leaching facilities and the concentrator constitute a single, integrated mining operation—“what we would typically refer to in the mining industry as a mining project or mining operation”—because, among others, the ore for both processes is “located in the same deposit, pre-treated together . . . mined with the same equipment, and hauled away for processing in the same trucks,” and because “many costs associated with processing the ore after it is removed from the pit are also shared”); **CER-4**, Otto I ¶¶ 33, 51. Cf. **RWS-3**, Tovar ¶ 18.

Mining and Beneficiation Concessions, and the auxiliary infrastructure supporting the mine as a whole, reflect this integrated nature.”⁴³⁷ Moreover, SMCV has a single headquarters “which coordinates all mining and processing operations, regardless of how ore is processed.”⁴³⁸

ii. The Government’s Confirmation that the Concentrator Was Part of the Stabilized Mining Unit Was Consistent with Its Prior Practice Toward Cerro Verde

93. As Freeport explained in its Memorial, the Government’s confirmation that the Concentrator was part of SMCV’s integrated mining unit, and thus entitled to stability guarantees, was consistent with the Government’s longstanding position that a concentrator would be an integral part of the Cerro Verde Mining Unit as well as with the Government’s prior representations that stability guarantees would apply to the entirety of SMCV’s Mining Unit.⁴³⁹

94. *First*, MINEM’s inclusion of the Concentrator within the existing Beneficiation Concession was entirely in line with the Government’s consistent recognition of Cerro Verde as a single mining unit since the 1970s, and with its clear recognition of the need to develop a concentrator as part of Cerro Verde’s integrated production unit.⁴⁴⁰ Freeport’s evidence on this point is entirely un rebutted by Peru.

(a) For instance, in 1972, Minero Perú commissioned a feasibility study for Cerro Verde that explored both leaching and flotation (*i.e.*, concentration) within the “Cerro Verde Economic and Administrative Unit,” leading to the construction of a pilot concentrator alongside the original SX/EW leaching plant in 1979.⁴⁴¹ Minero Perú’s 1993 plan to

⁴³⁷ **CWS-13**, Aquino II ¶ 5; *see also* **CWS-1**, Aquino, ¶¶ 57, 63.

⁴³⁸ **CWS-13**, Aquino II ¶ 11; *see also* **CWS-1**, Aquino ¶ 30.

⁴³⁹ *See, e.g.*, Memorial §§ III.A.2-3, IV.A.2(i)(d), IV.A.2(ii)(c).

⁴⁴⁰ *See* Memorial §§ III.A.2-3; *see also e.g.*, **Ex. CE-290**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, p. iv (noting that Minero Perú commissioned a feasibility study for Cerro Verde for the construction of the pilot concentrator alongside the original SX/EW plant within the “Cerro Verde Economic and Administrative Unit”); **Ex. CE-296**, Wright Engineers Ltd., Copper: From Oxides to Cathodes (April 1978), Figure 1, Site Plan (Minero Perú constructed the leaching facilities with this future concentrator in mind, sketching out a “Future Sulfide Plant” in blueprints for the site plan); **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), p. 5 (noting that Minero Perú’s 1993 plan to privatize Cerro Verde—which then included both the leaching facilities and the pilot concentrator—referred to the mine as a “Production Unit”).

⁴⁴¹ *See* Memorial ¶ 329(a) (citing **Ex. CE-290**, Wright Engineers Ltd., Feasibility Study for the Cerro Verde Project for Empresa Minera del Perú (1 February 1972), Vol. I, p. iv).

privatize Cerro Verde—which then included both the leaching facilities and the pilot concentrator—referred to the mine as a “Production Unit.”⁴⁴²

- (b) The privatization process confirmed the Government’s understanding of Cerro Verde as a single mining unit. The Public Deed establishing SMCV in 1993 confirmed that Minero Perú contributed to SMCV “the mining and beneficiation concessions and the assets that constitute the ‘Cerro Verde Mining Unit.’”⁴⁴³ Further, the 1994 Share Purchase Agreement defined “Unidad Cerro Verde” as “the mining and beneficiation concessions previously known collectively as the Cerro Verde Production Unit,” and the Stability Agreement itself referenced Cerro Verde as a “Unit of Production.”⁴⁴⁴

95. *Second*, during the privatization process, Peru also emphasized the availability of stability guarantees for Cerro Verde, without distinguishing between different processing methods or specific investments. Peru argues that “[t]he 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.”⁴⁴⁵ But Peru’s argument ignores that these conversations took place in the context of discussions regarding Cerro Verde’s integrated mining unit.

- (a) As Freeport explained, Minero Perú’s draft Heads of Agreement for the negotiations leading to the share purchase agreement for the Cerro Verde assets included “refusal of the Peruvian State to execute a stability contract” as a condition under its force majeure clause that would suspend the investment obligations of the purchaser.⁴⁴⁶ Peru’s argument that this head of agreement does not mention that “such stabilization agreement would cover all investments made within the Cerro Verde Mine” is irrelevant because the parties clearly understood that stability guarantees would be a prerequisite to Cyprus’s execution of the Share Purchase Agreement and necessary to protect its investment

⁴⁴² See Memorial ¶ 329(a) (citing **Ex. CE-351**, CEPRI, Minutes for SMCV (3 July 1996), p. 5 (“This need was clearly identified as the main objective for promoting private investment in the Cerro Verde Production Unit and in this vein it was that the Special Committee, in coordination with the COPRI, that decided to prioritize it vis-à-vis the other promotions to be carried out with the Production Units.”)).

⁴⁴³ See Memorial ¶ 329(a) (citing **Ex. CE-330**, SMCV Public Deed (20 August 1993), Clause 1.1; **Ex. CE-329**, Minero Perú, Minutes of Board Meeting No. 634 (22 June 1993), pp. 5-6; **CWS-10**, Silva I ¶¶ 18-19).

⁴⁴⁴ See Memorial ¶ 329 (citing **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru S.A. (17 March 1994), Definition; **Ex. CE-12**, 1998 Stability Agreement, Clause 1.4).

⁴⁴⁵ Counter-Memorial ¶ 69.

⁴⁴⁶ Memorial ¶ 332(a) (citing **Ex. CE-332**, CEPRI, International Public Competitive Bidding for the Sale of SMCV S.A.: Heads of Agreement (26 October 1993)).

commitment, which at the time explicitly included the construction of a large concentrator for the processing of primary sulfides.⁴⁴⁷

- (b) Peru also contends that no inferences may be drawn from its conduct during the privatization period because Minero Perú's bilingual primer on stabilization agreements "made clear that stabilization agreements were intended to grant stability guarantees to activities related to specific investment projects" and that "Stability Contracts must be entered into and registered with the relevant national organization . . . before the investments covered by the Contracts are made."⁴⁴⁸ Peru's argument is misleading as the phrases highlighted by Peru do not relate to mining stability agreements. Instead, they refer to *legal* stability agreements governed by L.D. 662 and 757 and signed by the investor, which explicitly limited the scope of stability to the initial investment amount for foreign or national investors.⁴⁴⁹ Notably, the section discussing *mining* stability agreements contains no such limitation.

96. *Finally*, MINEM's approval of SMCV's use of the profit reinvestment benefit to finance the construction of the Concentrator confirmed the Government's position that the Concentrator was part of SMCV's stabilized mining unit.⁴⁵⁰ Peru's argument that MINEM's Report No. 509-2003 in fact confirmed that stability guarantees applied to the investment project set out in the feasibility study is incorrect and contradicted by Ms. Chappuis's testimony.⁴⁵¹

- (a) The DGM issued Reports No. 509-2003 and No. 510-2003 in September 2003 in response to SMCV's inquiries about the application of the profit reinvestment benefit to

⁴⁴⁷ See **Ex. CE-339**, SMCV, Minutes of Board Meeting No. 008 (21 January 1994) (Cyprus made clear that the availability of stability guarantees was a "prerequisite" to its purchase of SMCV); **CWS-10**, Silva ¶ 29 ("During the negotiations, Cyprus stated clearly its intent to enter into the stability agreements that we had promoted during the bidding process."); **Ex. CE-4**, Share Purchase Agreement Between Cyprus Climax Metals Co. and Empresa Minera del Peru S.A. (17 March 1994), Article IV (containing Cyprus's investment to build a concentrator); *id.* Appendix H (model mining stability agreement). *Cf.* Counter-Memorial ¶ 70.

⁴⁴⁸ Counter-Memorial ¶ 71 (citing **Ex. CE-331**, Minero Perú, Stability Contracts (7 September 1993) (emphasis in original)).

⁴⁴⁹ See **Ex. RE-21**, Regulation on the Guarantee Regimes for Private Investment, Supreme Decree No. 162-92-EF, October 9, 1992, Clause 3 (applying to stability agreements under L.D. 662 and 757 that are signed by the investor. As discussed above, stability agreements under L.D. 662 and 757 signed directly with the company that received the investment cover the company in its entirety, regardless of the investment amount); *id.* Annex I (Model Agreement "A" for Investors), Clause 2 (limiting stability guarantees to the specific investment referred to in the legal stability agreement).

⁴⁵⁰ See Memorial ¶ 338(a).

⁴⁵¹ *Cf.* Counter-Memorial ¶¶ 154-63; **Ex. CE-398**, MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003); **CWS-14**, Chappuis II, ¶¶ 32-36.

finance the construction of the Concentrator.⁴⁵² Because the Peruvian Congress had repealed that benefit in 2000, it was only available to SMCV by virtue of the stabilized regime under the Stability Agreement. SMCV sought confirmation that MINEM would recognize that the Concentrator was part of the same mining unit, allowing it to access the profit reinvestment benefit.⁴⁵³

(b) Peru argues that Report No. 509-2003 confirmed that the stabilized regime applied only to the initial investment because it states that “the application of the Stabilized Regime is granted to the Cerro Verde Leaching Project”—the referential term used in the Stability Agreement—“and not to the company.”⁴⁵⁴ However, Ms. Chappuis, who signed the Report as Director General of Mining, testifies that this language “was a direct response to the reference in Ms. Torreblanca’s letter that it was SMCV the *company* that enjoyed stability.”⁴⁵⁵ Ms. Chappuis further testifies that in Report No. 509, “we used the term ‘Cerro Verde Leaching Project’ because that was the referential term used in the Stability Agreement,” but “in no way did we view that term as somehow limiting the scope of stability to the initial investment rather than the stabilized concessions.”⁴⁵⁶

(c) Further, in Report No. 510-2003, the DGM responded to SMCV’s question about eligibility in the affirmative, finding that “[t]he Project for the Primary Sulfide Exploitation could be eligible for this benefit, there being no requirement that the agreement giving rise to the benefit should have previously contemplated it as a project.”⁴⁵⁷ The DGM thus recognized that the Concentrator would be part of SMCV’s Mining Unit, which was covered by the Stability Agreement, since under Article 10 of the

⁴⁵² See **Ex. CE-398**, MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003); **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (5 September 2003); see also **CWS-14**, Chappuis II ¶¶ 32-36.

⁴⁵³ See Memorial ¶ 92 (citing **Ex. CE-394**, SMCV, Petition No. 1418719 to MINEM (3 July 2003)).

⁴⁵⁴ Counter-Memorial ¶¶ 166-67 (quoting **Ex. CE-398**, MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003)).

⁴⁵⁵ **CWS-14**, Chappuis II, ¶ 33 (emphasis original); see **Ex. CE-394**, SMCV, Petition No. 1418719 to MINEM (3 July 2003) (“In order to complete this aspect related to reinvestment of profits in the Feasibility Study, we would like to ask for your opinion on this matter, to be able to specify that the reinvestment of profits stabilized for Cerro Verde . . . This is requested because this *agreement stabilizes the profit-reinvestment regime for the mining titleholder rather than for the project that gave rise to its signing.*”) (emphasis added); see also *id.* (“[I]n light of my experience drafting L.D. 708, I was keenly aware that this was not the case, but rather, that the stability guarantees could only benefit SMCV’s activities performed in the concessions or mining unit that benefited from the initial qualifying investment.”).

⁴⁵⁶ **CWS-14**, Chappuis II, ¶ 33; see **Ex. CE-398**, MINEM, Report No. 509-2003-MEM-DGM-TNC (8 September 2003).

⁴⁵⁷ **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (5 September 2003).

Regulations, mining companies could only reinvest their profits in the same “mining unit.”⁴⁵⁸ Further, nothing in either report suggests that the stabilized regime was limited to the “investment project included in the feasibility study.” Rather, MINEM recognized that the Concentrator would enjoy the stabilized reinvestment benefit because it would be part of SMCV’s Mining Unit, notwithstanding the fact that such investment was not expressly mentioned in the Stability Agreement that gave rise to the reinvestment benefit.⁴⁵⁹

iii. SMCV, Freeport, and Phelps Dodge’s “Due Diligence” Is Irrelevant as to Whether SMCV was Legally Entitled to Stability for the Concentrator

97. Instead of addressing the myriad evidence demonstrating that SMCV was legally entitled to stability guarantees for the Concentrator and that the Government had explicitly confirmed to SMCV that the Concentrator would be stabilized prior to the investment, Peru repeatedly tries to frame the relevant question as whether SMCV “knew or should have known” that certain officials sought to act against it, whether SMCV and Phelps Dodge conducted sufficient “due diligence” before investing in the Concentrator, and whether Freeport conducted sufficient “due diligence” prior to its acquisition of Phelps Dodge.⁴⁶⁰ But SMCV, Freeport or Phelps Dodge’s due diligence is completely irrelevant to the question of SMCV’s legal rights under the Mining Law and Regulations and the Stability Agreement.

98. Moreover, and in any event, Peru’s assertion that there is “no evidence of any adequate due diligence undertaken either by Phelps Dodge or SMCV at the time” of the Concentrator investment is demonstrably false.⁴⁶¹

99. *First*, Peru’s attempt to frame the question of whether under the Stability Agreement, Peru was obligated to grant stability guarantees to the Concentrator, as a subjective question of whether SMCV “knew or should have known” about its intentions or whether SMCV or Phelps Dodge conducted sufficient “due diligence” on the issue prior to the investment—or whether Freeport did so at the time of its acquisition—is simply wrong as a matter of law and fact. SMCV’s awareness or lack thereof of Peru’s political intentions simply had no bearing on its underlying legal rights under the Stability Agreement.

⁴⁵⁸ See **CA-2**, Mining Regulations, Article 10 (“[M]ining activity titleholders, shall enjoy the benefit provided for in Article 72, paragraph b), of the Single Unified Text. Non-distributed income shall be applied to the execution of new investment programs that guarantee the increase of production levels of the relevant mining units.”).

⁴⁵⁹ See **Ex. CE-399**, MINEM, Report No. 510-2003-MEM-DGM-TNO (5 September 2003); see also Memorial ¶¶ 91-94; **CWS-14**, Chappuis II, ¶ 34.

⁴⁶⁰ Cf. Counter-Memorial ¶ 102; see generally *id.* § II.C.

⁴⁶¹ Cf. Counter-Memorial ¶ 112.

Peru has not provided a single shred of support for the proposition that its obligations under the Stability Agreement, and SMCV's legal entitlement to stability guarantees for the Concentrator, were somehow dependent on SMCV's own subjective understanding of its rights at the time. As explained in detail above and in the Memorial, SMCV clearly had a legal right to stability guarantees for all investments and activities in its Mining and Beneficiation Concessions under the terms of the Mining Law and Regulations, which the Stability Agreement implemented.⁴⁶² SMCV and Phelps Dodge's due diligence prior to the investment is totally irrelevant to this right—though in any event, both conducted adequate due diligence that confirmed that the Concentrator was entitled to stability guarantees.

100. *Second*, SMCV's initial assumption that the Concentrator would be entitled to stability guarantees was well-founded.

- (a) As Mr. Davenport explains, SMCV's assumption was based on, among others, its longstanding understanding that the Government expected SMCV to exploit the primary sulfides at Cerro Verde—so much so that it sued Cyprus in 2001 for its alleged failure to invest in a primary sulfide expansion; the fact that under the 1994 Stability Agreement both the leaching operations and the small Concentrator had been stabilized; the fact that the Government had applied the 1998 Stability Agreement to SMCV's later investments not included in the 1996 Feasibility Study; and MINEM's confirmation that SMCV could use the profit reinvestment benefit to construct the Concentrator, which confirmed that it was part of the same mining unit.⁴⁶³
- (b) Mr. Morán likewise explains that Phelps Dodge undertook detailed due diligence of SMCV.⁴⁶⁴ Among others, this included review of SMCV's financial statements, which confirmed that the Government had applied the Stability Agreement to investments that SMCV made after the Agreement's execution, which further confirmed that the Stability Agreement applied to SMCV's future investments.⁴⁶⁵

101. *Third*, before proceeding with the Concentrator investment, SMCV representatives met multiple times with Government officials to discuss, among others, whether the Concentrator would be

⁴⁶² See *supra* §§ II.A.1, 3; Memorial §§ III.C.1, III.D.3, III.F.3-5, IV.A.2.

⁴⁶³ See **CWS-16**, Davenport II ¶ 9; **CWS-5**, Davenport I ¶¶ 18-20, 34, 41.

⁴⁶⁴ See **CWS-19**, Morán II, ¶¶ 5-8; **Ex. CE-363**, Phelps Dodge, Cerro Verde Assessment (October-November 1999), p. 8; see also **CWS-8**, Witness Statement of Cristián Morán ("Morán I"), ¶¶ 10-16.

⁴⁶⁵ See **CWS-19**, Morán II, ¶ 7 (citing **Ex. CE-363**, Phelps Dodge, Cerro Verde Assessment (October-November 1999)).

entitled to stability guarantees.⁴⁶⁶ During these meetings, Peru confirmed to SMCV that the Concentrator would be covered, as discussed above in Section II.A.4(i). Peru does not claim that it made any representations to the contrary directly to SMCV or Phelps Dodge during this period. Based on this confirmation, Phelps Dodge’s Board of Directors approved the investment conditionally, underscoring that its final approval of the investment was contingent upon receiving all required permits that were pending in Peru, including expansion of the Beneficiation Concession.⁴⁶⁷ MINEM then *did* approve the expansion approximately seven weeks later, as anticipated.⁴⁶⁸ As Phelps Dodge made clear in its presentation at the March 2005 PDAC conference, this “certainty of stability contract” was a requirement to proceed with the Concentrator investment.⁴⁶⁹

102. *Fourth*, Peru’s claim that SMCV never obtained a “written confirmation” regarding the Concentrator, and that this renders the multiple confirmations and clear roadmap that SMCV *did* receive meaningless, mischaracterizes the sequence of events that led to SMCV’s and Phelps Dodge’s ultimate approval of the project.⁴⁷⁰ As explained, after receiving Ms. Chappuis’s explicit confirmation that the Concentrator would be stabilized and would be included within the stabilized Beneficiation Concession, MINEM approved SMCV’s formal request to expand the Beneficiation Concession to include the Concentrator.⁴⁷¹ SMCV thus obtained a clear assurance from the Government—in writing—that the Concentrator was part of the existing stabilized mining unit. Once SMCV had the assurance it sought, there was no need for SMCV to seek any further written assurance. The only further assurance SMCV could have sought would have been to ask Peru to commit in writing to obey its own laws.

103. *Finally*, Peru argues that “SMCV’s own actions contradict its interpretation” and “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” because SMCV entered into three

⁴⁶⁶ See *supra* § II.A.4(i); Memorial ¶¶ 106-10, 339-42; **CWS-3**, Chappuis I ¶¶ 50-55; **CER-5**, Vega I ¶¶ 66-68; **CWS-11**, Torreblanca I ¶¶ 25-27; **CWS-5**, Davenport I ¶¶ 33, 36, 39.

⁴⁶⁷ See Memorial ¶ 112 (citing **Ex. CE-470**, SMCV, Board of Directors Meeting Minutes (11 October 2004); **CWS-11**, Torreblanca I ¶ 27); **Ex. CE-901**, Phelps Dodge, Form 10-K 2004 (7 March 2005), 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.”); **CWS-21**, Torreblanca II, ¶ 17.

⁴⁶⁸ See **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 027-2004-MEM-DGM/PDM (26 October 2004), pp. 2-3.

⁴⁶⁹ See **Ex. CE-945**, Phelps Dodge, Peru and Phelps Dodge: Partners in Progress (9 March 2005), p. 12; *see also id.*, p. 16 (“Stability contract provides certainty to make \$850 million investment decision.”).

⁴⁷⁰ See Counter-Memorial ¶ 147; *see also* **RWS-3**, Tovar ¶ 14.

⁴⁷¹ See **Ex. CE-457**, SMCV, Petition No. 1487019 to MINEM (27 August 2004); **Ex. CE-476**, MINEM, Report No. 784-2004-MEM-DGM/PDM and Directorial Order No. 1027-2004-MEM-DGM/PDM (26 October 2004).

separate stability agreements in 1994, 1998, and 2012.⁴⁷² Peru’s argument makes no sense and ignores the obvious reasons why SMCV entered into those agreements.

- (a) As Freeport explained, SMCV entered into a 10-year stability agreement in 1994 based on a US\$2.5 million investment concerning the purchase of a few trucks, improvements to the crushing infrastructure, and the installation of a conveyor belt to transport minerals.⁴⁷³ Contrary to Peru’s argument, this agreement clearly did not apply solely to the improved mining equipment. Rather, like the 1998 Stability Agreement, it applied to the entire mining unit.⁴⁷⁴
- (b) Peru’s argument that there would be “no[] . . . need” for SMCV to apply for a second stability agreement if the 1994 Stability Agreement already covered the Mining Unit ignores the obvious reasons why SMCV signed a second agreement.⁴⁷⁵ Because SMCV made a much larger qualifying investment, SMCV was able to obtain a 15-year stability agreement, which in addition to a longer term also included additional benefits not available under the 10-year agreement, including the right to use a 20 percent annual depreciation rate and to keep its accounting in foreign currency.⁴⁷⁶ Under the original agreement, SMCV’s stability guarantees would have ended at the end of 2003 whereas under the 1998 Stability Agreement they ended ten years later, at the end of 2013. Further, once SMCV signed the 1998 Stability Agreement, the stabilized regime applied to the entirety of the Cerro Verde Mining Unit.⁴⁷⁷
- (c) Peru’s argument that the 1994 and 1998 Stability Agreements were “two separate agreements with respect to two different investment projects in the same mining concessions” is entirely unsupported.⁴⁷⁸ Peru’s sole support for this conclusion is an internal memo from the Legal Advisory Office that explains that the qualifying investment amount of the 1998 Feasibility Study did not include the amount already used

⁴⁷² Counter-Memorial ¶ 62.

⁴⁷³ **Ex. CE-344**, Agreement of Guarantees and Measures for the Promotion of Investments Between the Peruvian State and SMCV (26 May 1994), Clauses 4 and 5.

⁴⁷⁴ **CWS-21**, Torreblanca II, ¶ 46.

⁴⁷⁵ *Cf.* Counter-Memorial ¶ 75.

⁴⁷⁶ *See* **CA-1**, Mining Law, Article 84; Memorial ¶ 53; **CWS-21**, Torreblanca II, ¶ 46.

⁴⁷⁷ *See* **Ex. CE-991**, SMCV, Letter No. SMCV_VAC-GL-639-2013 to SUNAT (19 March 2013) (informing SUNAT of SMCV’s decision to defer the entry into force of the stabilized regime under the 2012 Stability Agreement until 1 January 2014, after the 1998 Stability Agreement expired); **Ex. CE-990**, SMCV, Letter No. SMCV_VAC-GL-510-2013 to MINEM (15 March 2013) (same); **CWS-21**, Torreblanca II, ¶ 46. *Cf.* Counter-Memorial ¶ 63; **RWS-6**, Camacho ¶ 15 (claiming that SMCV’s stability agreements “overlapped”).

⁴⁷⁸ *Cf.* Counter-Memorial ¶ 62.

to qualify for the 1994 Agreement, and hence that the former involved a “different investment” than the latter.⁴⁷⁹ There is absolutely nothing in this document that suggests that the scope of the two agreements was different. Peru further ignores the fact that this memo was issued in response to a suggestion by the DGM to clarify the relationship between the two agreements *precisely because* they applied to the “same Production Unit” and thus in the DGM’s view “could not coexist.”⁴⁸⁰ Contrary to Peru’s argument, there is no question that the 1994 Stability Agreement, like the 1998 Stability Agreement, applied to the entire Cerro Verde Mining Unit, and not to “different” qualifying “investments” such as trucks and a conveyer belt.

(d) Peru’s argument that SMCV signing the 2012 agreement supports Peru’s interpretation is likewise absurd.⁴⁸¹ There is little question as to why SMCV sought a new stability agreement when it made its US\$3.57 billion investment in a second concentrator: The 1998 Stability Agreement’s term concluded at the end of 2013, only a year after SMCV signed the new agreement.⁴⁸² Moreover, SMCV did not apply the stabilized regime under the 2012 agreement until 1 January 2014, and so it did not coexist or “overlap” with the 1998 Stability Agreement.⁴⁸³ And of course, by this point, SMCV was already aware of the Government’s novel position with regard to the scope of stability guarantees and the lengths the Government would go to walk back on the stability guarantees it contractually agreed to observe.

B. PERU BREACHED THE STABILITY AGREEMENT

104. As Freeport explained in its Memorial, Peru repeatedly breached its obligations under the Stability Agreement to grant tax and administrative stability to the entire Cerro Verde Mining Unit. In response, Peru argues that the Tribunal should find otherwise for two reasons. *First*, Peru argues that the Supreme Court of Peru has already decided that the Stability Agreement did not include the Concentrator and suggests that Freeport is “collaterally estopped” from bringing its claims in the arbitration and that the

⁴⁷⁹ **Ex. RE-23**, MINEM, Report No. 002-98-EM-OGAJ (30 December 1997).

⁴⁸⁰ **Ex. CE-356**, MINEM, Report No. 708-97-EM/DGM/OTN (30 December 1997).

⁴⁸¹ See Counter-Memorial ¶¶ 97-99.

⁴⁸² See **Ex. CE-12**, 1998 Stability Agreement, Clause 8 (“The period of the guarantees agreed in this contract will extend for 15 years, counted from the financial period evidencing the investment made and once the General Direction of Mining approves this,” on 31 December 2013); **CWS-21**, Torreblanca II, ¶ 47 (“I signed the 2012 Stability Agreement on behalf of SMCV on 17 July 2012.”).

⁴⁸³ See **CWS-21**, Torreblanca II, ¶ 47 (citing **Ex. CE-991**, SMCV, Letter No. SMCV_VAC-GL-639-2013 to SUNAT (19 March 2013); **Ex. CE-990**, SMCV, Letter No. SMCV_VAC-GL-510-2013 to MINEM (15 March 2013)).

Tribunal must adopt this interpretation as a prudential matter. *Second*, Peru argues that, in any event, Peru did not breach its obligations under the Stability Agreement since, according to Peru, the Stability Agreement does not cover the Concentrator under its “consistent” position that stability guarantees apply only to the specific “investment project” identified in the feasibility study. Each of these arguments is wrong.

1. The Peruvian Supreme Court Decision in the 2008 Royalty Case Does Not Affect the Tribunal’s Authority to Determine Whether Peru Breached the Stability Agreement

105. Peru’s arguments that the Peruvian Supreme Court decision in the 2008 Royalty Case limits the Tribunal’s consideration of whether Peru breached the Stability Agreement—either as “collateral estoppel” or as a “prudential matter”—are misconceived and unsupported. It is well established that decisions of national courts have no preclusive effect at the international level, because submission of disputes to an international tribunal is meant to provide a forum independent of national courts. Even in the Peruvian courts, the decisions would have no *res judicata* or other preclusive effect because of the absence of identity of the object of the proceeding and cause of action. Peru and its experts, Prof. Eguiguren and Prof. Morales, are therefore incorrect in contending that the Supreme Court’s decision in the 2008 Royalty Case is “*res judicata* and is binding on the parties” in this dispute, as is Prof. Eguiguren in contending that the Appellate Court decision in the 2006-2007 Royalty Case has *res judicata* effect in this dispute.⁴⁸⁴ And as Peru concedes, these decisions have no binding precedential value under Peruvian law.⁴⁸⁵ In other words, contrary to Peru’s argument, the scope of Peru’s obligations under the Stability Agreement is not an issue that has been “finally and definitively resolved”—even in Peru’s own courts, let alone before this Tribunal.⁴⁸⁶

i. Freeport Is Not “Collaterally Estopped” from Arguing that the 1998 Stability Agreement Applied to the Concentrator

106. Perhaps recognizing the futility of claiming that decisions of Peruvian courts could be *res judicata* on this tribunal—a proposition that tribunals have repeatedly rejected⁴⁸⁷—Peru instead asserts

⁴⁸⁴ Counter-Memorial ¶¶ 377, 551; **RER-1**, Eguiguren, ¶¶ 97-110; **RER-2**, Morales, ¶¶ 81-89.

⁴⁸⁵ Counter-Memorial ¶ 551.

⁴⁸⁶ Cf. Counter-Memorial ¶ 1.

⁴⁸⁷ See **CA-189**, *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Award (11 June 2012) (“*EDF v. Argentina Award*”), ¶¶ 943-69 (upholding umbrella clause claims without discussing the decisions of the Argentinean courts); **CA-349**, *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic*, SCC Case No. V 2015/095, Award (23 December 2018) (“*Greentech Award*”), ¶¶ 432, 464-466 (concluding that Italy’s modification of energy tariff scheme violated the ECT’s umbrella clause despite Italy’s argument that the Italian Constitutional Court confirmed that the tariff reduction did not breach the underlying Italian law obligations); see also **CA-314**,

that Freeport is “collaterally estopped” from arguing that the 1998 Stability Agreement applied to the Concentrator.⁴⁸⁸ Peru’s argument is both meritless and entirely unsupported, and provides no basis for the Tribunal to abstain from hearing Freeport’s claims.

107. *First*, despite Peru’s conclusory assumption to the contrary, it is by no means settled that collateral estoppel is a general principle applicable in international arbitration proceedings.⁴⁸⁹ This is in part because the doctrine of collateral estoppel is simply not recognized in civil law jurisdictions.⁴⁹⁰

108. *Second*, even assuming that collateral estoppel may apply in international arbitration proceedings as a general principle of law, there is absolutely no basis for its application based on prior decisions of domestic courts. Rather, the only prior decisions on which Peru relies to support this argument involved whether a party could relitigate an issue decided by an *international arbitration tribunal* in a subsequent international proceeding—an entirely different circumstance than Peru argues here.

- (a) The first case upon which Peru relies, *Apotex Holdings*, is inapposite because it dealt with sequential investment arbitration claims brought under the North American Free Trade

Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. 03/28, Decision on Jurisdiction (1 February 2006) (Fortier, Nikken (partially dissenting on other grounds), Tawil (partially dissenting)) (“*Duke Energy Decision on Jurisdiction*”), ¶¶ 152, 160 (dismissing Peru’s argument that claims for breach of a Peruvian stability agreement were inadmissible because “the key issues in dispute have already been fully resolved within the Peruvian tax system by operation of the Peruvian Tax Court” and explaining that “by agreeing to international arbitration in the DEI Bermuda LSA, Respondent affirmed Claimant’s right to a review by an ICSID tribunal of the matters considered by the Peruvian administration and court system, to the extent those matters fall within the guarantees contained in the DEI Bermuda LSA.”) (emphasis added).

⁴⁸⁸ Counter-Memorial ¶¶ 20, 657, 661-62.

⁴⁸⁹ See, e.g., **CA-414**, *Caratube Int’l Oil Co. v. Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award (27 September 2017), ¶ 459 (“Concerning the first question of the general applicability of the doctrine of collateral estoppel in investment arbitration, the Tribunal cannot follow the Respondent’s allegation that ‘the doctrine of collateral estoppel, also known as ‘issue preclusion’ or ‘issue estoppel,’ is a firmly established ‘principle of law applicable in the international courts and tribunals’”); **CA-355**, *Amco Asia Corp. v. Indonesia*, ICSID Case No. 81/1, Decision on Jurisdiction in Resubmitted Proceeding (10 May 1988), ¶¶ 30-32 (considering whether “the *reasons* of the nullifying body are also *res judicata*” in circumstances of an ICSID resubmission hearing and concluding that it “is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*.”); **CA-307**, Filip de Ly and Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 ARB. INT’L (2013), p. 63 (there is “a debate as to whether arbitral tribunals can and should apply issue or collateral estoppel”); **CA-417**, E. Gaillard, *Coordination or Chaos: Do the Principles of Comity, Lis Pendens, and Res Judicata apply to International Arbitration?*, 29 THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (2018), p. 227.

⁴⁹⁰ See **CA-409**, Sija Schaffstein, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS (2016), p. 60 (“The scope of the doctrine is generally wider in common law countries than in civil law countries, encompassing issue preclusion in addition to claim preclusion.”); **RA-20**, ILA Final Recommendations, p. 7 (recognizing that “concepts of issue estoppel. . . are yet unknown in civil law jurisdictions.”).

Agreement (“NAFTA”)—in other words, multiple international arbitration proceedings brought by the same claimant under the same treaty and raising the same claims.⁴⁹¹ The later-in-time tribunal’s consideration of the “preclusive effect” of the operative part of the earlier decisions thus provides absolutely no support for the proposition that a domestic court decision could result in “collateral estoppel” for a treaty-based international arbitration tribunal.

- (b) The other case on which Peru relies, *RSM v. Grenada II*, similarly addressed only the preclusive effect of a prior international arbitration decision.⁴⁹² In particular, the tribunal considered the preclusive effect of a decision on a prior ICSID claim that was filed by one of the parties to the arbitration.⁴⁹³ Moreover, unlike here, the claimant in *RSM II* did not dispute that issue preclusion was a general principle of international law, but rather argued it did not apply due to the difference in causes of action and parties between the proceedings.⁴⁹⁴
- (c) The only other source Peru provides in support of its argument, a 2006 ILA Report addressing the law of *res judicata* in the context of international *commercial* arbitration, similarly discusses collateral estoppel (or issue preclusion) only in the context of considering the impact of a prior international arbitral award on a subsequent international proceeding.⁴⁹⁵

109. *Third*, more generally, it is well-established that a domestic court decision does not have preclusive effect in international legal proceedings.⁴⁹⁶ A contrary result would undermine the contracting states’ agreement to submit disputes to an international forum independent of the states’ own courts.⁴⁹⁷

⁴⁹¹ **RA-18**, *Apotex Holdings v. USA (III)*, Award ¶ 7.23 (“tribunals have regularly examined under international law a prior tribunal’s reasoning, and the arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award’s operative part”); *see also id.* ¶¶ 2.53, 7.2 (describing procedural history).

⁴⁹² **RA-19**, *RSM Production Corporation and others v. Grenada II*, ICSID Case No. ARB/10/6, Award (10 December 2010) (“*RSM v. Grenada II Award*”) ¶¶ 1.2.1, 1.4.1–1.4.4, 2.3.1 (addressing preclusive effect of sequential ICSID investment arbitrations within same international legal order).

⁴⁹³ **RA-19**, *RSM v. Grenada II Award*, ¶¶ 1.2.1, 1.4.3, 2.3.1.

⁴⁹⁴ **RA-19**, *RSM v. Grenada II Award*, ¶¶ 5.3.5–5.3.6

⁴⁹⁵ *See RA-20*, ILA Final Recommendations, p. 7 (“To accept issue preclusion, it is required that a particular issue of fact or law has actually been arbitrated and determined by the award.”).

⁴⁹⁶ *See, e.g., CA-307*, Flip de Ly and Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 ARB. INT’L (2013), p. 56 (“*Res Judicata* in international law only relates to the effect of a decision of one international tribunal on a subsequent international tribunal. International dispute settlement organs are not considered to be bound by decisions of national courts or tribunals.”); **CA-306**, IAN BROWNLIE, *The Relation of Municipal and International Law*, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2003), p. 50 (“There is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction is

110. *Fourth*, Peru’s claim that Freeport is “collaterally estopped” from advancing its claims in the arbitration—and its alternative argument that the Tribunal should “afford the Peruvian court decisions significant deference as a prudential matter”—are a transparent attempt to get around the fact that Peru cannot satisfy the Treaty’s strict requirements for the narrow circumstances under which a claimant may be barred from raising certain claims that have already been litigated in a domestic proceeding.⁴⁹⁸ As Peru recognizes, Article 10.16.1 of the TPA explicitly allows claimants to bring claims for breach of an investment agreement to be heard by the Tribunal in an international forum. And Article 10.18.4 of the Treaty, which acts as *lex specialis* in this case, defines the *only* set of circumstances under which the existence of a prior domestic court proceeding may deprive the Tribunal of its ability to hear and decide those claims.⁴⁹⁹ If those circumstances are not met—and they are not met here, as Freeport explains in detail below in response to Peru’s jurisdictional objections—there is absolutely no basis for the Tribunal to abstain from hearing investment agreement claims or to defer to local court decisions as a “prudential matter.”⁵⁰⁰ Contrary to Peru’s claims, the fact that underlying investment agreement obligations “are governed by local, not international law” is immaterial to this point: the treaty parties explicitly intended for those claims to be heard by an *international* tribunal if the claimant so elected, *unless* barred by Article 10.18.4. Refusing to consider investment agreement claims on the basis of collateral estoppel or inappropriately affording “significant deference” to those claims would run contrary to this explicit intent.

111. *Finally*, for the same reasons, Peru is also mistaken when it argues that “[a]bsent a denial of justice or due process violation . . . [Claimant] is collaterally estopped from arguing that the 1998

concerned.”); **CA-293**, BIN CHENG, *The Principle of Res Judicata*, in GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953), fn. 6 (“[A] decision of municipal law does not constitute *res judicata* in international law.”); see **CA-314**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction (1 February 2006) (Fortier, Nikken (partially dissenting on other grounds), Tawil (partially dissenting)) (“*Duke Energy Decision on Jurisdiction*”), ¶¶ 152, 160 (dismissing Peru’s argument that claims for breach of a Peruvian stability agreement were inadmissible because “the key issues in dispute have already been fully resolved within the Peruvian tax system by operation of the Peruvian Tax Court” and explaining that “by agreeing to international arbitration in the DEI Bermuda LSA, Respondent affirmed Claimant’s right to a review by an ICSID tribunal of the matters considered by the *Peruvian administration and court system*, to the extent those matters fall within the guarantees contained in the DEI Bermuda LSA.”) (emphasis added); see also **CA-189**, *EDF v. Argentina Award*, ¶ 1125 (concluding that claims based on governmental measures affecting a contractual concession “are not foreign to this Tribunal and that any decisions made on these issues by Argentine courts do not render these claims *res judicata*”); **CA-349**, *Greentech Award*, ¶¶ 432, 464-466 (concluding that Italy’s modification of energy tariff scheme breached the ECT’s umbrella clause despite Italy’s reliance on an Italian Constitutional Court decision confirming that the tariff reduction did not breach underlying Italian law obligations).

⁴⁹⁷ See, e.g., **CA-314**, *Duke Energy Decision on Jurisdiction*, ¶ 160.

⁴⁹⁸ **CA-10**, US-Peru Trade Promotion Agreement, Art. 10.18.4 (precluding submission of investment agreement claims only if a claim for the “same alleged breach” has been previously submitted to certain domestic fora).

⁴⁹⁹ See *infra* Section III.B.

⁵⁰⁰ See *infra* Section III.B.

Stabilization Agreement covers the Concentrator Project” or alternatively that “the tribunal should respect” the domestic court decisions.⁵⁰¹ The general rule that an international tribunal is not bound by domestic court decisions is not subject to such a requirement and the denial of justice decisions on which Peru relies do not suggest the contrary. Neither *Mondev v. U.S.A.*, *Liman v. Kazakhstan*, nor *Alps Finance v. Slovak Republic* suggest that when an issue of domestic law is relevant to the resolution of a claim, absent a finding of denial of justice, an investment treaty tribunal should follow the decisions of local courts on that domestic law issue.⁵⁰² Rather, the tribunals in those cases merely conclude that the claimants in those cases failed to prove denial of justice claims that they had expressly asserted.

ii. The Supreme Court Decision in the 2008 Royalty Case Is Not Binding in Peru

112. The Supreme Court’s decision in the 2008 Royalty Case on the scope of the Stability Agreement is not even binding in Peruvian courts or the parties in other Peruvian legal proceedings, either as precedent or as *res judicata*. Peru fails to explain why this Tribunal should refrain from deciding issues that even the Peruvian courts would decide afresh.

113. *First*, Peru cannot demonstrate “triple identity,” which is required for *res judicata* under Peruvian law. Prof. Morales agrees with Prof. Bullard that preclusion only applies if the claims involve the same parties (*personae*), the same object (*petitum*), and the same cause of action (*causa petendi*).⁵⁰³ Yet, Peru fails to establish that all of those requirements are met here.⁵⁰⁴

- (a) The object (*petitum*) of Freeport’s claims in this arbitration and SMCV’s claims before the Supreme Court is not the same. In this proceeding, Freeport seeks a declaration of breaches of the Stability Agreement and compensatory damages for those breaches. Before the Supreme Court, SMCV sought the annulment of “administrative acts,”

⁵⁰¹ Counter-Memorial ¶ 541.

⁵⁰² Counter-Memorial ¶ 500 & n. 1133 (citing **RA-6**, citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (Stephen, Schwebel, Crawford) (“Mondev Award”), ¶ 127; **RA-23**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award (22 June 2010) (Böckstiegel, Hobér, Crawford) (“*Liman Excerpts of Award*”), ¶ 274; **RA-24**, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (Redacted Version) (5 March 2011) (Crivellaro, Stuber, Klein) (“*Alps Finance Award*”), ¶¶ 249-50).

⁵⁰³ **CA-344**, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment (17 March 2016), ¶ 55.

⁵⁰⁴ **RER-2**, Morales, ¶¶ 87-88 (“What are the requirements for *res judicata* to operate? . . . The identifying elements of a matter are certain parties, a petition or *petitum*, and a foundation or ‘cause of action’ (*causa petendi*).”); **CER-7**, Bullard II, ¶¶ 61, 65-70.

including the 2008 Royalty Assessments and the Tax Tribunal resolutions confirming those Assessments.⁵⁰⁵

- (b) The cause of action (*causa petendi*) for Freeport’s claims in this arbitration and SMCV’s claims before the Supreme Court is not the same.⁵⁰⁶ Freeport claims that Peru repeatedly breached the Stability Agreement. Before the Supreme Court, SMCV claimed that SUNAT and the Tax Tribunal breached Peruvian administrative law (the Peruvian General Administrative Procedure Law and Law on the Contentious Administrative Procedure).⁵⁰⁷

114. Peruvian law recognizes that breach of contract claims and breach of administrative law claims are distinct causes of action. As the *Duke Energy* tribunal observed, the administrative law “causes of action” and the breach of contract “causes of action” before the arbitration tribunal “ar[ose] from different laws and under different obligations.”⁵⁰⁸ Accordingly, the tribunal concluded, Tax Tribunal resolutions upholding the imposition of taxes had no effect on the claims before the tribunal.⁵⁰⁹

115. Moreover, as Prof. Bullard explains, “contentious-administrative proceedings are structurally inadequate” for the resolution of contract claims such as those Freeport submits for resolution in this arbitration because they have “very short procedural deadlines” and “limited evidentiary methods.”⁵¹⁰ For these reasons, “SMCV never had an evidentiary forum in the contentious-administrative proceeding to present its full case related to the contractual claims for breach of the Stability Agreement.”⁵¹¹ Prof. Bullard illustrates the distinction between Peruvian law claims for breach of contract and breach of administrative law with a discussion of parallel proceedings in which Compañía Minera Poderosa S.A. (“Poderosa”) alleged breaches of administrative law before the contentious-

⁵⁰⁵ **CER-7**, Bullard II, ¶ 65; **Ex. CE-97**, SMCV Administrative Court of Appeal of the Tax Tribunal Decision, 2008 Royalty Assessments (18 September 2013), pp.2-3 (seeking to nullify the Tax Tribunal resolution and the underlying SUNAT assessment and fine resolutions); **Ex. CE-138**, SMCV Supreme Court Appeal of the Appellate Court Decision No. 7650-2013, 2008 Royalty Assessment (23 February 2016) (seeking the annulment of the Administrative Court of Appeal’s decision upholding the Tax Tribunal resolution and the underlying SUNAT assessment and fine resolutions). See also **CA-314**, *Duke Energy Int’l v. Peru*, ICSID Case No. 03/28, Decision on Jurisdiction (1 February 2006), ¶ 159 (rejecting admissibility objection because, *inter alia*, distinct relief was sought under each of the proceedings).

⁵⁰⁶ See e.g., **CA-189**, *EDF v. Argentina*, ICSID Case No. ARB/03/23, Award (11 June 2012), ¶ 1134 (“In the local proceedings, EDEMSA brought suit under the Concession Contract, whereas Claimants in the present proceeding seek redress under the BIT. Parity is thus not satisfied with respect to the causes of action.”).

⁵⁰⁷ **CER-7**, Bullard II, ¶ 66.

⁵⁰⁸ **CA-314**, *Duke Energy Int’l v. Peru*, ICSID Case No. 03/28, Decision on Jurisdiction (1 February 2006), ¶ 159.

⁵⁰⁹ **CA-314**, *Duke Energy Int’l v. Peru*, ICSID Case No. 03/28, Decision on Jurisdiction (1 February 2006), ¶¶ 160-61.

⁵¹⁰ **CER-7**, Bullard II, ¶ 67.

⁵¹¹ **CER-7**, Bullard II, ¶ 67.

administrative courts and breaches of a mining stability agreement before the civil courts.⁵¹² In the civil proceedings, the Trial Court and the Appellate Court dismissed SUNAT's and the Tax Tribunal's *lis pendens* objection because the triple identity test, which is a requirement for *lis pendens* as well as *res judicata* in Peruvian law, was not met.⁵¹³

116. *Second*, Peru agrees with Freeport that the ruling of the Supreme Court in the 2008 Royalty Case has no precedential value in Peru.⁵¹⁴ Yet, at the same time, Peru argues that “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” and thus that “the Tribunal should . . . afford the Peruvian court decisions significant deference as a prudential matter.”⁵¹⁵ It is impossible to reconcile these two positions. If the Supreme Court's decision has no precedential value, it does not provide Peruvian courts, much less this tribunal, with a “definitive answer” on the proper scope of the Stability Agreement.⁵¹⁶

117. Dr. Eguiguren contends that “the content of the 2008 Supreme Court cassation judgment must be taken as a parameter for interpreting the scope of the Cerro Verde Stability Agreement” due to “the so-called ‘nomophylactic’ role of cassation.”⁵¹⁷ As Prof. Bullard explains, the Supreme Court's “nomophylactic” function aspires to standardize jurisprudence among lower courts.⁵¹⁸ But this Tribunal is not a Peruvian lower court whose decisions can be appealed to the Peruvian Supreme Court. In any event, as Prof. Bullard explains, the “nomophylactic function” of the Supreme Court “clearly does not set

⁵¹² **CER-7**, Bullard II, ¶¶ 68-69.

⁵¹³ **CER-7**, Bullard II, ¶ 69 (citing **CA-318**, Trial Court No. 43, File No. 41531-2006-79-1801-JR-CI-43 (19 October 2007)); **CA-326**, Civil Appellate Court Decision, Case File No. 1289-2009 (14 January 2010), pp. 1-2 (dismissing the argument that Poderosa's “claim should have been declared inadmissible” because the appropriate forum to resolve the dispute was the contentious-administrative proceeding.); **CA-339**, Supreme Court, Cassation 6285-2012 Cusco (15 April 2013), p. 5, ¶ Six (explaining that *lis pendens* requires that “triple identity” test).

⁵¹⁴ **CER-7**, Bullard II, ¶ 71; Counter-Memorial ¶ 551 (“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.”); **RER-1**, Eguiguren, ¶ 100 (“[T]he Supreme Court cassation judgment is not strictly precedential for all judges in Peru.”); **RER-2**, Morales, ¶ 86 (“[T]he Supreme Court's judgement does not create a precedent.”); **CER-2**, Bullard I, ¶ 76.

⁵¹⁵ Counter-Memorial ¶ 547.

⁵¹⁶ Counter-Memorial ¶ 547.

⁵¹⁷ **RER-1**, Eguiguren, ¶ 101.

⁵¹⁸ **CER-7**, Bullard II, ¶ 72.

binding precedents for lower courts or tribunals under Peruvian law”⁵¹⁹ and “in practice, Supreme Court decisions do not accomplish the goal of creating binding precedents for lower courts or tribunals.”⁵²⁰

118. *Finally*, the record conclusively demonstrates that neither the Supreme Court, nor the Tax Tribunal, nor SUNAT accorded any binding effect to the Supreme Court decision in the 2008 Royalty Case, including in interpreting the scope of the Stability Agreement in subsequent proceedings. After the Supreme Court had rendered its decision in the 2008 Royalty Case, the Supreme Court heard oral argument in the 2006-07 Royalty Case. SUNAT and the Tax Tribunal did not seek dismissal on the grounds that the Supreme Court decision in the 2008 Royalty Case had *res judicata* or precedential effect.⁵²¹ Moreover, the three justices voting to dismiss SMCV’s appeal of the 2006-2007 Royalty Assessments did not suggest that the Supreme Court decision in the 2008 Royalty Case was binding or otherwise dictated their votes.⁵²² Nor did the two justices voting to annul the decision of the Appellate Court. They concluded that the Appellate Court failed to consider whether:

the stability was granted to the beneficiation concession and . . . because of that, with the incorporation of the Sulfides Plant, approved by Directorial Resolution No. 056-2007-MEM/DGM, the extension of the guarantee operat[es] as a matter of law.⁵²³

Moreover, as reflected in Annex A of the Memorial, a total of 18 Tax Tribunal proceedings against SMCV arising out of the scope of the Stability Agreement remained pending after the Supreme Court rendered its decision in the 2008 Royalty Case. Not only did those proceedings continue, but SUNAT never argued, and the Tax Tribunal never concluded, that the decision in the 2008 Royalty Case had *res judicata* effect or was otherwise binding. Likewise, neither SUNAT nor the Tax Tribunal ever indicated that the Supreme Court decision was binding in any of the twelve SUNAT reconsideration proceedings or the six Tax Tribunal proceedings that SMCV initiated after 12 July 2017.⁵²⁴ There is no rational justification for giving Peruvian decisions greater effect before this Tribunal than they would have in Peru.

⁵¹⁹ **CER-7**, Bullard II, ¶ 72.

⁵²⁰ **CER-7**, Bullard II, ¶ 72.

⁵²¹ **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018) (showing that the case concerning the 2006/07 Royalty Assessments remained unresolved pending rehearing and that neither SUNAT or MEF moved to dismiss on grounds of *res judicata*).

⁵²² **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018).

⁵²³ **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), p. 46, ¶ 2.12.

⁵²⁴ Memorial, **Annex A**: Administrative Proceedings.

119. Not only is the Supreme Court’s decision in the 2008 Royalty Case incapable of having any binding effect, it also should not be accorded any weight by this Tribunal. As explained above, unlike civil proceedings, the contentious administrative proceedings before the Supreme Court did not provide SMCV with an adequate evidentiary forum to make the case that Freeport makes here or that SMCV would have been able to make to support breach of contract claims in the civil courts. The Supreme Court did not have before it the ample evidence submitted in this arbitration including, among others: (i) the evidence of due process violations tainting the Tax Tribunal resolution under review; (ii) the fact and expert witness testimony concerning Title Nine of the Mining Law and the Regulations; (iii) the full extent of the evidence concerning the Government’s consistent application of stability agreements to concessions and mining units; (iv) Mr. Isasi’s April and September 2005 Reports; (v) the evidence of the political pressure on Minister Sánchez Mejía resulting in MINEM’s *volte-face*; or (vi) expert witness testimony concerning the purpose of stability guarantees and their presumptive scope in international practice, among other matters. And last but not least, less than one year after the Supreme Court’s decision,⁵²⁵ the President of Peru recognized that the Supreme Court was part of a “system for administering justice” that had “collapsed” and needed sweeping anti-corruption reforms.⁵²⁶

2. Peru Repeatedly Breached Its Obligations Under the Stability Agreement

i. Peru Repeatedly Breached the Stability Agreement when its Royalty and Tax Assessments Applying the Non-Stabilized Regime to the Concentrator Became Final and Enforceable

120. Peru’s second defense is that it did not breach its obligations under the Stability Agreement. However, as explained in detail in Section II.A. above, under the Mining Law and Regulations, stability guarantees applied to the entire concessions or mining units in which the mining company made its qualifying investment. Clause 3 and Exhibit I of the Stability Agreement applied the stability guarantees to SMCV’s Mining Concession and Beneficiation Concession, which together formed the Cerro Verde mining unit.⁵²⁷ Because the Concentrator was part of the Cerro Verde Mining Unit, and included in the stabilized Beneficiation Concession—an inclusion that Peru had explicitly authorized—

⁵²⁵ **Ex. CE-153**, Supreme Court, Decision No. 5212-2016, 2008 Royalty Assessment (18 August 2017).

⁵²⁶ See **Ex. CE-1016**, Peru sets referendum to 'legitimize' reforms after scandal, AFP (29 July 2018). See also **Ex. CE-1018**; The Judiciary is perceived as the most corrupt in Peru, SEMANA ECONÓMICA (29 October 2018); **Ex. CE-1015**, Leaked calls reveal systemic corruption in Peru's judiciary, sparking flurry of resignations, WASHINGTON POST (20 July 2018); **Ex. CE-1013** Peru Judicial Branch declares three-month state of emergency, PERU REPORTS (16 July 2018); **Ex. CE-1012**, Corruption in the Judicial System Surfaces in Phone Taps, PERUVIAN TIMES (10 July 2018); **Ex. CE-1005**, GAN Integrity, Peru Corruption Report (September 2016).

⁵²⁷ See *supra* § II.A.3.

SMCV was entitled to enjoy stability guarantees for the Concentrator during the term of the Stability Agreement.

121. Accordingly, Peru violated its obligations under the Stability Agreement each time SUNAT's Royalty and Tax Assessments (set out in Table A of Freeport's Memorial) became final and enforceable against SMCV. Specifically, Peru repeatedly breached the following obligations contained in the Stability Agreement: (i) Clauses 9.4, 9.5, and 9.6, and the obligation to provide tax and administrative stability to SMCV⁵²⁸; (ii) Clause 10.1, and the obligation to exempt SMCV from the application of any new laws or regulations that "directly or indirectly, denaturalize[d] the guarantees provided" by the Stability Agreement⁵²⁹; and (iii) Clause 10.2, and the obligation to protect SMCV from "any encumbrance or obligation that could represent reduction of its availability of cash."⁵³⁰

122. As Freeport explained, each of these breaches of the Stability Agreement occurred when the relevant Royalty or Tax Assessment became final and enforceable against SMCV, which occurred either (i) the business day after SMCV was served with the Tax Tribunal Resolution upholding the Assessment (for the Assessments SMCV challenged before the Tax Tribunal); (ii) the business day after SMCV's deadline to submit a challenge before SUNAT or the Tax Tribunal expired (for the Assessments SMCV did not challenge before the Tax Tribunal or request reconsideration from SUNAT); or (iii) the business day after SMCV was served with SUNAT or the Tax Tribunal's resolution accepting SMCV's withdrawal (for the Assessments where SMCV withdrew its challenges).⁵³¹ The breaches of contract occurred as of this date because it was only once the Assessments became final and enforceable that the Government failed to deliver what was promised to SMCV under the terms of the Stability Agreement.⁵³² With respect to Assessments for which SMCV filed withdrawal petitions that Peru has failed to act on, Freeport treats the date of SMCV's withdrawal petitions as the constructive date of breach as is necessary to prevent Peru from delaying the date of breach indefinitely, preventing Freeport from seeking relief in international arbitration.⁵³³

⁵²⁸ **Ex. CE-12**, Contract of Guarantees and Investment Promotion Measures Between the Peruvian State and Sociedad Minera Cerro Verde S.A. (26 February 1998) ("1998 Stability Agreement"), Clause 9.5 (tax stability); *id.*, Clause 9.6 (administrative stability).

⁵²⁹ **Ex. CE-12**, 1998 Stability Agreement, Clause 10.1.

⁵³⁰ **Ex. CE-12**, 1998 Stability Agreement, Clause 10.2; *see also id.* Clause 9.4 (allowing SMCV to keep its accounting in dollars); *id.* Clause 13 (providing that the provisions referenced in the Stability Agreement are the ones in force at the time of the approval of the Feasibility Study).

⁵³¹ *See* Memorial ¶ 345.

⁵³² *See* **CER-2**, Bullard I, ¶ 80; **CER-7**, Bullard II ¶¶ 74, 75.

⁵³³ *See* Memorial ¶ 353.

123. Peru does not contest the dates upon which the Royalty and Tax Assessments became final and enforceable.⁵³⁴ However, Peru’s expert Mr. Morales claims that the breaches of the Stability Agreement actually occurred *before* the Assessments were final and enforceable—in particular, on the date they were notified to SMCV.⁵³⁵ This is simply wrong: at the time of notification, Peru had not yet actually applied to SMCV a regime different than the one it promised under the terms of the Stability Agreement.⁵³⁶ At the time of notification, Peru’s own administrative authority could still have corrected its initial Assessment through the normal administrative process.⁵³⁷ At that date, Peru also could not yet have applied the non-stabilized regime to SMCV by enforcing SUNAT’s assessments.⁵³⁸ Further, contrary to Prof. Morales’s suggestion, SMCV could not have filed a claim for breach of contract before Peruvian courts upon notification of the SUNAT Assessments.⁵³⁹ Rather, as Prof. Bullard explains, SMCV could only have brought a claim for breach of contract once it *actually suffered* a pecuniary loss—which only occurred once the Assessments became final and enforceable and SMCV had an enforceable obligation to pay the Assessments.⁵⁴⁰

ii. Peru also Breached the Stability Agreement when its Tax Assessments Applying the Non-Stabilized Regime to the Leaching Facilities became Final and Enforceable

124. In its Memorial, Freeport explained that Peru also breached the Stability Agreement when it arbitrarily applied in certain Tax Assessments the non-stabilized regime to SMCV’s entire mining unit, including to assets and activities that were stabilized even under Peru’s own novel and restrictive position.⁵⁴¹ Specifically:

- (a) In the 2010 and 2011 Income Tax Assessments, SUNAT applied non-stabilized depreciation rates to certain assets without attributing them to the Concentrator and—in the 2012 and 2013 Income Tax Assessments—to *all* the assets that SMCV started using

⁵³⁴ See generally Counter-Memorial § IV.A; **RER-2**, Morales § V.A.

⁵³⁵ See **RER-2**, Morales, ¶¶ 98-103.

⁵³⁶ See **CER-2**, Bullard I, ¶¶ 81-86; **CER-7**, Bullard II ¶¶ 75-81.

⁵³⁷ See **CER-2**, Bullard I, ¶ 86; **CER-7**, Bullard II ¶¶ 77, 82.

⁵³⁸ See **CER-2**, Bullard I, ¶¶ 84-86; **CER-7**, Bullard II ¶¶ 75-81.

⁵³⁹ Cf. **RER-2**, Morales, ¶¶ 106-108.

⁵⁴⁰ See **CER-2**, Bullard I, ¶ 89; **CER-7**, Bullard II ¶¶ 83-85.

⁵⁴¹ See Memorial ¶¶ 348-49, 351.

as of 2007, including some of the same leaching facilities' assets it had treated as stabilized in previous fiscal years.⁵⁴²

- (b) In the 2007-2013 Income Tax Assessments, SUNAT denied SMCV's income tax deductions for PTU, expenses accrued in prior years, and recreational expenses, as well as deductions for payments that SMCV recorded using the classification system applicable under the Stability Agreement.⁵⁴³ SUNAT did so on a blanket basis without even attempting to identify which deductions related to the Concentrator.⁵⁴⁴
- (c) Even though the Government never denied that the Stability Agreement applied to the investment in the leaching facilities, SUNAT assessed the following taxes from which SMCV was exempted by operation of the 1998 Stability Agreement against the *entire* Cerro Verde Mining Unit:
 - i. 2009–2013 TTNA;⁵⁴⁵
 - ii. 2007–2013 AIT; and⁵⁴⁶
 - iii. 2013 CMPF.⁵⁴⁷

125. As with Peru's other breaches of the Stability Agreement, these breaches likewise occurred when the relevant Tax Assessment became final and enforceable.

126. Peru concedes that SUNAT applied the non-stabilized regime to the leaching facilities in these assessments but attempts to place the blame for its arbitrary conduct on SMCV, asserting that SMCV "had to keep its accounts separate" and "it failed to do so."⁵⁴⁸ Peru is wrong, and its arguments to the contrary only emphasize the serious flaws in Peru's interpretation.

127. *First*, SMCV was not required to keep separate accounts for the leaching facilities.

- (a) As explained above, under Article 22 of the Regulations, only mining companies with multiple concessions or EAUs subject to different legal regimes—for example, stabilized

⁵⁴² See **CWS-4**, Choque I, ¶¶ 21-24; Memorial, **Annex A**: Administrative Proceedings; **CER-1**, Expert Report of Pablo Spiller and Carla Chavich ("Spiller and Chavich I"), Table 54.

⁵⁴³ See **CWS-4**, Choque I, ¶¶ 25-28; Memorial, **Annex A**: Administrative Proceedings.

⁵⁴⁴ See **CWS-4**, Choque I, ¶¶ 25-28; Memorial, **Annex A**: Administrative Proceedings; **CWS-4**, Spiller and Chavich, Table 54.

⁵⁴⁵ See Memorial, **Annex A**: Administrative Proceedings. See also **CWS-4**, Choque I, ¶¶ 29-32.

⁵⁴⁶ See Memorial, **Annex A**: Administrative Proceedings. See also **CWS-4**, Choque I, ¶¶ 29-32.

⁵⁴⁷ See Memorial, **Annex A**: Administrative Proceedings. See also **CWS-4**, Choque I, ¶¶ 29-32.

⁵⁴⁸ Counter-Memorial ¶¶ 391, 395.

and non-stabilized regimes or different stabilized regimes—were required to keep separate accounts.⁵⁴⁹

- (b) Nothing in Article 22 required a mining company to keep separate accounts for individual investments *within* a concession—because the Mining Law and Regulations did not contemplate the possibility of stability guarantees applying to an individual investment, rather than a concession or mining unit.⁵⁵⁰ Accordingly, SMCV rightly kept a single set of accounting records.⁵⁵¹

128. *Second*, while Peru admits that Peruvian law provided no official guidance on how SMCV should have distinguished between activities within its concession relating to the leaching facilities or the Concentrator, Peru asserts that it “left the choice up to the company.”⁵⁵² Peru and its experts thus argue that SMCV should have divided its accounting using an assortment of methods pulled from various unrelated strands of tax laws and regulations—namely, the sales criterion set out in Article 22 of the Regulations, the transfer pricing methods applicable to Articles 32.4 and 32-A of the Income Tax Law, and the GST allocation methods applicable to Article 5.10 of the General Sales Tax (GST) Regulations.⁵⁵³ This approach makes absolutely no sense.

- (a) Because the method used to divide SMCV’s accounting was an integral part of the tax calculation, it had to be clearly and expressly established in the relevant tax laws and regulations. As Prof. Hernández explains, under the fundamental taxation principles of certainty and predictability, “[e]very material aspect of a tax—including how it must be calculated—must be clearly and expressly defined in law.”⁵⁵⁴ Even Peru’s experts Mr. Bravo and Mr. Picón acknowledge that “it is not possible to extend the scope of tax regulations to different cases” because doing so “would violate the principle of legality of taxation which, in tax matters, is incorporated into Article 74 of the Political Constitution of Peru, according to which taxes may only be created, amended or repealed by law or by

⁵⁴⁹ See *supra* § II.A.1 (citing **CA-2**, Regulations, Article 22).

⁵⁵⁰ See *supra* § II.A.1; see also **CER-3**, Hernández I, ¶¶ 71-73; **CER-8**, Hernández II, ¶ 18; **CER-4**, Otto I, ¶ 40; **CER-9**, Otto II, ¶ 31; **CWS-15**, Choque II, ¶ 14.

⁵⁵¹ See **CWS-4**, Choque I, ¶ 15.

⁵⁵² Counter-Memorial ¶ 610; see also **RER-4**, Ralbovsky, ¶ 87 (“[A]ccounting practitioners and government authorities . . . have identified several methods to differentiate those mining costs effectively.”).

⁵⁵³ See **RER-3**, Bravo and Picón, ¶¶ 183-86; **RER-4**, Ralbovsky, ¶¶ 88, 90; see also Counter-Memorial ¶¶ 610-611.

⁵⁵⁴ **CER-8**, Hernández II, ¶ 17 (citing, *e.g.*, **CA-18**, Law of Administrative Procedure (25 January 2019), Article IV, § 1.1; **CA-53**, Political Constitution of Peru, Article 74).

legislative decree—and not by analogy.”⁵⁵⁵ None of the methods Peru and its experts proposed meet this standard.

- (b) Peru itself recognized that there was no regulatory framework governing accounting for different activities within the same concession when it issued the December 2019 amendments to Article 22 of the Regulations.⁵⁵⁶ As explained in detail above, the amended Article 22—introduced six years after the Stability Agreement’s 15-year term concluded—provided more detailed accounting guidance for mining companies to keep independent accounts for specific investments, and to distribute expenses and allocate sales between activities within the same concession.⁵⁵⁷ But no such guidance existed at the time the Stability Agreement was in force.
- (c) Further, each of the methods that Peru’s experts propose would have created serious implementation issues. The *sales criterion* could not apply to investments—such as technological improvements or new machinery—because investments do not necessarily generate sales by themselves.⁵⁵⁸ The *transfer pricing methods* did not exist under SMCV’s stabilized regime and, in any case, are meant for establishing arm’s-length prices for goods and services between related parties, not dividing the accounting of a single company, like SMCV.⁵⁵⁹ And the *GST allocation methods* are equally unsuitable because their purpose is to assign goods and services between joint venture parties, which is not what SMCV needed.⁵⁶⁰

⁵⁵⁵ **RER-3**, Bravo and Picón, ¶ 132.

⁵⁵⁶ See **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22.

⁵⁵⁷ See *supra* § II.A.1 (citing **CA-246**, Supreme Decree No. 021-2019-EM (28 December 2019), Article 22 (requiring that mining companies “keep independent accounts for each one of said activities [in concessions or Economic Administrative Units],” by “distribut[ing] [expenses] among [activities] in proportion to the net sales of the mining substances that are extracted from the concession(s) or Economic Administrative Unit(s)” and providing guidance on accounting in situations where “there are no sales linked to some or any of the mentioned activities” and “[i]n cases in which the indicated proportionality cannot be established”).

⁵⁵⁸ See **CER-8**, Hernández II, ¶ 18 (discussing the amendments to Article 22 introduced in 2019, after SMCV’s Stability Agreement completed its term, which for the first time specified how “[e]xpenses that are not directly identifiable with the [stabilized] *activities* or with [non-stabilized] *activities*” should be divided); **CER-3**, Hernández I, § V. Cf. **RER-3**, Bravo and Picón, ¶ 183; **RER-4**, Ralbovsky, ¶ 88.

⁵⁵⁹ See **CER-8**, Hernández II, ¶ 18 (“SMCV could not have used the transfer pricing methods to divide its accounting because they did not even exist on 6 May 1996—the date on which the legal regime was stabilized for SMCV . . . [and] the relevant laws and regulations do *not* provide that in calculating [Income Tax, AIT, TTNA, and CMPF] the transfer pricing methods should be used to divide common costs or assets.”). Cf. **RER-3**, Bravo and Picón ¶¶ 185, 189.

⁵⁶⁰ See **CER-8**, Hernández II, ¶ 18 (“SMCV could not have used the transfer pricing methods to divide its accounting because they did not even exist on 6 May 1996—the date on which the legal regime was stabilized for SMCV Additionally, SMCV could not have used the transfer pricing methods to divide its accounting

129. *Third*, SMCV provided SUNAT all its accounting information. Contrary to Peru’s attempt to blame its arbitrary conduct on SMCV’s alleged “failure” to provide information, SUNAT was not missing any of SMCV’s accounting information; otherwise, it could not have issued any of the Royalty or SMT Assessments, which distinguished between the leaching facilities’s and the Concentrator’s activities.⁵⁶¹ Peru accuses SMCV for failing to keep separate accounts for the leaching facilities, and imposed separate penalties on that basis, but fails to point to a single law or regulation that would have allowed SMCV to provide the information that SUNAT requested. Peru’s specious attempts to justify SUNAT’s arbitrary actions by blaming SMCV make this clear:

- (a) Peru’s assertion that its arbitrary 2012 and 2013 Income Tax Assessments were caused by SMCV’s alleged failure to track certain assets to the Concentrator after 2011 is unfounded.⁵⁶² The relevant tax laws and regulations did not require any particular method of tracking assets, and SUNAT could therefore not deny on that basis SMCV the guarantees to which it was legally entitled—even under Peru’s own current position.
- (b) Peru mischaracterizes Mr. Choque’s testimony when it states that he “admits that, for those years [2007, 2008, 2012 and 2013], 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[.]”⁵⁶³ But that is not what Mr. Choque testified. Rather, Mr. Choque explained that “[i]n the 2007, 2008, 2012 and 2013 income tax assessments, SMCV was *unable* to provide SUNAT with the information distinguishing between stabilized and non-stabilized PTU payments because...*neither* the legal framework *nor* SUNAT provided any criteria on how to do so.”⁵⁶⁴ Moreover, Mr. Choque testified that in the 2009 and 2010 income tax assessments, SUNAT arbitrarily applied the non-stabilized regime for PTU deductions to *some* of the PTU payments but not others, without making any attempt to identify the

for purposes of Income Tax, AIT, TTNA, and CMPF because the relevant laws and regulations do not provide that in calculating these taxes the transfer pricing methods should be used to divide common costs or assets.”); *see also* **CWS-4**, Choque I, ¶¶ 15-21. *Cf.* **RER-3**, Bravo and Picón, ¶¶ 183-86; **RER-4**, Rabovsky, ¶¶ 88, 90.

⁵⁶¹ Counter-Memorial ¶¶ 390, 394, 398; Memorial, **Annex A**: Administrative Proceedings (listing all SUNAT Royalty and Special Mining Tax Assessments).

⁵⁶² Counter-Memorial ¶ 396.

⁵⁶³ Counter-Memorial ¶ 397.

⁵⁶⁴ **CWS-4**, Choque I, ¶ 28 (emphasis added).

workers for whom it had rejected PTU deductions, or to explain how it had determined which PTU payments were not entitled to stability.⁵⁶⁵

- (c) Contrary to Peru’s assertion, SMCV did not “fail” to provide anything; rather, as explained, SMCV *could not* divide its accounting because the Government itself failed to provide a method SMCV could use to do so.⁵⁶⁶ If, as Peru and its tax law experts argue, the applicable legal framework provided the method needed to divide SMCV’s accounting, SUNAT itself should have divided SMCV’s accounting, as it already had all of SMCV’s accounting information.⁵⁶⁷ As Prof. Hernández explains, “SUNAT can only assess taxes based on verifiable facts, not presumptions.”⁵⁶⁸ For this reason, SUNAT has the power to take all the measures it deems necessary to ascertain the relevant facts for imposing taxes, regardless of the information the taxpayer provides.⁵⁶⁹ Thus, SUNAT should have taken whatever measures it thought necessary to divide SMCV’s accounting according to whatever criteria SUNAT wrongly believed applied and tax SMCV only for the operations and assets related to the Concentrator.⁵⁷⁰
- (d) Instead, SUNAT opted for the easiest, most arbitrary and lucrative option: to illegally presume that SMCV’s entire operations and assets were not stabilized and tax SMCV for its entire mining unit.⁵⁷¹ In doing so, SUNAT effectively punished SMCV for the

⁵⁶⁵ **CWS-4**, Choque I, ¶ 28 (citing **Ex. CE-115**, SUNAT Assessment Resolution No. 052-003-00011921 (30 October 2014) (2009 Income Tax); **Ex. CE-123**, SUNAT Assessment Resolution No. 052-003-0012411 (13 February 2015) (2010 Income Tax); **Ex. CE-131**, SUNAT Intendancy Resolution No. 055-014-0002145 (23 July 2015) (2009 Income Tax), pp. 266-271; **Ex. CE-134**, SUNAT Intendancy Resolution No. 055-014-0002255 (4 November 2015) (2010 Income Tax), pp. 275-281).

⁵⁶⁶ See Memorial ¶¶ 346-47; **CWS-4**, Choque I, ¶¶ 15-16, 21, 28, 31.

⁵⁶⁷ See **CER-8**, Hernández II, ¶ 19; **CER-3**, Hernández I, ¶ 79 (“If there had been any official criterion for dividing costs, it is reasonable to assume that SUNAT would have used it to divide the non-processing operations and mixed assets between the Leaching Plant and the Concentrator.”).

⁵⁶⁸ **CER-8**, Hernández II, ¶ 20.

⁵⁶⁹ **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Article 62 (“The audit power of the Tax Administration is exercised in a discretionary matter . . . [t]he exercise of the audit function includes the inspection, investigation and checking of compliance with tax obligations, including those matters enjoying tax immunity, exemption or benefits,” including “require[ing] tax debtors to produce and/or submit” documents, taking inventories, inspections, etc.); see also **CER-8**, Hernández II, ¶ 20; **CA-18**, Law of Administrative Procedure (January 25, 2019), Article IV, Section 1.3 (principle of timely official action for administrative authorities); *id.* Section 1.11 (principle of efficacy for administrative authorities).

⁵⁷⁰ See **CER-8**, Hernández II, ¶ 20.

⁵⁷¹ See **CER-8**, Hernández II, ¶ 20.

Government's failure to establish a legally applicable method to divide SMCV's accounting between its different operations.⁵⁷²

C. PERU BREACHED ARTICLE 10.5 OF THE TPA

130. Freeport explained in its Memorial that, in addition to violating its obligations under the Stability Agreement, Peru also violated its obligations under Article 10.5 of the TPA to ensure fair and equitable treatment to Freeport's investment. Specifically:

- (a) Peru violated Article 10.5 of the TPA each time the Royalty Assessments became final and enforceable because, after SMCV had decided to make its US\$850 million investment in the Concentrator, the Government changed its long-held position that stability guarantees applied to concessions or mining units to the novel and much more restrictive position that the stability guarantees applied only to the initial investment set forth in the feasibility study and hence not to SMCV's Concentrator. The Government did so in response to political pressure in utter disregard of basic notions of transparency, and in contravention of SMCV's and Freeport's legitimate expectations. The Government then applied that novel position arbitrarily and inconsistently when confirming Royalty Assessments against SMCV. Moreover, SMCV's challenges to the Royalty Assessments before the Tax Tribunal were marred by serious procedural irregularities and due process violations.
- (b) Peru also violated Article 10.5 of the TPA each time the Government arbitrarily and unreasonably failed to waive the penalties and interest assessed on the royalties and taxes even though Peruvian law and fundamental principles of fairness and equity required the Government to do so, because SMCV's position that the stability guarantees covered the Concentrator was, at a very minimum, based on a reasonable interpretation of the Mining Law and Regulations.
- (c) Peru violated Article 10.5 of the TPA when, after assessing Royalties for Q4 2011 and 2012, the Government arbitrarily and unreasonably refused to reimburse SMCV for part of the GEM payments SMCV had made. SMCV was entitled to reimbursement of the GEM payments as a matter of Peruvian law and general principles of fairness and equity because the Government had assured SMCV that, if it made GEM payments, it would not be assessed Royalties, but several years later nevertheless assessed Royalties against SMCV.

⁵⁷² See CER-8, Hernández II, ¶ 20.

131. Peru attempts to rebut Freeport’s claims by (i) arguing that the customary international law minimum standard of treatment has not evolved in the last 100 years, and accordingly only prohibits conduct amounting to “bad faith” or “willful misconduct;” (ii) portraying the fair and equitable treatment obligation as an excessively high standard even if it is not limited to Peru’s inappropriately narrow formulation of the minimum standard of treatment—despite the fact that the Parties generally agree on the types of conduct that violate this obligation; and (iii) recasting the Government’s actions as reasonable, non-arbitrary government conduct even though they were anything but. Peru fails in each of these attempts.

1. The Customary International Law Minimum Standard of Treatment’s Fair and Equitable Treatment Obligation Is Materially Similar to the Broadly-Recognized Autonomous Treaty Standard of Fair and Equitable Treatment

132. Article 10.5 of the TPA requires Peru to observe, among others, “treatment in accordance with customary international law, including fair and equitable treatment.”⁵⁷³ As Freeport explained in its Memorial, this customary obligation of fair and equitable treatment is today understood to be “not materially different” from the treaty-based obligation to afford “fair and equitable treatment”—a position that is clearly supported by the weight of authority on this issue, including a number of authorities on which Peru itself relies.⁵⁷⁴ However, Peru nevertheless argues that the fair and equitable treatment obligation under customary international law is limited to the “particularly egregious state conduct” described by the 1926 decision in *Neer v. Mexico*, which Peru claims does not include protections against, among others, arbitrary conduct, frustration of legitimate expectations, and inconsistent and non-transparent conduct.⁵⁷⁵ Peru’s argument has been repeatedly and resoundingly rejected by tribunals

⁵⁷³ **CA-10**, United States-Peru Trade Promotion Agreement, Art. 10.5.

⁵⁷⁴ Memorial ¶ 361. See **RA-33**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL/NAFTA), Partial Award (13 November 2000) (Schwartz, Hunter, Chiasson), ¶¶ 259, 265 (noting that “[t]he minimum standard of treatment provision of the NAFTA is similar to clauses contained in BITs” and recognizing the “breadth of the ‘minimum standard’, including its ability to encompass more particular guarantees”); **RA-57**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) (Landau, Born, Hanotiau), ¶ 592 (“[T]he Arbitral Tribunal also accepts, as found by a number of previous arbitral tribunals and commentators, that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law.”); **RA-70**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (van den Berg, Gómez Pinzón, Kaufmann-Kohler), ¶¶ 336-37 (“The Tribunal concurs . . . with the conclusion that the standards [under an autonomous FET provision and under customary international law] are essentially the same.”); **RA-74**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (Stern, Kaufmann-Kohler, Veeder), ¶ 7.158 (“In regard to the development of investment protection in treaty law and customary international law, the Tribunal considers that the content of this standard is, at the present time, similar to the other standards expressly mentioned in Article 10(1) ECT, which also exist as standards of protection in customary international law.”).

⁵⁷⁵ Counter-Memorial ¶¶ 624-26.

interpreting investment treaties that incorporate the customary international law minimum standard of treatment.⁵⁷⁶ Further, in its attempt to prove otherwise, Peru repeatedly mischaracterizes or outright ignores the arguments and authorities Freeport already submitted with its Memorial, which clearly demonstrate that Peru’s attempts to radically limit Article 10.5’s protective scope are meritless.

133. *First*, Peru attempts to characterize Freeport as “ignor[ing] the actual text of Article 10.5,” and argues that “[t]o adopt Claimant’s position that the FET standard in the TPA is the same as an autonomous FET standard would deprive . . . the phrase ‘in accordance with customary international law’ and . . . the entirety of Article 10.5.2 of the TPA, of their plain and ordinary meaning.”⁵⁷⁷ Peru further alleges that the fact that Article 10.5 “does not create substantive rights beyond those guaranteed under the customary international law minimum standard . . . is fatal to most of Claimant’s FET claims.”⁵⁷⁸ This is simply wrong, and completely mischaracterizes Freeport’s arguments. There is no dispute that Article 10.5 incorporates by reference obligations under customary international law and does not create an autonomous treaty-based standard.⁵⁷⁹ Nor does Freeport suggest, as Peru argues, that the tribunal should “appl[y] an autonomous FET standard to a treaty provision . . . explicitly limited to the MST.”⁵⁸⁰ Rather, Freeport’s position is that the *content* of the customary international law minimum standard of treatment’s fair and equitable treatment obligation is, today, largely co-extensive with the “core components” of fair and equitable treatment that tribunals have repeatedly recognized when interpreting autonomous, treaty-based fair and equitable treatment provisions.⁵⁸¹ This argument is fully

⁵⁷⁶ See **CA-391**, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), pp. 236-38 (“Although respondent states have referred to [*Neer*] as reflecting the minimum standard of treatment . . . the *Neer* case involved the question of state conduct in response to criminal acts of private parties, and not the treatment by the state itself of foreigners or their property. In *Neer*, the Commission did not purport to provide an exhaustive definition of the minimum standard of treatment. The *Neer* decision is therefore of little value as an articulation of the minimum standard for the purpose of IIA claims . . . IIA tribunals have confirmed that the minimum standard of treatment is constantly in the ‘process of development’ and has continued to evolve since 1926” and “include[s], but not exhaustively: denial of justice, lack of due process, lack of due diligence, and instances of arbitrariness and discrimination.”); **CA-383**, Jan Paulsson and Georgios Petrochilos, *Neer-ly Mised?*, 22 ICSID REV. – FOREIGN INV. L.J. (2007), pp. 242, 247, 257 (“[N]one of the commentaries or relevant decisions may be fairly read as suggesting that *Neer* is controlling in all cases where state conduct is alleged to have fallen below the minimum standard” and “[t]here should be no doubt that, to the extent the customary-law minimum standard has any role to play in the interpretation of investment treaties, the *Neer* formula is of limited import. The majority of modern claims concern administrative or legislative acts . . . *Neer* was on its own terms inapplicable in such cases—in 1926 and *a fortiori* today.”).

⁵⁷⁷ See Counter-Memorial ¶¶ 618-19.

⁵⁷⁸ See Counter-Memorial ¶ 617.

⁵⁷⁹ **CA-10**, United States-Peru Trade Promotion Agreement, Art. 10.5, Art. 10.5.2.

⁵⁸⁰ Cf. Counter-Memorial ¶ 621.

⁵⁸¹ See Memorial ¶¶ 361-62; **CA-269**, *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Gómez) (“Waste Management II Award”), ¶ 98 (“[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and

consistent with the text of Article 10.5, which specifically references “fair and equitable treatment” as a component of the minimum standard of treatment.⁵⁸²

134. *Second*, Peru’s argument that the “full scope” of the minimum standard of treatment that states must provide to investors and their investments under customary international law remains the 1926 *Neer* tribunal’s standard—which prohibits conduct that amounts “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”⁵⁸³—has been repeatedly rejected by tribunals and authorities interpreting the minimum standard of treatment. Instead, tribunals have consistently articulated the minimum standard of treatment under customary international law as protecting against state conduct that is arbitrary, non-transparent, involves a lack of due process, and/or is inconsistent with representations made by the state which were reasonably relied upon—in other words, that it is not materially different from the treaty-based fair and equitable treatment obligation.

- (a) To begin with, Peru ignores the express language of Article 10.5, which establishes that “fair and equitable treatment and full protection and security” are *part of* the customary international law minimum standard of treatment. Article 10.5 itself thus makes clear that the customary standard today does not remain frozen in time to *Neer*, since both of these concepts are concepts that have developed since that time for the protection of foreign investments.⁵⁸⁴
- (b) Peru provides only one decision that purports to adopt the *Neer* standard; namely, the 2009 decision of the tribunal in *Glamis Gold*, which interpreted the reference to the customary international law minimum standard of treatment in NAFTA’s Article 1105.⁵⁸⁵ Yet even the *Glamis* tribunal recognized that although the “fundamentals” of the *Neer* standard of review may apply today, the minimum standard of treatment has evolved to prohibit additional conduct, including the “repudiation” of legitimate expectations and

harmful to the claimant if the conduct 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 manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”).

⁵⁸² **CA-10**, United States-Peru Trade Promotion Agreement, Art. 10.5, Art. 10.5.2.

⁵⁸³ Counter-Memorial ¶¶ 625-26.

⁵⁸⁴ **CA-10**, United States-Peru Trade Promotion Agreement, Art. 10.5 (“Each Party shall accord to covered investments treatment in accordance with customary international law, *including* fair and equitable treatment and full protection and security.”) (emphasis added).

⁵⁸⁵ **RA-30**, *Glamis Gold v. USA* Award, ¶¶ 614, 616.

State conduct that “shock[s]” the contemporary international community but “did not offend us previously.”⁵⁸⁶ The tribunal likewise acknowledged that customary international law had evolved since *Neer* by holding that “a finding of bad faith is not a requirement for a breach of Article 1105(1).”⁵⁸⁷ The other two decisions on which Peru relies, *Cargill* and *Al Tamimi*, did not actually adopt the *Neer* standard, but, as Peru itself recognizes, merely “looked to *Neer* to explain the scope of the obligation” before acknowledging that the minimum standard has evolved since *Neer*.⁵⁸⁸

- (c) Further, Peru conveniently ignores the fact that the heavy weight of authority in cases interpreting the minimum standard of treatment—including the cases on which it relies—have found that the customary international law minimum standard of treatment today has evolved beyond the *Neer* standard to protect a broader range of conduct than simply conduct amounting to “bad faith” or “willful neglect,” and in so doing, have directly rejected Peru’s interpretation.⁵⁸⁹ For example, in its September 2021 Award interpreting

⁵⁸⁶ **RA-30**, *Glamis Gold v. USA* Award, ¶ 616; *id.* ¶ 627 (“[A] breach may be exhibited by . . . the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations.”).

⁵⁸⁷ **RA-30**, *Glamis Gold v. USA*, Award, ¶ 22 (“[A]lthough *the standard* for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under *Neer*, it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously.”).

⁵⁸⁸ See Counter-Memorial ¶ 626; **RA-29**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (McRae, Caron, Pryles) (“*Cargill Award*”), ¶ 282 (“[T]he Parties in this proceeding and this Tribunal agree with the view that the customary international law minimum standard of treatment may evolve in accordance with changing State practice manifesting to some degree expectations within the international community. As the world and, in particular, the international business community become ever more intertwined and interdependent with global trade, foreign investment, BITs and free trade agreements, the idea of what is the minimum treatment a country must afford to aliens is arising in new situations simply not present at the time of the *Neer* award which dealt with the alleged failure to properly investigate the murder of a foreigner.”); **RA-28**, *Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015) (Thomas, Brower, Williams), ¶ 383 (recognizing that “a number of subsequent arbitral decisions have acknowledged that with the passage of time the [*Neer*] standard has likely advanced beyond these basic requirements”).

⁵⁸⁹ See, e.g., **RA-53**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 January 2003) (Lamm, Mestral, Feliciano) (“*ADF Group Award*”), ¶ 179 (“[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”); **RA-6**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (Schwebel, Crawford, Stephen) (“*Mondev Award*”), ¶ 116 (“*Neer* and like arbitral awards were decided in the 1920s, when the status of the individual in international law, and the international protection of foreign investments, were far less developed than they have since come to be. In particular, both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable

NAFTA Article 1105, the tribunal in *Lion Mexico* noted that “reliance on [*Neer*] has rightfully declined in the recent years” because, *inter alia*, “[o]ther tribunals have agreed that the *Neer* standard may have reflected the minimum standard—but only as of 1927 and not in contemporary times” and “the facts in *Neer* . . . are not apposite when discussing treatment of aliens under the FET standard.”⁵⁹⁰ The *Bilcon/Clayton* tribunal likewise observed that NAFTA tribunals have “tended to move away from the position more recently expressed in *Glamis*, and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors” and accordingly concluded that “the international minimum standard . . . has evolved in the direction of increased investor protection.”⁵⁹¹ Tribunals interpreting provisions that directly incorporate the customary international law minimum standard of treatment in other treaties have arrived at the same conclusion, adopting the view that “the standard today is broader than that defined in the *Neer* case.”⁵⁹² Peru essentially

need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”); **RA-35**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006) (Ariosa, Wälde, van den Berg), ¶ 194 (noting the “evolution of customary international law since decisions such as *Neer*” and concluding that “the content of the minimum standard should not be rigidly interpreted and it should reflect evolving international customary law”); *see also* **RA-30**, *Glamis Gold v. USA* Award, ¶ 22 (acknowledging that the minimum standard evolves over time and noting that “it is entirely possible that, as an international community, we may be shocked by State actions now that did not offend us previously”).

⁵⁹⁰ **CA-286**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021) (Fernández-Armesto, Cairns, Boisson de Chazournes), ¶¶ 253-58. *See also* **CA-280**, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (27 September 2016) (Cremades, Bishop, Heiskanen) (“*Windstream* Award”), ¶ 352 (“[T]he *Neer* tribunal itself did not have any direct evidence relating to State practice before it. The Tribunal is therefore unable to determine the content of the customary international law minimum standard of treatment by revisiting the evidence before the *Neer* tribunal. Nor did the *Neer* decision deal with the treatment of foreign investors, and consequently the factual circumstances of the case are in any event not directly relevant here.”).

⁵⁹¹ **CA-278**, *Clayton et al. v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (McRae (dissenting), Schwartz, Simma) (“*Bilcon/Clayton v. Canada* Award”), ¶¶ 434-38.

⁵⁹² *See, e.g.*, **CA-285**, *Eco Oro Minerals Corp., v. Colombia*, ICSID Case No. ARB/16/341, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021) (Blanch, Naón (dissenting in part on other grounds), Sands (dissenting in part on other grounds)) (“*Eco Oro* Decision on Jurisdiction, Liability, and Directions on Quantum), ¶¶ 700, 744 (interpreting Article 805 of the Canada-Colombia FTA, which is substantially similar to Article 10.5 of the Peru-US FTA, and noting that “the Tribunal does not accept that the meaning of MST under customary international law must remain static. The meaning must be permitted to evolve as indeed international customary law itself evolves”); **CA-276**, *Railroad Development Corp. v. Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012) (Crawford, Eizenstat, Sureda) (“*RDC* Award”), ¶¶ 212, 218 (reviewing the “extensive[]” discussion of the minimum standard in NAFTA arbitrations to interpret Article 10.5 of DR-CAFTA, which is identical to Article 10.5 of the Peru-US FTA, and concluding that “the minimum standard of treatment is ‘constantly in a process of development,’ including since *Neer*’s formulation”). *See also id.* ¶ 216 (“It is ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a

ignores these cases, despite the fact that Freeport included the vast majority of them in its Memorial, and despite the fact that they clearly interpreted and applied the *minimum standard of treatment* rather than an autonomous treaty provision—exactly what the Tribunal is tasked with here.⁵⁹³

- (d) Moreover, these cases make clear that, as Freeport already explained, the *content* of the fair and equitable treatment obligation that forms part of the minimum standard of treatment does not differ significantly from the content of the treaty-based fair and equitable treatment obligation as it is consistently interpreted by tribunals.⁵⁹⁴ Peru itself implicitly acknowledges this fact by relying on the *Waste Management* tribunal’s articulation of the standard—a case which addressed the *minimum standard of treatment*, not a treaty-based autonomous fair and equitable treatment standard—to describe the content of the fair and equitable treatment obligation.⁵⁹⁵ In particular, the *Waste Management* tribunal confirmed that this obligation includes protection against conduct 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” such as “a complete lack of transparency and candor in an administrative process.”⁵⁹⁶ The tribunal recognized that “[i]n applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”⁵⁹⁷ Subsequent tribunals

sense of obligation. By the strict standards of proof of customary international law applied in *Glamis Gold, Neer* would fail to prove its famous statement . . . to be an expression of customary international law.”).

⁵⁹³ See e.g., Counter-Memorial ¶ 634, n. 1333 (recognizing that the *RDC* tribunal “consider[ed] content of minimum standard of treatment”); *id.* ¶ 636, n.1350 (acknowledging that cases cited by claimant involve alleged breaches of the minimum standard of treatment); *id.* ¶¶ 738-40 (attempting to factually distinguish *Lion Mexico* without contesting that the case interprets and applies the minimum standard of treatment).

⁵⁹⁴ See e.g., **CA-285**, *Eco Oro* Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 754 (“[C]oncepts such as transparency, stability and the protection of the investor’s legitimate expectations play a central role in defining the FET standard, as does procedural or judicial propriety and due process and fairness, refraining from taking arbitrary or discriminatory measures, or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment.”); **CA-278**, *Bilcon/Clayton v. Canada* Award, ¶ 455 (“The reasonable expectations of the investor are a factor to be taken into account in assessing whether the host state breached the international minimum standard of fair treatment under Article 1105 of NAFTA.”).

⁵⁹⁵ Counter-Memorial ¶ 641 (relying on **CA-269**, *Waste Management II* Award to articulate the content of the fair and equitable treatment obligation).

⁵⁹⁶ Counter-Memorial ¶ 641 (citing **CA-269**, *Waste Management II* Award, ¶ 98).

⁵⁹⁷ **CA-269**, *Waste Management II* Award, ¶ 98.

interpreting the minimum standard of treatment have repeatedly reaffirmed these aspects of its fair and equitable treatment obligation.⁵⁹⁸

- (e) Given this consistent articulation of the fair and equitable treatment obligation of the minimum standard of treatment, tribunals have repeatedly recognized that it is not materially different from the general consensus as to the content of treaty-based fair and equitable treatment provisions, as Freeport explained.⁵⁹⁹ Peru attempts to ignore this weight of authority by arguing that none of these authorities “actually applied an autonomous FET standard to a treaty provision that was explicitly limited to the MST.”⁶⁰⁰ But this argument misses the point: that the *content* of the minimum standard of treatment applied in the vast majority of cases interpreting that obligation, including multiple cases Freeport cited in its Memorial, is substantially similar to the treaty-based fair and equitable treatment obligation, meaning among others that cases interpreting a treaty-based obligation may be instructive to the Tribunal by analogy, particularly where the tribunal equates the content of the treaty-based obligation with the minimum standard of treatment.⁶⁰¹

135. *Finally*, Peru argues that Freeport has not demonstrated that the minimum standard of treatment’s fair and equitable treatment obligation prohibits arbitrary, inconsistent, and non-transparent

⁵⁹⁸ See, e.g., **CA-285**, *Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum*, ¶ 754; **CA-202**, *TECO Guatemala Holdings, LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award (19 December 2013) (Mourre, Park, von Wobeser) (“*TECO Award*”), ¶ 455, n.433 (agreeing with the standard articulated by the *Waste Management II* tribunal); *id.* ¶ 457 (“[T]he Arbitral Tribunal considers that, pursuant to Article 10.5 of CAFTA-DR, a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard.”); **CA-276**, *RDC Award*, ¶¶ 212, 219 (applying the DR-CAFTA and finding “that *Waste Management II* persuasively integrates the accumulated analysis of prior NAFTA Tribunals and reflects a balanced description of the minimum standard of treatment”).

⁵⁹⁹ See Memorial ¶¶ 361-62 (citing **CA-237** *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (27 July 2008) (Hanotiau, Lalonde, Boyd) (“*Rumeli Award*”), ¶ 611 (adopting “the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law”). See also *supra* ¶ 125 (citing **RA-57**, *Biwater Gauff Award*, ¶ 592 (same)).

⁶⁰⁰ Counter-Memorial ¶ 621.

⁶⁰¹ See e.g., **CA-279**, *Murphy Exploration & Production Co. Int'l v. Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (6 May 2016) (Hobér, Hanotiau, Derains) (“*Murphy Partial Final Award*”), ¶ 208 (analyzing claims for breach of fair and equitable treatment on the express condition that “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”); **CA-108**, *Occidental Exploration & Production Co. v. Ecuador*, LCIA Case No. UN3467, Award (1 July 2004) (Sweeney, Brower, Vicuña) (“*Occidental Award*”), ¶ 190 (“The Tribunal is of the opinion that in the instant case the Treaty standard is not different from that required under international law . . . [t]o this extent the Treaty standard can be equated with that under international law as evidenced by the opinions of the various tribunals cited above. It is also quite evident that the Respondent's treatment of the investment falls below such standards.”).

conduct and requires Peru not to frustrate an investor’s legitimate expectations because Freeport has not submitted primary evidence of state practice and *opinio juris*. Given the overwhelming weight of decisions to the contrary, this argument is entirely unfounded.

- (a) Contrary to Peru’s proposed approach, tribunals interpreting the minimum standard of treatment under NAFTA, CAFTA and other treaties routinely rely on prior arbitral decisions that have considered the same issue as authoritative distillations of the customary international law standard.⁶⁰² Even the *Glamis Gold* tribunal itself, on which Peru relies so heavily, acknowledged that it could look “to arbitral awards—including BIT awards—that seek to be understood by reference to the customary international law standard” in order to assess the content of that standard, and then did exactly that.⁶⁰³ In an effort to avoid the clear and consistent weight of tribunal decisions supporting Freeport’s position, Peru attempts to conflate the *legal* elements of the creation or evolution of customary international law with the *evidentiary* burden for arbitration claimants demonstrating the content of a treaty provision incorporating the minimum standard of treatment. But as tribunals have repeatedly recognized—again, including the authorities on which Peru relies—claimants may demonstrate the content of that standard by relying on prior arbitral decisions as an “efficient manner” of showing “what it believes to be the law.”⁶⁰⁴
- (b) As explained above and discussed in further detail with respect to the specific elements of the standard below, prior arbitral decisions interpreting the content of the minimum

⁶⁰² See **CA-278**, *Bilcon/Clayton v. Canada* Award, ¶ 411 (“In interpreting the international minimum standard, the Tribunal also drew guidance from earlier NAFTA Chapter Eleven decisions.”); **RA-53**, *ADF Group* Award, ¶ 184 (“[A]ny general requirement to accord ‘fair and equitable treatment’ and ‘full protection and security’ must be disciplined by being based upon State practice *and judicial or arbitral caselaw* or other sources of customary or general international law.”) (emphasis added); **CA-269**, *Waste Management II* Award, ¶ 98 (surveying prior arbitral awards and articulating minimum standard of treatment based on “the S.D. Myers, Mondev, ADF and Loewen cases”); **CA-202**, *TECO* Award, ¶ 455 (agreeing “with the many arbitral tribunals and authorities that have confirmed [] the content of the minimum standard of treatment in customary international law”); **CA-276**, *RDC* Award, ¶ 219 (adopting same approach).

⁶⁰³ See **RA-30**, *Glamis Gold v. USA* Award, ¶ 611; Counter-Memorial ¶ 620.

⁶⁰⁴ **CA-276**, *RDC* Award, ¶ 217 (“[A]s such, arbitral awards do not constitute State practice, but it is also true that parties in international proceedings use them in their pleadings in support of their arguments of what the law is on a specific issue. There is ample evidence of such practice in these proceedings. It is an efficient manner for a party in a judicial process to show what it believes to be the law.”). See also, e.g., **RA-30**, *Glamis Gold v. USA* Award, ¶ 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.”); **RA-29**, *Cargill* Award, ¶¶ 277-78 (“[T]he writings of scholars and the decisions of tribunals may serve as evidence of custom.”).

standard of treatment have confirmed that among others, it protects legitimate expectations,⁶⁰⁵ prohibits arbitrary, non-transparent and inconsistent conduct⁶⁰⁶ and requires due process in judicial and administrative proceedings.⁶⁰⁷

2. The Fair and Equitable Treatment Obligation Requires States to Honor Investors' Legitimate Expectations and Prohibits Arbitrary, Unreasonable, Inconsistent and Non-Transparent Conduct and Conduct that Violates Due Process

136. Peru argues that even if the content of the fair and equitable treatment obligation is consistent with Freeport's articulation of the standard—namely, that its interrelated obligations include the requirement that the state honor investors' legitimate expectations and refrain from arbitrary or unreasonable conduct, act with reasonable consistency and transparency and ensure procedural propriety and due process—Peru has complied with that obligation.⁶⁰⁸ In so doing, Peru takes great pains to portray this as a heightened standard requiring the demonstration of “severe” or “willful” misconduct, or as a “high bar.” However, the cases on which Peru relies make clear that no such “heightened” standards are

⁶⁰⁵ See *supra* ¶¶ 134(d), n.594 (citing **CA-278**, *Clayton v. Canada Award*, ¶ 455); *id.* n.594 (citing **CA-285**, *Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum*, ¶ 754); **RA-30**, *Glamis Gold v. USA Award*, ¶ 22 (“[A] breach may be exhibited by . . . the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations.”) (emphasis original); **CA-277**, *Abengoa, S.A. et al. v. Mexico*, ICSID Case No. ARB(AF)/09/2, Award (18 April 2013) (Siquieros, Fernández-Armesto, Mourre) (“*Abengoa Award*”), ¶ 642 (actions that “arbitrarily reverse previous or preexisting decisions or approvals issued by the State upon which the investor relied and based on the assumption of its commitments, is contrary to the minimum standard of treatment under customary international law”); **CA-269**, *Waste Management II Award*, ¶ 98 (“In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.”); **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 (22 May 2012) (Sands, Janow, van Houtte), ¶ 152 (determining “[o]n the basis of the NAFTA case-law and the parties’ arguments” that “in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and (ii) were, by reference to an objective standard, reasonably relied on by the investor, and (iii) were subsequently repudiated by the NAFTA host State”).

⁶⁰⁶ See *supra* ¶¶ 134(d), n.594 (citing **CA-285**, *Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum*, ¶ 754); **RA-29**, *Cargill Award*, ¶ 285 (“As outlined in the *Waste Management II* award quote above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome.”); **CA-269**, *Waste Management II Award*, ¶ 98 (referring to “a complete lack of transparency or candour in an administrative process” as part of the MST); **CA-288**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (Simma, Vicuña, Fernández-Armesto), ¶¶ 520-24 (finding that treaty’s fair and equitable treatment provision should be interpreted as providing only the customary international law minimum standard of treatment and determining that “whether the State has respected the principles of due process and transparency when adopting the offending measures” is a relevant component of the standard).

⁶⁰⁷ See *e.g.*, **CA-202**, *TECO Award*, ¶ 457 (“[T]he Arbitral Tribunal considers that, pursuant to Article 10.5 of CEFTA-DR, a lack of due process in the context of administrative proceedings such as the tariff review process constitutes a breach of the minimum standard.”).

⁶⁰⁸ See Memorial ¶ 361.

appropriate, and the distinctions Peru attempts to draw with respect to individual aspects of the obligation are largely distinctions without a difference.

137. *First*, Peru’s attempt to stretch the fair and equitable treatment obligation into one requiring “sever[e]” conduct or a showing of “wilful neglect of duty, an insufficiency of action falling *far below* international standards, or even *subjective bad faith*” is inconsistent with the bulk of fair and equitable treatment decisions, including those on which Peru relies, and is simply another attempt to restrict the fair and equitable treatment obligation to the 100-year old *Neer* standard.⁶⁰⁹

- (a) As Freeport explained in its Memorial, there is a “consensus” in arbitral jurisprudence that the “core components of FET” include “protection against conduct that is arbitrary, unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency.”⁶¹⁰ While Peru does not appear to contest this articulation of the standard in principle, it insists that the fair and equitable treatment obligation only prohibits conduct of a certain “severity.”⁶¹¹ Peru does not define “severity,” but argues that “not every act that could possibly be labeled as minimally ‘unfair’ will constitute a

⁶⁰⁹ See Counter-Memorial ¶¶ 640-41 (citing **RA-56**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) (Fortier, Heth, van den Berg) (“*Genin Award*”), ¶ 367) (emphasis added).

⁶¹⁰ **CA-234**, *Deutsche Telekom v. The Republic of India*, PCA Case No. 2014-10, Interim Award (13 December 2017) (Kaufmann-Kohler, Price, Stern) (“*Deutsche Telekom Interim Award*”), ¶ 336. See Memorial ¶¶ 361-65; *supra* ¶ 134(d), ns.594-98 (summarizing prior arbitral decisions interpreting the content of the minimum standard of treatment and finding that it protects legitimate expectations, prohibits arbitrary, non-transparent and inconsistent conduct and requires due process in judicial and administrative proceedings); **CA-269**, *Waste Management II Award*, ¶ 98 (“[T]he 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 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 complete lack of transparency and candour in an administrative process.”); **CA-276**, *RDC Award*, ¶¶ 219, 234-35 (finding a breach of MST for conduct that was “arbitrary, grossly unfair, [and] unjust”) (internal quotations omitted); **CA-277**, *Abengoa Award*, ¶ 651 (finding a breach of MST due to inconsistent and arbitrary conduct and actions “contradictory to the positions previously taken by the competent municipal, state and federal authorities”). See also, e.g., **CA-213**, *Gold Reserve v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (Bernardini, Williams, Dupuy) (“*Gold Reserve Award*”), ¶¶ 573, 591 (citing **CA-269**, *Waste Management II Award* and finding that Venezuela’s conduct in failing to grant a mining approval “despite Claimant’s repeated requests without explaining the reasons for such inaction . . . amount[ed] to conduct evidencing (through acts and omissions) a lack of transparency, consistency, and good faith in dealing with an investor”); **CA-223**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. The Republic of India*, PCA Case No. 2013 09, Award on Jurisdiction and Merits (25 July 2016) (Lalonde, Haigh (dissenting in part on other grounds), Singh) (“*CC/Devas Award*”), ¶¶ 458, 468-70 (citing **CA-269**, *Waste Management II Award* and concluding that non-transparent and inconsistent conduct breached FET provision in treaty); **CA-202**, *TECO Award*, ¶¶ 455, 682-83, 711 (citing **CA-269**, *Waste Management II Award* and finding breach of FET due to arbitrary conduct and due process violations in administrative proceedings).

⁶¹¹ See Counter-Memorial ¶ 641 (citing **CA-269**, *Waste Management II Award*, ¶ 98).

breach of the Treaty.”⁶¹² But this is both uncontroversial and irrelevant: Freeport does not argue that “minimal unfairness” must result in a breach of the fair and equitable treatment obligation, and Peru’s conduct goes well beyond “minimal unfairness.”⁶¹³ Peru provides no support for why its position would require straying from the generally accepted formulation of fair and equitable treatment quoted above.⁶¹⁴

- (b) Peru also suggests that the fair and equitable treatment obligation requires a “wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith”—an example Peru draws from the 2001 decision in *Genin v. Estonia*, and which appears to be another attempt to revert back to the *Neer* standard.⁶¹⁵ This suggestion is entirely unsupported, including by cases on which Peru relies. While this type of conduct certainly would *violate* the obligation of fair and equitable treatment, subsequent decisions have “rejected any suggestion that the standard of treatment of a foreign investment . . . is confined to . . . outrageous treatment . . . amounting to an ‘outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action [] far short of international standards’”—even though here, Peru’s conduct would clearly meet even that heightened standard.⁶¹⁶ Tribunals have likewise repeatedly affirmed that while bad faith may constitute a violation of a state’s fair and equitable treatment obligation, it is not required for a finding of breach.⁶¹⁷

⁶¹² See Counter-Memorial ¶ 639.

⁶¹³ See generally Memorial § IV.B.1.

⁶¹⁴ See also *supra* ¶ 134(d); see also Memorial ¶ 361.

⁶¹⁵ See Counter-Memorial ¶ 640 (citing **RA-56**, *Genin Award*, ¶ 367).

⁶¹⁶ **CA-269**, *Waste Management II Award*, ¶ 93 (emphasis added). See also, e.g., **RA-71**, *Enron Corporation, Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007) (Orrego-Vicuña, van den Berg, Tschanz) (“*Enron v. Argentina Award*”), ¶ 263 (“The Tribunal observes that, as acknowledged by previous arbitral tribunals, the principle of good faith is not an essential element of the standard of fair and equitable treatment and therefore violation of the standard would not require the existence of bad faith.”); **RA-63**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (Caflisch, Bernardini, Stern) (“*El Paso v. Argentina Award*”), ¶¶ 347, 357 (departing from “narrower conceptions” of FET in **RA-56**, *Genin Award* and holding that “the Tribunal considers that a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard, and that such a violation does not require subjective bad faith on the part of the State”).

⁶¹⁷ See, e.g., **CA-277**, *Abengoa Award*, ¶¶ 644 (noting that “some tribunals have found that it is not necessary to establish bad faith in order for there to be a violation of the minimum level of treatment,” but noting that manifest lack of good faith should be “taken into account”) (citing **RA-6**, *Mondev Award*), ¶ 116; **RA-30**, *Glamis Gold v. USA Award*, ¶ 560 (“Although bad faith would meet the standards described, most tribunals agree that a breach of [the minimum standard of treatment] does not require bad faith.”). See also, e.g., **CA-130**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) (de Maekelt, Rezek, van den Berg) (“*LG&E Decision*”).

138. *Second*, Peru argues that even if the fair and equitable treatment obligation protects an investor’s legitimate expectations, it only protects “those basic . . . expectations that actually induced claimants’ investments” which must be “objectively reasonable” and “contain a degree of specificity that would allow a tribunal to assess whether the expectation was breached.”⁶¹⁸ But Freeport does not assert that the obligation not to frustrate an investor’s legitimate expectations extends to cover “any and all assorted expectations,” to use Peru’s words.⁶¹⁹ Rather, Freeport’s assertion is that a State’s repudiation of the general legal framework or specific representations on which the investor reasonably relied in making its investment is relevant to assessing whether the State has breached the fair and equitable treatment obligation.⁶²⁰ The authorities on which Peru relies support this conclusion.⁶²¹ Moreover, Freeport’s argument that Peru repudiated its legitimate expectations is based on facts that clearly satisfy the standard put forward by Peru. In particular, Freeport argues that SMCV and Freeport’s predecessor-in-interest, Phelps Dodge, invested in the Concentrator in reliance on the reasonable expectation that Peru would apply the stabilized regime to the entirety of SMCV’s Mining and Beneficiation Concessions—an

on Liability”), ¶ 129 (“The Tribunal is not convinced that bad faith or something comparable would ever be necessary to find a violation of fair and equitable treatment.”); **CA-99**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (Grigera Naon, Fernandez Rozas, Bernal Vereza) (“*Tecmed Award*”), ¶ 153 (“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”) (citing **RA-6**, *Mondev Award*, ¶116).

⁶¹⁸ See Counter-Memorial ¶¶ 644-646.

⁶¹⁹ Cf. Counter-Memorial ¶¶ 643, 644, n.1357.

⁶²⁰ See Memorial ¶¶ 362, 368 (citing **CA-279**, *Murphy Partial Final Award*, ¶¶ 206-207 (“Protecting the stability and predictability of the host state’s legal and business framework” “underpins the modern customary international law standard.”); *id.* ¶ 248 (“An investor’s legitimate expectations are based on an objective understanding of the legal framework . . . consist[ing] of the host State’s international law obligations, its domestic legislation and regulations, as well as contractual arrangements concluded between the investor and the State.”); **CA-277**, *Abengoa Award*, ¶ 642 (“[G]rossly inconsistent, contradictory action[s] devoid of reasons that come[] to arbitrarily reverse previous or preexisting decisions or approvals issued by the State on which the investor relied . . . is contrary to the minimum level of treatment.”); **CA-278**, *Bilcon/Clayton v. Canada Award*, ¶ 589 (finding that legitimate expectations “calls for a consideration of representations made by the host state which an investor relied on to its detriment”). See also **CA-271**, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) (Garro, van den Berg, Álvarez), ¶ 307 (finding breach of fair and equitable treatment when Argentina “entirely altered the legal and business environment . . . in contradiction with the established Regulatory Framework, as well as the specific commitments represented by Argentina, on which BG relied when it decided to make the investment”).

⁶²¹ See, e.g., **RA-60**, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award (7 March 2017) (Mourre, Ramírez, Jana), ¶ 509 (“[A] promise of the administration on which the Claimants rely,” can constitute a legitimate expectation); **RA-62**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (Derains, Rovine, Bernardini) (“*EDF v. Romania Award*”), ¶ 217 (finding that “specific promises or representations . . . made by the State to the investor” may be relied on as legitimate expectations); **RA-64**, *Georg Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) (Pryles, Thomas, Alexandrov), ¶ 956 (“Legitimate expectations founded on specific assurances or representations made by the State to the investor are protected,” as well as “[l]egitimate expectations with respect to consistency and due process in State actions and relations”).

expectation that was both sufficiently specific and objectively reasonable based on the existing legal framework established by the Mining Law and Regulations and by the Government’s explicit confirmation of this point.⁶²²

139. *Third*, Peru’s attempt to characterize arbitrariness as a “high bar” fails to detract from the fact that the parties essentially agree on the types of conduct that may be considered “arbitrary.”

(a) Peru relies on *EDF v. Romania* to argue that Freeport must meet a “high bar” to 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 willful disregard of due process.’”⁶²³ However, other than Peru’s insistence in describing this standard as a “high bar,” in substance Peru’s attempts to reframe the standard of what constitutes “arbitrary” conduct essentially amount to a distinction without a difference. In particular, Peru agrees that measures that are “not based on legal standards but on discretion, prejudice[,] personal preference,” or political calculations or “taken for reasons that are different from those put forward by the decision maker”—exactly the types of measures that Freeport challenges in this arbitration—are arbitrary.⁶²⁴ The authorities on which Peru relies, including *EDF* itself, likewise confirm this.⁶²⁵

(b) Peru further argues that arbitrariness requires conduct “opposed to the rule of law,” rather than “something opposed to a rule of law,” and thus argues that “not even a violation of domestic law will necessarily constitute arbitrary conduct under international law.”⁶²⁶

⁶²² See Memorial ¶¶ 368-72. See also **CA-279**, *Murphy* Partial Final Award, ¶¶ 249-51, 273, 281, 292-93 (finding claimant held legitimate expectations derived from an oil participation contract that offered fiscal stability and that Ecuador’s new fiscal measures to increase oil production revenues “fundamentally” changing the underlying legal and business framework undermined those expectations); **CA-277**, *Abengoa* Award, ¶¶ 173-91, 646-51 (finding that claimant held legitimate expectations that its waste management project plant “met all the necessary administrative and legal requirements” due to the government’s assurances to “provide its support to promote a favorable business climate” for the investment and issuance of certain related regulatory approvals); **CA-285**, *Eco Oro* Decision on Jurisdiction, Liability and Directions on Quantum, ¶¶ 791, 806-21 (finding that Colombia’s granting of a mining concession and repeated assurances of development support, including from the President, created legitimate expectations that the mining company would be entitled to exploit the entirety of the concession).

⁶²³ Counter-Memorial ¶¶ 649-50 (citing **RA-62**, *EDF v. Romania* Award, ¶ 303).

⁶²⁴ Counter-Memorial ¶¶ 645-50, 654 (“To the extent that Claimant is arguing [that measures that are not based on legal standards but political calculations are arbitrary], Perú does not disagree that such actions could be arbitrary under certain circumstances.”) (citing Memorial ¶ 363).

⁶²⁵ See **RA-62**, *EDF v. Romania* Award, ¶ 303; Counter-Memorial ¶ 651, n.1367 (relying on **CA-163**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (Fernández-Armesto, Paulsson, Voss) (“*Lemire* Decision on Jurisdiction and Liability”), ¶ 262 (“Arbitrariness has been described as ‘founded on prejudice or preference rather than on reason or fact.’”)).

⁶²⁶ Counter-Memorial ¶¶ 651-52 (emphasis original).

But Freeport does not claim that Peru breached its fair and equitable treatment obligation simply by violating a local law. Instead, Freeport bases its claims on conduct clearly falling within the bounds of what other tribunals have found to be “arbitrary,” because it is “not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker,” where “prejudice, preference or bias is substituted for the rule of law”—conduct which would qualify as “arbitrary” even under Peru’s characterization of the term.⁶²⁷ None of the cases on which Peru relies—each of which assessed the definition of “arbitrary” in a context other than the fair and equitable treatment obligation—are to the contrary.⁶²⁸

⁶²⁷ Memorial ¶ 363, n. 977. See **CA-277**, *Abengoa Award*, ¶¶ 651 (concluding that Mexico breached the MST when it “arbitrar[ily]” cancelled claimant’s license for its waste management project following local opposition, “completely contradict[ing] . . . the positions previously taken by the competent municipal, state, and federal authorities”); **CA-276**, *RDC Award*, ¶¶ 234-35 (finding that a decree declaring the investor’s railroad concession to be illegal made on the basis of “formal correctness allegedly in defense of the rule of law” but actually made “for exacting concessions,” was “arbitrary, grossly unfair, [and] unjust” and in violation of the MST). See also **CA-222**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (Lévy, Gotanda, Boisson de Chazournes) (“*Crystallex Award*”), ¶ 578; **CA-163**, *Lemire Decision on Jurisdiction and Liability*, ¶¶ 262-63; **RA-75**, *Muszynianka Spółka z Ograniczoną Odpowiedzialnością v. The Slovak Republic*, PCA Case No. 2017-08, Award (7 October 2020) (Kaufmann-Kohler, Volterra, Thomas) (“*Muszynianka Award*”), ¶¶ 616, 648 (concluding that Respondent’s refusal to seek procedural extensions of time and deliberate choice to “keep [Claimant] entirely in the dark” during a regulatory permitting process was arbitrary and in breach of the treaty’s FET and non-impairment obligations); **CA-122**, *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award (19 August 2005) (Fortier, Schwebel, Rajski (dissenting in part on other grounds)) (“*Eureko Partial Award*”), ¶¶ 233-34 (characterizing decisions taken for reasons “linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character” as “arbitrary” and in breach of the FET obligation).

⁶²⁸ See, e.g., **RA-63**, *El Paso v. Argentina Award*, ¶¶ 300, 319 (defining “arbitrary” as “‘not governed by any fixed rules or standard,’ ‘performed without adequate determination of principle,’ ‘without cause based upon the law,’ or resulting from a ‘failure to exercise honest judgment’” in context of treaty-based prohibition on “arbitrary or discriminatory” measures); *id.* ¶¶ 300, 322-23, 515-19 (finding Argentina did not breach treaty-based prohibition on “arbitrary and discriminatory” measures because certain challenged measures were “reasonable and consistent with the aim pursued” and were “taken in the framework of the existing constitutional order,” but nevertheless concluding that conduct taken as a whole breached the fair and equitable treatment obligation because they resulted in a “total alteration of the entire legal setup for foreign investments”); **RA-73**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award (5 November 2021) (van Houtte, Schill, Bernárdez) (“*Casinos Austria Award*”), ¶¶ 347, 378 (defining “[u]nreasonable or arbitrary measures” in the context of an expropriation claim as “those which are not founded in reason or fact but on caprice, prejudice or personal preference” and finding unlawful and arbitrary expropriation based on, among others, the “manifestly incorrect interpretations of several legal rules that form part of the regulatory framework”); **RA-29**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (Pryles, McRae, Caron) (“*Cargill Award*”), ¶¶ 296, 303 (finding that customary international law minimum standard of treatment prohibits conduct that is “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” and concluding that Mexico violated this obligation where it intentionally targeted the claimant’s

- (c) Peru’s insistence that “for a measure to be arbitrary, it is insufficient merely to show that the measure could have been better or is not perfect” misses the point.⁶²⁹ None of Freeport’s fair and equitable treatment claims are that Peru’s conduct “could have been better or is not perfect.”
- (d) Peru also asserts that taking into account “political or public controversy” in government decision-making as a general matter is not inherently arbitrary. Peru relies on the tribunal’s conclusion in *Electrabel v. Hungary* that the government’s introduction of new price regulations following “political . . . controversies” were not arbitrary because they were executed in accordance with the existing law.⁶³⁰ But again, this has absolutely no bearing on the present case, which does not involve decisions taken in accordance with the existing legal framework but rather an extra-legislative repudiation of existing law in response to political pressure.

140. *Fourth*, Peru’s argument that “consistency and transparency . . . are not distinct FET elements” misses the point.⁶³¹

- (a) As Freeport explained, while each of the various “strands” of the fair and equitable treatment obligation has its own meaning, they in many circumstances overlap. The Tribunal must take into account “the overall evaluation of the state’s conduct as ‘fair and equitable’” when determining whether the state’s conduct has violated the Treaty with respect to a particular claim.⁶³² Freeport does not ask the Tribunal to find separate breaches based on the individual “strands” of the fair and equitable treatment obligation, but rather, to declare that Peru’s conduct as a whole has resulted in breaches of the fair and equitable treatment obligation each time that Peru’s Royalty Assessments became final and enforceable.

investment to obtain a specific outcome, namely, denial of a necessary permit); **RA-71**, *Enron v. Argentina Award*, ¶¶ 215, 266-68, 281 (interpreting and applying “arbitrary and discriminatory measures” provision and finding no breach of that provision, but determining that Argentina committed an “objective breach” of its FET obligation because “[w]here there was certainty and stability for investors, doubt and ambiguity are the order of the day”).

⁶²⁹ Cf. Counter-Memorial ¶ 653.

⁶³⁰ Counter-Memorial ¶ 655 (citing **RA-74**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (Veeder, Kaufmann-Kohler, Stern) (“*Electrabel Decision*”), ¶ 8.23).

⁶³¹ Counter-Memorial ¶ 656.

⁶³² See Memorial ¶ 366 (quoting **CA-222**, *Crystallex Award*, ¶ 545).

(b) It is thus irrelevant whether there is an “independent obligation in customary international law for the State to be consistent and transparent.”⁶³³ Freeport is not arguing that Peru owed an affirmative duty of full transparency independent from the fair and equitable treatment obligation, but rather that Peru’s complete lack of transparency, in circumstances where the lack of transparency was misleading, is an important component of Peru’s unfair and inequitable conduct resulting in its breaches of Article 10.5. Contrary to Peru’s attempts to discredit them, this is exactly the approach taken by prior tribunals that have found a respondent’s lack of transparency relevant in the context of considering breaches of the minimum standard of treatment or fair and equitable treatment obligations.⁶³⁴ Unsurprisingly, the cases on which Peru relies confirm the same.⁶³⁵ Peru’s reliance on the partial set-aside of the *Metalclad* award by a single

⁶³³ Counter-Memorial ¶ 634(c).

⁶³⁴ See, e.g., **CA-280**, *Windstream Award*, ¶¶ 376-80 (finding that Canada breached the MST when it failed to “address the legal and contractual limbo” imposed on the investor when the government adopted a moratorium on offshore wind development, driven by public opposition); **CA-285**, *Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum* ¶ 754 (interpreting the FET obligation in the MST standard and concluding that “[r]eviewing past decisions, concepts such as transparency. . . play a central role in defining the FET standard, as does. . . refraining from taking arbitrary or discriminatory measures”); **CA-269**, *Waste Management Award*, ¶ 98 (“[T]he minimum standard of treatment of fair and equitable treatment is infringed by. . . a complete lack of transparency and candour in an administrative process.”). See also **CA-234**, *Deutsche Telekom Interim Award*, ¶ 387 (finding breach of fair and equitable treatment for, among other reasons, a “manifest” “lack of transparency and forthrightness”); **CA-213**, *Gold Reserve Award*, ¶ 591 (“[A]cts and omissions” “evidencing” “lack of transparency, consistency, and good faith in dealing with an investor,” among other reasons, violates the fair and equitable treatment obligation); **CA-133**, *PSEG Global Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) (Orrego Vicuña, Fortier, Kaufmann-Kohler) (“*PSEG Award*”), ¶ 246 (finding breach of fair and equitable treatment obligation for “serious administrative negligence and inconsistency”); **CA-108**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award (1 July 2004) (Orrego Vicuña, Brower, Sweeney) (“*Occidental Award*”) ¶¶ 183-85 (Ecuador violated the fair and equitable treatment obligation and requirements for “the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor” by changing its tax law “without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes”).

⁶³⁵ See **RA-58**, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (Cremades, Hanotiau, Knieper) (“*Arif v. Moldova Award*”), ¶ 557 (“The Tribunal has analysed Respondent’s treatment of Claimant’s investment primarily through the prism of legitimate expectations, referring as well to consistency and good faith. Claimant presented his case in a similar manner. The Tribunal has also considered other expressions of the fair and equitable treatment obligation referred to by the Parties or in the case law cited by them (such as the need for transparency, or to avoid harassment or arbitrary or discriminatory treatment.)” (emphasis added); **RA-78**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) (Bucher, Martínez-Fraga, McLachlan) (“*Urbaser Award*”), ¶ 628 (noting that “[a] subset of this respect for trust [in the fair and equitable treatment obligation] is the investor’s right to be treated with a certain transparency” and that this transparency “requirement” “has certainly its value as a principle”); **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 (8 July 2016) (Bernardini, Born, Crawford) (“*Philip Morris Award*”), ¶¶ 320-24 (agreeing that “non-transparent” and “manifestly inconsistent” conduct is “indicative of a breach of the FET standard”); **RA-71**, *Enron v. Argentina Award*, ¶ 260 (“[T]he Tribunal concludes that a key element of

domestic court decision—on the grounds that the award was based on finding an autonomous *affirmative* duty of transparency—is thus misplaced.⁶³⁶

141. *Fifth*, Peru’s argument that “inconsistencies or even disagreements among, or within, [government] agencies, without something more, cannot be grounds to find a breach of the FET obligation,” is both overly simplistic and once again mischaracterizes the basis for Freeport’s allegations.⁶³⁷

(a) As Freeport explained in its Memorial, tribunals have repeatedly recognized that a state’s inconsistent treatment of investors or investments may give rise to violations of the obligation of fair and equitable treatment. For example, in *PSEG v. Turkey*, the tribunal concluded that Turkey violated its obligation of fair and equitable treatment when it committed a *volte-face* and “demanded the establishment of a Turkish corporation” despite previously recognizing the claimant’s foreign branch corporate structure.⁶³⁸ The tribunal held that Turkey’s “[i]nconsistent administrative acts,” including occasions where the “administration would ignore rights granted by law as a matter of policy or practice,” violated Turkey’s fair and equitable treatment obligation, emphasizing that “it was not only the law that kept changing but notably the attitudes and policies of the administration.”⁶³⁹

fair and equitable treatment is the requirement of a ‘*stable framework for the investment.*’) (emphasis in original).

⁶³⁶ Counter-Memorial ¶ 634 (citing **RA-46**, *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529, Supplementary Reasons for Judgment of the Honourable Mr. Justice Tysoe, October 31, 2001, ¶¶ 70-72). See also **CA-269**, *Waste Management II Award*, ¶ 154 (“The Supreme Court upheld Mexico’s argument that the tribunal’s finding under Article 1105 was *in excess of jurisdiction* because the tribunal used NAFTA’s transparency provisions (*extraneous to Chapter II*) as a basis for the interpretation and application of Article 1105); **RA-36**, *International Thunderbird Gaming Corporation v. The United Mexican States*, Separate Opinion of Mr. Thomas Wälde (Arbitral Award) (26 January 2006), ¶ 11 n.4 (interpreting NAFTA based on the entire treaty text and observing that “[t]his interpretation method has been properly applied in the Metalclad v Mexico award; the contrary view of an enforcement court in Vancouver (suggesting that principles of the NAFTA outside Chapter XI should be ignored) has, rightly, not found any support”).

⁶³⁷ Counter-Memorial ¶ 657.

⁶³⁸ **CA-133**, *PSEG Award*, ¶ 248.

⁶³⁹ **CA-133**, *PSEG Award*, ¶¶ 248, 254-56. See **CA-285**, *Eco Oro Decision on Jurisdiction, Liability and Directions on Quantum*, ¶¶ 767, 770, 781, 798, 805 (finding breach of MST where “Colombia’s inconsistent approach” failed to “ensure a predictable business environment” because claimant “continued to receive encouragement from Colombia with respect to [exploiting its concession],” despite the passage of legislation, resolutions, and court decisions designating the Concession as environmentally protected and because the government “inconsistent[ly]” calculated canons due on the concession); **CA-202**, *TECO Award*, ¶ 681-82 (finding that a National Commission of Electric Energy (“CNEE”) tariff resolution that contradicted applicable regulatory guidance was “inconsistent with the regulatory framework” and breached “the minimum standard of treatment in international law [which] obliged the CNEE to act in a manner that was consistent with the fundamental principles . . . in Guatemalan law”). See also **CA-213**, *Gold Reserve Award*, ¶ 591 (finding

- (b) The main case on which Peru relies confirms this point.⁶⁴⁰ In *Glencore v. Colombia*, the tribunal concluded that the government authorities reaching allegedly inconsistent decisions had acted according to the “pre-existing legal framework” and applied their powers “in a way which was not materially different from that applied in previous cases.”⁶⁴¹ However, the tribunal noted that the fair and equitable treatment obligation “could have been violated if the [Colombian authority] had made its decision on the basis of criteria different from those set forth in the pre-existing legal framework.”⁶⁴²
- (c) The other case on which Peru relies, *Philip Morris v. Uruguay*, is entirely inapposite, since in that case, the “inconsistency” at issue—which the tribunal assessed in connection with a denial of justice claim—involved two separate courts assessing challenged regulations under their respective and separate competences, namely constitutional and administrative law.⁶⁴³ This case has no bearing on the present dispute, as the legal basis for Freeport’s claims and the underlying facts are completely different.
- (d) Freeport’s claims are not based on “mere inconsistencies” or “disagreements” arising out of the state’s legitimate division of responsibilities within an existing legal framework. Rather, Freeport claims that, as a result of political pressure, the very same government authority—MINEM—changed its position regarding the scope of stability guarantees and subverted the existing legal framework so that the Government could collect royalties from SMCV that it had contractually committed not to assess. Then, even after MINEM

breach of fair and equitable treatment obligation based on failure to grant a mining approval “despite Claimant’s repeated requests without explaining the reasons for such inaction, rather reinforcing Claimant’s expectation that such signature would be forthcoming once the proposed alternative access road had been accepted, amount[ed] to conduct evidencing (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor”); **CA-12**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award (19 December 2016) (Townsend, Lambrou, Boisson de Chazournes) (“*Garanti Award*”), ¶ 382 (“The inconsistency of behavior between one agency of the Turkmenistan Government, which had agreed to a system of payment based on the percentage of work completed, and other arms of the same Government that insisted that payment could only be made against invoices built up from costs, plus a limited profit margin, as required to conform to Smeta [a pricing standard], would alone have been sufficient to call into question whether the Claimant had been treated fairly and equitably.”); **RA-71**, *Enron v. Argentina* Award, ¶¶ 215, 266-68, 281 (determining that Argentina committed an “objective breach” of its FET obligation because “[w]here there was certainty and stability for investors, doubt and ambiguity are the order of the day”).

⁶⁴⁰ See Counter-Memorial ¶ 657 (citing **CA-245**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019) (Fernández-Armesto, Garibaldi, Thomas) (“*Glencore Award*”).

⁶⁴¹ **CA-245**, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award (27 August 2019) (Fernández-Armesto, Garibaldi, Thomas) (“*Glencore Award*”), ¶¶ 1413-14, 1420-23.

⁶⁴² **CA-245**, *Glencore Award*, ¶¶ 1413-14, 1420-23.

⁶⁴³ Counter-Memorial ¶ 657; **RA-76**, *Philip Morris Award*, ¶¶ 527-28.

officials internally adopted the new position on the scope of stability guarantees, Government officials continued to make contrary representations to SMCV, and induced significant additional payments premised on the assumption that SMCV would not make *any* royalty payments. This type of *volte-face* followed by inconsistent and nontransparent conduct is exactly what prior tribunals have concluded gives rise to breaches of the fair and equitable treatment obligation.

142. *Sixth*, Peru’s argument that “the transparency requirement ‘cannot mean that [the State] has to act under complete disclosure of any aspect of its operation’” is equally irrelevant, since once again, Freeport’s allegations are not about a lack of “complete disclosure,” but rather a pervasive lack of transparency by Peruvian Government officials.⁶⁴⁴ As Freeport explained in its Memorial and as discussed above, tribunals have repeatedly recognized that transparency is a key component of the fair and equitable treatment obligation, particularly where a lack of transparency can reasonably be expected to mislead the investor—as is the case where, for example, government officials continue to act “as if [a] project were on track and it was business as usual,” when in fact decisions have already been made internally against the company.⁶⁴⁵ This is also consistent with Chapter 19 of the TPA, which expressly establishes general requirements of transparency on the treaty parties.⁶⁴⁶

143. *Finally*, Peru’s convoluted attempts to characterize the due process component of the fair and equitable treatment obligation as requiring a finding of denial of justice—even in the context of proceedings before an administrative decision-maker—are misguided and unsupported by prior decisions.

⁶⁴⁴ Counter-Memorial ¶ 660 (citing **RA-78**, *Urbaser Award*, ¶ 628).

⁶⁴⁵ Memorial ¶¶ 364, 379; *supra* ¶¶ 134(d), 137(a). See **CA-234**, *Deutsche Telekom Interim Award* ¶¶ 375-87 (finding breach of fair and equitable treatment obligation following annulment of investment contract where India not only failed to “raise the issues it had identified” with the investor and “engage with a view to attempting to reach an acceptable solution,” but also “affirmatively misled” the investor by failing to disclose internal decisions already made against the company in meetings with investor); **CA-223**, *CC/Devas Award*, ¶¶ 468, 470 (noting based on the same factual circumstances that Respondent’s conduct breached the fair and equitable treatment obligation where “at none of [the meetings with the claimant] did the Respondent indicate that the [government agency] had decided to annul the . . . Agreement or that there were competing military or other societal needs for the S-band [satellite] spectrum which had been allocated to Devas”); **CA-222**, *Crystallex Award* ¶¶ 589, 598 (finding that “it constitutes non-transparent and inconsistent conduct” for the government to “invite the investor” to make a substantial investment when Venezuelan officials “had already come to the conclusion” that they would commit a “*volte-face*” by denying mining permit application after completion of investment); **RA-78**, *Urbaser Award*, ¶¶ 843-45 (concluding that Argentina’s non-transparent conduct breached FET because *inter alia* “[n]or was it fair and equitable to invite AGBA to submit proposals for a renegotiation and to entertain intensive discussions, which were put to an end abruptly in reliance on federal policies unrelated to the Concession under negotiation and producing an impact that the Province must have been aware of in advance but did not inform AGBA’s representatives appropriately”); **RA-75**, *Muszynianka Award*, ¶¶ 616, 648 (concluding that Respondent’s refusal to seek procedural extensions of time and deliberate choice to “keep [Claimant] entirely in the dark” during a regulatory permitting process was “in willful disregard of. . . the transparency expected from State authorities” and breached FET).

⁶⁴⁶ See **CA-10**, US-Peru TPA, Chapter 19 Transparency.

- (a) Peru argues that Freeport’s claims arising from the Tax Tribunal’s serious procedural irregularities are “essentially” “denial of justice” claims.⁶⁴⁷ This makes no sense. Peru acknowledges that the Tax Tribunal is not part of the judiciary, but rather is part of the executive branch, acting as the final administrative decision-maker in royalty and tax proceedings.⁶⁴⁸ While Peru spills much ink arguing that “any claim based on acts of the judiciary” must be analyzed according to a denial of justice framework—a proposition which is itself contradicted by a number of prior decisions—Peru provides absolutely no support for its proposition that administrative conduct *must* be interpreted according to the same framework.⁶⁴⁹ Even the tribunal in *Glencore v. Colombia*, a case on which Peru heavily relies, expressly acknowledged that the fair and equitable treatment standard can be breached “[b]y the State’s judicial system, as a whole, when it commits a denial of justice” *or* “[b]y the . . . administrative branch.”⁶⁵⁰
- (b) Contrary to Peru’s framing, and as Freeport already explained in its Memorial, tribunals have repeatedly concluded that, while the fair and equitable treatment obligation *includes* the standard of denial of justice, it is not limited to that standard. Rather, “conduct which . . . interferes with the legitimate exercise of rights,” such as serious procedural shortcomings in administrative proceedings, “equally” violates the obligation.⁶⁵¹

⁶⁴⁷ Counter-Memorial ¶ 661.

⁶⁴⁸ Counter-Memorial ¶¶ 282, 666. *See also* Memorial ¶¶ 387-88.

⁶⁴⁹ Counter-Memorial ¶¶ 664-66. *But see RA-1, Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) (Kaufmann-Kohler, Hanotiau, Stern) (“*Infinito Gold Award*”), ¶ 361 (“[D]enial of justice is only one of the ways in which judicial decisions may breach the BIT. Even if a decision does not amount to a denial of justice, it may violate other treaty standards (such as FET or expropriation), provided the requirements for these breaches are met.”); *see also id.* ¶ 363 (citing scholars in support), ¶¶ 364-66 (citing international court and investment tribunal authorities in support).

⁶⁵⁰ **CA-245**, *Glencore Award*, ¶ 1309. *See also id.* ¶ 1319 (“It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard.”).

⁶⁵¹ **CA-211**, *OAO Tatneft v. Ukraine*, PCA Case No. 2008-08, Award (29 July 2014) (Orrego Vicuña, Brower, Lalonde) (“*OAO Tatneft Award*”), ¶ 411. *See CA-202, TECO Award*, ¶¶ 458, 473, 682-83, 711 (finding administrative agency’s “willful disregard” of its own procedures and of “elementary standards of due process in administrative matters,” breached the fair and equitable treatment obligation, even though claimant did not allege a denial of justice claim). *See also CA-237, Rumeli Award*, ¶¶ 617-19 (finding breach of fair and equitable treatment obligation where administrative Working Group failed to provide “transparency and due process” “in contradiction with the requirements of the fair and equitable treatment principle,” by issuing a “summarily reasoned” decision, where the investor had no “real possibility” to present their claims, despite also concluding that there was no evidence of procedural or substantive error by courts); **CA-163, Lemire Decision on Jurisdiction and Liability**, ¶¶ 299, 309, 316 (concluding that Ukrainian agency “facilitate[d] arbitrary decision making” by issuing decision “behind closed doors” and without providing sufficient reasoning in its ultimate decision on claimant’s license application, violating FET); **CA-99, Tecmed Award**, ¶¶ 162-65 (concluding that Mexican administrative agency violated fair and equitable treatment by *inter alia* failing to provide claimant with proper notice or opportunity to present its views on permit renewal process);

- (c) Peru’s argument that “the bar for Claimant is even higher” because “administrative proceedings trigger less stringent due process obligations than judicial proceedings” likewise inappropriately conflates the denial of justice framework with the separate question of whether Peru has complied with its procedural obligations.⁶⁵² The fact that administrative proceedings typically have different procedural protections than judicial proceedings has no bearing on whether the legal standard for assessing those claims should be a “heightened” version of the standard applicable to judicial proceedings, as Peru appears to suggest. Rather, the level of procedural protections required in administrative proceedings is simply relevant to whether the challenged conduct violates Peru’s obligation to accord due process as part of its fair and equitable treatment obligation.
- (d) In any event, Peru’s misguided attempts to frame Freeport’s administrative due process argument as a “denial of justice” in administrative proceedings are ultimately of little consequence: the Tax Tribunal’s egregious procedural failures meet either standard. Tribunals have repeatedly recognized that the cumulative effect of repeated procedural shortcomings,⁶⁵³ involving disregard for the individual circumstances of a particular case,⁶⁵⁴ flagrant violations of procedure or law, including those designed to ensure due process,⁶⁵⁵ and biased decision-makers,⁶⁵⁶ amounts to breaches of the fair and equitable treatment obligation to afford due process or constitutes a “denial of justice.”

CA-331, Stephen M. Schwebel, *Is Neer Far from Fair and Equitable?*, 27 ARB. INT’L 555, 559 (2011) (“[P]rocedural” defects, “far removed from the confines and criteria of a denial of justice,” including those which might not be as grave as to amount to egregiousness or bad faith, may give rise to breaches of the fair and equitable treatment obligation).

⁶⁵² Counter-Memorial ¶¶ 666, 698.

⁶⁵³ See, e.g., **CA-217**, *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015) (Mayer, Paulsson, Landau) (“*Dan Cake* Decision on Jurisdiction and Liability”), ¶¶ 142-46 (finding that the Hungarian bankruptcy court’s multiple “unjustified” procedural obstacles amounted to a due process violation that also constituted a denial of justice); **CA-211**, *OAO Tatneft Award*, ¶ 395 (FET requires that the “legal process . . . including its judicial manifestations, is fair and reasonable, devoid of arbitrariness, discrimination or manipulation to the detriment of those rights”).

⁶⁵⁴ See, e.g., **CA-195**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) (Hanotiau, Williams, Ali Khan) (“*Deutsche Bank Award*”), ¶¶ 487-91.

⁶⁵⁵ See, e.g., **CA-202**, *TECO Award*, ¶¶ 458, 473, 682-83, 711.

⁶⁵⁶ See, e.g., **CA-195**, *Deutsche Bank Award*, ¶¶ 479-80. See also **CA-211**, *OAO Tatneft Award*, ¶¶ 402-404.

3. Peru Breached Article 10.5 Each Time the Royalty Assessments Became Final and Enforceable Against SMCV

144. As Freeport explained in its Memorial, Peru violated the fair and equitable treatment obligation of Article 10.5 when each of the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments against SMCV became final and enforceable.⁶⁵⁷ Peru's arguments in response to these claims are unavailing and, at heart, fall back on Peru's flawed attempt to create an alternative narrative that Peru "consistently" applied stability guarantees to specific investments—a narrative that, as discussed in Section II.A.2 above, is simply wrong.

i. Peru Frustrated Freeport's and SMCV's Legitimate Expectations by Violating its Obligations Under the Stability Agreement

145. As Freeport explained in its Memorial, Peru frustrated Freeport's and SMCV's legitimate expectations by repeatedly violating its obligations under the Stability Agreement, thus abrogating the legal framework on which SMCV and Freeport's predecessor-in-interest, Phelps Dodge, reasonably relied when making the investment in the Concentrator.⁶⁵⁸ Peru's arguments to the contrary are unfounded.

146. *First*, Peru argues that Freeport cannot argue that Peru frustrated its legitimate expectations because "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."⁶⁵⁹ Peru provides absolutely no support for this proposition, which is both logically flawed and completely ignores the fact that Freeport brings its Article 10.5 claims both on its own behalf and on behalf of SMCV.

(a) To begin with, Peru's suggestion that SMCV's legitimate expectations are irrelevant makes absolutely no sense given that Freeport brought its Article 10.5 claims both on its own behalf (under Article 10.16.1(a)) and on behalf of SMCV (under Article 10.16.1(b)).⁶⁶⁰ Thus, SMCV's legitimate expectations at the time of the Concentrator investment are unquestionably relevant to its claims under Article 10.5.

⁶⁵⁷ See Memorial ¶¶ 367-99.

⁶⁵⁸ See Memorial ¶¶ 368-72.

⁶⁵⁹ Counter-Memorial ¶ 670.

⁶⁶⁰ See Notice of Arbitration, p. 1 ("Pursuant to Articles 10.16.1(a), (b) . . . of the United States-Peru Trade Promotion Agreement (the 'TPA') . . . Freeport-McMoRan Inc. ('Freeport' or 'Claimant') and Freeport on behalf of Sociedad Minera Cerro Verde S.A.A. ('SMCV'), hereby submit this notice of Arbitration against the Republic of Peru ('Peru' or the 'Government') for claims arising out of their investments in Cerro Verde."); Memorial ¶ 435 ("All damages that Freeport claims under Article 10.16.1(a) of the TPA are subsumed within the damages that Freeport claims on behalf of SMCV under Article 10.16.1(b) of the TPA.").

(b) Further, as Freeport explained, it is the successor-in-interest to Phelps Dodge following its acquisition of that entity in March 2007, according to which Freeport obtained complete ownership of Phelps Dodge’s investments and all rights and interests relating thereto.⁶⁶¹ Peru has provided no explanation for why this corporate restructuring should render its conduct prior to the Concentrator investment—which formed the basis for Phelps Dodge’s legitimate expectations at the time of that investment—irrelevant to the question of whether Peru breached Article 10.5 of the Treaty when its assessments thwarting those legitimate expectations became final and enforceable. To the contrary, tribunals have concluded that outside of the context of nationality-shopping— unquestionably not at issue here—corporate restructurings subsequent to an investment do not affect the content of the underlying substantive claims.⁶⁶²

147. *Second*, Peru argues that SMCV’s and Phelps Dodge’s expectations were “not objectively reasonable.”⁶⁶³ In so doing, Peru essentially re-hashes the same flawed arguments it relies on to argue that it never violated the Stability Agreement, and ignores or attempts to underlay the weight of evidence to the contrary—all to no avail.

(a) Peru first argues that SMCV’s and Phelps Dodge’s expectations were not reasonable because the Mining Law limited stability guarantees to the investment project outlined in the feasibility study.⁶⁶⁴ But as explained in detail in Section II.A, this is simply wrong and contrary to both the plain text of the Mining Law and Regulations and Peru’s own consistent practice before it reversed course against SMCV.⁶⁶⁵ In light of this clear text as well as Peru’s own practice, it was clearly at the very minimum objectively reasonable for Phelps Dodge and SMCV to maintain the expectation that Peru would apply stability guarantees to SMCV’s entire mining unit, made up of the Mining and Beneficiation Concessions, just as it had done in all prior cases to that point.

⁶⁶¹ See Memorial ¶¶ 156-58 (citing **Ex. CE-902**, Freeport-McMoRan Copper & Gold Inc., Annual Report 2006 (15 March 2007), p. 25; **Ex. CE-903**, Freeport-McMoRan Copper & Gold Inc., Annual Report 2007 (17 March 2008), p. 5; **Ex. CE-29**, SEC Filing, Freeport Completes Acquisition of Phelps Dodge Corp. (19 March 2007)).

⁶⁶² See, e.g., **CA-404**, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014) (Oreamuno, Godoy (dissenting in part on other grounds), Hanotiau) (“*Levi v. Peru Award*”), ¶ 145 (finding that “[t]he transmission of legal rights [of ownership] could occur without affecting protection of the investment under the [France-Peru BIT], provided that the other requirements of that treaty were met”).

⁶⁶³ Counter-Memorial ¶ 671.

⁶⁶⁴ Counter-Memorial ¶ 671.

⁶⁶⁵ See *supra* §§ II.A.1-2.

- (b) Peru then attempts to discount President Toledo’s explicit and public statement confirming that Peru would “fulfill [its] responsibility to maintain economic and legal stability” in relation to the Concentrator investment, arguing that it is “irrelevant” because it was not made “at (or before) the time that the investment was made.”⁶⁶⁶ This is factually wrong: President Toledo made his statement reaffirming Peru’s commitment to legal stability on 12 October 2004, one day after SMCV and Phelps Dodge’s Boards of Directors conditionally approved the Concentrator investment, but before they actually proceeded with the investment.⁶⁶⁷ Rather, construction of the Concentrator did not commence until December 2004, after SMCV received approval of the Beneficiation Concession—the reason why the prior approvals were “conditional.”⁶⁶⁸ And in any event, irrespective of its date, President Toledo’s assurance is further evidence that SMCV’s and Phelps Dodge’s expectation that Peru would honor the Stability Agreement and apply the stabilized regime to the Concentrator was “objectively reasonable.”
- (c) Peru also claims that the DGM’s approval of the expansion of the Beneficiation Concession “had no bearing whatsoever on the scope of the stability guarantees.”⁶⁶⁹ But again, as explained above in Section II.A, the expansion approval explicitly confirmed that the Concentrator fell within the Beneficiation Concession, which was already stabilized under the existing Stability Agreement.⁶⁷⁰ Moreover, Ms. Chappuis had specifically told SMCV and Phelps Dodge representatives that approval of the expansion would provide confirmation that the Concentrator would benefit from the stabilized regime.⁶⁷¹ It was thus entirely reasonable for Phelps Dodge and SMCV to understand the DGM’s approval as doing exactly that.
- (d) Peru then attempts to downplay the fact that Ms. Chappuis *explicitly confirmed* to SMCV that the Concentrator would be entitled to benefit from the stabilized regime—which alone is sufficient to find that Phelps Dodge and SMCV’s expectations were “objectively reasonable”—by characterizing it as the “informal, oral statement of a single official,”

⁶⁶⁶ Counter-Memorial ¶¶ 672.

⁶⁶⁷ Memorial ¶¶ 112-13.

⁶⁶⁸ **CWS-11**, Torreblanca I, ¶¶ 27-28; **CWS-8**, Morán I, ¶¶ 29-30.

⁶⁶⁹ Counter-Memorial ¶ 673.

⁶⁷⁰ *See supra* ¶¶ 89-92.

⁶⁷¹ *See* **CWS-3**, Chappuis I ¶¶ 52-53; **CWS-14**, Chappuis II, ¶ 37; **CWS-11**, Torreblanca I, ¶ 25; **CWS-21**, Torreblanca II, ¶ 16.

and contradicted by Mr. Polo, then-Vice Minister of Mines.⁶⁷² But as already explained, as Director General of Mining, it was Ms. Chappuis, not Mr. Polo, who was responsible for “ensuring compliance with stability agreements”—this task, as well as granting beneficiation concessions, was “outside [Mr. Polo’s] immediate responsibilities.”⁶⁷³ As the government official ultimately charged with this issue, Ms. Chappuis’s repeated confirmations to SMCV were clear: the Stability Agreement applied to the Concentrator.⁶⁷⁴ And as already explained, Mr. Tovar’s attempts to discredit Ms. Chappuis’s testimony by arguing that he was not present in the meetings where Ms. Chappuis made these confirmations is irrelevant: given his ancillary role in the process compared to Ms. Chappuis’s, “[t]he fact that Mr. Tovar may not have been invited to [the meetings between MINEM and SMCV] only shows that his opinion as Director of Mining Promotion and Development was not warranted,” as Ms. Chappuis explains.⁶⁷⁵

- (e) Finally, Peru’s attempt to discredit Ms. Chappuis’s confirmations because they were “oral” rather than written is meritless. To begin with, there is no basis for Peru’s suggestion that a representation must be written rather than oral in order for an investor to reasonably rely on it.⁶⁷⁶ Further, following Ms. Chappuis’s explanation of the process to include the Concentrator within the existing Beneficiation Concession, SMCV applied for that expansion and obtained its approval in writing—exactly as Ms. Chappuis had described. As explained, Phelps Dodge and SMCV reasonably understood this to be sufficient confirmation of the fact that the Concentrator would be entitled to benefit from the stabilized regime without further action on their part.

ii. Peru Arbitrarily Changed Its Position on the Scope of Stability Guarantees as a Result of Sustained Political Pressure to Act Against SMCV

148. As Freeport explained, after SMCV commenced construction of the Concentrator, the Government arbitrarily changed its long-held position that stability guarantees apply to concessions or

⁶⁷² Counter-Memorial ¶¶ 674-75.

⁶⁷³ CWS-14, Chappuis II, ¶ 40.

⁶⁷⁴ CWS-14, Chappuis II, ¶¶ 37, 40.

⁶⁷⁵ CWS-14, Chappuis II, ¶ 41.

⁶⁷⁶ See, e.g., CA-285, *Eco Oro* Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 767 (finding that Colombia’s repeated encouragement of claimant’s investment, including verbal statements from various government officials, gave rise to reasonable legitimate expectations that Colombia supported the investment, notwithstanding subsequently-issued resolutions to the contrary).

mining units to the much more restrictive position that stability guarantees apply only to the initial investment set forth in the feasibility study submitted to access stability guarantees. Although MINEM had assured SMCV that the stability guarantees applied to its Concentrator because it was part of its stabilized Beneficiation Concession, MINEM then took the position that the Concentrator was not entitled to stability guarantees.⁶⁷⁷ This *volte-face* was “not based on legal standards”: as explained above in Section II.A, the Mining Law and Regulations clearly applied stability guarantees to entire concessions or mining units, as the Government’s practice up to that point confirmed.⁶⁷⁸ Instead, the Government’s *volte-face* was the result of significant and unrelenting political pressure to extract additional economic contributions from Cerro Verde, one of Peru’s largest mines at that time, and to disregard SMCV’s Stability Agreement to increase revenues from the recently-enacted Royalty Law.⁶⁷⁹

149. Peru acknowledges this political pressure campaign, though it attempts to downplay its significance.⁶⁸⁰ For example, Peru concedes that during the Congressional debates about the Royalty Law, Congressman Diez Canseco and other members of Congress sought to thwart stability agreements by pushing for the royalty to apply to *all* mining companies, including those with stability agreements. Peru also concedes that whether companies with stability agreements—including specifically Cerro Verde—would pay royalties was the subject of “public debate.”⁶⁸¹ Peru and its witnesses also acknowledge that MINEM’s December 2004 approval of the profit reinvestment benefit for the construction of SMCV’s Concentrator “raised concerns in Congress,” and does not contest that following MINEM’s approval of the profit reinvestment benefit, political pressure began to focus on Cerro Verde—one of Peru’s largest mines—with Congressman Diez Canseco and others demanding to know why SMCV was permitted to use the “questionable Profit Reinvestment benefit.”⁶⁸²

⁶⁷⁷ See Memorial ¶¶ 373-78, 381.

⁶⁷⁸ See Memorial ¶¶ 320-34.

⁶⁷⁹ See Memorial ¶¶ 373-78; see also **CE-1009**, *There is evidence against PPK*, EXPRESO (3 October 2017).

⁶⁸⁰ See Counter-Memorial ¶ 187; **RWS-1**, Polo ¶ 38.

⁶⁸¹ See Counter-Memorial ¶ 187; **RWS-1**, Polo ¶ 36 (acknowledging that from the moment the Mining Royalty Law went into force, “the payment of the new mining royalty by mining companies that had legal stabilization agreements in force with the State, including Cerro Verde,” were the subject of a “public debate”); see also Memorial ¶ 105 (citing **CWS-7**, Flury I ¶ 31; **Ex. CE-429**, Javier Diez Canseco, *Mining Royalties and the Need to Reform Mining Taxation: Who Is Opposed?* (April 2004); **Ex. CE-438**, Congress, Draft Law No. 10636/2003-CR (21 May 2004), Art. 4); see generally Memorial § III.F.2.

⁶⁸² **RWS-1**, Polo I, ¶ 38; Counter-Memorial ¶ 187; see **Ex. CE-506**, Javier Diez Canseco, *Questions About Cerro Verde*, La República (25 August 2005), p. 1; **RWS-1**, Polo I, ¶¶ 36-38 (acknowledging that Cerro Verde’s entitlement to stability guarantees for the newly constructed concentrator was “publicly questioned,” and that the reinvestment approval “generated . . . debate” within Congress and MINEM); **RWS-2**, Isasi, ¶ 39 (testifying that members of Congress argued that SMCV should “pay Income Tax under the ordinary regime, asserting that the tax benefit of reinvestment of profits had been repealed and that it should pay royalties on the Leaching Project”).

150. While Peru nevertheless generally denies that it acted against SMCV as a result of political pressure, the following sequence of events, which includes new documents that Peru was ordered to disclose, leaves no doubt that Peru’s radical change of course was engineered for political reasons, rather than the purported legal justification Peru now asserts. In particular, the events confirm that MINEM officials, in particular Minister Sánchez Mejía, faced unrelenting pressure to act against SMCV—and adopted Peru’s novel position regarding the scope of stability guarantees in response.

- (i). On 9 December 2004, Minister Sánchez Mejía approved SMCV’s request to apply the profit reinvestment benefit to construct the Concentrator.⁶⁸³ This benefit had been repealed in 2001 and was only available to SMCV by virtue of the Stability Agreement.⁶⁸⁴
- (ii). On 17 January 2005, Congressman Diez Canseco requested Minister Sánchez Mejía to provide him, with the “greatest urgency,” information about the “incentives” that were granted for SMCV’s investment in the Concentrator and the “technical and legal basis and cost-benefit analysis” supporting MINEM’s approval.⁶⁸⁵
- (iii). On 23 February 2005, Minister Sánchez Mejía responded to Congressman Diez Canseco, “inform[ing]” him that SMCV “ha[d] signed with the Peruvian State” a Stability Agreement “valid until 2013.”⁶⁸⁶ He attached an *aide memoire*, which praised the Concentrator investment for “allow[ing] an increase of more than 200% in [SMCV’s] copper production,” engaging a “large number of workers” “which will benefit the population of the area,” and generally creating a “positive effect . . . in the economic activation of services, hotels, restaurants, transportation, communications, health, etc.”⁶⁸⁷
- (iv). Also on 23 February 2005, Congressman Diez Canseco published an article in *La República*, one of two major daily newspapers sold nationwide, decrying the pending judicial challenges to the Royalty Law and castigating mining companies for

⁶⁸³ **Ex. CE-23**, MINEM, Ministerial Resolution No. 510-2004-MEM/DM (9 December 2004).

⁶⁸⁴ *See CA-79*, Stability Agreements with the State, Law No. 27343 (5 September 2000).

⁶⁸⁵ **Ex. CE-942**, Congressman Diez Canseco to Minister Sánchez Mejía, Communication No. 083-2005-JDC/CR (17 January 2005).

⁶⁸⁶ **Ex. CE-943**, MINEM, Communication No. 272-2005-MEM/DM (23 February 2005), p. 1.

⁶⁸⁷ **Ex. CE-943**, MINEM, Communication No. 272-2005-MEM/DM (23 February 2005), p. 2.

“refusing to give regions and municipalities fair compensation for exploiting their unrenewable natural resources.”⁶⁸⁸

- (v). On 2 March 2005, Congressman Diez Canseco published another article in *La República*, with the title “Mining Royalties: Sleeping with the Enemy.” In the article, he attacked Minister Sánchez Mejía’s supposed failure to defend the State’s income and asserted that “the MEF and the MEM are standing with their arms crossed and are winking to the mining lobbies.”⁶⁸⁹
- (vi). On 5 and 9 March 2005, the national press reported that Congressman Diez Canseco and others organized marches and sit-ins before the Constitutional Tribunal to “demand enforcement of the royalty law.”⁶⁹⁰
- (vii). On 1 April 2005, Peru’s Constitutional Tribunal upheld the Mining Royalty Law, holding that the royalty was not a tax but constituted an “administrative charge.”⁶⁹¹
- (viii). On 6 April 2005, Congressman Diez Canseco published an article in *La República* applauding the decision, and noting that “the recognition that the mining royalty is NOT tax . . . means that it must be universally applied without being stymied or distorted by tax stability agreements signed behind Peruvians’ backs.”⁶⁹²
- (ix). On 14 April 2005, Mr. Isasi issued his Report in response to the Constitutional Tribunal’s decision. As explained in Section II.A.2(ii) above, Mr. Isasi’s April 2005 Report confirmed that a mining company would be exempt from paying royalties for the “*mining concessions* of which it is the titleholder” if those concessions were “part of a project set out in a stability agreement signed prior to the enactment of [the Royalty] Law”—making clear that MINEM had not yet adopted the position that only specific investments *within* a concession were entitled to stability.⁶⁹³
- (x). On 22 April 2005, Minister Sánchez Mejía informed the press that he had sent the MEF and SUNAT information on the “mining companies that signed administrative

⁶⁸⁸ **Ex. CE-483**, *The Offensive Against Mining Royalties*, LA REPÚBLICA (23 February 2005).

⁶⁸⁹ **Ex. CE-485**, *Mining Royalties: Sleeping with the Enemy*, LA REPÚBLICA (2 March 2005), p. 1.

⁶⁹⁰ See Memorial, ¶¶ 368-369; **Ex. CE-487**, Mining companies appeal to the Courts to avoid paying royalties, LA REPÚBLICA (5 March 2005); **Ex. CE-489**, Mining companies urged to comply with the payment of royalties to regions, LA REPÚBLICA (9 March 2005).

⁶⁹¹ **Ex. CE-490**, Constitutional Tribunal, Decision, Case No. 0048-2004-PI/TC (1 April 2005).

⁶⁹² **Ex. CE-491**, Javier Diez Canseco, Mining Royalties: Peru Won, LA REPÚBLICA (6 April 2005), p. 1.

⁶⁹³ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17.

guarantees with the State.”⁶⁹⁴ He also noted that MINEM and the MEF intended to make a joint statement to resolve the “state of uncertainty” about which mining companies were exempt from royalty payments.⁶⁹⁵

- (xi). On 29 April 2005, Mr. Polo sent an internal email to Mr. Isasi, copying other MINEM officials, in which he mentioned that MEF had organized a meeting with MINEM and SUNAT presumably to discuss a response to the 1 April decision by the Constitutional Tribunal.⁶⁹⁶ Mr. Polo attached a draft of a proposed joint news release by the two Ministries and SUNAT that he wanted to propose to Min. Sánchez Mejía. In the email, Mr. Polo asks Mr. Isasi to “take the lead on the communication.”⁶⁹⁷ Peru did not produce Mr. Isasi’s response or any further communications regarding Mr. Polo’s proposed draft.⁶⁹⁸ The joint draft news release does not appear to ever have been issued.
- (xii). On 6 May 2005, Minister of Economy and Finance Kuczynski announced that the Constitutional Tribunal’s classification of the royalty as an “economic consideration” meant that it would still fall within the guarantee of “administrative stability” for companies like SMCV that had mining stability agreements.⁶⁹⁹
- (xiii). On 3 June 2005, Mr. Isasi emailed a draft “final presentation” to Min. Sánchez Mejía titled, “Mining Royalties: Proposals for Modifying the Law and the Effects of the Judgement of the Constitutional Tribunal,” noting that the draft reflected the agreement of Mr. Isasi, Mr. Tovar, and another MINEM official.⁷⁰⁰ As explained in Section II.A.2(ii) above, the presentation recognized that stability guarantees are granted to “investors protected by a ‘Contrato-Ley,’” that “Administrative Stability

⁶⁹⁴ **Ex. CE-495**, MEF and MEM Will Issue Analysis on Royalties Next Week, EL PERUANO (22 April 2005); *see also* Memorial ¶ 137.

⁶⁹⁵ **Ex. CE-495**, MEF and MEM Will Issue Analysis on Royalties Next Week, EL PERUANO (22 April 2005); *see also* Memorial ¶ 137.

⁶⁹⁶ *See Ex. CE-947*, Email from Cesar Polo to Felipe Isasi (29 April 2005, 8:41 PM PET).

⁶⁹⁷ *See Ex. CE-947*, Email from Cesar Polo to Felipe Isasi (29 April 2005, 8:41 PM PET), p. 2.

⁶⁹⁸ Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 5.

⁶⁹⁹ **Ex. CE-500**, *Mining Royalties to be Defined over the Next Few Days*, AREQUIPA AL DÍA (6 May 2005).

⁷⁰⁰ *See Ex. CE-948*, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM).

is granted to some *investors*,” and that “Clause 9” of the Model Stability Agreement guarantees benefits “applicable to the *investor*.”⁷⁰¹

- (xiv). On 8 June 2005, Min. Sánchez Mejía made his presentation on the effects of the judgment of the Constitutional Tribunal before the Energy and Mines Congressional Committee.⁷⁰² Min. Sánchez Mejía acknowledged both the overwhelming political push to enact a royalty scheme against mining profits, and that “great expectations have been generated at a national level” by the Royalty Law and that “mining royalties had the majority support of almost 90 votes from all the political forces.”⁷⁰³ As explained in Section II.A.2(ii) above, nothing in this presentation confirmed Peru’s novel position that stability guarantees were limited to the investment program contained in the feasibility study. Instead, Min. Sánchez Mejía repeatedly confirmed that the royalty would be calculated based on concessions, and that companies would be entitled to stability for the “mining projects” for which they had signed stability agreements.⁷⁰⁴
- (xv). On 25 August 2005, Congressman Diez Canseco began publishing additional articles, this time targeting SMCV directly. For example, in another article in *La República* entitled “Questions about Cerro Verde,” Congressman Diez Canseco stated that “[t]here are too many questions that beg to be answered by the Ministry of Energy and Mines, the regional authorities and the company itself” such as why SMCV was granted the reinvestment of profit benefit or why SMCV was exempted from royalty payments.⁷⁰⁵
- (xvi). On 15 September 2005, Congressman Oré requested Minister Sánchez Mejía to provide, among others, “information relating to the legal stability agreement entered into with the mining company Phelps Dodge about the Cerro Verde mine.”⁷⁰⁶

⁷⁰¹ See *supra* § II.A.3; **Ex. CE-948**, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM), pp. 27, 31, 32.

⁷⁰² See **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee (8 June 2005).

⁷⁰³ **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee (8 June 2005), p. 24.

⁷⁰⁴ See **Ex. RE-29**, Meeting Minutes, Energy and Mines Congressional Committee (8 June 2005).

⁷⁰⁵ See Memorial, ¶¶ 374-76; **Ex. CE-506**, Javier Diez Canseco, Questions about Cerro Verde, LA REPÚBLICA (25 August 2005); **Ex. CE-517**, Javier Diez Canseco, Cerro Verde: Enough Abusing Peru!, VOLTAIRE (6 October 2005).

⁷⁰⁶ **Ex. CE-507**, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía (15 September 2005).

- (xvii). On 16 September 2005, the press reported statements by Congressman Diez Canseco demanding that Minister Sánchez Mejía revoke SMCV’s authorization to reinvest profits, and “demand[] . . . that Cerro Verde comply with the payment of royalties,” threatening to file “a compliance action or process” or to “denounce [Minister Sánchez Mejía] constitutionally” if he failed to do so.⁷⁰⁷ Documents produced by Peru reveal that Congressman Diez Canseco also apparently sent a letter to Minister Sánchez Mejía reiterating these threats.⁷⁰⁸ However, Peru has failed to produce Congressman Diez Canseco’s letter, despite the fact that it was clearly responsive to Freeport’s document requests.⁷⁰⁹
- (xviii). On 19 September 2005, Congressman Diez Canseco made a motion to create a *Congressional Committee* to investigate “possible irregularities” “relating to the granting of tax benefits” to SMCV’s Concentrator and reiterated his accusations.⁷¹⁰ The motion sought to “establish . . . administrative and legal responsibilities” for MINEM’s “questionable decision” to grant the profit reinvestment benefit to SMCV.⁷¹¹ Congressman Diez Canseco’s motion was ultimately adopted by the Congressional Energy and Mines Commission, resulting in the creation of the Congressional Working Group to investigate Cerro Verde on 5 October 2005.⁷¹²
- (xix). On the same day—as Peru’s document production revealed—Mr. Isasi sent an email marked as “high” importance to several MINEM officials, including Mr. Tovar, in which he forwarded a presentation by Congressman Diez Canseco on “Cerro Verde and its Implications for Arequipa.” In the presentation, the Congressman questioned the “justification for granting Cerro Verde II . . . a tax benefit that was repealed 4

⁷⁰⁷ See Memorial ¶ 132 (citing **Ex. CE-508**, *Minera Cerro Verde Under JDC's Magnifying Glass*, LA REPÚBLICA (16 September 2005); **Ex. CE-509**, Congressman Diez Canseco considers denouncing the Minister for providing benefits to mining companies that do not pay royalties, EL HERALDO (16 September 2005), p. 2; **CWS-11**, Torreblanca I, ¶ 42).

⁷⁰⁸ See **Ex. CE-953**, MINEM Report No. 1718-2005-MEM/DM (26 September 2005) (referring to an unproduced letter from Congressman Diez Canseco threatening Minister Sánchez Mejía with a constitutional complaint).

⁷⁰⁹ See Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 8.

⁷¹⁰ **Ex. CE-510**, Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR (19 September 2005), p. 2; *see also id.* ¶ 9 (arguing that the reinvestment approval was a “controversial and irregular act” resulting from “a biased interpretation that violated the regulatory framework that governs the mining sector”); Memorial, ¶ 141.

⁷¹¹ **Ex. CE-510**, Congress, Agenda Motion No. 0366 2605 2006-DDP-EM/CR (19 September 2005), p. 2.

⁷¹² **Ex. CE-516**, Congress, Energy & Mines Commission, Minutes of Sixth Regular Session (5 October 2005), p. 2.

years ago” and the “correct[ness]” of “the Central Government in Lima deciding on its own to grant Cerro Verde a tax privilege that affects the interests of Arequipa.”⁷¹³

(xx). In the same email, Mr. Isasi attached for comments the draft of a presentation for Minister Sánchez Mejía to Congress.⁷¹⁴ In the draft presentation, Mr. Isasi stated that the Stability Agreement “only applied to the Leaching Project” and for the first time took the position that “the project of primary sulfides of Cerro Verde does not form part of the stabilized regime” covered by the Stability Agreement—a position that directly contradicted MINEM’s confirmation to SMCV a year earlier that the Concentrator would be entitled to stability guarantees if it formed part of the stabilized Beneficiation Concession.⁷¹⁵ Mr. Isasi’s draft slides also contradicted the view he himself had taken five months earlier in his April 2005 Report, in which he stated that “mining concessions . . . depending on whether or not they are part of a project set out in a stability agreement signed prior to the enactment of [the Royalty] Law” “will be exempt or not from the payment of royalties.”⁷¹⁶ Peru does not contend that Minister Sánchez Mejía actually gave this presentation before Congress and there is no evidence that he did.

(xxi). The next day, on 20 September 2005, Minister Sánchez Mejía stated to the press that Cerro Verde would have to pay royalties related to the Concentrator—but he did not say why that would be the case.⁷¹⁷ This was the first time MINEM made any such public statement—almost a year after SMCV approved the investment in the Concentrator.

⁷¹³ **Ex. CE-952**, Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jamie Chavez Riva (19 September 2005, 10:00 AM), Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa (September 2005), slide 21.

⁷¹⁴ **Ex. CE-952**, Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jamie Chavez Riva (19 September 2005, 10:00 AM), Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa (September 2005).

⁷¹⁵ **Ex. CE-952**, Email from Felipe Isasi to Percy Olivas Lazo, Oswaldo Tovar, and Jamie Chavez Riva (19 September 2005, 10:00 AM), Javier Diez Canseco Cisneros, Cerro Verde and its Implications for Arequipa (September 2005) pp. 27, 31.

⁷¹⁶ **Ex. CE-494**, MINEM, Report No. 153-2005-MEM/OGAJ (14 April 2005), ¶ 17.

⁷¹⁷ See Memorial ¶ 132 (citing **Ex. CE-511**, Minister: Cerro Verde Expansion Subject to Royalty, BUSINESS NEWS AMERICAS (20 September 2005)).

- (xxii). On 22 September 2005, Mr. Isasi sent Minister Sánchez Mejía his Report responding to Congressman Oré’s request for information on SMCV’s stability guarantees, which confirmed that SMCV’s reinvestment benefit had been correctly approved.⁷¹⁸
- (xxiii). On 26 September 2005, Minister Sánchez Mejía wrote to Congressman Diez Canseco to respond to the Congressman’s allegations of unconstitutional conduct against him.⁷¹⁹ In his response, Minister Sánchez Mejía attempted to deflect the pressure by claiming that the Congressman’s ire was misdirected because MINEM was not “the competent body” for administering the Mining Royalty Law and encouraged Congressman Diez Canseco to direct his requests to the MEF and SUNAT.⁷²⁰ The Minister’s position was completely at odds with the position that Peru advances in this arbitration—that MINEM was the relevant authority to determine whether companies were exempt from paying royalties due to stability agreements.
- (xxiv). On 30 September 2005, Minister Sánchez Mejía sent Congressman Diez Canseco copies of the “technical file” for the Concentrator, in response to yet another communication from the Congressman that Peru has failed to produce.⁷²¹
- (xxv). On 3 October 2005, Minister Sánchez Mejía responded to Congressman Oré’s 15 September 2005 letter asserting without support that “the Primary Sulfide Project will not enjoy the tax, exchange-rate and administrative stability regime, since for said Project the signing of an Agreement for Promotion and Guarantee of Investment has not been applied for”—a sharp contrast to his previous claim that assessing the royalty issue fell outside MINEM’s jurisdiction.⁷²²
- (xxvi). On 5 October 2005, the Congressional Working Group to investigate Cerro Verde was created, after the Committee on Energy and Mines considered and

⁷¹⁸ See **Ex. CE-512**, MINEM, Report No. 385-2005-MEM/OGJ (22 September 2005); see also Memorial ¶ 142.

⁷¹⁹ **Ex. CE-953**, MINEM Report No. 1718-2005-MEM/DM (26 September 2005).

⁷²⁰ **Ex. CE-953**, MINEM Report No. 1718-2005-MEM/DM (26 September 2005).

⁷²¹ **Ex. CE-954**, MINEM Report No. 1719-2005-MEM/DM (30 September 2005) (responding to “Oficio No. 441-2005-JDC/CR” from Congressman Diez Canseco to Minister Sánchez Mejía). See Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 8.

⁷²² See Memorial ¶¶ 134-36 (citing **Ex. CE-507**, Communication No. 3769-2005-AOM-CR from Congressman Oré to Minister Sánchez Mejía (15 September 2005); **Ex. CE-515**, MINEM, Report No. 1725-2005-MEM/DM (3 October 2005)).

“unanimously approved” the motion to “investigate the alleged tax benefits received by Sociedad Minera Cerro Verde” and “adopt the appropriate measures.”⁷²³

- (xxvii). On 24 October 2005, Minister Sánchez Mejía responded to yet another request—this time apparently from the Coordinator of the Working Group to investigate Cerro Verde, Congressman Olaechea, for a report on the “tax benefits” granted to SMCV for the Concentrator, though again Peru has improperly failed to produce the request. In his response, Minister Sánchez Mejía stated that SMCV had not requested or been granted any benefits applicable to the Concentrator.⁷²⁴
- (xxviii). On 31 October 2005, Congressman Diez Canseco stepped up the pressure on Minister Sánchez Mejía and rejected the Minister’s assertion that MINEM was not “competent” to “ensure the due collection of the Mining Royalty.”⁷²⁵ The Congressman stated that the Ministry had a “political responsibility” to “*guarantee*” royalty collections, and reiterated his prior request for information on the measures MINEM had taken to “ensure the collection of mining royalties,” including for “specific cases such as . . . Sociedad Minera Cerro Verde S.A.A.,” demanding that MINEM respond with the “utmost urgency.”⁷²⁶
- (xxix). On 8 November 2005, Minister Sánchez Mejía provided the Congressman his long-sought response confirming that the Government would pursue royalty payments from SMCV.⁷²⁷
- (xxx). On 16 January 2006, Mr. Isasi sent an internal report to Minister Sánchez Mejía to address Congressman Diez Canseco’s request for information on the measures MINEM had taken to “ensure the collection of mining royalties.”⁷²⁸ The report noted that the Directorate General of Mining provided “necessary technical support”

⁷²³ **Ex. CE-516**, Congress, Energy & Mines Commission, Minutes of Sixth Regular Session (5 October 2005), pp. 2-3.

⁷²⁴ **Ex. CE-955**, MINEM Report No. 1884-2005-MEM/DM (24 October 2005) (responding to “Oficio No. 003-2005-2006-GTCV-CEM-CR”); *see* Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 8.

⁷²⁵ **Ex. CE-956**, Communication No. 0491-2005-JDC/CR from Congressman Diez Canseco to Minister Sánchez Mejía (31 October 2005), p. 1.

⁷²⁶ **Ex. CE-956**, Communication No. 0491-2005-JDC/CR from Congressman Diez Canseco to Minister Sánchez Mejía (31 October 2005), pp. 1-2. *See* Memorial, ¶ 133; **Ex. CE-516**, Congress, Energy & Mines Commission, Minutes of Sixth Regular Session (5 October 2005), p. 2 (establishing the Working Group by the Congressional Energy and Mines Commission).

⁷²⁷ **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005), p. 1; *see* Memorial ¶ 137.

⁷²⁸ **Ex. CE-957**, MINEM, Report No. 015-2006-MEM/OGJ (16 January 2006).

to SUNAT by providing a “monthly” “list of mining titleholders and their respective *production units*.”⁷²⁹ Notably, the report said nothing about providing information relating to specific *investment projects*. On 15 February 2006, Minister Sánchez Mejía forwarded Mr. Isasi’s report to Congressman Diez Canseco.⁷³⁰

- (xxxi). On 24 April 2006, *La República* published an article on the political debates about requiring the “big companies,” including “Cerro Verde” to pay royalties. The article displayed a graphic attributed to MINEM listing SMCV as a stabilized mining company that would not pay royalties until 2013—*i.e.*, after the Stability Agreement’s term.⁷³¹ The article also quoted the President of the Congressional Energy and Mines Commission, Juan Valdivia, complaining about SUNAT’s lack of “political will” to enforce the collection of royalties on companies with stability agreements, and noted that Mr. Valdivia planned to “summon the head of SUNAT, Nahil Hirsh . . . to explain the reason for her approach.”⁷³² It further noted that despite political pressure, “[MINEM] consider[ed] that the approach of the mining companies [was] correct, since stability agreements protect the company . . . from administrative modifications,” and quoted Mr. Tovar as acknowledging that this approach reflected its “respect for the signed [stability] agreements.”
- (xxxii). On 3 May 2006, Mr. Isasi made his presentation to the Working Group of the Congressional Energy and Mines Committee, in which he laid out essentially the same argument made in his June 2006 Report several weeks later.⁷³³
- (xxxiii). That same day, the Energy and Mines Committee also discussed the royalty issue in its full session. The transcripts of that session reflect the significant pressure to collect royalties from stabilized companies, as MINEM officials faced questions from members of Congress about why ten mining companies with stability agreements identified by SUNAT were “paying absolutely nothing,” demands that MINEM “explain to us why these important companies do not pay mining royalties

⁷²⁹ **Ex. CE-957**, MINEM, Report No. 015-2006-MEM/OGJ (16 January 2006).

⁷³⁰ **Ex. CE-958**, MINEM, Report No. 269-2006-MEM/DM (15 February 2006).

⁷³¹ **Ex. CE-1042**, *SUNAT must impose assessments against the big companies that don’t pay royalties*, LA REPÚBLICA (24 April 2006).

⁷³² **Ex. CE-1042**, *SUNAT must impose assessments against the big companies that don’t pay royalties*, LA REPÚBLICA (24 April 2006).

⁷³³ *See, e.g.*, Counter-Memorial ¶¶ 197-200.

to our country, to our people,” and accusations that the government was “harming the nation.”⁷³⁴

(xxxiv). The full session also featured a presentation by Vice Minister of Mines Rómulo Mucho on behalf of Min. Sánchez Mejía.⁷³⁵ This presentation, which Peru first produced in its production, is largely similar to the “final presentation” that Mr. Isasi circulated for Min. Sánchez Mejía in June 2005, less than a year earlier.⁷³⁶ But key differences between the two slide decks are striking, and demonstrate MINEM’s development of its novel position over the course of that year to justify its objective of assessing royalties for the Concentrator in response to sustained pressure. In particular, while the June 2005 slide deck nowhere limits the scope of stability guarantees to the investment specifically designated in the feasibility study, the May 2006 presentation amends several key slides to introduce a more restrictive position, as the table below demonstrates:⁷³⁷

⁷³⁴ **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 15 (quoting Congressman Carrasco Távara).

⁷³⁵ *See Ex. CE-962*, MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission on 3 May 2006, attached to email from Tovar Oswaldo to Chavez Riva Jamie (3 May 2006, 7:32 PM); **Ex. CE-963**, Transcripts of Congressional Session before the Energy and Mines Commission (3 May 2006), pp. 2-3 (describing Minister Sánchez Mejía’s request to have Vice Minister Rómulo Mucho present “in his place”).

⁷³⁶ *Compare Ex. CE-948*, MINEM, Mining Royalties: Proposals for Modifying the Law and Effects of the Judgement of the Constitutional Tribunal, attached to email from Felipe Isasi to Glodomiro Sanchez (3 June 2005, 4:10 PM), *with Ex. CE-962*, MINEM, Mining Royalties and Their Evolution, presentation before the Congressional Energy and Mines Commission on 3 May 2006, attached to email from Tovar Oswaldo to Chavez Riva Jamie (3 May 2006, 7:32 PM).

⁷³⁷ *See also supra* ¶ 69.

Draft June 2005 Presentation	May 2006 Presentation
<p style="text-align: center;">Slide 28</p> <p>“Consequently, whoever enters into a <i>contrato-ley</i> with the State, is protected from modifications subsequent to the stabilized legal regime.”</p>	<p style="text-align: center;">Slide 14</p> <p>“Consequently, whoever enters into a <i>contrato-ley</i> with the State, is protected from protects its investment against modifications subsequent to the stabilized legal regime.”⁷³⁸</p>
<p style="text-align: center;">Slide 31</p> <p>“Consequently, a <i>Contrato-Ley</i> with Administrative Stability prior to the Royalty Law does protect against this new obligation.”</p>	<p style="text-align: center;">Slide 18</p> <p>“Consequently, a <i>Contrato-Ley</i> with Administrative Stability prior to the Royalty Law does protects against this new obligation the investments set out in the contract.”⁷³⁹</p>
<p style="text-align: center;">Slide 29</p> <p>“. . . in [the Constitutional Tribunal’s decision] there is no express exception regarding mining projects protected by <i>Contratos-Ley</i> executed prior to the enactment of the Royalty Law.”</p>	<p style="text-align: center;">[Slide Deleted]</p>

(xxv). In early June 2006, 5,000 local Arequipa residents and municipal and regional politicians protested at Cerro Verde against the profit reinvestment “benefit[,] granted unlawfully by the Ministry of Energy and Mines.”⁷⁴⁰ During the protests, the mayor of Arequipa “warned” the central government, threatening “an open-ended regional strike” later that month if it failed to “respon[d]” to the political outcry over the “loss of . . . tax revenue from Cerro Verde” that “the Peruvian State suffered.”⁷⁴¹

(xxvi). On 16 June 2006, Mr. Isasi issued his non-binding report setting out the legal position underlying MINEM’s conclusion that SMCV’s stability agreement did not prevent the assessment of royalties for the Concentrator—that stability guarantees

⁷³⁸ See also **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 22 (“Consequently, whoever enters into a *contrato-ley* with the State is protecting their investment against modification to the stabilized regime.”).

⁷³⁹ See also **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006), p. 23 (“Consequently, a *contrato-ley* with administrative stability prior to the Royalty Law protects against this new obligation to investments, subject matter of the contract.”).

⁷⁴⁰ **Ex. CE-535**, Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000, LA REPÚBLICA (19 June 2006), p. 1.

⁷⁴¹ **Ex. CE-535**, Cerro Verde Evades Payment of Taxes Based on a Law Repealed in 2000, LA REPÚBLICA (19 June 2006), p. 2.

“[are] granted to an investment project clearly delimited by the Feasibility Study and agreed to in the agreement.”⁷⁴²

151. Mr. Isasi’s June 2006 Report was thus the culmination of a year and a half of political pressure and threats targeted at MINEM from both national and local politicians—including formal inquiries, Congressional investigations, civil unrest, and direct threats to commence a constitutional enforcement action against Min. Sanchez Mejía—that sought to increase the revenues SMCV paid to the state for its operations at Cerro Verde. In the face of this political pressure, the record clearly demonstrates that instead of applying and upholding the law as it was, MINEM worked backwards: first deciding that SMCV *must* pay royalties for the Concentrator—even though less than a year before MINEM had confirmed to SMCV that the Concentrator was exempted from Royalties—and then developing a legal position to attempt to justify that conclusion, even if that meant completely upending the stability framework contained in the Mining Law and Regulations as it had been applied up to that point.

152. Further, in the lead-up to SUNAT issuing its first Royalty Assessments against SMCV, SUNAT and the MEF also faced political pressure to act against SMCV—despite having repeatedly confirmed up to that point that stability guarantees applied to concessions or mining units, as explained above.⁷⁴³

- (i). For example, on 20 July 2006, Dante Martínez Palacios, a local union leader in Arequipa, filed a complaint against SMCV through SUNAT’s internal complaint procedure challenging SMCV’s use of the reinvestment benefit.⁷⁴⁴ On 25 July 2006, Mr. Martinez Palacios filed additional submissions arguing that SUNAT had “distort[ed] the regulations” in granting SMCV’s request to use the benefit, “allowing undue enrichment,” and through “cunning, distracted [popular] attention” away from the issue, evading SUNAT’s “responsibility” to “defen[d] . . . the rights of the Peruvian people . . . who are the true owners of copper and other wealth and natural resources in our country.”⁷⁴⁵

⁷⁴² See **Ex. CE-534**, MINEM, Report No. 156-2006-MEM/OGJ (16 June 2006), Section I ¶ 5.2, Section III ¶ 4.1.

⁷⁴³ See Memorial ¶ 376.

⁷⁴⁴ **Ex. CE-1040**, Dante Martinez, Complaint to SUNAT No. 016278 (25 July 2006).

⁷⁴⁵ **Ex. CE-1040**, Dante Martinez, Complaint to SUNAT No. 016278 (25 July 2006).

- (ii). On 12 November 2007, Mr. Martínez Palacios, filed yet another complaint before SUNAT alleging that SMCV “fraudulent[ly]” applied the profit reinvestment benefit to the Concentrator.⁷⁴⁶
- (iii). On 20 November 2007—a little over a week after Mr. Martínez filed his latest complaint before SUNAT—SUNAT requested MINEM to provide it with a “list of parties obligated to pay mining royalties.”⁷⁴⁷
- (iv). On 29 January 2008, MINEM provided SUNAT with the “information of entities that are obligated to pay mining royalties” and enclosed, among other documents, Mr. Isasi’s June 2006 Report setting forth MINEM’s novel position on the scope of stability guarantees.
- (v). A few months later, SUNAT initiated an audit of SMCV.⁷⁴⁸ On 17 August 2009, SUNAT issued its first Royalty Assessments in which it relied on MINEM’s conclusion that SMCV’s Concentrator was not protected by the Stability Agreement.⁷⁴⁹

153. As explained in Section II.A.2 above, there is absolutely no evidence that SUNAT applied stability guarantees only to specific “investment projects” before MINEM developed its novel position. On the contrary, the evidence clearly demonstrates that SUNAT applied stability guarantees to entire mining units or concessions. Notably, three years *after* issuing its first Royalty Assessment against SMCV, SUNAT advised taxpayers that stability guarantees applied to the “*concession[s] or economic administrative unit[s]*” covered by a stability agreement.⁷⁵⁰ Peru’s witness Ms. Bedoya also fails to rebut the fact that SUNAT clearly agreed with SMCV’s interpretation of the scope of stability agreements until instructed otherwise by MINEM in the face of sustained political pressure. Ms. Bedoya provides not a single example of SUNAT taking the position that stability guarantees were limited to investment projects

⁷⁴⁶ **Ex. CE-1041**, Dante Martínez, Complaint to SUNAT (12 November 2007); *see* **Ex. CE-588**, Dante Martínez, Superior Civil Court Complaint (28 April 2009); **CWS-11**, Torreblanca I, ¶¶ 64-65.

⁷⁴⁷ *See* Memorial ¶¶ 160, 169, 318(b), 376-77 (citing **Ex. CE-568**, SUNAT Report No. 261-2007-SUNAT/2E0000 (20 November 2007), p. 1; **Ex. CE-603**, Dante A. Martínez, *The Largest Tax Fraud in the History of Peru*, CON NUESTRO PERÚ (15 January 2011)).

⁷⁴⁸ *See* Memorial §§ III.K, III.L (citing **Ex. CE-577**, SUNAT, Inductive Letter No. 108052004279 (30 May 2008) (requesting that SMCV file documents related to the payment of royalties for sales of copper ore from the Concentrator from 2006 and 2007)).

⁷⁴⁹ *See* **Ex. CE-31**, SUNAT, 2006/07 Royalty Assessments (17 August 2009).

⁷⁵⁰ *See supra* § II.A.2(i) (citing **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 February 2020), p. 3).

instead of concessions or mining units.⁷⁵¹ Moreover, neither Peru nor Ms. Bedoya have anything to say about why SUNAT took action against SMCV only after MINEM sent SUNAT Mr. Isasi’s June 2006 Report, noting that “[t]his information is sent considering the implications that the [Stability Agreement] might have on the payment of Mining Royalties corresponding to the Primary Sulfides Project.”⁷⁵²

154. Peru’s main argument on this issue—that there was never any *volte-face* resulting from political pressure because there was no *volte-face* in the Government’s position at all—is simply not credible in light of the evidence discussed in Section II.A. above showing that MINEM and other Government entities consistently applied stability guarantees to concessions or mining units, and that MINEM confirmed to SMCV that the Concentrator would be covered by the Stability Agreement.

- (a) It is telling that Peru’s argument essentially devolves into quibbling with the timing of whether Mr. Isasi first articulated Peru’s so-called “consistent position” that stability guarantees are limited to specific investments in his April 2005 Report, or his May 2006 presentation, or his June 2006 Report.⁷⁵³ But this difference is essentially meaningless. Even if MINEM adopted its novel and restrictive position on the scope of stability guarantees in 2005, or began to formulate that position, it still did so *after* it had provided SMCV with assurances to the contrary; *after* SMCV made its decision to invest in the Concentrator and started to construct the Concentrator and *after* the political campaign against SMCV’s entitlement to stability guarantees for the Concentrator was already well under way. Importantly, Peru has not pointed to a single example of Government entities advancing their so-called “consistent” position prior to SMCV’s decision to invest in the Concentrator and the commencement of its construction.⁷⁵⁴
- (b) Peru’s attempt to characterize Congressman Diez Canseco’s September 2005 threat against Min. Sánchez Mejía as the starting point for political pressure levelled at the Government is belied not only by press reports that SMCV presented with its Memorial, but also by documents Peru was ordered to produce. As explained above, this evidence confirms that as early as January 2005, Congressman Diez Canseco was demanding that Min. Sánchez Mejía answer to him regarding SMCV’s stability guarantees, and by March

⁷⁵¹ See generally **RWS-4**, Bedoya.

⁷⁵² Memorial ¶ 162; see also **Ex. CE-573**, MINEM, Report No. 077-2008-MEM-DGM (29 January 2008).

⁷⁵³ See Counter-Memorial ¶ 181.

⁷⁵⁴ The only exception Peru attempts to rely on is **Ex. RE-26**, SUNAT, Report No. 263-2002-SUNAT/K00000 (23 September 2002), the SUNAT Report issued in 2002, but this document does not support Peru’s position, as explained in detail in Section II.A.2(ii) above.

2005, was publishing incendiary articles in a leading Peruvian newspaper targeting MINEM, MEF, and SMCV.⁷⁵⁵

155. The parties agree that conduct is arbitrary if it is “not based on legal standards” but rather “on political calculations,” or if it is “taken for reasons that are different from those put forward by the decision maker.”⁷⁵⁶ See Section II.C.2 above. Here, Peru’s politically-motivated and baseless *volte-face* in its application of the Mining Law and Regulations was an abrupt departure from the existing legal framework and the Government’s prior practice, which had always been to apply stability guarantees to entire concessions or mining units. The Tax Tribunal’s resolutions upholding SUNAT’s Royalty Assessments on the basis of Peru’s novel position likewise completely contradicted MINEM’s prior confirmation that the Concentrator would be entitled to stability guarantees when it approved SMCV’s request to expand the Beneficiation Concession. Peru’s decisions to uphold the Royalty Assessments on the basis of this arbitrary, inconsistent conduct clearly constituted violations of Peru’s obligation of fair and equitable treatment.

iii. Peru Withheld Key Documents and Information from SMCV Even as Government Officials Affirmed SMCV’s Position and Induced Significant Additional Payments

156. As Freeport explained in its Memorial, Peru’s arbitrary and inconsistent conduct was compounded by its total lack of transparency in its dealings with SMCV.⁷⁵⁷ In particular, even after MINEM adopted its novel position that stability guarantees are limited to the investment project—and in SMCV’s case, only to the leaching facilities but not the Concentrator—MINEM did not share this novel position or its purported legal basis with SMCV.⁷⁵⁸ This is despite the fact that MINEM and other agencies had ample opportunity to do so, including in multiple direct meetings between SMCV representatives and Government officials.⁷⁵⁹ Instead, the Government continued to withhold key information and documents from SMCV to induce further “voluntary” payments of over US\$365 million from SMCV based on the premise that SMCV would not pay royalties or additional taxes.⁷⁶⁰

⁷⁵⁵ Ex. CE-485, *Mining Royalties: Sleeping with the Enemy*, LA REPÚBLICA (2 March 2005).

⁷⁵⁶ RA-62, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) ¶ 303; Counter-Memorial ¶¶ 650-54.

⁷⁵⁷ See Memorial ¶¶ 364, 367, 378-83.

⁷⁵⁸ See Memorial ¶ 381.

⁷⁵⁹ See Memorial ¶¶ 381-82.

⁷⁶⁰ See Memorial ¶ 382 (SMCV contributed US\$125 million to Arequipa following the 2006 Roundtable Discussions, US\$140 million under the Voluntary Contribution Agreement, and over US\$100 million to GEM).

157. Peru does not deny that (i) it withheld key documents from SMCV, (ii) after it began acting against SMCV as a result of political pressure, Government officials repeatedly declined to clarify their intentions regarding assessing royalty payments against SMCV when SMCV requested them to do so; and (iii) the Government did not object when SMCV stated its position that the stability guarantees also applied to its Concentrator investment—a position that was based on MINEM’s own confirmation. Instead, Peru advances the remarkable argument that SMCV should not have relied on its face-to-face conversations with key Government officials and instead should have watched on CCTV two presentations that Peru alleges Min. Sánchez Mejía and Mr. Isasi gave before Congressional Committees, in which they purportedly explained Peru’s novel position.⁷⁶¹ Peru also relies on Mr. Tovar’s unsupported testimony that MINEM presented its novel position to Phelps Dodge’s President, Red Conger, and external counsel, Luis Carlos Rodrigo Prado, in Toronto in March 2005 and to SMCV during the Roundtable Discussions in 2006—testimony that is contradicted by contemporaneous evidence and by Ms. Torreblanca’s testimony.⁷⁶² None of these arguments, however, can get around the evidence clearly demonstrating that Peru’s conduct wholly lacked transparency, and in so doing, affirmatively misled SMCV about the Government’s intentions and the status of its stability guarantees.

158. *First*, Peru asserts that SMCV “should have known” that the Government intended to deny stability guarantees to the Concentrator. But this is irrelevant. The relevant question is not whether SMCV *could have* discovered Peru’s true intentions, it is whether *Peru’s* conduct lived up to its obligation of fair and equitable treatment to be transparent to SMCV about its intentions. To frame the question as being whether SMCV “should have known” that the Government made a complete *volte-face* is a blatant attempt to avoid the fact that the Government not only repeatedly failed to inform SMCV directly of its changed position on the scope of stability guarantees in the multiple meetings that SMCV held with Government officials and in the Government’s correspondence with SMCV, but that the Government even continued to confirm SMCV’s position during this time.

- (a) In March 2005, Ms. Torreblanca sent a letter to SUNAT in which she set out SMCV’s understanding that the Stability Agreement applied to “Cerro Verde” in its entirety and that, as a result, SMCV would not be subject to royalties. Shortly after, she reiterated SMCV’s understanding in a meeting with Haraldo Cruz, SUNAT’s Regional Intendent for Arequipa.⁷⁶³ Peru and Mr. Cruz do not contest that SUNAT never responded to the letter

⁷⁶¹ See Counter-Memorial ¶¶ 185, 200; **RWS-2**, Isasi, ¶¶ 51, 59.

⁷⁶² See Counter-Memorial ¶ 216; **RWS-3**, Tovar ¶¶ 53, 61, 66-67; **CWS-11**, Torreblanca I ¶¶ 53-54; **CWS-21**, Torreblanca II ¶¶ 25-27.

⁷⁶³ Memorial ¶ 124 (citing **Ex. CE-486**, SMCV, Letter No. SMCV-AL-279/2005 to SUNAT (4 March 2005); **CWS-11**, Torreblanca I, ¶ 32); *id.* ¶ 318(a).

and that Mr. Cruz did not contradict Ms. Torreblanca’s explanation. Instead, they argue that “SUNAT had no power to establish or interpret the scope of the 1998 Stabilization Agreement.”⁷⁶⁴ As explained above, this is a false statement.⁷⁶⁵ It is directly contradicted by the Royalty Assessments that SUNAT started to issue four years later. It is also contradicted by Peru’s own witness Ms. Bedoya.⁷⁶⁶ And even under Peru’s alternative narrative that the Government, including SUNAT, “from the outset” interpreted stability guarantees as applying to specific investment projects, SUNAT’s silence would violate any notions of transparency, as Mr. Cruz should have corrected Ms. Torreblanca’s understanding. That he did not do so means either that he deliberately misled Ms. Torreblanca, or that SUNAT at the time still took the position that stability guarantees applied to concessions and mining units.⁷⁶⁷

- (b) Mr. Tovar alleges that during an 8 March 2005 meeting at the PDAC Conference in Toronto, he told Phelps Dodge representatives that the Concentrator “would have to pay royalties, because it was not stabilized.”⁷⁶⁸ But as explained above in Section II.A.2(ii), Mr. Tovar’s claim is flatly contradicted by the very two *aide-mémoires* on which Mr. Tovar relies in support of his assertion, by Ms. Torreblanca’s testimony and by the presentation Mr. Conger of Phelps Dodge gave at the Conference the day after meeting Mr. Tovar.
- (c) Peru also did not share Mr. Isasi’s April 2005 Report with SMCV—despite the fact that Peru now argues that it represents a clear articulation of Peru’s position. In fact, not only did MINEM fail to disclose it to SMCV, it resisted disclosure under its own Transparency Law and before Peru’s Transparency Tribunal.⁷⁶⁹ If Peru’s position that Mr. Isasi’s April 2005 Report supported its position were correct, then the Government’s persistent failure and resistance to share the April 2005 Report with SMCV would be further powerful evidence of the Government’s utter lack of transparency. But, as Freeport explained above in Section II.A.2(ii), Mr. Isasi’s April 2005 Report clearly supports the position

⁷⁶⁴ Counter-Memorial ¶ 170; **RWS-7**, Witness Statement of Colón Haraldo Cruz Negrón (“Cruz”), ¶¶ 13, 20.

⁷⁶⁵ *See supra* § II.A.2; **CER-3**, Hernández I, ¶¶ 105-110.

⁷⁶⁶ *See supra* § II.A.2.

⁷⁶⁷ *See supra* § II.A.2(i) (discussing evidence supporting that SUNAT’s position was that stability guarantees applied to entire concessions or units).

⁷⁶⁸ **RWS-3**, Tovar, ¶ 55.

⁷⁶⁹ *See* Memorial ¶ 315 (citing **Ex. CE-884**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021- JUS/TTAIP (16 April 2021)).

that stability guarantees apply to concessions or mining units, which explains why the Government so persistently refused to disclose it.⁷⁷⁰

- (d) Peru also does not contest that it failed to provide to SMCV the two letters that Min. Sánchez Mejía wrote to Congressman Oré in October 2005 and to Congressman Diez Canseco in November 2005, in which he took the position that the Concentrator would not be entitled to stability guarantees. Peru does not contest that it failed to provide these documents to SMCV at the time, despite their clear relevance to SMCV. Peru only shared the November 2005 letter with SMCV *two and a half years later*, in June 2008.⁷⁷¹
- (e) Likewise, Peru concedes that it did not provide Mr. Isasi's June 2006 Report setting out the novel position that stability guarantees were limited to specific investment projects to SMCV at the time it was issued. Rather, MINEM provided SMCV with a copy of the report only *two years later*, in June 2008.⁷⁷² Peru attempts to excuse this failure by arguing that it was not "obligat[ed]" to share Mr. Isasi's June 2006 Report with SMCV.⁷⁷³ But this misses the point: Peru's witnesses testify that Mr. Isasi's June 2006 Report was the critical factor in the Government's ultimate determination that SMCV had to pay royalties for the Concentrator.⁷⁷⁴ The importance of Mr. Isasi's opinion to the Government's ultimate decisions against SMCV is likewise corroborated by contemporaneous evidence.⁷⁷⁵ Peru even goes so far as to argue that SUNAT was effectively bound by Mr. Isasi's Report, despite the fact that the Report itself and Peru's witness, Ms. Bedoya, state that it was non-binding, because the MEF (of which SUNAT

⁷⁷⁰ See **Ex. CE-884**, Transparency and Access to Public Information Tribunal, Decision, Case No. 00547-2021-JUS/TTAIP (16 April 2021), p. 13 (quoting Peru's arbitration counsel's advice that April 2005 Report "at first glance, appears to support the Claimant's main argument in these [arbitration] cases"); see also Memorial, ¶¶ 314-15.

⁷⁷¹ See **Ex. CE-519**, MINEM, Report No. 2004-2005-MEM/DM (8 November 2005).

⁷⁷² See Counter-Memorial ¶ 204; Memorial ¶¶ 381-82; **CWS-11**, Torreblanca I, ¶¶ 70, 75.

⁷⁷³ See Counter-Memorial ¶ 257.

⁷⁷⁴ See **RWS-3**, Tovar, ¶ 64 ("[a]fter this report was issued . . . there was no doubt whatsoever that the Ministry's position was that the Concentrator was not covered by the Stabilization Agreement"); see also **RWS-1**, Polo, ¶ 39 (Mr. Isasi's "careful analysis" formed the basis of MINEM's "understanding that the stability guaranteed by a stabilization agreement is granted to the investment project that is delimited by the feasibility study and agreed to in the contract").

⁷⁷⁵ See Memorial ¶ 162 (citing **Ex. CE-573**, MINEM, Report No. 077-2008-MEM-DGM (29 January 2008)) (forwarding June 2006 Report to SUNAT); **Ex. CE-38**, SUNAT, Resolution No. 055-014-0001290/SUNAT, 2006/07 Royalty Assessments (31 March 2010), p. 34 (expressly relying on June 2006 Report in assessing royalties against SMCV).

is a part) had no independent authority to interpret the scope of SMCV's stability guarantees.⁷⁷⁶

- (f) Mr. Isasi likewise does not contest that he never provided his report or discussed his position on the scope of stability guarantees under the Mining Law with SMCV before SMCV received a copy of the report in June 2008.⁷⁷⁷ This is despite the fact that only ten days after Mr. Isasi published the June 2006 Report, Mr. Isasi and other Government officials, such as Min. Sánchez Mejía, met with SMCV for the Roundtable Discussions.⁷⁷⁸
- (g) Mr. Isasi testifies that “[he] do[es] not remember exactly what was discussed in each of [the Roundtable Discussion meetings].”⁷⁷⁹ But Mr. Tovar asserts that during one of these meetings in June 2006, MINEM gave a presentation that stated 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” and that “the presentation was also clear that mining royalties did apply to the Concentrator Project.”⁷⁸⁰ Mr. Tovar's assertion is unsupported and contradicted by the evidence. The presentation itself is undated, and there is no documentary evidence that would show it was actually presented in the Roundtable discussions.⁷⁸¹ Mr. Tovar alleges it was made during “the sessions in June 2006”—*i.e.*, either the 23 June 2006 session or the 29 June 2006 session. Mr. Tovar was only present for the 23 June 2006 session.⁷⁸² However, the minutes of that session make clear that the issue of mining royalties was not discussed at that meeting, but rather, reserved for the later sessions: they note that the parties “*will discuss* the applicability of mining royalties to investments in Cerro Verde II [*i.e.*, the Concentrator].”⁷⁸³ Contemporaneous press reports also confirm that following the first

⁷⁷⁶ See Counter-Memorial ¶ 231; **RWS-6**, Camacho, ¶ 34; **RWS-7**, Cruz, ¶ 6 (“As the Regional Intendent of SUNAT in Arequipa, I was not in a position to confirm the correct interpretation of the scope of a stabilization agreement.”).

⁷⁷⁷ See **RWS-2**, Isasi, ¶ 57.

⁷⁷⁸ See Memorial ¶¶ 146-47.

⁷⁷⁹ **RWS-2**, Isasi, ¶ 65.

⁷⁸⁰ **RWS-3**, Tovar, ¶ 67.

⁷⁸¹ See **Ex. RE-107**, MINEM, “Profit Reinvestment and Mining Royalties Cerro Verde: Leaching Project and Primary Sulfide Project,” (June 2006).

⁷⁸² See **Ex. CE-537**, Congress, Pro-Investment Commission, Minutes of the Session of 23 June 2006; **Ex. RE-51**, Meeting Minutes, Proinversión Commission, Congress, June 29, 2006.

⁷⁸³ **Ex. CE-537**, Congress, Pro-Investment Commission, Minutes of the Session of 23 June 2006 (emphasis added).

meeting, Arequipa leaders who had attended the meeting “demanded that the Government order the payment of the mining royalties of Cerro Verde I and II”—making clear that the Arequipa delegation came away from the meeting with the understanding that SMCV would pay *no* royalties.⁷⁸⁴ Ms. Torreblanca likewise explains that she personally attended the 29 June session and no such presentation was made during that meeting.⁷⁸⁵ Further, she was fully briefed on the 23 June session by her colleagues that attended in person, who did not inform her of any presentation or statements by MINEM of the kind described by Mr. Tovar—as they surely would have done, given that those statements would have been a clear departure from MINEM’s representations to SMCV up to that point and the very purpose of the Roundtable discussions was to obtain contributions from SMCV to compensate for its use of stability guarantees.⁷⁸⁶

- (h) Peru also does not dispute that Government officials continued to confirm that stability guarantees applied to concessions and mining units even *after* SUNAT issued its initial assessments against SMCV. Ms. Torreblanca explains that multiple officials she spoke to after receiving SUNAT’s assessments and Mr. Isasi’s June 2006 Report confirmed that SMCV’s position regarding the scope of stability guarantees under the Mining Law and Regulations was correct. These officials include Marisol Guiulfo, the Vice-Minister of Economy, and Liliana Chipoco, MEF’s General Director of Public Revenue Policy.⁷⁸⁷ Moreover, as late as 2012, long after SUNAT issued its first Royalty Assessment against SMCV, SUNAT issued a report, authored by Ms. Chipoco, which repeatedly confirmed that “mining-activity owners that have signed agreements on guarantees and measures to promote investment under the General Mining Law will enjoy a stabilized tax system applicable *solely to the concession or economic-administrative unit for which said agreement has been signed.*”⁷⁸⁸

159. *Second*, Peru attempts to justify its abject failure to disclose its new position on the scope of stability guarantees to SMCV in the multiple face-to-face meetings Government officials had with SMCV by arguing that SMCV “should have known” that the Government was dishonest because SMCV allegedly could have watched on the Congress’s CCTV two presentations given by MINEM officials

⁷⁸⁴ **Ex. CE-540**, *Arequipa and Cerro Verde Authorities Seek Solutions*, EL HERALDO (28 June 2006), p. 2; *see also* **CWS-11**, Torreblanca I, ¶ 53.

⁷⁸⁵ *See* **CWS-21**, Torreblanca II, ¶ 34.

⁷⁸⁶ *See* **CWS-21**, Torreblanca II, ¶¶ 34-35.

⁷⁸⁷ **CWS-11**, Torreblanca I, ¶ 81; **CWS-21**, Torreblanca II, ¶ 44.

⁷⁸⁸ **Ex. CE-883**, SUNAT, Report No. 084-2012-SUNAT/4B0000 (13 September 2012) (emphasis added).

before a Congressional Committee and a Congressional Working Group in which they allegedly stated the Government's new position.⁷⁸⁹ This argument is ludicrous and just one more striking example of Peru's total lack of transparency and fair dealing.

- (a) Peru also does not provide any evidence that these sessions were broadcast to the public when it asserts they were "transmitted via a closed circuit television system," even though it agreed to produce any documents to that effect in discovery.⁷⁹⁰ Peru has also failed to provide any evidence that the sessions of the Committee and the Working Group were open to the public. Moreover, SMCV did not receive any invitation to attend these meetings.⁷⁹¹
- (b) Moreover, as explained in Section II.A.2(ii) above, it is incorrect that Minister Sánchez Mejía presented the Government's novel position at his June 2005 presentation.⁷⁹² And, as explained in Section II.A.2(ii) above, on the same day that Mr. Isasi spoke before the Congressional Working Group in May 2006, several other Government officials stated before the Energy and Mines Commission that the stability guarantees applied to concessions or mining units.⁷⁹³

160. *Third*, there is a reason why MINEM officials kept their new position on the scope of stability guarantees and SMCV's Concentrator close to their chest: the Government sought to induce SMCV to pay hundreds of millions of dollars in "voluntary" contributions in the belief that its Concentrator was exempt from royalties—as MINEM itself had previously confirmed. Peru does not contest that SMCV made hundreds of millions of dollars in "voluntary" contributions and GEM payments that it should not have had to make if it had to pay royalties.⁷⁹⁴

- (a) The explicit purpose of the Roundtable Discussions was to provide the Arequipa province with additional contributions to make up for the tax and royalty payments that SMCV did

⁷⁸⁹ See Counter-Memorial ¶ 257.

⁷⁹⁰ **RWS-2**, Isasi, ¶ 51; Counter-Memorial ¶¶ 185, 200; Procedural Order No. 2 (4 July 2022), Appendix 1, Request No. 10.

⁷⁹¹ *Contra* Counter-Memorial ¶¶ 182, 200.

⁷⁹² See also **Ex. CE-968**, MINEM, 2006 Annual Mining Report (August 2007); **Ex. CE-970**, MINEM, 2007 Annual Mining Report (February 2008); **Ex. CE-972**, Felipe Isasi, Mining in Peru (September 2008); **RER-3**, Bravo & Picón, ¶ 42; **Ex. CE-1004**, ProInversión Manual (2016); **Ex. CE-939**, ProInversión, Terms for International Public Contest No. PRI-80-2003, Las Bambas - Apurímac Department (24 August 2004); **Ex. CE-980**, ProInversión, Terms for International Public Contest, Minería Magistral (September 2010); **Ex. CE-1010**, ProInversión, Terms for International Public Contest, Yacimientos Cupríferos de Michiquillay (January 2018). *Contra* Counter-Memorial ¶¶ 184-85, 232-33.

⁷⁹³ See **Ex. CE-963**, Congressional Energy and Mines Commission, Session Transcript (3 May 2006).

⁷⁹⁴ Memorial ¶ 382.

not have to make because of the Stability Agreement. SMCV contributed over US\$125 million to Arequipa through the Roundtable Discussion Agreement.⁷⁹⁵ These contributions covered: (i) feasibility studies for the construction of a potable water treatment plant and a wastewater treatment plant; (ii) construction of the potable water treatment plant; and (iii) the shortfall in Arequipa's budget deficit from investments for local communications, from June 2006 to May 2007.⁷⁹⁶

- (b) Even after SMCV's significant contribution to Arequipa, the Government induced SMCV to sign the Voluntary Contribution Agreement and contribute an additional US\$140 million on the premise that SMCV would not be subject to any royalty payments.⁷⁹⁷ Peru does not contest that (i) during the negotiation process of this agreement, SMCV was designated as "stabilized" and the Government did not contest that classification; (ii) the amount of SMCV's voluntary contribution payments reflected the assumption that SMCV would not make *any* royalty payments because SMCV's contributions were based on annual net income or operating profit from the *entire* Mining Unit, without any deductions for royalties; (iii) the Government never alerted SMCV that, since the Government intended to impose royalty payments on the Concentrator profits, SMCV was *significantly overpaying* its voluntary contributions; and (iv) the Government had guaranteed that the payments SMCV had already made following the Roundtable Discussions would be deductible from the voluntary contribution plan, and then reneged on that promise.⁷⁹⁸ SMCV thus willingly made full contributions under the Program on the good faith understanding that it was exempt from paying royalties—as MINEM had confirmed it would be.⁷⁹⁹
- (c) Peru and its witness Mr. Camacho assert that the designation of SMCV as "stabilized" in Apoyo's projected voluntary and royalty collections is irrelevant because companies could be "partially stabilized" and the "purpose of these meetings was to review projections on the effect of the creation of these taxes and voluntary contributions in macro-fiscal terms."⁸⁰⁰ This is wrong. Apoyo's proposal and projections accounted only

⁷⁹⁵ See Memorial ¶ 148.

⁷⁹⁶ See Memorial ¶ 148 (citing **Ex. CE-544**, Agreements of the Roundtable Discussion Between the Committee of the Struggle for the Defense of the Interests of Arequipa and SMCV (2 August 2006)).

⁷⁹⁷ **Ex. CE-27**, SMCV, Voluntary Contribution Agreement (10 August 2007); Memorial § III.I.4.

⁷⁹⁸ See Counter-Memorial ¶¶ 218-24; *see also* Memorial ¶¶ 149-50, 153, 334; **CWS-2**, Castagnola I, ¶¶ 21, 23, 43.

⁷⁹⁹ **CWS-11**, Torreblanca I, ¶¶ 60, 62.

⁸⁰⁰ Counter-Memorial ¶ 222; **RWS-6**, Camacho, ¶¶ 16, 28-30.

for “stabilized” and “non-stabilized” companies.⁸⁰¹ If the Government had held the position that only specific “investment projects” were stabilized, and that, as a result, the companies were only “partially stabilized,” the Government would not have relied on the projections.

- (d) Peru also argues that the Voluntary Contribution Program proves that companies could be “partially stabilized” because it allowed for the deduction of a percentage of royalty payments from the contribution.⁸⁰² But this argument is simply irrelevant. Voluntary contributions were paid both by stabilized and non-stabilized companies but non-stabilized companies could credit up to 64.4% of the royalties paid in the same fiscal year from the contributions.⁸⁰³ Peru’s assertion fails to address the fact that the amount of SMCV’s payments made absolutely clear that SMCV assumed it was fully stabilized, since SMCV did not deduct any royalty payments as it would have been entitled to do. It is simply not credible that the Government would have been unaware that SMCV’s payments covered its entire Mining Unit, without any royalty deduction. SMCV at that time was the second-largest contributor to the Voluntary Contribution Program and the target of fierce political opposition to its stability guarantees. Yet as Peru concedes, the Government remained silent and accepted SMCV’s significant voluntary contributions without complaint.

161. *Finally*, Peru also does not contest that SMCV made millions of dollars in GEM payments following the Government’s explicit confirmation that SMCV needed to make *either* GEM payments *or* royalty and SMT payments, but not both—a confirmation that the Government repudiated several years later after it had received all of SMCV’s GEM payments.⁸⁰⁴

- (a) Peru does not deny that (i) SMCV sent several letters to MINEM and MEF officials seeking clarity on the relationship between the Stability Agreement and GEM, which the Government repeatedly ignored; (ii) despite having several opportunities to do so, the Government never stated that SMCV was not obligated to pay GEM for the Concentrator because the Concentrator was not an “investment project” covered under the Stability Agreement; (iii) Government officials confirmed to SMCV that SMCV could not be

⁸⁰¹ **CWS-2**, Castagnola ¶¶ 19, 23; *id.*, Appendix A, pp. 27-29.

⁸⁰² Counter-Memorial ¶ 223; **RWS-6**, Camacho, ¶ 17.

⁸⁰³ **CA-131**, Voluntary Contribution Program, Supreme Decree No. 071-2006-EM (21 December 2006), Model Agreement of the “Voluntary Contribution Program (*Programa Minero de Solidaridad con el Pueblo*),” Clauses 3.1.1-3.1.2; *see also* **CWS-2**, Castagnola I, ¶¶ 19-26.

⁸⁰⁴ Memorial ¶ 382.

subject to both royalties and GEM on the same profits; (iv) GEM was calculated on the basis of profits *per concession*, and the GEM Agreement did not provide any basis under which a company could pay royalties for particular non-stabilized “investment projects” within that concession and GEM for other stabilized “investment projects” within the same concession; (v) SMCV’s GEM payments reflected the assumption that its entire Mining Unit was stabilized because SMCV did not deduct royalties; and (vi) the Government accepted SMCV’s payments and never informed SMCV that it was significantly *overpaying* under the GEM Agreement.⁸⁰⁵

- (b) Peru asserts that the Government never “affirmed” SMCV’s assumption and hence did not act inconsistently when it induced full GEM payments despite knowing that it would impose royalties on the Concentrator for the same period.⁸⁰⁶ This assertion is incorrect.⁸⁰⁷ Peru has failed to submit any evidence rebutting Ms. Torreblanca’s testimony that in early October 2011, Laura Calderón, MEF’s Vice-Minister of Economy, and José Manuel Pando, MINEM’s Director of Legal Affairs, assured Ms. Torreblanca that SMCV would not pay both GEM and royalties.⁸⁰⁸ Ms. Torreblanca then confirmed that position in a letter to MEF.⁸⁰⁹

⁸⁰⁵ See Counter-Memorial ¶¶ 229, 595; see also Memorial ¶¶ 188-92, 423; **CWS-11**, Torreblanca I, ¶¶ 85-89.

⁸⁰⁶ Counter-Memorial ¶¶ 206-208, 693-95; see also Memorial ¶¶ 26, 382.

⁸⁰⁷ See **Ex. CE-1054**, Emails exchanged between Julia Torreblanca, et al. (3-13 October 2011, 3:35 PM PET) (“All people involved have verbally stated that Cerro Verde will only pay GEM.”); see also **Ex. CE-1053**, Emails exchanged between Julia Torreblanca, et al. (3-13 October 2011, 4:57 PM PET) (subsequent email in the thread reacting to Ms. Torreblanca’s email); **Ex. CE-1051**, Emails exchanged between Julia Torreblanca, et al. (3-13 October 2011, 3:41 PM PET) (same); **Ex. CE-1047**, Emails exchanged between Julia Torreblanca, et al. (3-13 October 2011, 5:01 PM PET) (same); **Ex. CE-1044**, Emails exchanged between Julia Torreblanca, et al. (3-13 October 2011, 4:21 PM PET) (same); see also **Ex. CE-1048**, Emails exchanged between Julia Torreblanca, et al. (30 September 2011, 7:12 PM PET) (describing pressure from the Government on SMCV to “sign [the GEM Agreement] ASAP”).

⁸⁰⁸ **Ex. CE-1052**, Emails exchanged between Julia Torreblanca, et al. (11 October 2011, 1:05 AM PET) (“Luis Carlos and I met with the Viceminister of Economy, Laura Calderon, SUNAT functionary Marco Camacho, momentarily supporting Economy and Finance, and Dr. Pando from Energy and Mines Legal Office. We explained the royalty-case antecedents and the level of certainty FCX and Cerro Verde need before GEM agreement is signed in order to avoid a similar situation in the future. All of them understood our position, and reassured that no one wants Cerro Verde nor any other company to pay double. *The laws are clear, companies should either pay GEM or IEM + royalties, not both.*”) (emphasis added); **Ex. CE-1050**, Emails exchanged between Julia Torreblanca, et al. (12 October 2011, 1:26 PM PET) (“I got together with Cesar Zegarra [MINEM]. He had already been filled in by the two attorneys [from MINEM] we met both on Friday and Monday. He was also in agreement that Cerro Verde should pay only one burden/tax, not two.”); **Ex. CE-1049**, Emails exchanged between Julia Torreblanca, et al. (12 October 2011, 2:15 PM PET) (subsequent email in the thread reacting to Ms. Torreblanca’s email); see Memorial ¶¶ 189, 423; **CWS-11**, Torreblanca I, ¶¶ 85-59.

⁸⁰⁹ See Memorial ¶ 191 (citing **Ex. CE-631**, SMCV, Letter No. SMCV-VL&RG-2217-2011 (5 December 2011)); **CWS-11**, Torreblanca I, ¶ 89; see also **Ex. CE-629**, MEF, Report No. 206-2011-EF/61.01 (14 October 2011),

- (c) Documents that Peru was ordered to disclose also confirm that the Government was, at the time, uncertain what position to take about the scope of stability in relation to the GEM Law. On 13 October 2011, Minister of Energy and Mines Carlos Herrera Descalzi forwarded Ms. Torreblanca’s 7 October 2011 letter to Minister of Economy and Finance Luis Miguel Castilla Rubio and requested an opinion from MEF about: (i) the scope of Clause 1 of the Model GEM Agreement and whether the reference to Stability Agreements entered into under the Mining Law “must literally be” confined to the “name of the mining project that enjoys the stabilized legal regime,” and “not other economic operations that may be connected or related;” and (ii) whether stabilized mining projects can be subject to GEM, SMT, and Royalties.⁸¹⁰ Thus even six years after Peru asserts that MINEM clearly interpreted the scope of stability guarantees under the Mining Law as limited to a specific “investment project,” MINEM still appears to have been, at a minimum, uncertain about its position in the context of the newly enacted GEM law—and sought guidance from the MEF on that account. The following day, MEF responded to Minister Herrera’s request, confirming that GEM only applied to mining companies “for that which is covered by [a stability agreement],” whereas the SMT and Royalty were applicable “on that which is not included in [stability] Agreements.”⁸¹¹
- (d) Moreover, during the discussions leading to the adoption of the GEM Law, the Government considered projections based on the assumption that mining companies were either stabilized or non-stabilized.⁸¹² There is no evidence that any Government official suggested that these projections were defective on the grounds that mining companies would be partially stabilized or because the projections assumed that all of SMCV’s operations were stabilized.⁸¹³

p. 2, Section II, ¶¶ 2-3 (DGM letter attaching October 2011 MEF Opinion confirming that the GEM program applied to mining companies “for that which is covered by [a stability agreement]” whereas full royalties and SMT applied “for that which is not covered by [a stability agreement].”).

⁸¹⁰ **Ex. CE-986**, MINEM, Communication No. 096-2011-EF/DM (13 October 2011).

⁸¹¹ **Ex. CE-629**, MEF, Report No. 206-2011-EF/61.01 (14 October 2011), p. 2, Section II, ¶¶ 2-3.

⁸¹² **CWS-9**, Witness Statement of Hugo Santa María (“Santa María I”), ¶ 40 (explaining that APOYO presentations shared with the Government highlighted SMCV as an example of a stabilized company as “Company 2” which would have been obvious reflected SMCV’s operations). *Contra* **RWS-6**, Camacho, ¶ 29 (offering only testimonial assertions that “there was no discussion at these meetings on the scope of the legal stabilization agreements of other companies on an individual basis”). *See also* Memorial ¶ 423.

⁸¹³ *See* Memorial ¶¶ 181-83 (citing **CWS-9**, Santa María I, ¶¶ 38, 41, 45); *see generally* **CWS-20**, Reply Witness Statement of Hugo Santa María (“Santa María II”).

- (e) Peru also argues that the GEM Law itself should have confirmed that SMCV’s understanding was wrong because Article 2.1 of the GEM Law states that it 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.”⁸¹⁴ But the term “projects” here refers to “mining projects” or “mining units,” which is consistent with the Government’s usage of the term.⁸¹⁵ This is confirmed by the GEM Regulations and the GEM Model Agreement, which each make clear that GEM payments were calculated based off the operating profit “from the *concessions* included in each of the [stability agreements]” and “from the *concessions* included in each one of the [stability] Agreements,” respectively.⁸¹⁶ Neither the GEM Law nor the GEM Regulations provided a mechanism that would have allowed companies to distinguish between stabilized and non-stabilized “investment projects” *within* a concession, which further confirms that, as late as 2011, the Government understood that stability guarantees applied toward mining units or concessions.⁸¹⁷
- (f) Peru further argues that the GEM Law confirms that concessions can be “partially stabilized” because “the program contemplated the possibility of companies having to pay royalties and IEM [*i.e.*, SMT] 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).”⁸¹⁸ Peru’s argument is again contradicted by the text of the GEM Regulations and GEM Model Agreement, which calculate obligations on the basis of operating profit per *concession*.⁸¹⁹ Moreover, Peru’s argument reflects a total misunderstanding of how the GEM Law operated. As Freeport explained in detail in its Memorial, under the GEM regime, a number of companies with stability agreements still had to pay royalties—because unlike SMCV they signed stability agreements *after* the 2004 Royalty Law came into force.⁸²⁰ However, because

⁸¹⁴ Counter-Memorial ¶ 235 (emphasis added).

⁸¹⁵ *See supra* § II.A.2(ii).

⁸¹⁶ **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011); *id.*, Model Agreement, Clause 2.1.

⁸¹⁷ *See CA-182*, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011); *id.*, Model Agreement, Clause 2.

⁸¹⁸ Counter-Memorial ¶ 237.

⁸¹⁹ *See CA-182*, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011); *id.*, Model Agreement, Clause 2.

⁸²⁰ *See Memorial* ¶ 184.

they had stability agreements, they paid royalties based on the calculations under the 2004 Royalty Law, instead of the newly passed 2011 Royalty Law, and did not have to pay SMT, which was also introduced in 2011 alongside the new Royalty Law.⁸²¹ Accordingly, they still had to make GEM payments to make up the shortfall, but could deduct the royalties paid according to the 2004 Royalty Law calculation.⁸²²

- (g) Further, Peru conveniently ignores the fact that under the GEM Agreement the Government concluded with SMCV, SMCV agreed to pay GEM for its Mining Concession and its Beneficiation Concession, which included the Concentrator.⁸²³

162. In sum, the Government's politically motivated *volte-face* on the scope of stability guarantees, after SMCV decided to make the US\$850 million investment in the Concentrator, and the Government's deliberate withholding of its novel and restrictive position from SMCV in order to extract additional hundreds of millions of dollars in "voluntary payments," constitutes exactly the type of conduct that tribunals have confirmed violates the fair and equitable treatment obligation, which includes the obligation to be "transparent and consistent."⁸²⁴ As in *Deutsche Telekom*, the "lack of transparency and

⁸²¹ See **CA-179**, Mining Royalties Law, Law Modifying Law No. 28258, Law No. 29788 (28 September 2011); **CA-180**, Creating the Special Mining Tax, Law No. 29789 (28 September 2011).

⁸²² Memorial ¶ 184 (including chart explaining payments made under the GEM regime by companies without stability agreements, companies with stability agreements signed prior to the 2004 Royalty Law, and companies with stability agreements signed after the 2004 Royalty Law).

⁸²³ See **Ex. CE-64**, GEM Agreement, Law No. 29790 (28 February 2012), Art. 2.1 (confirming that GEM "is the result of assessing on the quarterly operating profit, from the concessions included in each of the Agreements signed by THE COMPANY referred to in the First Clause"); *id.* Art. 1 (listing Stability Agreement as relevant agreement held by SMCV); see also **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Art. 2(l) (confirming that companies will pay GEM only for "the concessions included in each of the Agreements of Guarantees[.]"); **Ex. CE-1043**, Emails exchanged between Julia Torreblanca and H. (Red) Conger (10-11 November 2011, 5:38 AM PET) (discussing SMCV's understanding of the GEM Agreement, which would be signed three months later, that "once [SMCV] volunteer[s] to pay GEM, we will not have to pay the Special Mining Tax (IEM) nor any recently passed royalties"); **Ex. CE-1045**, Emails exchanged between Red Conger and Julia Torreblanca (10-11 November 2011, 5:59 AM PET) (email exchanged later in the thread); **Ex. CE-1046**, Emails exchanged between Red Conger and Julia Torreblanca (10-11 November 2011, 5:41 AM PET (same)).

⁸²⁴ See Memorial ¶ 378 (citing **CA-222**, *Crystallex* Award, ¶¶ 589, 598 (concluding that Venezuela's *volte-face* breached the fair and equitable treatment standard because it constituted "non-transparent and inconsistent conduct"); see also **CA-251**, *ESPF* Award, ¶¶ 443-444 (fair and equitable treatment "is made up of several components, including the duty to create stable conditions, to act in a transparent and consistent manner (with due process and in good faith), and to refrain from taking arbitrary or discriminatory measures or from frustrating investors' legitimate expectations regarding the legal, regulatory, and legislative framework and adversely affecting their investments"); **CA-213**, *Gold Reserve* Award, ¶ 591 (Acts and omissions "evidencing" "lack of transparency [and] consistency," among other reasons, violates the fair and equitable treatment obligation). *Contra* Counter-Memorial ¶ 539.

forthrightness is manifest”—the Government “affirmatively misled” SMCV, and even after adopting its novel position on the scope of stability guarantees, the Government left SMCV “in the dark.”⁸²⁵

iii. Peru Committed Serious Due Process Violations When SMCV Challenged the Royalty Assessments Before the Tax Tribunal

163. As Freeport explained in its Memorial, Peru’s politically motivated attempts to extract royalties, additional tax payments, penalties and interest, and “voluntary” contributions from SMCV became even more apparent—and more egregious—when it committed serious due process violations in the course of SMCV’s challenges to SUNAT’s Royalty Assessments before the Tax Tribunal to ensure that the Assessments would be confirmed.⁸²⁶ These serious violations—including interference by the Tax Tribunal President to dictate the results of the first-decided 2008 Royalty Case, improperly copy-pasting the flawed resolution in that case to decide other cases, and allowing a blatantly conflicted decision-maker to preside over the 2010-2011 Royalty Case—are exactly the type of conduct that prior tribunals have concluded give rise to due process violations in breach of the fair and equitable treatment obligation.⁸²⁷

164. Peru does not and cannot contest the basic facts of its interference in SMCV’s challenges. Yet incredibly, Peru attempts to characterize this misconduct as “normal, administrative activities” and asserts that Freeport’s claims are based on “wild speculations concerning the motives of certain actors.”⁸²⁸ But there is no need for “speculation”: the evidence clearly demonstrates the impropriety of Peru’s conduct in the Tax Tribunal challenges.

a. Peru Concedes the Tax Tribunal President’s Interference in the 2006-2007 and 2008 Royalty Cases

165. As Freeport explained in its Memorial, the President of the Tax Tribunal, Zoraida Olano Silva—a long-time MEF employee who reports directly to the Minister of Economy and Finance—interfered to resolve the 2008 Royalty Case in the Government’s favor by instructing her administrative assistant, Ursula Villanueva, to draft the operative resolution.⁸²⁹ President Olano Silva then fast-tracked the 2008 Royalty Case resolution so that it would be the first issued, and pressured the *vocales* in charge of the 2006-2007 Royalty Case to adopt a nearly identical resolution in that case, despite their duty to

⁸²⁵ CA-234, *Deutsche Telekom* Interim Award ¶¶ 387-88.

⁸²⁶ See Memorial ¶¶ 196-211, 243-44, 384-99.

⁸²⁷ See Memorial ¶ 385; *supra* ¶¶ 134(d), 137(a).

⁸²⁸ Counter-Memorial ¶ 700.

⁸²⁹ See Memorial ¶¶ 196-211, 389-94; CWS-6, Witness Statement of Leonel Estrada Gonzales (“Estrada I”), ¶¶ 34-49; CER-3, Hernández I, ¶¶ 194-202.

consider each case individually.⁸³⁰ Peru does not contest the basic sequence of events, but argues these actions were “normal.”⁸³¹ This is simply wrong.

166. *First*, Peru concedes that Ursula Villanueva, the Tax Tribunal President’s assistant, drafted the 2008 resolution at the behest of President Olano Silva, but surprisingly asserts that this improper interference was a “routine administrative act.”⁸³²

(a) Peru and President Olano Silva assert that she instructed Ms. Villanueva to assist in the resolution of SMCV’s challenge to the 2008 Royalty Assessments “to support the *vocal* of Chamber No. 1 handling the 2008 Royalty Assessment case because of a staff shortage” and that “[t]his was explicitly within President Olano Silva’s authority.”⁸³³ In support, Peru and Ms. Olano Silva cite pages 4 and 12 of the Manual of the Operation and Functions of the Tax Tribunal (“MOF”) that list the powers of the President of the Tax Tribunal—but appointing “substitute law clerks” is not one of them.⁸³⁴ There is no provision in the MOF or elsewhere that either expressly or implicitly grants the Tax Tribunal President the power to unilaterally appoint her administrative assistants as “substitute law clerks.”⁸³⁵ There are good reasons for that. The Tax Tribunal President is a MEF employee who reports directly to the Minister of Economy and Finance. She only has administrative functions and no role in the decision making of the Chambers.⁸³⁶ For

⁸³⁰ See Memorial ¶ 392; **CWS-6**, Estrada I, ¶¶ 23, 29-31; **CER-3**, Hernández I, ¶¶ 185-92, 206, 211-15; see also **CA-18**, Single Unified Text of the Law on General Administrative Procedure, 1 June 2017, Article. 66.1 (according to the text approved by Supreme Decree No. 004-2019-JUS) (in administrative procedures “[t]he precedence [is] required in serving the public, on a strict first-come, first served basis.”); **CA-196**, Tax Tribunal Procedural Manual, approved by Resolution of the General Secretariat of the Ministry of Economy and Finance No. 017-2012-EF/13 (31 October 2012), p. 13 (“On the day of the session [the *vocales*] participate in the presentation, discussion and approval of the draft Resolutions and Procedural Orders to the session.”); **CA-231**, Single Unified Text of the Law on General Administrative Procedure, Article 3.1 (according to the text approved by Supreme Decree No. 004-2019-JUS) (providing that for administrative acts, such as the Chambers’ resolution, to be valid they “must meet the *indispensable* requirements pertaining to the session, quorum and deliberation for its issue[d]” decision) (emphasis added).

⁸³¹ See Counter-Memorial ¶¶ 700, 705; **RWS-5**, Witness Statement of Zoraida Alicia Olano Silva (18 April 2022) (“Olano Silva”), ¶ 50.

⁸³² See Counter-Memorial ¶¶ 302-303, 700, 703-705; **RWS-5**, Olano Silva, ¶¶ 46-50.

⁸³³ See Counter-Memorial ¶ 703.

⁸³⁴ See Counter-Memorial ¶ 703; **RWS-5**, Olano Silva, ¶ 2; **CA-186**, Manual of the Operation and Functions of Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 (10 October 2012), pp. 4, 12.

⁸³⁵ See **CA-186**, Manual of the Operation and Functions of Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 (10 October 2012), pp. 12-13.

⁸³⁶ See **CA-186**, Manual of Procedures of the Tax Tribunal Ministerial Resolution No. 626-2012-EF/43 (10 October 2012), pp. 12-15 (the President’s only permissible deliberative function involves “analy[zing] . . . technical matters to be submitted to the Plenary Chamber,” “[p]articipat[ing] in Plenary Chamber meetings,” and “cast[ing] [a] vote on matters brought before [the Plenary Chamber] for their consideration”); see also

the Tax Tribunal President to appoint her own administrative assistant, who reports to the President, as a “substitute law clerk” would be tantamount to the President intervening herself in the resolution of the cases.⁸³⁷ Further, the position of a law clerk assigned to one of the Chambers differs significantly from that of an administrative assistant like Ms. Villanueva.⁸³⁸ Law clerks are appointed based on merit, can only be terminated based on just cause, report to the *vocales*, and assist them in drafting their resolutions.⁸³⁹ Ms. Villanueva in turn was appointed directly by President Olano Silva at her sole discretion as a “confidence public servant,” could be terminated at the President’s will, reported to the President, and assisted the President with her administrative functions.⁸⁴⁰

(b) President Olano Silva’s assertion that she neither “interfer[ed]” nor was involved in the “actual adjudication” of the challenge to the 2008 Royalty Assessments is belied by the record.⁸⁴¹ Contemporaneous emails clearly show that, after President Olano Silva instructed her assistant Ms. Villanueva to draft the resolution, President Olano Silva actively took part in the discussions of the merits of the case, which, as Prof. Hernández explains, “constitute serious procedural irregularities.”⁸⁴² In particular, before an oral

CER-3, Hernández I, ¶ 171 (“The Office of the President is *not* authorized to intervene in the resolution of challenges.”); **CER-8**, Hernández II, ¶ 41; Memorial ¶ 381; **CWS-6**, Estrada I, ¶ 33; **CWS-17**, Reply Witness Statement of Leonel Estrada Gonzales (“Estrada II”), ¶¶ 24-25.

⁸³⁷ **CER-8**, Hernández II, ¶ 41 (“The President cannot appoint an administrative assistant who reports to her as substitute law clerk to a Chamber because doing so would be tantamount to intervening in the resolution of the case, as the ‘substitute law clerk’ would still be reporting to the President of the Tribunal who must not intervene in the decision of the cases.”); *see also* **Ex. CE-81**, Email from Úrsula Villanueva Arias to Gabriela Bedoya of SUNAT (24 April 2013, 2:37 PM PET) (Ms. Villanueva’s signature identifies her position as “Asesor de Presidencia,” or Assistant to the President, not “substitute law clerk”).

⁸³⁸ *See* **CA-186**, Manual of the Operation and Functions of Tax Tribunal, Ministerial Resolution No. 626-2012-EF/43 (10 October 2012), pp. 18, 89 (law clerks assist *vocales* in the resolution of cases but administrative assistants support the President in her administrative functions); **CER-8**, Hernández II, ¶ 41; *see also* **CWS-6**, Estrada I, ¶¶ 27-29, 33 (describing the role of *vocales* versus the role of administrative assistants).

⁸³⁹ *See* **CA-319**, Legislative Decree Regulating the Special Regime for Administrative Service Contracts, Legislative Decree No. 1057 (28 June 2008), Article 8 (administrative services contracts—which *vocales* qualify for—“must be made through a public competition”); *id.* Article 10(f) (“The administrative services contract can be terminated through [] Unilateral decision of the requiring entity with a discipline or capacity-based cause duly proven.”); **CA-321**, Regulations of the Special Regime for Administrative Service Contracts, Supreme Decree No. 075-2008-PCM (25 November 2008), Article 13(f) (same); *see also* **CER-8**, Hernández II, ¶ 41.

⁸⁴⁰ *See* **CA-340**, Public Service Law, Law No. 30057 (4 July 2013), Article 3(e) (“Confidence public servant[s] . . . are hired without a public competition of the merits, on the basis of the discretionary power of the directive that designates it.”); *id.* Article 49(m) (“The following are events of termination of the civil service: [] Discretionary decision, in the case of confidence public servants.”); *see also* **CER-8**, Hernández II, ¶ 41.

⁸⁴¹ **RWS-5**, Olano Silva, ¶ 49.

⁸⁴² **CER-8**, Hernández II, ¶ 42; *see* Memorial ¶¶ 198, 200-203, 390; **CER-3**, Hernández I, ¶¶ 195-202, 215; **CWS-6**, Estrada I, ¶¶ 40-55; **CWS-17**, Estrada II, ¶¶ 35-36.

hearing had been scheduled for the case, Ms. Villanueva sent an email to her boss, President Olano Silva, to inform her that she had begun studying a case involving Cerro Verde and that she was already “more or less leaning to one side.”⁸⁴³ Ms. Villanueva also asked her boss, President Olano Silva, to “read the arguments when [she had a chance]” so that they “[could] talk about it.” President Olano Silva acknowledged receipt, replying “Ok, thank you.”⁸⁴⁴

- (c) Peru asserts that “there is nothing unusual about this” because “Ms. Villanueva merely asked her boss, the President of the Tax Tribunal and an experienced tax attorney, to discuss a case with her.”⁸⁴⁵ This too is quite a remarkable assertion. The President’s conduct should have been *highly* unusual. It is totally irrelevant that President Olano Silva was an “experienced tax attorney” or Ms. Villanueva’s boss: as the Tax Tribunal President, who directly reports to the Minister for Economy and Finance, she was absolutely prohibited from taking part in the adjudication of a case on the merits.⁸⁴⁶ That function is reserved to the *vocales*, who have the indispensable duty to meet together in sessions to deliberate independently each case.⁸⁴⁷ Peru’s argument only reinforces the

⁸⁴³ **Ex. CE-648**, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET).

⁸⁴⁴ **Ex. CE-648**, Email from Zoraida Alicia Olano Silva to Úrsula Villanueva Arias (22 March 2013, 5:57 PM PET).

⁸⁴⁵ Counter-Memorial ¶ 704.

⁸⁴⁶ See **CA-186**, Manual of Procedures of the Tax Tribunal Ministerial Resolution No. 626-2012-EF/43 (10 October 2012), pp. 12-15 (the President’s only permissible deliberative function involves “analy[zing] . . . technical matters to be submitted to the Plenary Chamber,” “[p]articipat[ing] in Plenary Chamber meetings,” and “cast[ing] [a] vote on matters brought before [the Plenary Chamber] for their consideration”); see also **CER-3**, Hernández I, ¶ 171 (“The Office of the President is *not* authorized to intervene in the resolution of challenges.”); **CER-8**, Hernández II, ¶ 41; Memorial ¶ 389; **CWS-6**, Estrada I, ¶ 33; **CWS-17**, Estrada II, ¶¶ 24-25.

⁸⁴⁷ **CER-3**, Hernández I ¶¶ 33, 34, 186; **CA-18**, Single Unified Text of the Law on General Administrative Procedure, Supreme Decree No. 004-2019-JUS (25 January 2019), Article 3, numeral 1 (“The requirements for validity of administrative acts include: 1. Jurisdiction.- To be issued by the authorized body based on the matter, territory, degree, time or amount, through the authority regularly appointed at the time of issuance and in the case of collegiate bodies, complying with the session, quorum and deliberation requirements essential for its issuance.”); **CA-196**, Tax Tribunal Procedural Manual, approved by Resolution of the General Secretariat of the Ministry of Economy and Finance No. 017-2012-EF/13 (31 October 2012), p. 13 (“On the day of the session [the *vocales*] participate in the presentation, discussion and approval of the draft Resolutions and Procedural Orders to the session.”); **CA-231**, Single Unified Text of the Law on General Administrative Procedure, Article 3.1 (according to the text approved by Supreme Decree No. 004-2019-JUS) (providing that for administrative acts, such as the Chambers’ resolution, to be valid they “must meet the *indispensable* requirements pertaining to the session, quorum and deliberation for its issue[d]” decision) (emphasis added); see also **CA-18**, Single Unified Text of the Law on General Administrative Procedure, Supreme Decree No. 004-2019-JUS (January 25, 2019), Article 3, numeral 4; **CA-186**, Manual of Organization and Functions of the Tax Tribunal, Ministerial Resolution 626-2012-EF/43 (10 October 2012), p. 78 (outlining duties for *vocales*); Memorial ¶ 385; **CWS-6**, Estrada I, ¶¶ 29-30.

impropriety of Ms. Villanueva’s participation, as she sought guidance on the resolution of the case not from the *vocales* that she was allegedly supporting as a “substitute law clerk,” but from “her boss, the Tax Tribunal President,” to whom she reported.⁸⁴⁸ Moreover, when Ms. Villanueva wrote to Ms. Bedoya *ex parte* requesting additional information, she signed the request as “assistant to the President,” which further confirms that she did not view her role as serving as an independent clerk to Chamber No. 1.⁸⁴⁹

(d) Peru further argues that President Olano Silva’s coordination with Ms. Villanueva was appropriate because “[President Olano Silva] 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).”⁸⁵⁰ Peru has it completely backwards. The Tax Tribunal President has the authority to call the Plenary Chamber to resolve inconsistency if two Chambers come to different conclusions *after* independently deliberating.⁸⁵¹ But that does not grant her any authority whatsoever to interfere in the resolution of cases *before* the Chambers have issued their resolutions.⁸⁵² Peru’s assertion that it is “nothing unusual” and even *necessary* for the Tax Tribunal President to interfere in the resolution of cases involving similar facts is a shocking admission as to the Tax Tribunal’s procedural defects.⁸⁵³

167. *Second*, Peru asserts that the fact that Chamber No. 1 issued its resolution in the challenge to the 2008 Royalty Assessments before Chamber No. 10’s resolution in the challenge to the 2006-2007 Royalty Assessments—even though the challenge to the 2008 Royalty Assessments was filed *nine months later*—cannot be attributed to President Olano Silva’s interference.⁸⁵⁴ Yet this assertion, too, is contradicted by contemporaneous emails.

⁸⁴⁸ Cf. Counter-Memorial ¶ 704.

⁸⁴⁹ See **Ex. CE-81**, Email from Úrsula Villanueva Arias to Gabriela Bedoya of SUNAT (24 April 2013, 2:37 PM PET) (Ms. Villanueva’s signature identifies her position as “Asesor de Presidencia,” or Assistant to the President, not “substitute law clerk”).

⁸⁵⁰ Counter-Memorial ¶ 704; *see also* **RWS-5**, Olano Silva, ¶ 60.

⁸⁵¹ **CA-196**, Tax Tribunal Procedural Manual, Ministerial Resolution No. 017-2012-EF/13 (31 October 2012), p. 13, ¶¶ 22-28 (establishing that after the Chambers issue a resolution, the Dispatch Professional reviews for inconsistencies and sends to the Director, which sends to the President of the Tax Tribunal if appropriate).

⁸⁵² See **CER-8**, Hernández II, ¶ 44.

⁸⁵³ Cf. Counter-Memorial ¶ 704; **RER-3**, Bravo & Picón, ¶¶ 155-56 (“[V]arious chambers of the Tax Tribunal cannot decide two cases that are practically identical, differently That would be contrary to maintaining uniformity in decisions, which . . . is indispensable to guarantee legal security.”); *id.* ¶161; **RWS-5**, Olano Silva, ¶ 81.

⁸⁵⁴ See Counter-Memorial ¶ 707.

- (a) The Parties agree that the Tax Tribunal generally followed a “first in, first out” rule for resolving challenges.⁸⁵⁵ However, Peru asserts this was no “hard and fast rule,” that “[t]here are any number of reasons why one case might proceed more quickly than another,” and that “nine months is not a significant difference in filing dates.”⁸⁵⁶ But Peru offers no real explanation for why it prioritized finalizing the challenge to the 2008 Royalty Assessment. The record shows that a mere four days after Chamber No. 10 held its oral hearing on the 2006-2007 Royalty Case, Chamber No. 1 suddenly scheduled its oral hearing on the 2008 Royalty Case.⁸⁵⁷ Less than three weeks after the oral hearing and before Chamber No. 10 had ruled on the earlier-filed 2006-2007 Royalty Case, Chamber No. 1 issued the resolution in the 2008 Royalty Case that Ms. Villanueva drafted under the direction of her boss, President Olano Silva.⁸⁵⁸ Peru avoids the real issue here: why Chamber No. 1, whose resolution was drafted by the President’s assistant Ms. Villanueva, rushed to hold the hearing and issue its resolution before Chamber No. 10 could issue its resolution in the 2006-07 Royalty case, even though this was not the Tax Tribunal’s usual way of proceeding.⁸⁵⁹
- (b) Further, as Freeport explained, internal emails from the *vocal presidente* of Chamber No. 10, Mr. Moreano, clearly confirm his objection to the sequence of events at the time.⁸⁶⁰ The day after Chamber No. 1 issued its resolution, he sent an email to President Olano Silva complaining that “the ideal thing would have been for Chamber 1 to hold a session on the Cerro Verde file after coordinating with us . . . it was the right thing to do” and noting that “as always happens, if we do not call we will not find out anything.”⁸⁶¹ Peru argues that this email “does not prove anything other than that Mr. Moreano was

⁸⁵⁵ See, e.g., Memorial ¶ 391; Counter-Memorial ¶ 707; **RWS-5**, Olano Silva, ¶ 54.

⁸⁵⁶ See Counter-Memorial ¶ 707.

⁸⁵⁷ See **Ex. CE-79**, Evidence of Oral Report No. 0286-2013-EF/TF (5 April 2013); **Ex. CE-80**, Notification of Oral Report No. 0411-2013-EF/TF (9 April 2013) (scheduling an oral hearing for the 2008 Royalty Case for 2 May 2013); see also **Ex. CE-40**, SMCV, Challenge to Tax Tribunal, 2006/07 Royalty Assessments (22 June 2010); **Ex. CE-49**, SMCV, Challenge to Tax Tribunal, 2008 Royalty Assessments (10 March 2011); Memorial ¶ 384.

⁸⁵⁸ See **Ex. CE-83**, Tax Tribunal Decision, No. 08252-1-2013 (2008 Royalty Case) (21 May 2013).

⁸⁵⁹ See **CWS-17**, Estrada II, ¶ 33 (“I find it unusual that, contrary to the Law on General Administrative Procedure, Chamber No. 1 resolved the 2008 Royalty Case before Chamber No. 10 resolved the 2006/2007 Royalty Case, since Chamber No. 10 was assigned the case almost a year earlier and had held the oral report almost a month before Chamber No. 1.”); **CWS-6**, Estrada I, ¶ 46.

⁸⁶⁰ See Memorial ¶¶ 205-206, 391.

⁸⁶¹ See Memorial ¶ 391 (citing **Ex. CE-652**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013 8:58 AM PET)).

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 . . . was dealing with the same issues.”⁸⁶² But Mr. Moreano’s email clearly reflects not only a desire for a “better job” coordinating, but frustration at the total lack of transparency and usurpation of Chamber No. 10’s role by Chamber No. 1, acting in coordination with President Olano Silva. A final email on this chain that Peru produced during document production confirms this: in that email, Mr. Moreano made it clear that “Chamber No. 1 did not previously inform [Chamber No. 10] that it was going to meet” to issue its resolution and clearly reiterated his frustration with President Olano Silva again telling her that “I don’t think that was the right thing to do.”⁸⁶³

168. *Third*, Peru’s attempts to gloss over the fact that Chamber No. 10 *vocales* clearly abdicated their duty to independently deliberate in the challenge to the 2006-2007 Royalty Assessments when they adopted a nearly identical resolution to that drafted by Ms. Villanueva under President Olano Silva’s direction are unavailing.

- (a) Peru acknowledges that the Chamber No. 10 *vocales* in charge of the 2006-2007 Royalty Case “embrac[ed] and borrow[ed] language” from the 2008 Royalty Case resolution, and argues that this was “desired” because “consistency in the application of law creates fairness and transparency.”⁸⁶⁴ But the 2008 and 2006-2007 Royalty Case resolutions were not just consistent, they were nearly identical.⁸⁶⁵ The resolution in the 2006-2007 Royalty Case thus reflected the text drafted by Ms. Villanueva under direction of President Olano Silva. Peru’s admission of this fact belies its argument that the Tax Tribunal rendered impartial and independent resolutions in the Royalty cases.
- (b) Peru asserts that internal emails demonstrate that the Chamber No. 10 *vocales* did deliberate because the *vocal ponente* of Chamber No. 1, Ms. Zuñiga, stated (after Chamber No. 1 had already issued its resolution) that she had “spoken with Luis Cayo,” the *vocal ponente* of Chamber No. 10, and “they were in agreement to confirm.”⁸⁶⁶ But

⁸⁶² Counter-Memorial ¶¶ 707.

⁸⁶³ **Ex. CE-992**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013, 11:09 AM PET).

⁸⁶⁴ See Counter-Memorial ¶¶ 708, 710.

⁸⁶⁵ See **CER-3**, Hernández I, Appendix D (redline of the 2006-2007 and 2008 Royalty Case resolutions, comparing **Ex. CE-83** and **Ex. CE-88**).

⁸⁶⁶ See Counter-Memorial ¶ 709 (citing **Ex. CE-652**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013, 8:58 AM PET)).

even if Ms. Zuñiga had spoken to Mr. Cayo, Mr. Moreano’s email of the same day confirms that Chamber No. 10 had not independently deliberated on the resolution, as was its duty.⁸⁶⁷

(c) Further, Peru asserts that Ms. Zuñiga’s email “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.”⁸⁶⁸ But that assertion is totally contradicted by the *actual resolution*. As noted, the 2006-2007 Royalty Case resolution makes clear that Chamber No. 10 did not “carefully consider[] the language” of the 2008 Royalty Case resolution, but rather adopted that language wholesale.⁸⁶⁹ Peru also presents no evidence that the *vocales* in the 2006-2007 Royalty Case undertook an independent deliberation.

(d) Peru likewise does not appear to contest that Chamber No. 10’s resolution was not drafted by a law clerk, as would normally have been the case in a challenge of this size and complexity.⁸⁷⁰ None was of course needed as Chamber No. 10 copy-pasted almost all of the text drafted by Ms. Villanueva under the direction of the President. This is highly unusual. A review of contemporaneous resolutions shows that during 2012 and 2013, *less than 1% of the cases* in which Mr. Cayo acted as *vocal ponente* did not include a law clerk’s initials.⁸⁷¹ The lack of a law clerk’s involvement thus clearly indicates that the Chamber did not independently draft the resolution.⁸⁷²

⁸⁶⁷ See **Ex. CE-992**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013, 11:09 AM PET) (“Zoraida: That coordination was done by Luis Cayo (vocal ponente) with Licette because I told him to call her, since we found out extraofficially that Ursula Villanueva had already delivered the Project and that Chamber No. 1 was going to take up the Cerro Verde case file yesterday. Chamber No. 1 did not previously inform us that it was going to meet yesterday morning, let alone hand us its project to coordinate, which only reached us today, in which I find out that the Chamber No. 1 case file was taken up yesterday morning. With all due respect, I don’t think that was the right thing to do.”).

⁸⁶⁸ Counter-Memorial ¶ 710.

⁸⁶⁹ See Memorial ¶ 393 (citing Hernández, Appendix D (redline of the 2006-2007 and 2008 Royalty Case resolutions, comparing **Ex. CE-83** and **Ex. CE-88**)).

⁸⁷⁰ See **CWS-6**, Estrada I, ¶ 58 (“According to the work route, no law clerk assisted Dr. Cayo Quispe in preparing the draft resolution. I worked as a law clerk for a long time in the same Chamber as Dr. Cayo Quispe. In my experience, Dr. Cayo Quispe always worked on cases with the help of a law clerk; I never saw him work on a complex case on his own.”); **CWS-17**, Estrada II, ¶ 38.

⁸⁷¹ See **CWS-17**, Estrada II, ¶ 38.

⁸⁷² See Memorial ¶ 393(c) (citing **Ex. CE-83**, Tax Tribunal Decision, No. 08252-1-2013 (21 May 2013), p. 24 (signature page missing the initials of a drafting law clerk in the work route)).

b. The Tax Tribunal’s Due Process Violations Continued Unabated in the 2009, 2010-2011, and Q4 2011 Royalty Cases.

169. Freeport explained in its Memorial that following this blatant and unlawful interference in the 2008 and 2006-2007 Royalty Cases, Peru’s due process violations continued unabated in the 2009, 2010-2011, and Q4 2011 Royalty Cases, where the Tax Tribunal appointed and then refused to recuse a clearly conflicted decision-maker, and then again copy-pasted significant portions of the 2008 Royalty Case resolution to decide the 2009 and 2010-2011 Royalty Cases.⁸⁷³ Once again, Peru does not contest the basic facts of its interference, but attempts to portray them as “normal, administrative activities.”⁸⁷⁴

170. *First*, Peru concedes that the Tax Tribunal assigned the 2010-2011 Royalty Case to *vocal* Victor Mejía Ninacondor, notwithstanding the fact that he had worked in the very SUNAT department that confirmed the 2010-2011 Royalty Assessments and made an entry of appearance for SUNAT before the Court of Appeals in the 2006-2007 Royalty Case.⁸⁷⁵

(a) Mr. Ninacondor’s participation in these cases raises serious doubts about his impartiality and independence and the due process afforded to SMCV in the resolution of the 2010-2011 Royalty Case.⁸⁷⁶ Peru’s attempt to rely on the *Glencore* decision in support of its argument that there was nothing untoward about Mr. Ninacondor’s participation is unavailing.⁸⁷⁷ In *Glencore*, the administrative body in question, the Colombian *Contraloría*, permitted its “decision-maker” to “act[] simultaneously as prosecutor and as judge” to investigate and enforce allegations of mismanagement of public funds, “and a related officer . . . is often the one who rules on appeal,” pursuant to Colombia’s applicable laws of administrative procedure—thus the lack of “strict separation” between those functions did not constitute a due process violation.⁸⁷⁸ Here, by contrast, Peru’s laws prohibit authorities with decision-making powers—including administrative officials, like *vocales*—from exercising their authority where circumstances “may influence the direction of the resolution.”⁸⁷⁹ These include circumstances where the administrative official has a prior employer-employee relationship with a party interested in the matter, or where there are other reasons of decorum requiring recusal (*i.e.*,

⁸⁷³ Memorial ¶¶ 395-99.

⁸⁷⁴ See Counter-Memorial ¶¶ 700, 716.

⁸⁷⁵ See Counter-Memorial ¶ 713.

⁸⁷⁶ See Memorial ¶¶ 243-49; 396-98.

⁸⁷⁷ See Counter-Memorial ¶¶ 698, 702, 713-14.

⁸⁷⁸ CA-245, *Glencore* Award, ¶¶ 388, 393, 1319.

⁸⁷⁹ CA-231, Single Unified Text of the Law on General Administrative Procedure (June 1, 2017), Art. 97.

situations that can affect or raise justifiable doubts about the impartiality or independence of the authority).⁸⁸⁰ If such authorities “ha[ve] jurisdiction,” they must “refrain from participating in [such] matters” and recuse themselves.⁸⁸¹

- (b) Peru does not deny that Mr. Ninacondor was listed as a representative for SUNAT before the Court of Appeals in the 2006-2007 Royalty Case.⁸⁸² However, Peru nevertheless argues that Mr. Ninacondor “performed no work on any matter, administrative or otherwise.”⁸⁸³ For this, Peru relies on President Olano Silva’s statement that “there is no evidence that *Vocal Mejía* Ninacondor participated directly in this judicial appeal [because he] reported that he did not participate in the 2006–2007 Case.”⁸⁸⁴ But that is not what the evidence shows. Nothing in the decision denying SMCV’s recusal request shows that Mr. Ninacondor “reported that he did not participate in the 2006–2007 Case.” Instead, it shows that he simply failed to disclose such representation—a fact that itself is troubling.⁸⁸⁵ As Prof. Hernández explains, Mr. Ninacondor “had the obligation to disclose that he represented SUNAT” and “[t]he fact that he did not is extremely problematic and, in itself, calls into question his impartiality and independence.”⁸⁸⁶
- (c) Moreover, shortly after the Plenary Chamber rejected SMCV’s recusal request, the Government added a new recusal ground that recognized that “the *vocales*’ past working relationship with SUNAT is relevant for assessing their impartiality and independence.”⁸⁸⁷ The Government thus recognized the relevance of Mr. Ninacondor’s

⁸⁸⁰ Compare **CA-245**, *Glencore* Award, ¶ 1319 (finding that the due process standard does not require “strict separation” in administrative proceedings where the applicable law permits “the decision-maker” acting as “the investigator, the accuser, and the adjudicator”), with **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Article 100 (“Duty of Self-Recusal of the Vocales The Vocales and Complaint Resolution Officials/Secretaries of the Tax Tribunal, under penalty of law, shall recuse themselves from ruling on the cases mentioned in Article 97 of the Single Unified Text of the General Administrative Procedure Act.”); **CA-231**, Single Unified Text of the Law on General Administrative Procedure (June 1, 2017), Art. 97.5 (requiring recusal for a prior employer-employee relationship with a third party directly interested in the matter); *id.* Art. 97.6(a) (requiring recusal when circumstances can affect the impartiality or independence of the authority); **CA-18**, Single Unified Text of the Law on General Administrative Procedure, Supreme Decree No. 004-2019-JUS (January 25, 2019), Articles 97.5, 97.6 (a), 100; *see also* **CER-3**, Hernández I, ¶¶ 220-22; **CER-8**, Hernández II, ¶¶ 51, 54.

⁸⁸¹ **CA-231**, Single Unified Text of the Law on General Administrative Procedure (June 1, 2017), Art. 97.

⁸⁸² *See* Counter-Memorial ¶ 338.

⁸⁸³ Counter-Memorial ¶ 713.

⁸⁸⁴ **RWS-5**, Olano Silva ¶ 78; *see also* Counter-Memorial ¶ 713.

⁸⁸⁵ *See* **Ex. CE-181**, Tax Tribunal, Rejection of SMCV’s Request for Removal, Minutes of Plenary Council Meeting No. 2018-20 (22 June 2018).

⁸⁸⁶ *See* **CER-8**, Hernández II, ¶ 53.

⁸⁸⁷ **CER-8**, Hernández II, ¶ 61.

tenure at SUNAT to the question of his potential bias—which was the case even before the Government formally introduced it as an independent ground for recusal.⁸⁸⁸ Peru offers no explanation for why Mr. Ninacondor’s recent employment at SUNAT would not pose a threat to his impartiality and independence.⁸⁸⁹ If Mr. Ninacondor had previously worked for SMCV instead of SUNAT, he would obviously have been recused.⁸⁹⁰ Thus even if Mr. Ninacondor had not worked “directly and actively” on the 2010-2011 Royalty Assessments, as Peru argues, he should still have been recused in light of his affiliation with SUNAT and with SMCV’s cases, which he failed to fully disclose.⁸⁹¹ Peru’s recognition of this new recusal ground also makes abundantly clear that the Plenary Chamber’s stated reason for denying SMCV’s request—that his relationship with SUNAT could not be taken into account *at all* because SUNAT was not technically an “administered party”—was simply wrong.⁸⁹²

171. *Second*, Peru asserts that President Olano Silva “simply followed the normal procedure” when she sent to the *vocales* in advance of the Plenary Session a draft resolution announcing that the Plenary Chamber had voted to reject SMCV’s recusal request—despite the fact that the session had not yet met and the *vocales* not yet voted.⁸⁹³ Peru and its experts attempt to paint this process as an inconsequential, time-saving step.⁸⁹⁴ But their assertion ignores that President Olano Silva’s draft went far beyond simply framing the parties’ arguments and relevant points for debate. Instead, the draft included *exactly* how President Olano Silva expected the *vocales* to vote.⁸⁹⁵ The fact that the Plenary Chamber’s final decision corresponded to the President’s draft cannot absolve Peru of this irregularity

⁸⁸⁸ See **CA-238**, Amendments to the Tax Code, Legislative Decree No. 1421 (12 September 2018), Article 3 (amending Article 100 of the Tax Code); **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 100 (as amended by Legislative Decree No. 1421); see also **CER-3**, Hernández I, ¶ 242.

⁸⁸⁹ But see **CER-3**, Hernández I, ¶¶ 237-42 (“The *vocal* Mejía Ninacondor’s prior employment history creates precisely the type of conflict that the legislature attempted to prevent. Given his employment relationship with SUNAT, there was a well-founded risk that the *vocal* Mejía Ninacondor’s resolution of the case would not be impartial and independent.”); **CER-8**, Hernández II ¶ 56.

⁸⁹⁰ **CER-8**, Hernández II, ¶ 56; see also **CA-231**, Single Unified Text of the Law on General Administrative Procedure (June 1, 2017), Article 97(5) (“[A] relationship of service or subordination with any of the subjects [*administrados*] or third parties directly involved in the matter,” is a ground for recusal).

⁸⁹¹ See **CER-8**, Hernández II, ¶¶ 53-56, 60-61.

⁸⁹² See **CER-8**, Hernández II, ¶ 55.

⁸⁹³ Counter-Memorial ¶ 716; see Memorial ¶¶ 245-48 (detailing the President Olano Silva’s involvement in drafting the resolution from the date SMCV filed its request for recusal until the date the Plenary Chamber voted, two days later).

⁸⁹⁴ See Counter-Memorial ¶ 716; **RWS-5**, Olano Silva, ¶ 72.

⁸⁹⁵ See Memorial ¶¶ 245-48.

because it is impossible to know what the *vocales* would have decided if they had been given the chance to deliberate without the President’s indication on how she expected them to vote.⁸⁹⁶

172. *Third*, Peru does not contest that in the 2009 and 2010-2011 Royalty Cases—decided nearly simultaneously despite the 2009 Royalty Case having being filed *five years* earlier—the Tax Tribunal again copy-pasted significant parts of the flawed 2008 Royalty Case resolution, thus propagating the serious procedural defects of that resolution.⁸⁹⁷ Peru’s argument that “considering prior resolutions . . . is in no way an abdication of the duty to independently decide cases” fails to account for the fact that the 2008 resolution was itself not “independently” decided, but drafted by Ms. Villanueva under the direction of President Olano Silva.⁸⁹⁸ Moreover, Peru presents no evidence that the *vocales* in the latter cases—including the conflicted *vocal ponente* of the 2010-2011 Royalty Case—ever undertook such an independent deliberation.⁸⁹⁹

173. *Finally*, Peru does not contest that, after the President’s administrative assistant, Ms. Villanueva, was promoted to *vocal* she was assigned to act as the *vocal ponente* of the Q4 2011 Royalty Case.⁹⁰⁰ Peru argues that Ms. Villanueva’s assignment to the Q4 2011 Royalty Case reflects the “realit[y] of administrative practice” and adjudication with “repeat parties,” that Ms. Villanueva’s assignment was no different from a *vocal* appearing in multiple cases involving the same parties,⁹⁰¹ and that SMCV could have “[sought] recusal of Ms. Villanueva as *vocal*,” during the pendency of the case.⁹⁰² But Peru’s argument ignores that the Q4 2011 Royalty Case was not merely a case involving “repeat parties” and the same decision-maker in the normal course. Rather, Ms. Villanueva’s role in the 2008 Royalty Case, as the President’s assistant who drafted the 2008 resolution under the President’s direction, was utterly improper—and thus completely disqualified her from serving as *vocal* in the latter Q4 2011 Royalty Case.⁹⁰³ Unsurprisingly, Ms. Villanueva’s resolution in the Q4 2011 Royalty Case repeated the same legal argument that she had developed under the direction of President Olano Silva in the 2008 Royalty Case.⁹⁰⁴ Contrary to Peru’s argument, SMCV could not have requested the recusal of Ms. Villanueva in the Q4 2011 Royalty Case because SMCV did not become aware of Ms. Villanueva’s role

⁸⁹⁶ **CER-8**, Hernández II, ¶ 58.

⁸⁹⁷ See Memorial ¶¶ 250, 253, 398.

⁸⁹⁸ Counter-Memorial ¶ 718.

⁸⁹⁹ See Counter-Memorial ¶ 718.

⁹⁰⁰ See Counter-Memorial ¶ 719.

⁹⁰¹ Counter-Memorial ¶ 719

⁹⁰² Counter-Memorial ¶ 345; **RWS-5**, Olano Silva I, ¶ 82.

⁹⁰³ See *supra* ¶¶ 166-67.

⁹⁰⁴ See **Ex. CE-269**, Tax Tribunal, Decision, No. 10574-9-2019, Q4 2011 Royalty Assessments (18 November 2019; see also Memorial ¶¶ 261, 399.

in the 2008 Royalty Case until well after the Tax Tribunal had issued its resolution in the Q4 2011 Royalty Case.⁹⁰⁵

174. The Tax Tribunal President's repeated improper interference in the resolution of SMCV's challenges, the Tax Tribunal's repeated abdication of its duty to deliberate and resolve challenges independently, and its refusal to recuse a blatantly-conflicted decision-maker all gave rise to serious due process violations, and accordingly, to breaches of Peru's obligation of fair and equitable treatment.⁹⁰⁶

4. Peru Breached Article 10.5 When It Refused to Waive Penalties and Interest

175. In its Memorial, Freeport explained that Peru also violated its obligation of fair and equitable treatment each time it arbitrarily and unreasonably failed to waive the exorbitant and punitive penalties and interest assessments against SMCV.⁹⁰⁷ The penalty and interest charges were unfair and inequitable, as SMCV's position that it was not required to pay royalties and taxes was eminently reasonable in light of the clear provisions of the Mining Law and Regulations that stability guarantees applied to the entire concessions or mining units;⁹⁰⁸ the Government's consistent practice in applying stability guarantees to concessions and mining units;⁹⁰⁹ and the Government's confirmation to SMCV that the Concentrator was covered by the stability guarantees because it was included in the stabilized Beneficiation Concession.⁹¹⁰ However, when the Peruvian authorities nevertheless denied the stability guarantees to the Concentrator, at the very least, they had an obligation under Peruvian law and international principles of fairness and equity to waive the exorbitant penalties and interest on the Royalty and Tax Assessments on the grounds that the provisions of the Mining Law and Regulations were, at a minimum, subject to reasonable doubt as to their correct interpretation.⁹¹¹

⁹⁰⁵ See **CWS-21**, Torreblanca II, ¶ 48.

⁹⁰⁶ See **CER-8**, Hernández II, ¶¶ 37, 49; **CER-3**, Hernández I, ¶¶ 215, 248; see also, e.g., **CA-211**, *OAO Tatneft* Award, ¶¶ 265-68 (finding that a politically-appointed prosecutor's interference was a "common thread" in administrative and judicial proceedings that were "systematically adverse to the rights of the Claimant," despite the investor's "tenable" claims, violating "due process and necessary impartiality in delivering justice"); **CA-202**, *TECO* Award, ¶¶ 458, 682-83, 711 (finding that an administrative agency's disregard of its own rules and procedures was "arbitrary and breach[d] elementary standards of due process in administrative matters"); **CA-195**, *Deutsche Bank* Award ¶¶ 486-91 (finding that an administrator of the Bank Supervision Department "decided to form his own views of" an investigation, in "total contradiction" of the individual circumstances of the case breached the fair and equitable treatment standard).

⁹⁰⁷ Memorial ¶¶ 400-420.

⁹⁰⁸ See *supra* §§ II.A.1; Memorial ¶¶ 302-12.

⁹⁰⁹ See *supra* §§ II.A.2; Memorial ¶¶ 313-19, 408.

⁹¹⁰ See *supra* §§ II.A.3; Memorial ¶¶ 326-34, 408.

⁹¹¹ See Memorial ¶¶ 400-408; **CER-3**, Hernández I, ¶¶ 110-23.

176. But instead of doing so, Peru first arbitrarily sought to dismiss the waiver requests on spurious procedural grounds.⁹¹² Then, when SUNAT and the Tax Tribunal considered the issue on the merits, the Government sought to avoid the waiver by refusing to issue a “clarification,” although under its own laws, it was required to do so.⁹¹³ Peru’s arbitrary failure to waive penalties and interest was further compounded by (i) SUNAT’s delay in issuing the Royalty Assessments and the Tax Tribunal’s excessive delays in deciding SMCV’s challenges to the Royalty and Tax Assessments that significantly increased the extraordinarily punitive interest charges, and (ii) the Government’s arbitrary refusal to reduce the applicable interest rate during these extensive delays, even though it was required to do so under Peruvian law.⁹¹⁴ The penalties and interest amounts SMCV had to pay as a result of Peru’s failure to waive were wholly disproportionate as they exceeded the amount of principal assessed, and thus resulted in the Government effectively double-charging SMCV for the royalties and taxes it did not owe in the first place.⁹¹⁵ Peru’s refusal to waive penalties and interest thus resulted in a windfall to Peru at SMCV’s expense, in violation not only of Peruvian law but also fundamental notions of fairness and equity.⁹¹⁶ Peru’s own tax expert, Mr. Picón, called in a media interview SUNAT’s assessments of SMCV and eight other major companies “absurd” and “generated by poorly interpreted formalities” and not for “alleged tax evasion.”⁹¹⁷ Mr. Picón also explained that a large part of the debt in these cases was caused by penalties and interest accruing because of lengthy delays that were “the fault of the State and not the taxpayer.”⁹¹⁸

177. Peru attempts to characterize its arbitrary and unlawful conduct as, at most, a mere misapplication of a provision of Peruvian law that, if proven, would not constitute a breach of fair and equitable treatment because it does not “rise to the level of ‘something opposed to the rule of law’ or an act that shocks a sense of judicial propriety.”⁹¹⁹ But Freeport does not claim that Peru simply misapplied Peruvian law, but rather, that Peru’s refusal to waive penalties and interest was arbitrary, unreasonable, disproportionate, procedurally improper, and fundamentally inequitable in light of the circumstances.⁹²⁰

⁹¹² See Memorial ¶¶ 413-416; **CER-3**, Hernández I, ¶¶ 134-45.

⁹¹³ See Memorial ¶¶ 403, 416; **CER-3**, Hernández I, ¶¶ 124-25, 136, 144.

⁹¹⁴ See Memorial ¶¶ 417-20.

⁹¹⁵ See Memorial ¶¶ 401, 418-19.

⁹¹⁶ See Memorial ¶ 402.

⁹¹⁷ **Ex. CE-1039**, Jorge Picón, Nine Mega SUNAT Trials are Based on Absurd Assessments, EXPRESO (4 October 2017).

⁹¹⁸ **Ex. CE-1039**, Jorge Picón, Nine Mega SUNAT Trials are Based on Absurd Assessments, EXPRESO (4 October 2017).

⁹¹⁹ Counter-Memorial ¶ 721 (citing **RA-63**, *El Paso v. Argentina* Award ¶ 319).

⁹²⁰ See **CA-163**, *Lemire* Decision on Jurisdiction and Liability ¶ 385 (“blatant disregard of applicable [] rules,” which required Ukraine’s National Council to consider certain factors in a tender process, and resulted in a

Moreover, as explained in Section II.C.2 above, Peru’s attempt to raise the bar of the fair and equitable treatment standard to require conduct that is “shocking” or particularly “severe” is unfounded and unsupported—even though Peru’s conduct here certainly is shocking and severe.⁹²¹

178. Peru’s defenses to its unlawful conduct lack any merit. Peru argues that (i) there was no “reasonable doubt” as to whether SMCV owed taxes and royalties for the Concentrator; (ii) even if there was reasonable doubt, SMCV would not be entitled to a waiver because the Government did not issue an “official clarification;” (iii) the Tax Tribunal and Courts correctly found SMCV waived its right to request a waiver in the 2006-2007 and 2008 Royalty Cases; and (iv) SUNAT and the Tax Tribunal correctly rejected SMCV’s waiver requests in the remaining cases.⁹²² Peru both misstates and misapplies the applicable law and minimizes the arbitrariness of its own conduct.

i. SMCV Was Entitled to a Waiver of Penalties and Interest Because There Was, at a Minimum, Reasonable Doubt as to the Correct Interpretation of the Mining Law and Regulations

179. As Freeport explained, paragraph 1 of Article 170 allows taxpayers to request a waiver of penalties and interest when the nonpayment results from the fact that the meaning of the relevant provision is subject to reasonable doubt.⁹²³ In this context, “reasonable doubt” exists when the language

“distort[ed]” and unfair outcome, violated Ukraine’s fair and equitable treatment obligation); **CA-211**, *OAO Tatneft Award*, ¶¶ 398-400 (finding that the Government’s “error[oneous]” decisions, which “contrast[ed] with the provisions of more pertinent legislation,” “compounded by procedural defects that also cast doubt on the observance of due process requirements,” failed to satisfy the FET standard); **CA-194**, *Occidental Award* ¶¶ 450-452 (concluding that the penalty imposed by Ecuador on foreign investors for the investor’s failure to comply with regulatory approval requirements for oilfield contractors was disproportionate and in breach of FET because the “hundreds of millions of dollars” price paid by the claimants “was out of proportion to the wrongdoing alleged [], and similarly out of proportion to the importance and effectiveness of the ‘deterrence message’ which the Respondent might have wished to send to the wider oil and gas community”); **CA-201**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) (Alexandrov, Abi-Saab (dissenting in part on other grounds), Lévy), ¶ 525 (stating in relation to fair and equitable treatment obligation that “for a state’s conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state’s acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors”).

⁹²¹ Compare *supra* ¶ 137 (citing **CA-234**, *Deutsche Telekom Interim Award* ¶ 336), with Respondent’s Counter-Memorial ¶¶ 651, 658.

⁹²² See Counter-Memorial ¶¶ 723-745.

⁹²³ See Memorial ¶ 403 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 170 (“The assessment of interest, restatement for inflation based on the Consumer Price Index or the assessment of penalties is not applicable if: 1. As a result of the misinterpretation of a provision, no amount of the tax debt related to said interpretation had been paid until the clarification thereof, provided the clarifying provision expressly states that this paragraph is applicable.”); *id.* at Art. 92(g) (summarizing the criteria in Article 170 as involving “cases of reasonable doubt”)); **CER-3**, Hernández I, ¶ 97.

of the provisions in question is on its face ambiguous.⁹²⁴ Unlike paragraph 2 of Article 170—which allows taxpayers to request a waiver of penalties and interest when SUNAT or the Tax Tribunal issues conflicting decisions (*duplicidad de criterio*)—a party requesting waiver for “reasonable doubt” under paragraph 1 is not required to demonstrate contradictory interpretations by SUNAT or the Tax Tribunal.⁹²⁵ Once the Government issued its Royalty and Tax Assessments against SMCV, SMCV was entitled to a waiver of penalties and interest for “reasonable doubt” because the evidence clearly demonstrated that, at the very least, the language of Article 83 of the Mining Law and Article 22 of the Regulations was objectively ambiguous. Specifically, MINEM officials, the Contentious-Administrative Courts, Congress, SUNAT, and other Government officials either adopted the interpretation that under Article 83 of the Mining Law and Article 22 of the Regulations stability guarantees applied to entire concessions or mining units, or stated that the meaning of these provisions was unclear.⁹²⁶

180. Peru mischaracterizes Freeport’s argument as demonstrating “why, in the colloquial sense, SMCV had reasonable doubt about its tax and royalty obligations” and asserts that “SMCV’s subjective beliefs are irrelevant.”⁹²⁷ But Freeport has never argued that “SMCV’s subjective beliefs” were relevant. Instead, Freeport has argued that there was at a minimum *objectively* reasonable doubt as to the correct interpretation of Article 83 of the Mining Law and Article 22 of the Regulations.⁹²⁸ And Peru agrees that “reasonable doubt . . . requires an objective analysis.”⁹²⁹ Under this objective analysis, each of Peru’s attempts to discard Freeport’s evidence of reasonable doubt falls short.

181. *First*, there was, at a minimum, reasonable doubt because Government officials from MINEM, SUNAT and other Government authorities consistently took the position that stability guarantees applied to entire concessions or mining units.⁹³⁰ Moreover, MINEM officials confirmed to SMCV that the stability guarantees would extend to the Concentrator as it was included in the existing Beneficiation Concession covered by the Stability Agreement.⁹³¹ When the Government later changed its position, it should have recognized that there was, at a minimum, reasonable doubt as to the correct

⁹²⁴ See Memorial ¶ 403; **CER-3**, Hernández I, ¶ 102 (“Reasonable doubt is determined by looking at the text of the law or rule itself and assessing if the text as written can support multiple interpretations because of imprecision, ambiguity, or obscurity in the drafting.”).

⁹²⁵ See Memorial ¶ 414; **CER-3**, Hernández I, ¶¶ 97, 101-02; **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 170.

⁹²⁶ See Memorial ¶¶ 405, 407-408; **CER-3**, Hernández I, ¶¶ 112-23.

⁹²⁷ Counter-Memorial ¶ 727.

⁹²⁸ See Memorial ¶¶ 405, 407, 415; **CER-3**, Hernández I, ¶¶ 101-102, 105-106, 110-25, 136-38; **CER-8**, Hernández II, ¶ 65.

⁹²⁹ Counter-Memorial ¶ 724.

⁹³⁰ See *supra* §§ II.A.2-4; Memorial ¶¶ 326-34, 401, 408.

⁹³¹ See *supra* §§ II.A.2-4; see also Memorial ¶¶ 328, 408(f)-(g).

interpretation of Article 83 of the Mining Law and Article 22 of the Regulations.⁹³² Peru's experts Mr. Bravo and Mr. Picón claim that admissions by some Government officials of SMCV's position "does not mean that [such interpretation] was correct."⁹³³ But this misses the point. Reasonable doubt is not a question of which interpretation is "correct," but rather, whether the language of the law is objectively ambiguous.⁹³⁴

182. *Second*, there also was, at a minimum, reasonable doubt because, even after the Government's *volte-face*, Government entities and officials continued to take the position that stability guarantees extend to concessions and mining units.⁹³⁵ As mentioned, *after* SUNAT issued its Royalty Assessments against SMCV for 2006-2007, 2008, and 2009, as well as multiple Tax Assessments, SUNAT issued a report in which it advised that stability guarantees are "applicable solely to the *concession or economic-administrative unit* for which said agreement has been signed."⁹³⁶ The report represented SUNAT's official position and was binding on SUNAT and other bodies of the Tax Administration.⁹³⁷ SUNAT itself thus contradicted in that report the position that it had taken, and continued to take, with regard to SMCV's Concentrator.

183. *Third*, there further was reasonable doubt because, when issuing the 2014 amendment of the Mining Law and the 2019 amendment of the Regulations, Peru itself took the position that there was ambiguity in the original text of the Mining Law and Regulations.⁹³⁸ Peru's arguments to the contrary are futile.

- (a) The 2014 and 2019 Amendments are powerful evidence that the original versions of Article 83 of the Mining Law and Article 22 of the Regulations applied stability

⁹³² See also Memorial ¶¶ 218, 342-43, 407.

⁹³³ **RER-3**, Bravo & Picón, ¶ 113; see also **RER-3**, Bravo & Picón, ¶ 115 (stating that "[t]he fact that the head of SUNAT had indicated that the companies that were not paying royalties had entered into stabilization agreements has no implication with respect to the correct interpretation of the law.").

⁹³⁴ **CER-8**, Hernández II, ¶ 81 ("[R]easonable doubt does not hinge on whether there was a 'correct' interpretation of the law . . . but rather on whether the language of the law is ambiguous.").

⁹³⁵ See *supra* ¶ 158; see also Memorial ¶¶ 382, 408(l)-(m).

⁹³⁶ **Ex. CE-883**, SUNAT, Report No. 08412-SUNAT/4B0000 (13 September 2012), p. 3 (emphasis added).

⁹³⁷ See **CER-8**, Hernández II, ¶ 11 ("The 2012 SUNAT Report was issued in response to queries submitted by a regional office of SUNAT under the consultation procedure set out in Article 94 of the Tax Code. According to Article 94 of the Tax Code, SUNAT's response to a consultation 'will be *mandatory* for the different bodies of the Tax Administration.' Thus while these reports are not binding on taxpayers, they are binding on the Tax Administration, and establish SUNAT's official position on the issues covered."); **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 94 ("Consultations shall be submitted in writing to the competent Tax Administration body The pronouncement that is issued will be mandatory for the different bodies of the Tax Administration.").

⁹³⁸ See *supra* § II.A.1(i).

guarantees to entire concessions or mining units.⁹³⁹ But even as Peru nonetheless enforced the Royalty and Tax Assessments against SMCV, it should have recognized that these amendments demonstrate that, at a minimum, Article 83 of the Mining Law and Article 22 of the Regulations were objectively ambiguous. The Amendments revised Article 83 and Article 22 to limit stability guarantees no longer to concessions and mining units, but to the investment specifically designated in the feasibility study.⁹⁴⁰ If Article 83 and Article 22 had previously clearly provided that stability guarantees applied only to the investment specifically designated in the feasibility study, there would have been no reason whatsoever to amend the terms of these provisions.⁹⁴¹

(b) Moreover, the Statement of Legislative Intent of the 2012 Amendment *explicitly* states that its purpose was to “establish a *clearer* regulatory framework in accordance with the principle of legal certainty.”⁹⁴² Peru’s assertion that this stated goal “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’” is nonsensical: given that one of these “proposed” changes was the introduction of Article 83-B, Peru cannot explain why this change would be exempt from the clarifying purpose of the amendments.⁹⁴³ Peru then argues that “as a general matter, making a law ‘clearer’ does not necessarily mean that the law was unclear to begin with.”⁹⁴⁴ This also makes no sense: if an amendment expressly seeks to make the law *clearer*, it is necessarily because the law, in its current state, is not sufficiently clear.

(c) The Statement of Legislative Intent for the 2019 Amendments to the Regulations likewise specifically noted that it amended Article 22 because:

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

⁹³⁹ See *supra* ¶¶ 40-44; Memorial ¶¶ 218, 342-43, 407.

⁹⁴⁰ See *supra* ¶ 41-43; Memorial ¶¶ 218, 342-43.

⁹⁴¹ See *supra* ¶¶ 42-43; **CER-8**, Hernández II, ¶¶ 76-77; **CER-5**, Vega I, ¶ 52.

⁹⁴² **Ex. CE-823**, Congress, Bill No. 30230, Statement of Legislative Intent, p. 11 (emphasis added); **CER-3**, Hernández I, ¶ 120.

⁹⁴³ Cf. Counter-Memorial ¶ 731.

⁹⁴⁴ Counter-Memorial ¶ 731.

considering the provisions of Articles 79, 83, 83-B of the Single Unified Text of the Mining Law.⁹⁴⁵

In this statement, the Government thus explicitly acknowledged that a literal reading of Article 22 was that stability guarantees apply to concessions or EAUs—a fact that the Government no longer wished to espouse and hence dubbed “misleading.” But for purposes of determining whether there was reasonable doubt, the Government’s Statement of Legislative Intent acknowledged that Article 22 at least was ambiguous and that its text could be read to support SMCV’s position.⁹⁴⁶

(d) In response, Peru asserts this Statement is not evidence of reasonable doubt because the last phrase of the paragraph states that Articles 79, 83, and 83-B “clear[] up any misunderstanding that might have resulted from the face of the previous version of Article 22, standing alone.”⁹⁴⁷ Peru’s argument is flawed in multiple respects. To start, the Statement references the provisions of the Mining Law as they existed after the 2014 Amendment, that is, after the Government for the first time limited the scope of stability guarantees to the investments expressly set out in the feasibility study.⁹⁴⁸ These provisions are irrelevant to assessing “reasonable doubt” in the period before 2014. More broadly, MINEM’s Statement of Intent explicitly stated that “the amendment [would] contribute to clarifying” not only the Regulations but also the Mining Law, which together form an integrated regime.⁹⁴⁹ Thus, the Government’s own explanation for the amendment acknowledged that Article 22 was, at a very minimum, unclear.

184. *Finally*, there further was, at a minimum, reasonable doubt because, as Peru concedes, (i) a Contentious-Administrative Court adopted SMCV’s position that the stability guarantees applied to the Concentrator; and (ii) several Supreme Court and Appellate Court judges voted in SMCV’s favor.⁹⁵⁰ Peru’s assertions why that decision and those votes should not prove reasonable doubt are unavailing.

⁹⁴⁵ **CA-246**, Supreme Decree amending the Regulations of the Ninth Title of the General Mining Law, Supreme Decree No. 021-2019-EM (28 December 2019), Statement of Legislative Intent, pp. 9-10; *see also* Memorial ¶ 407.

⁹⁴⁶ *See* Memorial ¶ 407; **CER-3**, Hernández I, ¶¶ 120-21.

⁹⁴⁷ Counter-Memorial ¶ 732.

⁹⁴⁸ *See* **CA-209**, Law Establishing Tax Measures, Simplification of Procedures and Permits for the Promotion and Dynamization of Investment in the Country, Law No. 30230 (12 July 2014), Article 83-B; **CA-246**, Supreme Decree No. 021-2019-EM (December 28, 2019), Article 22. *See also supra* ¶¶ 36-37, 41, 44.

⁹⁴⁹ **Ex. CE-885**, Statement of Intent, Supreme Decree No. 021-2019-EM (28 December 2019), Statement of Legislative Intent, pp. 9-10.

⁹⁵⁰ *See* Memorial ¶ 405; **CER-3**, Hernández I, ¶¶ 112-13.

- (a) Peru first asserts that the decision and votes cannot evidence reasonable doubt because they post-date SMCV’s nonpayment of royalties and taxes.⁹⁵¹ But this misses the point. The date of the decisions is irrelevant because a provision does not *become* ambiguous as a result of a court decision or a judge’s vote.⁹⁵² Instead, the court decisions and votes of judges are evidence that, at a minimum, the provision was ambiguous from the outset because members of the judiciary interpreted it in different ways.⁹⁵³
- (b) Peru also argues that the Contentious-Administrative Court decision in the 2008 Royalty Case, which was in SMCV’s favor, is not relevant because it was reversed on appeal, and “the law is determined by the decision of the highest court to decide the issue.”⁹⁵⁴ This argument too misses the mark: the issue is not whether the Contentious-Administrative Court decision was final. The issue is whether the Court decision shows that the correct interpretation of Article 83 of the Mining Law and Article 22 of the Regulations was, at a minimum, subject to reasonable doubt because judges disagreed on their proper interpretation.⁹⁵⁵
- (c) Peru’s attempt to dismiss the one vote of the Appellate Court judge and the two votes of Supreme Court justices in SMCV’s favor as having “no bearing on whether there may have been reasonable doubt about the proper interpretation of the Mining Law and its Regulations” also fails.⁹⁵⁶ The one Appellate Court judge and two Supreme Court justices voting to reverse the lower court’s judgment all pointed out that the 2006-2007 Royalty Case turned on the proper interpretation of the Mining Law and Regulations. In his dissent, Appellate Court Judge Reyes Ramos noted that the “case basically boils down to a dispute surrounding two clashing interpretations on the same piece of legislation.”⁹⁵⁷ Similarly, Supreme Court Justices Martínez Maraví and Rueda Fernández concluded that the lower court’s judgment should be reversed because it “omitted a decision on the issue that the stability was granted to the beneficiation concession and that, because of that,

⁹⁵¹ See Counter-Memorial ¶ 728.

⁹⁵² CER-8, Hernández II, ¶ 71.

⁹⁵³ CER-8, Hernández II, ¶¶ 70-71.

⁹⁵⁴ Counter-Memorial ¶¶ 728-29; see also RER-3, Bravo and Picón, ¶¶ 95, 97.

⁹⁵⁵ CER-8, Hernández II, ¶ 71 (“Dissenting votes do not *create* reasonable doubt or ambiguity—the rule is either ambiguous or not since its enactment. The dissenting votes show . . . that the rule is ambiguous and, therefore, subject to reasonable doubt.”).

⁹⁵⁶ Counter-Memorial ¶ 729.

⁹⁵⁷ Ex. CE-274, Appellate Court, Decision No. 48, File No. 7649-2013 (12 July 2017), pp. 34, 36.

with the incorporation of the Sulfides Plant . . . the extension of the guarantee operate[s] as a matter of law.”⁹⁵⁸

ii. The Government Was Required to Issue a Clarification but Arbitrarily and Unreasonably Failed to Do So

185. Peru argues that, even if there was objectively reasonable doubt, a party is only entitled to a waiver of penalties and interest if the relevant Peruvian authorities have issued a “clarification” that expressly provides it is issued for purposes of Article 170 of the Tax Code and published the clarification in the official gazette, *El Peruano*.⁹⁵⁹ What is more, Peru argues that the power to issue such a clarification is entirely discretionary—meaning that the Government can deny parties the opportunity for a waiver at will.⁹⁶⁰ Yet this is plainly wrong: when there is objectively reasonable doubt, the Government cannot sit on its hands and arbitrarily refuse to issue a “clarification.”⁹⁶¹ If the Government could simply refuse to do so, it could thwart any request for a waiver of penalties and interest, rendering paragraph 1 of Article 170 utterly meaningless.⁹⁶² Unsurprisingly, this is neither what Peruvian law provides nor what the standard of fair and equitable treatment calls for.

186. *First*, Peru argues that while “certain Peruvian bodies are ‘empowered to clarify the scope’ of the law,” “such clarification is not mandatory,” but rather “discretionary” because Article 170 of the Tax Code provides that “Peruvian bodies ‘may’ clarify, not, *e.g.*, ‘shall’ clarify, a rule.”⁹⁶³ But Peru misreads Article 170.⁹⁶⁴ As Prof. Hernández explains, Article 170 provides that 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.”⁹⁶⁵ The word “may” refers to the *means* through which the Government can issue the clarification, but it does not render the Government’s *obligation* to issue the

⁹⁵⁸ **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), pp. 46 (¶ 2.11).

⁹⁵⁹ Counter-Memorial ¶ 724.

⁹⁶⁰ Counter-Memorial ¶ 725.

⁹⁶¹ See Memorial ¶¶ 403, 416; **CER-3**, Hernández I, ¶¶ 136(c), 146.

⁹⁶² Memorial ¶ 416; **CER-3**, Hernández I, ¶ 106.

⁹⁶³ Counter-Memorial ¶ 725. See also *id.* ¶¶ 353, 736, 742-44; see also **RER-3**, Bravo & Picón, ¶¶ 74, 77-78.

⁹⁶⁴ See **CER-8**, Hernández II, ¶¶ 83-89; **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 170(1).

⁹⁶⁵ **CER-8**, Hernández II, ¶ 84; **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 170(1) (“To this end, the clarification may be made by means of a Law or provision of a similar rank, a Supreme Degree 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.”) (emphasis added).

clarification into a discretionary decision.⁹⁶⁶ Thus, if read correctly, Article 170 provides that after the authorities determine that the relevant provisions are subject to reasonable doubt, the Government must issue the clarification but “may” fulfill that obligation through any of the means Article 170 authorizes.⁹⁶⁷

187. *Second*, if the Government could simply withhold the clarification at will, then it could arbitrarily deny taxpayers their right to a waiver of penalties and interest for reasonable doubt for no or any reason, contrary to the equitable purposes that Article 170 serves.⁹⁶⁸ This would render the objective criterion of reasonable doubt essentially meaningless, leaving behind only the purely subjective criterion of the decision-maker’s caprice.⁹⁶⁹ In addition to being inherently unfair and inequitable, such a system would be contrary to Peru’s own acknowledgment that the test for waiver of penalties and interest “requires an objective analysis.”⁹⁷⁰

188. *Finally*, even if the Government had discretion to decide whether to issue a clarification, which it did not, the Government should have issued the clarification to waive SMCV’s penalties and interest. Under the proportionality principle set out in Article IV, § 1.4, of the Law on General Administrative Procedure (“LGAP”), the Government does not have *absolute* discretion but must make decisions proportional to the purpose sought to be achieved by the provision in question.⁹⁷¹ Here, because of the equitable purpose of Article 170, the Government should have issued the clarification and waived SMCV’s penalties and interest because there was clearly, at a minimum, reasonable doubt in the underlying provisions, rendering the excessive penalties and interest the Government imposed both unfair and unreasonable.⁹⁷²

iii. **The Government Had the Obligation to Consider *Sua Sponte* SMCV’s Waiver but Instead Arbitrarily Rejected SMCV’s Requests on Spurious Procedural Grounds**

189. As Freeport explained, the Tax Tribunal and the courts’ refusal to accept SMCV’s waiver requests in the 2006-2007 and 2008 Royalty Cases on the grounds that SMCV allegedly did not file them on time was arbitrary and unfounded because under Peruvian law, the right to waiver of penalties and

⁹⁶⁶ See CER-8, Hernández II, ¶ 84.

⁹⁶⁷ See CER-8, Hernández II, ¶ 84; CER-3, Hernández I, § XI.A.

⁹⁶⁸ See CER-8, Hernández II, ¶ 84.

⁹⁶⁹ See CER-8, Hernández II, ¶ 84.

⁹⁷⁰ Counter-Memorial ¶ 724.

⁹⁷¹ See CA-341, Juan Carlos Morón Urbina, Comments on the Law on General Administrative Procedure (Gaceta Jurídica, 10th ed. 2014), p. 74. See also CER-8, Hernández II, ¶ 84.

⁹⁷² See CER-8, Hernández II, ¶¶ 84, 89.

interest cannot be waived.⁹⁷³ Rather, because Article 170 of the Tax Code is a peremptory norm, the relevant authorities, including the Tax Tribunal and the courts, have the obligation to consider the issue *sua sponte*.⁹⁷⁴ As noted, while Freeport does not advance claims based on the breaches that occurred when the 2006-07 and 2008 Assessments of penalties and interest became final and enforceable at the conclusion of the administrative process due to the time bar, it submits claims based on the Contentious Administrative Courts' arbitrary refusal to consider the waiver issue *de novo*, as they were required to do, which constituted self-standing breaches of Article 10.5.⁹⁷⁵ In defense, Peru and its experts argue that the Tax Tribunal and the Courts rightly denied SMCV's waiver requests in the 2006-2007 and 2008 Royalty Cases for allegedly not filing them on time.⁹⁷⁶ Peru's and its experts' arguments are incorrect.

190. *First*, Peru's experts do not contest that Article 170 of the Tax Code is a "peremptory norm" that must be applied if its conditions are met, or that Article 170 does not require the taxpayer to request its application.⁹⁷⁷ But Peru asserts that this obligation exists only when the Government has already issued a "clarification," which Peru argues is entirely discretionary.⁹⁷⁸ As explained above, this argument is wrong and illustrates why Peru's assertion that the "clarification" is entirely at the discretion of the Government cannot be correct.⁹⁷⁹ If the trigger for the Government's obligation to consider a taxpayer's entitlement to a waiver were entirely discretionary, then no real obligation would exist, contrary to Article 170's status as a peremptory norm.

191. *Second*, in its Memorial, Freeport cited several provisions that established the Tax Tribunal's obligation to consider SMCV's waiver *sua sponte*, including Article 127 of the Tax Code, which provides that "[t]he decision-making body is empowered to conduct a full re-examination of the particulars of the disputed matter, whether such issues have been raised by the interested parties or not, and new verifications shall be conducted where relevant."⁹⁸⁰ Peru agrees that under Article 127 "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," but contends that "[it] is not required to do so."⁹⁸¹ Peru's argument is incorrect. As Prof. Hernández explains, "[t]he Tax Tribunal and the Courts must do complete

⁹⁷³ Memorial ¶¶ 409-10.

⁹⁷⁴ Memorial ¶¶ 410-11.

⁹⁷⁵ See Memorial ¶ 427.

⁹⁷⁶ See Counter-Memorial ¶¶ 319-20; **RER-3**, Bravo & Picón, ¶¶ 81-86.

⁹⁷⁷ **RER-3**, Bravo & Picón, ¶ 83.

⁹⁷⁸ Counter-Memorial ¶ 736.

⁹⁷⁹ See *supra* ¶¶ 186-87.

⁹⁸⁰ **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 127; see also Memorial ¶ 215; **CER-3**, Hernández I, ¶¶ 103-04.

⁹⁸¹ Counter-Memorial ¶ 320; **RER-3**, Bravo & Picón, ¶¶ 81-86.

justice—that is, render decisions that comprehensively resolve any and all issues related to the case, regardless of whether they were argued by the parties.”⁹⁸² This obligation is clearly established by Article 129 of the Tax Code, which Freeport also cited in its Memorial, which provides that decisions “shall...rule on all the questions raised by the interested party *and any others raised by the case file*.”⁹⁸³

192. *Finally*, Peru attempts to explain the Contentious Administrative Courts’ total failure to independently assess whether SMCV was entitled to a waiver by vaguely arguing that “[i]t is a routine, and well-founded, practice that appellate courts, generally, do not enlarge the scope of a case on appeal.”⁹⁸⁴ To begin with, Peru’s characterization of the Contentious Administrative Courts’ role as “appellate courts” is wrong. When reviewing Tax Tribunal resolutions, the Contentious Administrative Courts are obligated to “resolve *sua sponte* all issues arising from case.”⁹⁸⁵ Moreover, Peru completely ignores that SMCV *did* raise the issue of waiver before the Tax Tribunal *and* asked both the first instance and the appellate courts to rule on whether the Tax Tribunal should have considered the issue *sua sponte*—a request that the courts completely ignored.⁹⁸⁶ Two of the Supreme Court justices in the 2006-2007 Royalty Case explicitly highlighted this defect in the lower court’s reasoning, noting that the Appellate Court had “not addressed claimant’s request” to waive penalties and interest under Article 170—indicating not only that it was within the lower court’s power to do so, but that the court *should* have done so.⁹⁸⁷

iv. **SUNAT and the Tax Tribunal Then Rejected SMCV’s Waiver Requests for the Remaining Assessments on Arbitrary and Pretextual Grounds**

193. In its Memorial, Freeport further explained that SUNAT and the Tax Tribunal arbitrarily and unreasonably refused to waive penalties and interest in SMCV’s remaining Royalty and Tax

⁹⁸² **CER-8**, Hernández II, ¶ 93.

⁹⁸³ **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 129. *See* Memorial ¶ 215; **CER-3**, Hernández I, ¶¶ 103-04.

⁹⁸⁴ Counter-Memorial ¶ 737.

⁹⁸⁵ **CER-8**, Hernández II, ¶¶ 93-95; *see* **CER-3**, Hernández I, ¶ 36; **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 129; **CA-257**, Law on the Contentious-Administrative Procedure, Law No. 27584 and the Single Unified Text, approved by Supreme Decree No. 013-2008-JUS (29 August 2008), Article 5.

⁹⁸⁶ *See* Memorial ¶¶ 212-15, 404 (citing **Ex. CE-656**, SMCV, Letter to the President of Chamber No. 10 (Royalties 2006/07) (26 June 2013); **Ex. CE-90**, SUNAT Letter to Tax Tribunal Chamber No. 1, Resolution No. 8252-1-2013 (26 June 2013); **Ex. CE-91**, Tax Tribunal, Decision No. 11667-10-2013 (15 July 2013), p. 5; **Ex. CE-92**, Tax Tribunal, Decision No. 11669-1-2013 (15 July 2013), p. 5).

⁹⁸⁷ **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017 (2006/07 Royalty Assessments) (20 November 2018), pp. 46-47, ¶ 2.1; *see also* Memorial ¶¶ 238, 411.

Assessments based on arbitrary and pretextual grounds.⁹⁸⁸ Peru and its experts' arguments to the contrary are incorrect.

194. *First*, Peru and its experts find no issue with the Tax Tribunal's baffling conclusion that there was no reasonable doubt because the "key issue" was not the correct interpretation of the Mining Law and Regulations but rather the scope of the 1998 Stability Agreement, which incorporated the Mining Law and Regulations in their entirety.⁹⁸⁹ As Freeport already explained, this is clearly wrong and easily disproven on the face of the Tax Tribunal's own resolutions and SUNAT's own assessments and decisions against SMCV, all of which expressly relied on the Mining Law and Regulations.⁹⁹⁰ And Peru acknowledges the importance of the Mining Law two sentences later, when it wrongly asserts that the Tax Tribunal's determination that the Mining Law was "clear" was "[f]atal to Claimant's allegations."⁹⁹¹ Moreover, Peru and its experts expressly acknowledge that the Mining Law and Regulations govern the scope of stability guarantees and whether stability guarantees are granted to specific concessions or to specific investments—which further proves that the correct interpretation of these provisions was in fact the "key issue."⁹⁹²

195. *Second*, Peru argues that SUNAT and the Tax Tribunal correctly relied on the lack of a formal clarification to reject SMCV's waiver requests.⁹⁹³ But SUNAT and the Tax Tribunal are the very authorities that are not only empowered, but *required*, to issue a clarification when there is objectively reasonable doubt as to the underlying provision, rendering their conclusions that they *could not* issue a waiver because they did not issue a clarification entirely circular.⁹⁹⁴

196. *Finally*, Peru's assertion that SUNAT and the Tax Tribunal rightly discounted SMCV's myriad evidence as "irrelevant" by characterizing this evidence as relating to "a subjective, colloquial understanding of 'reasonable doubt,' not the limited, objective 'reasonable doubt' analysis that is required under Article 170" only reinforces the flaws in SUNAT and the Tax Tribunal's approach.⁹⁹⁵ SMCV's

⁹⁸⁸ See Memorial, **Annex A**: Administrative Proceedings (listing 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments and all Income Tax, General Sales Tax, Temporary Tax on Net Assets, Special Mining Tax, and Complimentary Mining Pension Fund Assessments); see also Memorial ¶¶ 413-16.

⁹⁸⁹ See Counter-Memorial ¶ 328; **RER-3**, Bravo & Picón, ¶ 127.

⁹⁹⁰ See Memorial ¶ 414; **CER-8**, Hernández II, ¶ 97; **CER-3**, Hernández I, ¶¶ 139-43.

⁹⁹¹ Counter-Memorial ¶ 328.

⁹⁹² See *supra* § II.A.1; **RER-1**, Eguiguren, ¶¶ 35, 40, 61; **RER-2**, Morales, ¶ 59; see also Counter-Memorial ¶¶ 49, 202, 358-60, 365-74, 391; **RER-3**, Bravo & Picón, ¶¶ 90, 99, 108, 117, 123, 250; **RWS-4**, Bedoya, ¶¶ 18-22.

⁹⁹³ Counter-Memorial ¶ 275 (citing **RER-3**, Bravo & Picón, ¶¶ 76-82).

⁹⁹⁴ See **CER-3**, Hernández I, ¶ 109; **CER-8**, Hernández II, ¶¶ 83-89.

⁹⁹⁵ Counter-Memorial ¶ 743.

evidence—like Freeport’s now—was not to demonstrate a “subjective” understanding, but rather, demonstrates that, objectively, the underlying provisions of the Mining Law and Regulations were at a minimum ambiguous.⁹⁹⁶ That the Government simply dismissed this evidence out of hand as “irrelevant” demonstrates a total lack of interest in actually providing SMCV with a fair hearing on its waiver claims.

v. SUNAT and the Tax Tribunal Compounded Penalties and Interest Through Excessive Delays and Their Arbitrary Failure to Adjust the Interest Rate

197. Peru’s arbitrary failure to waive penalties and interest was further compounded by the Government’s excessive delays in deciding SMCV’s challenges to the Royalty and Tax Assessments that significantly increased the punitive interest charges, and the Government’s arbitrary refusal to adjust the applicable interest rate following these extensive delays, even though it was required to do so under Peruvian law.⁹⁹⁷

198. *First*, Peru acknowledges that the penalties and interest SMCV incurred are “a significant portion of SMCV’s total tax liability.”⁹⁹⁸ But Peru argues that SMCV, and not Peru, is responsible for that exorbitant amount because (i) SMCV accepted the risk of not paying royalties, given that “SMCV knew or should have known” that it was the Government’s position that SMCV had to pay royalties “by the time of the June 2005 publicly-televised Congressional hearing at the latest”; and (ii) SMCV could have mitigated damages, but chose not to, by paying the assessments and penalties at the same time that it challenged them, and then later requesting reimbursement if the challenges were successful.⁹⁹⁹ These arguments are incorrect.

(a) As discussed above at Section II.A.2(ii), Peru’s assertion that in the June 2005 Congressional hearing the Government stated that SMCV had to pay royalties is contradicted by the transcripts of that session. Moreover, as discussed above at Section II.A.2(ii), on multiple occasions after June 2005, the Government took the position, or did not contradict SMCV’s position, that stability guarantees applied to concessions and mining units and that SMCV did not have to pay royalties. Also, when challenging the Royalty and Tax Assessments, SMCV expected that it would receive a fair hearing—an expectation that was badly thwarted as a result of the Tax Tribunal’s due

⁹⁹⁶ See *supra* ¶¶ 179-84.

⁹⁹⁷ See **CA-167**, *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2007-02/AA277, Partial Award on the Merits (30 March 2010) ¶ 262 (judicial delays, and the “apparent unwillingness” of the government to allow “cases to proceed” was “undue and amounts to a breach of the BIT”).

⁹⁹⁸ Counter-Memorial ¶ 746.

⁹⁹⁹ See Counter-Memorial ¶¶ 746, 748; **RER-3**, Bravo & Picón, ¶ 61.

process violations discussed above at Section II.C.3(iii)—and further the Government continued to confirm that the Concentrator was stabilized and that SMCV would have a “very strong argument for prevailing before the Tax Tribunal.”¹⁰⁰⁰

(b) Moreover, SMCV was not required under Peruvian law to pay assessments and penalties before challenging them, nor is there a common practice to do so.¹⁰⁰¹ As Prof. Hernández explains, taxpayers generally do not pay assessments that they challenge because even if they prevail, the Government may take a long time to issue reimbursements—or may refuse to do so altogether, as the Government did with respect to certain of SMCV’s GEM payments.¹⁰⁰²

(c) In any event, SMCV did mitigate damages although it had no obligation to do so, as discussed in detail in Section IV.D below.

199. *Second*, Peru argues that in the 2009 and 2010-2011 Royalty Cases, SUNAT correctly applied the statutory interest rate instead of the Consumer Price Index (“CPI”) because the CPI rule set out in Article 33 of the Tax Code purportedly does not apply to royalties.¹⁰⁰³ According to Peru, Law No. 28,969—which authorizes SUNAT to administer royalties—does not provide that Article 33 of the Tax Code applies to royalties.¹⁰⁰⁴ Peru’s argument lacks any support in law.

200. As Prof. Hernández explains, the CPI rule—which seeks to avoid punishing the taxpayer for Tax Tribunal delays and not reward the Government for Tax Tribunal inefficiencies—applies to royalty proceedings because they are subject to the same procedural rules as tax proceedings.¹⁰⁰⁵ Further, in 2005, the Constitutional Court established that taxpayers have the right to have *any* case before the Tax Tribunal—which includes challenges to royalty assessments—decided within a reasonable time and ordered CPI to apply for the time exceeding the 12-month deadline.¹⁰⁰⁶ Thus Peru’s argument that “the

¹⁰⁰⁰ See Memorial ¶¶ 174, 182-95; **CWS-11**, Torreblanca I, ¶¶ 80-81.

¹⁰⁰¹ **CER-8**, Hernández II, ¶¶ 99-100.

¹⁰⁰² **CER-8**, Hernández II, ¶¶ 99-100.

¹⁰⁰³ See Counter-Memorial ¶¶ 749-50.

¹⁰⁰⁴ See Counter-Memorial ¶¶ 343, 749-50; **RER-3**, Bravo and Picón, ¶¶ 129-33 (applying CPI to royalties “would violate the principle of legality of taxation which, in tax matters, is incorporated into Article 74 of the Political Constitution of Peru, according to which taxes may only be created, amended or repealed by law or by legislative decree—and not by analogy”); see also **CE-1014**, Jorge Bravo Cucci, *Nemo Auditor Propriam Turpitudinem Allegans* (18 July 2018); **CE-1025**, Jorge Picon: “*In a Crisis as Extreme as the Current One, SUNAT Must Give Security to Formal Investment*,” LA LEY (22 January 2021).

¹⁰⁰⁵ **CER-3**, Hernández I, ¶ 154 (“[A]ll challenges processed before the Tax Tribunal follow the *same* procedural rules, regardless of whether they derive from royalty or tax procedures.”).

¹⁰⁰⁶ See **CA-118**, Constitutional Court, Judgments handed down in Case File No. 125503-AA/TC (March 21, 2005); **CA-115**, Constitutional Court, Judgments handed down in Case File No. 3591-2004-AA/TC

specific Mining Law and its Regulations take priority over the general Tax Code . . . and apply monthly interest equivalent to the default interest rate” is simply wrong because the challenge in question was pending before the Tax Tribunal for more than 12 months.¹⁰⁰⁷

201. *Finally*, Peru and its experts Mr. Bravo and Mr. Picón also assert that the Tax Tribunal rightly dismissed SMCV’s complaints against SUNAT’s decisions to apply statutory interest rate instead of CPI.¹⁰⁰⁸ They argue that SMCV lost its right to challenge SUNAT’s decisions when it entered into deferral and installment plans that terminated the collection procedures because “a claim . . . concerning outstanding fiscal payments due must be made when the tax debt at issue is under forced collection.”¹⁰⁰⁹ This is not only wrong, but would lead to a fundamentally unfair result.

- (a) As Freeport explained in its Memorial, SMCV entered, *under protest*, into the deferral and installment plans to avoid SUNAT’s coercive collection measures, such as being registered as a delinquent debtor and being subject to attachment measures.¹⁰¹⁰
- (b) SMCV then challenged SUNAT’s calculations before the Tax Tribunal, after which SUNAT, with extraordinary speed, terminated the collection procedures within *two business days* (in the 2009 Royalty Case) and *one business day* (in the 2010-2011 Royalty Case).¹⁰¹¹
- (c) Even though SMCV entered into the deferral and installment plans *under protest*, Peru and its experts argue that SUNAT’s decision to immediately terminate its collection

(24 January 2005); **CA-136**, Constitutional Court, Judgments handed down in Case File No. 7802-2006-AA/TC (19 April 2007); **CA-137**, Constitutional Court, Judgments handed down in Case File No. 1282-2006-AA/TC (20 April 2007); **CA-151**, Constitutional Court, Judgments handed down in Case File No. 02082-2008-PA/TC (7 October 2008); **CA-169**, Constitutional Court, Judgments handed down in Case File No. 0082010-PA/TC (19 July 2010); **CER-3**, Hernández I, ¶ 155 (summarizing cases); **CER-8**, Hernández II, ¶ 104.

¹⁰⁰⁷ **CER-3**, Hernández I, ¶ 155. *Cf.* Counter-Memorial ¶ 750.

¹⁰⁰⁸ *See* Counter-Memorial ¶¶ 342-43; **RER-3**, Bravo & Picón, ¶ 135.

¹⁰⁰⁹ Counter-Memorial ¶ 342; *see* **RER-3**, Bravo & Picón, ¶¶ 137-38.

¹⁰¹⁰ *See* **Ex. CE-727**, SUNAT, Coercive Enforcement Resolution, No. 011-006- 0056517, 2010/11 Royalty Assessments (10 October 2018); **Ex. CE-729**, SUNAT, Coercive Enforcement Resolution, No. 011-006-0056535, 2009 Royalty Assessments (18 October 2018); **Ex. CE-733**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2009 Royalty Assessments, (26 October 2018); **Ex. CE-734**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2010/11 Royalty Assessments, (30 October 2018); **Ex. CE-735**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2009 Royalty Assessments, (30 October 2018); **Ex. CE-736**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2010/11 Royalty Assessments, (31 October 2018). *See also* **CER-8**, Hernández II, ¶ 100; **CER-3**, Hernández I, § IX.C.

¹⁰¹¹ *See* **Ex. CE-207**, 2 SMCV, Submission Requesting Recalculation of Interest, 2009 Royalty Assessment (28 December 2018), pp. 26-27; **Ex. CE-212**, SMCV, Submission Requesting Recalculation of Interest, 2010/11 Royalty Assessments (3 January 2019), p. 26; **Ex. CE-1020**, SUNAT Coercive Collection Resolution No. 0110070138760 (2009 Royalty Assessments) (2 January 2019); **Ex. CE-1021**, SUNAT Coercive Collection Resolution No. 0110070138788 (2010-2011 Royalty Assessments) (4 January 2019).

procedures instantly impaired SMCV's challenges.¹⁰¹² If what Peru and its tax law experts argue were true, it would mean that if SMCV wanted to challenge SUNAT's flawed calculations, SMCV should have endured SUNAT's coercive collection measures. Such an inequitable conclusion must fail. In contrast, Freeport's posture is reasonable and leads to a fair outcome: by availing itself of the deferral and installment plans *under protest*—that is, without agreeing or consenting to the debts—SMCV preserved the right to challenge SUNAT's calculations.¹⁰¹³ Thus, the Tax Tribunal's refusal to consider SMCV's challenges of SUNAT's flawed calculations was arbitrary and grossly unfair.¹⁰¹⁴

5. Peru Breached Article 10.5 When It Arbitrarily Refused to Reimburse Certain GEM Payments

202. In its Memorial, Freeport explained that Peru violated its obligation of fair and equitable treatment when it refused to reimburse the GEM payments that SMCV made for the Concentrator during the periods of Q4 2011 to Q3 2012.¹⁰¹⁵ As Freeport explained, in early 2012, SMCV agreed to pay GEM for its entire mining unit, including the Concentrator, after the Government confirmed that it would not impose both GEM and royalties and SMT on SMCV.¹⁰¹⁶ The Government initially stopped issuing any further Royalty Assessments. But six years later—and after SMCV had made GEM payments in excess of US\$100 million for its entire mining unit—SUNAT notified SMCV (i) on 18 January 2018, of the Q4 2011 Royalty Assessment and the Q4 2011-2012 SMT Assessments; and (ii) on 18 April 2018, of the 2012 Royalty Assessments—despite the fact that mining companies' GEM payments were made *in lieu* of royalty and SMT payments.¹⁰¹⁷ In December 2018, SUNAT granted SMCV's reimbursement request for

¹⁰¹² See Counter-Memorial ¶¶ 342-43; **RER-3**, Bravo & Picón, ¶¶ 67, 130, 137-38.

¹⁰¹³ See **CER-8**, Hernández II, ¶ 100; **CER-3**, Hernández I, ¶ 164.

¹⁰¹⁴ See **CER-8**, Hernández II, ¶ 100; **CER-3**, Hernández I, ¶¶ 164-65.

¹⁰¹⁵ See Memorial ¶¶ 422-24.

¹⁰¹⁶ See Memorial ¶ 422 (citing **CWS-11**, Torreblanca I, ¶ 90); **Ex. CE-64**, Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012).

¹⁰¹⁷ See **Ex. CE-174**, SUNAT Assessment No. 012-003-0092685, Q4 2011 Royalty Assessments (29 December 2017) (notified on 18 January 2018); **Ex. CE-700**, SUNAT Assessments No. 012-003-0092658 and 012-003-0092961 to 012-003-0092964 (SMT for 4Q 2011-2012) (29 December 2017) (notified on 18 January 2018); **Ex. CE-176**, SUNAT Assessment No. 012-003-0094883, 2012 Royalty Assessments (28 March 2018) (notified on 18 April 2018); see **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Article 2(1); **Ex. CE-64**, Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012), Article 2.1 (confirming that GEM “is the result of assessing on the quarterly operating profit, from the concessions included in each of the Agreements signed by THE COMPANY referred to in the First Clause”); *id.* Article 1 (listing Stability Agreement as relevant agreement held by SMCV).

Q4 2012 to Q4 2013 GEM overpayments and repaid US\$76 million, including interest, recognizing that GEM and royalties were mutually exclusive under Peruvian law.¹⁰¹⁸

203. In December 2018, SMCV then also requested under protest the reimbursement of the GEM overpayments for Q4 2011 to Q3 2012—a reimbursement to which it was clearly entitled since Peru had now charged GEM *plus* SMT and royalties *plus* penalties and interest for the same periods.¹⁰¹⁹ However, SUNAT arbitrarily refused to reimburse SMCV’s GEM overpayments on the spurious ground that SMCV’s reimbursement requests were time-barred even though they clearly were not.¹⁰²⁰

204. Peru concedes that SMCV had the right to have the GEM overpayments reimbursed, but argues that SUNAT “complied with Peruvian law” when it denied SMCV’s requests as untimely under the statute of limitations of the Tax Code.¹⁰²¹ Peru also asserts that “enforcing a statute of limitations” cannot give rise to a breach of the fair and equitable treatment.¹⁰²² Peru is wrong on both counts.

205. *First*, Freeport’s claims are not merely based on Peru “enforcing a statute of limitations,” as Peru argues. Rather, as discussed above, Peru’s failure to reimburse SMCV’s GEM payments was arbitrary, grossly unfair, nontransparent, and inequitable given that the Government had induced and accepted those very payments assuring SMCV that it did not have to pay both GEM and royalties. As explained in Section II.C.3(iii) above, among others:

- (a) Before signing the GEM Agreement in February 2012, MEF and MINEM officials verbally confirmed to Ms. Torreblanca that mining companies “could not be subject to both” royalties and GEM.¹⁰²³
- (b) The GEM Law, GEM Regulations, and GEM Model Contract made clear that mining companies only had to pay GEM for the concessions covered by a stability agreement in force.¹⁰²⁴ Moreover, the GEM Law, GEM Regulations, and GEM Model Contract

¹⁰¹⁸ See **Ex. CE-746**, SUNAT, Resolution No. 012-180-0018113/SUNAT (GEM Q4 2012) (18 December 2018); **Ex. CE-747**, SUNAT, Resolution No. 012-180-0018114/SUNAT, (GEM 2013) (18 December 2018); see also Memorial ¶ 424.

¹⁰¹⁹ See **Ex. CE-208**, SMCV Reimbursement Request, GEM Q4 2011 (28 December 2018); **Ex. CE-209**, SMCV Reimbursement Request, GEM Q1 2012 (28 December 2018); **Ex. CE-210**, SMCV Reimbursement Request, GEM Q2 2012 (28 December 2018); **Ex. CE-211**, SMCV Reimbursement Request, GEM Q3 2012 (28 December 2018).

¹⁰²⁰ See **Ex. CE-218**, SUNAT Resolution No. 012-180-0018640/SUNAT, GEM Q4 2011-Q3 2012 (4 March 2019); Memorial ¶¶ 265, 423-24; **CER-7**, Bullard II, § V.

¹⁰²¹ Counter-Memorial ¶¶ 763, 767.

¹⁰²² Counter-Memorial ¶ 753.

¹⁰²³ See Memorial ¶ 423; **CWS-11**, Torreblanca I, ¶ 86;

¹⁰²⁴ **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Article 2(1); **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la

required mining companies to pay GEM for their *entire* stabilized concessions—that is, they did not exempt any operations or investments within the stabilized concessions from paying GEM.¹⁰²⁵

- (c) Pursuant to Articles 1 and 2.1 of the GEM Agreement, SMCV agreed to pay GEM for its *entire mining unit*, made up of the Mining Concession and the Beneficiation Concession, which included the Concentrator, as explained above.¹⁰²⁶
- (d) When SMCV paid GEM for its *entire mining unit*, clearly reflecting the assumption that SUNAT would not assess Royalties for the Concentrator, the Government did not object.¹⁰²⁷ When collecting GEM, SUNAT never told SMCV that it should not pay GEM for the Concentrator.¹⁰²⁸
- (e) For *four years* after SMCV entered into the GEM Agreement, Peru did not issue any new Royalty Assessments. But in April 2016, after SMCV had made in excess of US\$100 million in GEM payments, SUNAT notified SMCV that it had issued the 2010-2011 Royalty Assessments.¹⁰²⁹ Then in January 2018, SUNAT notified SMCV of the Q4 2011 Royalty Assessments, a period in which SMCV had made GEM payments—contrary to the Government’s assurances that SMCV would not pay both GEM *and* Royalties and

Minería Approved by Law No. 29790 (28 February 2012), Article 2.1 (confirming that GEM “is the result of assessing on the quarterly operating profit, from the concessions included in each of the Agreements signed by THE COMPANY referred to in the First Clause”); *id.* Article 1 (listing Stability Agreement as relevant agreement held by SMCV).

¹⁰²⁵ See **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Article 2(l); **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 (28 February 2012), Article 2.1 (confirming that GEM “is the result of assessing on the quarterly operating profit, from the concessions included in each of the Agreements signed by THE COMPANY referred to in the First Clause”); *id.* Article 1 (listing Stability Agreement as relevant agreement held by SMCV).

¹⁰²⁶ See *supra* ¶ 161(e); **Ex. CE-64**, Agreement for the Assessment of Gravamen Especial a la Minería Approved by Law No. 29790 (28 February 2012), Article 2.1 (confirming that GEM “is the result of assessing on the quarterly operating profit, from the concessions included in each of the Agreements signed by THE COMPANY referred to in the First Clause”); *id.* Article 1 (listing Stability Agreement as relevant agreement held by SMCV); see also **CA-182**, Regulations for the Law Establishing GEM Legal Framework, Supreme Decree No. 173-2011-EF (29 September 2011), Article 2(l) (confirming that companies will pay GEM only for “the concessions included in each of the Agreements of Guarantees”).

¹⁰²⁷ See Memorial ¶ 423.

¹⁰²⁸ See Memorial ¶¶ 195, 423.

¹⁰²⁹ See **Ex. CE-142A**, SUNAT, Assessment Resolution Nos. 052-003-0014011 to 052-003-0014015, 052-003-0014020 to 052-003-0014022, 052-003-0014024, 052-003-0014026 to 052-003-0014028 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016); **Ex. CE-142B**, SUNAT, Assessment Resolution Nos. 052-003-0014016 to 052-003-0014019, 052-003-0014023, 052-003-0014025, 052-003-0014029 to 052-003-0014031 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016).

SMT.¹⁰³⁰ SUNAT ultimately issued Royalty and SMT Assessments for each of the periods in which SMCV made full GEM payments (Q4 2011 through Q4 2013).¹⁰³¹

206. Peru's refusal to reimburse SMCV for the GEM overpayments for Q4 2011 to Q3 2012 was thus arbitrary, grossly unfair, nontransparent, and inequitable, and particularly egregious considering the Government's assurances, inducement, and silence that led SMCV to make GEM payments for its entire mining unit.¹⁰³²

207. *Second*, Peru argues that the statute of limitations for SMCV's reimbursement requests "started to run on January 1, 2013 and expired on January 1, 2017."¹⁰³³ This is because, according to Peru, the "rights under discussion" are "specific rights under the Tax Code to seek refunds for overpayment of certain taxes"; and under 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."¹⁰³⁴ Peru here repeats the same spurious argument SUNAT used to deny SMCV the reimbursement of the Q4 2011 - Q3 2012 GEM payments, awarding itself in excess of US\$66 million in payments that Peru itself acknowledges it was not owed.¹⁰³⁵ Peru's argument lacks any basis.

¹⁰³⁰ See **Ex. CE-700**, SUNAT, Assessment No. 012-003-009285 (Q4 2011 Royalty Assessment) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-163**, SUNAT, Assessment No. 012-003-0092658 (SMT for Q4 2011-2012) (29 December 2017) (notified to SMCV 18 January 2018); **Ex. CE-65**, SMCV, GEM Payment, 4Q 2011 (29 February 2012).

¹⁰³¹ See **Ex. CE-215**, SUNAT, Resolution No. 0150140014560 (2012 Royalty Assessment) (11 January 2019); **Ex. CE-220**, SUNAT, Resolution No. 0150140014816 (2013 Royalty Assessment) (28 May 2019); **Ex. CE-195**, SUNAT, Assessment No. 012-003-0099078 to 012-003-0099081 (SMT for 2013) (28 September 2018); **Ex. CE-70**, SMCV, GEM Payment, 1Q 2012 (31 May 2012); **Ex. CE-71**, SMCV, GEM Payment, 2Q 2012 (31 August 2012); **Ex. CE-73**, SMCV, GEM Payment, 3Q 2012 (30 November 2012); **Ex. CE-78**, SMCV, GEM Payment, 4Q 2012 (28 February 2013); **Ex. CE-87**, SMCV, GEM Payment, 1Q 2013 (30 May 2013); **Ex. CE-96**, SMCV, GEM Payment, 2Q 2013 (28 August 2013); **Ex. CE-101**, SMCV, GEM Payment, 3Q 2013 (28 November 2013); **Ex. CE-106**, SMCV, GEM Payment, 4Q 2013 (27 February 2014).

¹⁰³² See, e.g., **CA-222**, *Crystallex Award* ¶¶ 589, 598 ("[I]t constitutes non-transparent and inconsistent conduct on the part of the Ministry of Environment to invite the investor to pay [a substantial contribution]," while "the same Ministry had already come to the conclusion" that they would commit a *volte-face* and deny the investor's application for a mining permit); **CA-234**, *Deutsche Telekom Interim Award* ¶¶ 380-88 (finding that India violated its fair and equitable treatment obligation for "manifest" "lack of transparency and forthrightness" when it "affirmatively misled" the investor about the government's intentions, despite many meetings with the investor and opportunities to do so); **CA-213**, *Gold Reserve Award* ¶ 591 (Venezuela "reinforce[d] Claimant's expectation" that a mining permit would be approved but failed to ultimately do so, "without explaining the reasons," and "evidenc[ed] (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor").

¹⁰³³ Counter-Memorial ¶¶ 241, 755.

¹⁰³⁴ Counter-Memorial ¶¶ 755, 765.

¹⁰³⁵ See Memorial ¶ 424 (citing **Ex. CE-218**, SUNAT Resolution No. 012-180-0018640/SUNAT, GEM Q4 2011-Q3 2012) (4 March 2019)).

- (a) The five-year statute of limitations set out in the Civil Code, not the Tax Code, applies to GEM overpayments because the GEM is not a tax. It is a contractual obligation that stems from the GEM Agreement that SMCV concluded with the Government.¹⁰³⁶ The GEM Law confirms that the GEM is a contractual obligation: (i) Article 2.1 provides that the GEM “is applicable...with regard to and *based on the signing of agreements* with the State”; and (ii) the GEM Law includes a model agreement that participating companies had to sign with the Government that formed the basis of their payment obligation.¹⁰³⁷
- (b) Under Peruvian law, “the provisions of the Civil Code apply to legal relationships and situations regulated by other laws” unless those “other laws” expressly preempt the Civil Code.¹⁰³⁸ Here, the GEM Law does not provide a different statute of limitations applicable to SMCV’s reimbursement requests based on the contractual nature of GEM.¹⁰³⁹ Thus, the statute of limitations set out in Article 1274 of the Civil Code applies, which provides that “[t]he statute of limitations to recover what was unduly paid runs out five years after the payment has been made.”¹⁰⁴⁰

208. Under the Civil Code, the statute of limitations does not begin to run until the date the party became aware that the payment was unduly imposed—which in SMCV’s case, was not until 13 April 2016 at the very earliest, when SUNAT notified SMCV of the 2010-2011 Royalty Assessments.¹⁰⁴¹ It was only as of this date that the Government resumed assessing Royalties against SMCV despite the fact that the Government and SMCV had signed the GEM Agreement, which

¹⁰³⁶ See **CER-7**, Bullard II, ¶ 91(c) (“Contrary to royalties and the SMT, GEM is not imposed through a statutory mandate. The obligation to pay GEM arises after the signing of a contract with the Government—without the contract, mining companies have no obligations to pay GEM. In addition, unlike the SMT, Congress did not define GEM as a tax. Rather, it is a “primary public resource” due to the Government for the ‘exploitation of non-renewable resources.’”); **Ex. CE-64**, Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012).

¹⁰³⁷ **CA-181**, Establishing GEM Legal Framework, Law No. 29790 (28 September 2011), Article 2.1 (emphasis added); *id.*, Model Agreement.

¹⁰³⁸ **CER-7**, Bullard II, ¶ 91 (citing **CA-39**, Peruvian Civil Code, Legislative Decree No. 295, Preliminary Title, Article IX).

¹⁰³⁹ See **CER-7**, Bullard II, ¶ 91(d).

¹⁰⁴⁰ **CA-39**, Peruvian Civil Code, Legislative Decree No. 295, Article 1274.

¹⁰⁴¹ See **Ex. CE-142A**, SUNAT, Assessment Resolution Nos. 052-003-0014011 to 052-003-0014015, 052-003-0014020 to 052-003-0014022, 052-003-0014024, 052-003-0014026 to 052-003-0014028 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016); **Ex. CE-142B**, SUNAT, Assessment Resolution Nos. 052-003-0014016 to 052-003-0014019, 052-003-0014023, 052-003-0014025, 052-003-0014029 to 052-003-0014031 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016); **CER-7**, Bullard II, ¶ 97.

confirmed that GEM payments were made in lieu of Royalties and SMT.¹⁰⁴² The Government’s Royalty Assessments for the years in which SMCV had already made full GEM payments and for which SMCV sought reimbursement were issued *even later*, on 18 January 2018 (for the Q4 2011 Royalty Assessments) and 18 April 2018 (for the 2012 Royalty Assessments). The five-year statute of limitations thus expired at the very earliest on 13 April 2021, and SMCV’s reimbursement requests made on 28 December 2018 fell well within the five-year period.¹⁰⁴³ Peru’s assertions to the contrary are unavailing.

- (a) Peru first argues that the fact that SUNAT paused its Royalty Assessments for five years—including the entirety of the time in which SMCV made the GEM payments—is irrelevant because SMCV “knew SUNAT’s position.”¹⁰⁴⁴ But SMCV’s payments did not become undue until 13 April 2016 at the very earliest—when Peru arbitrarily resumed its Royalty Assessments despite SMCV’s having entered into and paid in full under the GEM Agreement.¹⁰⁴⁵
- (b) Peru’s attempt to defend its assertion that the statute of limitations begins to run as of the date of SMCV’s GEM payments by asserting that the Tax Code “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” is unfounded.¹⁰⁴⁶ This is not a case involving any “mistake” by SMCV that requires “correct[ion].”¹⁰⁴⁷ This is another case of the Government acting arbitrarily to further enrich itself without any legal basis. SMCV’s payment became undue because, after inducing SMCV into signing the GEM Agreement and then accepting SMCV’s full GEM payments in lieu of royalty payments, Peru turned

¹⁰⁴² See **Ex. CE-64**, Agreement for the Assessment of *Gravamen Especial a la Minería* Approved by Law No. 29790 (28 February 2012), Art 2.2(b) (“The TAX has the following features In order to assess it, the amounts paid for the mining royalties set forth in Law No. 28258, the Mining Royalties Law . . . falling due subsequently to the signing of this AGREEMENT are deducted.”).

¹⁰⁴³ See **Ex. CE-208**, SMCV Reimbursement Request, GEM Q4 2011 (28 December 2018); **Ex. CE-209**, SMCV Reimbursement Request, GEM Q1 2012 (28 December 2018); **Ex. CE-210**, SMCV Reimbursement Request, GEM Q2 2012 (28 December 2018); **Ex. CE-211**, SMCV Reimbursement Request, GEM Q3 2012 (28 December 2018).

¹⁰⁴⁴ Counter-Memorial ¶ 757.

¹⁰⁴⁵ See **Ex. CE-142A**, SUNAT, Assessment Resolution Nos. 052-003-0014011 to 052-003-0014015, 052-003-0014020 to 052-003-0014022, 052-003-0014024, 052-003-0014026 to 052-003-0014028 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016); **Ex. CE-142B**, SUNAT, Assessment Resolution Nos. 052-003-0014016 to 052-003-0014019, 052-003-0014023, 052-003-0014025, 052-003-0014029 to 052-003-0014031 (2010-2011 Royalty Assessments) (13 April 2016) (notified to SMCV 13 April 2016).

¹⁰⁴⁶ Counter-Memorial ¶ 766.

¹⁰⁴⁷ *Contra* Counter-Memorial ¶ 766.

around and assessed royalties and SMT against SMCV anyway for the same periods.¹⁰⁴⁸ Accordingly, because of Peru's own conduct, SMCV could not have known that its payments were undue until, in Peru's words, "circumstances changed to make the payment excessive"—*i.e.*, when it became clear that the Government intended to repudiate its assurances and charge SMCV royalties notwithstanding the terms of the GEM Agreement and the GEM payments SMCV had made.¹⁰⁴⁹

209. Peru's refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM overpayments notwithstanding its assurances that SMCV did not have to pay both GEM and Royalties and SMT, its inducement of SMCV to participate in the GEM program and its acknowledgement that SMCV was entitled to reimbursement, compounded by its continued reliance on a spurious interpretation of the statute of limitations under Peruvian law, was arbitrary, grossly unfair, nontransparent, and inequitable, and thus breached Peru's obligation to accord fair and equitable treatment.

¹⁰⁴⁸ See **Ex. CE-174**, SUNAT Assessment No. 012-003-0092685, Q4 2011 Royalty Assessments (29 December 2017) (notified on 18 January 2018); **Ex. CE-163**, SUNAT Assessments No. 012-003-0092658 and 012-003-0092961 to 012-003-0092964 (SMT for 4Q 2011-2012) (29 December 2017) (notified on 18 January 2018); **Ex. CE-176**, SUNAT Assessment No. 012-003-0094883, 2012 Royalty Assessments (28 March 2018) (notified on 18 April 2018); **Ex. CE-65**, SMCV, GEM Payment, 4Q 2011 (29 February 2012); **Ex. CE-70**, SMCV, GEM Payment, 1Q 2012 (31 May 2012); **Ex. CE-71**, SMCV, GEM Payment, 2Q 2012 (31 August 2012); **Ex. CE-73**, SMCV, GEM Payment, 3Q 2012 (30 November 2012); **Ex. CE-78**, SMCV, GEM Payment, 4Q 2012 (28 February 2013).

¹⁰⁴⁹ Counter-Memorial ¶ 763; *see also* **RER-3**, Bravo & Picón, ¶¶ 203-204 (the statute of limitations provides for the "extinguishing . . . of time, if any ground for suspension or interruption are identified").

III. THE TRIBUNAL HAS JURISDICTION TO CONSIDER FREEPORT'S CLAIMS

210. Peru seeks to avoid liability for its repeated breaches of the Stability Agreement and Article 10.5 of the TPA by raising a series of meritless jurisdictional objections to Freeport's claims. Each of Peru's objections is completely detached from the express terms of the TPA. The negotiating history of the TPA, further confirms that the TPA provisions invoked by Peru never were intended to have the effect that Peru now—in disregard of their clear and unambiguous terms—attempts to give them. Freeport presents the testimony of negotiators from both the Peruvian and U.S. delegations—former ProInversión official, Carlos Herrera, and former Senior Counsel at the U.S. Department of the Treasury, Gary Sampliner. Moreover, Peru's arguments do not find any support in investment treaty decisions. The tribunal should reject each of Peru's jurisdictional objections for the reasons set forth below.

A. ARTICLE 10.18.1 OF THE TPA DOES NOT BAR FREEPORT'S CLAIMS

211. As Freeport explained in the Memorial, all of Freeport's claims were submitted to arbitration within the three-year limitation period in Article 10.18.1 of the TPA.¹⁰⁵⁰ Article 10.18.1 of the TPA provides that:

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*.¹⁰⁵¹

The Parties agree that 28 February 2017, three years before the date of the Request for Arbitration, is the cut-off date for the three-year limitation period.¹⁰⁵² Accordingly, the time-bar applies to a particular claim if, before 28 February 2017, Freeport acquired or should have acquired knowledge of the alleged breach and that SMCV had incurred loss or damage. Freeport acquired knowledge of each of the alleged breaches of the Stability Agreement and the TPA and the respective losses or damages incurred after the 28 February 2017 cut-off date.

¹⁰⁵⁰ Memorial ¶¶ 355, 429(a).

¹⁰⁵¹ CA-10, TPA, Article 10.18.1 (emphasis added).

¹⁰⁵² See Memorial ¶¶ 355, 429(a); Counter-Memorial ¶ 418.

1. Freeport's Claims for Breach of the Stability Agreement Are Timely

212. Peru argues that all of the 36 Royalty and Tax Assessments constituted a single breach of the Stability Agreement that gave rise to a single limitation period running from 18 August 2009, when SUNAT notified SMCV of the 2006-2007 Royalty Assessments, because:

[a]t 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 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.¹⁰⁵³

Alternatively, Peru argues that the limitation period was triggered on: (i) 15 September 2009, the date SMCV filed its Request for Reconsideration of the 2006-2007 Royalty Assessment with SUNAT's Claims Division;¹⁰⁵⁴ (ii) 8 July 2011, the date SMCV was notified of the 2009 Royalty Assessments, if the Tribunal excludes the 2006-2007 and 2008 Royalty Assessments (which SMCV does not challenge as resulting in a breach of the Stability Agreement in this arbitration) from its determination of when the limitation period began to run;¹⁰⁵⁵ or (iii) either 30 December 2009, the date SMCV was notified of the first Tax Assessment, the 2006 GST Assessment,¹⁰⁵⁶ or 28 January 2010, the date SMCV filed its Request for Reconsideration of the 2006 GST Assessment with SUNAT's Claims Division,¹⁰⁵⁷ if the Tribunal finds that knowledge of the breaches of the Stability Agreement resulting from the Tax Assessments cannot be "imputed" from the earlier Royalty Assessments.¹⁰⁵⁸

213. According to Peru, Freeport not only acquired knowledge of each of Peru's breaches of the Stability Agreement before any of the Assessments were final and enforceable, but years before SUNAT even notified SMCV of the other Royalty and Tax Assessments and before most of the relevant fiscal years had even started.¹⁰⁵⁹ Peru's argument strains credulity. Under Peru's theory, a claimant would be encouraged to resort to international arbitration before an assessment becomes final and enforceable.

¹⁰⁵³ Counter-Memorial ¶ 424 (emphases added). *See also id.* at ¶¶ 425-35.

¹⁰⁵⁴ Counter-Memorial ¶ 436.

¹⁰⁵⁵ Counter-Memorial ¶ 430.

¹⁰⁵⁶ Counter-Memorial ¶ 442.

¹⁰⁵⁷ Counter-Memorial ¶ 442.

¹⁰⁵⁸ Counter-Memorial ¶ 440.

¹⁰⁵⁹ *See* Counter-Memorial ¶ 427.

And a claimant would be expected to submit investment treaty claims for yet uncertain future assessments for which the fiscal years have not even started and for amounts that are yet unknown.

214. Unsurprisingly, that is not how Article 10.18.1 works. Rather, the plain language of Article 10.18.1 makes clear that the limitation period cannot be triggered until the claimed breaches actually have occurred and the claimant has incurred loss or damage. *First*, Peru breached the Stability Agreement and SMCV incurred loss or damage only once each Assessment became final and enforceable.¹⁰⁶⁰ *Second*, each final and enforceable Assessment resulted in a separate breach of the Stability Agreement and separate loss to SMCV, and thus gives rise to a separate claim for breach of the Stability Agreement with a separate limitation period.

i. Under the Terms of Article 10.18.1, the Limitation Period Can Only Start After a Claimed Breach Has Occurred and the Claimant Has Incurred Damage

215. Peru's argument that the limitation period for each of Freeport's claims commenced at the date of notification of the 2006-2007 Royalty Assessments is completely detached from the plain terms of Article 10.18.1.

216. Article 10.18.1 provides that, for each claim, the limitation period starts to run "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 . . . or the enterprise . . . has incurred loss or damage."¹⁰⁶¹ Article 10.18.1 thus makes clear that the limitation period does not start to run until claimant has knowledge: (i) of the alleged breach; and (ii) that the claimant or the enterprise has incurred loss or damage.¹⁰⁶² There is simply no support in the express terms of Article 10.18.1 for Peru's argument that that the limitation period for each of Freeport's claims could have commenced *before* those breaches and losses even occurred.

217. Contrary to Peru's assertions, Article 10.18.1 does not refer to knowledge or constructive knowledge that a claimant or an enterprise "would incur" loss or damage.¹⁰⁶³ It refers, in the past tense, to

¹⁰⁶⁰ With respect to Assessments for which SMCV filed withdrawal petitions that Peru has failed to act on, Freeport treats the date of SMCV's withdrawal petitions as the constructive date of breach as is necessary to prevent Peru from delaying the date of breach indefinitely, preventing Freeport from seeking relief in international arbitration.

¹⁰⁶¹ CA-10, TPA, Article 10.18.1.

¹⁰⁶² CA-10, TPA, Article 10.18.1.

¹⁰⁶³ *But see* Counter-Memorial ¶ 424 ("SMCV (and thus Claimant) knew . . . that SMCV . . . would incur . . . loss or damages" and "Claimant (and SMCV) knew at that time that SMCV would have to pay royalties, and that SMCV would have to pay taxes at an unstabilized rate.") (emphases added).

knowledge or constructive knowledge that a claimant or an enterprise “has incurred loss or damage.”¹⁰⁶⁴ Thus, the limitation period cannot commence until the breach and loss has *actually occurred*. This has been repeatedly confirmed by investment treaty tribunals interpreting limitation provisions whose relevant terms were almost identical to Article 10.18.1.

- (a) The tribunal in *Eli Lilly v. Canada*, interpreting the limitation period in NAFTA, observed that “[a]n investor cannot be obliged or deemed to know of a breach before it occurs” for limitation purposes.¹⁰⁶⁵ And as Peru’s authority, *Resolute Forest v. Canada*, makes clear “the alleged breach must actually have occurred.”¹⁰⁶⁶
- (b) The tribunal in *Pope & Talbot v. Canada*, interpreting the limitation provision in NAFTA, explained “[t]he critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur.”¹⁰⁶⁷ Likewise, the tribunal in *Mobil II v. Canada*, also interpreting NAFTA, explained, “[i]t is impossible to know that loss or damage has been incurred until that loss or damage actually has been incurred.”¹⁰⁶⁸

218. This approach makes eminent sense and is consistent with the intent of the treaty parties; if the limitation period began to run *before* the government measure resulted in a breach and *before* the investor incurred loss or damage, investors would be encouraged to file international arbitration claims that are not yet ripe for adjudication. The parties to the TPA, did not intend it to be

sufficient for a host government to announce a position that *may* cause loss or damage. Rather, the host government must adopt a binding and enforceable measure implementing that position. If the domestic law enables the claimant to challenge the measure administratively before the government’s position is enforceable

¹⁰⁶⁴ CA-10, TPA, Article 10.18.1 (emphasis added).

¹⁰⁶⁵ CA-411, *Eli Lilly and Company v. The Government of Canada*, ICSID Case No. UNCT/14/2, Final Award (16 March 2017) (Born, Bethlehem, Van den Berg) (“*Eli Lilly v. Canada Award*”), ¶ 167. See also *id.* at ¶ 113 (quoting NAFTA Article 1117(2): “An investor may not make a claim on behalf of an enterprise . . . if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage”).

¹⁰⁶⁶ RA-5, *Resolute Forest Products, Inc. v. Canada*, PCA Case No. 2016/13, Decision on Jurisdiction and Admissibility (30 January 2018) (Cass, Lévesque, Crawford) (“*Resolute Forest v. Canada Decision on Jurisdiction*”), ¶ 153.

¹⁰⁶⁷ CA-364, *Pope & Talbot v. Canada*, UNCITRAL, Award on Preliminary Motion by the Government of Canada (24 February 2000) (Belman, Greenberg, Derviard) (“*Pope & Talbot v. Canada Award on Preliminary Motion*”), ¶ 12.

¹⁰⁶⁸ CA-420, *Mobil v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility (13 July 2018) (Rowley, Griffith, Greenwood) (“*Mobil II v. Canada Decision on Jurisdiction*”), ¶ 154 (emphasis omitted).

against an investor, then the claimant has not yet “incurred loss or damage.”¹⁰⁶⁹

219. Peru also argues that “a treaty’s limitations period should be interpreted strictly.”¹⁰⁷⁰ That argument too is simply wrong. Peru relies on *Grand River, Corona Materials v. Dominican Republic*, and *Resolute Forest*, but those decisions do not indicate that anything other than the ordinary rules of treaty interpretation apply to the interpretation of the NAFTA and CAFTA-DR limitation provisions.¹⁰⁷¹ The tribunals in those cases merely observed that the limitation provisions in those treaties should be interpreted according to their plain terms and could not be modified by the tribunal.¹⁰⁷² Nor does Peru proffer a “strict interpretation” of Article 10.18.1. To the contrary, Peru proffers an exceedingly loose interpretation that is completely detached from the terms of Article 10.18.1.

ii. Peru’s Breaches of the Stability Agreement Did Not Occur Until Each Assessment Became Final and Enforceable

220. Freeport could not have acquired knowledge of Peru’s breaches of the Stability Agreement, and the resulting loss or damage, until each of those breaches occurred and SMCV incurred loss or damage from them. This did not take place until the relevant Assessment became final and enforceable, because it was only at that point that the Government failed to perform its obligation to apply the Stability Agreement to the Cerro Verde Mining Unit and the relevant Assessment caused SMCV to incur loss or damage.

¹⁰⁶⁹ **CER-11**, Sampliner, ¶ 23. *See also CWS-12*, Herrera, ¶ 22 (“[I]t was clear to the Peruvian delegation that Article 10.18.1 referred to actual or constructive knowledge of *past* events—*i.e.*, breaches that had *occurred* and loss or damage that had been *incurred*—and not events that could unfold in the future. Therefore, we understood that the limitations period could not begin to run even if an investor could have known that a host government would breach an obligation in the future or even if loss or damage from a breach that was already known to an investor but had not yet been incurred.”).

¹⁰⁷⁰ Counter-Memorial ¶ 417.

¹⁰⁷¹ Counter-Memorial ¶ 417 (citing **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 29; **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 (31 May 2016) (Dupuy, Thomas, Mantilla-Serrano) (“*Corona Materials v. Dominican Republic* Award on Preliminary Objections”), ¶ 199; **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 153).

¹⁰⁷² **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 29 (describing the limitation provision in the NAFTA as a “clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification”); **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 199 (“[T]he three-year period is a strict one, no suspension or ‘tolling’ of the three-year period is contemplated by the Treaty.”); **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 153 (“The Tribunal agrees with the Respondent, and with the other NAFTA Parties in their Article 1128 submissions, that this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period.”).

- (a) Peru does not dispute that the Assessments did not become final and enforceable until the conclusion of the administrative process for each assessment. Specifically, royalty and tax assessments become final and enforceable:
- i. on the business day after the taxpayer’s deadline for submitting a challenge before SUNAT or the Tax Tribunal expires without the taxpayer having filed a challenge;
 - ii. on the business day after the taxpayer is served with the Tax Tribunal resolution confirming the denial of the request for reconsideration; and
 - iii. if the taxpayer withdrew one or all the claims, the business day after the taxpayer is served with the SUNAT or Tax Tribunal resolution accepting the taxpayer’s withdrawal.¹⁰⁷³
- (b) Before the Assessments became final and enforceable, they were not final administrative decisions because the administrative process allowed the tax administration to reverse course before they took effect against the taxpayer.¹⁰⁷⁴ Specifically, SUNAT’s Claims Division could have corrected the Assessments as a result of SMCV’s requests for reconsideration.¹⁰⁷⁵ Similarly, the Tax Tribunal could have corrected the Assessments as a result of SMCV’s administrative challenges.¹⁰⁷⁶
- (c) SMCV was under no obligation to pay the Assessments until they became final and enforceable. Under Peruvian law, before an assessment becomes final and enforceable, a

¹⁰⁷³ **CER-3**, Hernández I, ¶ 41. *See also* Memorial ¶ 353; **CER-2**, Bullard I, ¶ 83 (“SUNAT assessments become final and definitive administrative acts when the final administrative instance publishes a decision (or resolution) confirming the assessments and notifying the taxpayer; when the taxpayer does not challenge or appeal the decision (or resolution) of a lower instance within the time period provided for by the law; or when the taxpayer has challenged or appealed the decision (or resolution) and then withdraws the challenge or appeal.”) (emphasis omitted); *id.* ¶ 87. With respect to Assessments for which SMCV filed withdrawal petitions that Peru has failed to act on, Freeport treats the date of SMCV’s withdrawal petitions as the constructive date of breach as is necessary to prevent Peru from delaying the date of breach indefinitely, preventing Freeport from seeking relief in international arbitration.

¹⁰⁷⁴ **CER-7**, Bullard II, ¶ 82 (“[I]n the case at hand, SMCV had no enforceable obligation to pay the SUNAT Assessments at the time of notification because the tax administration itself—through the corresponding challenges—could have changed or reversed them before they became *final, definitive, and enforceable*.”); **CER-3**, Hernández I, ¶¶ 26, 30 (noting that Assessments are not final and enforceable when challenged by request for reconsideration or to the Tax Tribunal); **CER-8**, Hernández II, ¶ 109 (“SMCV did not suffer any loss until the Royalty and Tax Assessments became *final and enforceable* because SMCV did not have an obligation to pay the Royalty and Tax Assessments until they became *final and enforceable*” because “SUNAT and the Tax Tribunal could correct the Assessments” before that point).

¹⁰⁷⁵ **CER-8**, Hernández II, ¶ 113 (citing **CA-14**, Tax Code, Articles 109, 110, 127).

¹⁰⁷⁶ **CER-8**, Hernández II, ¶ 116 (citing **CA-14**, Tax Code, Articles 109, 110, 127, 150).

taxpayer has no obligation to pay an assessment and the tax administration cannot enforce the assessment against the taxpayer. Peru’s experts, Mr. Bravo and Mr. Picón, acknowledge that “taxpayer challenges [to] these resolutions ha[ve] the effect of suspending [their] enforceability.”¹⁰⁷⁷ Peru’s expert Mr. Morales similarly acknowledges that the Assessments could not be enforced against SMCV until the administrative process was complete.¹⁰⁷⁸ Article 115 of the Tax Code (which also applies to Royalties) provides that it is only when the assessment becomes final and enforceable that “SUNAT can initiate coercive procedures to collect the debt.”¹⁰⁷⁹ As the Tax Tribunal has recognized, “administrative acts for which the term for challenging them has not yet expired cannot be considered coercively enforceable debts.”¹⁰⁸⁰

(d) It is, therefore, only once a particular Assessment became final and enforceable that it resulted in a breach of the Stability Agreement. It is only at that moment that the

¹⁰⁷⁷ **RER-3**, Bravo and Picón, ¶ 61.

¹⁰⁷⁸ **RER-2**, Morales, ¶ 99 (“Now, the ‘enforceability of the administrative act’ should not be confused with the moment when the act becomes enforceable (with the enforceability of the act) that is established in the second phase of the administrative act.”).

¹⁰⁷⁹ **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 115(a), (c) (“An enforceable debt will give rise to coercive actions for its collection. To this end, the following are considered to be enforceable debts: a) A debt created by means of an Assessment or Penalty Resolution or a debt contained in the Installment Cancellation Resolution notice of which is served by the Administration and not complained against by the legal deadline . . . c) An enforceable debt created by a Resolution not appealed by the legal deadline, or appealed after the legal deadline, provided there is a failure to submit the respective Bond Bid in accordance with the provisions of Article 146, or the one required in the Resolution of the Tax Tribunal.”). *See also CER-3*, Hernández I, ¶¶ 42-43 (“Once the assessments and fines become final and enforceable, SUNAT can initiate coercive procedures to collect the debt. SUNAT initiates the coercive enforcement procedure by serving a coercive enforcement resolution on the taxpayer. The taxpayer has only seven business days from the day he or she is served with notice of the coercive enforcement procedure to pay the debt. If the taxpayer does not pay the debt by the deadline, SUNAT can: (i) designate the taxpayer as delinquent with credit-check companies in charge of collecting and disclosing credit information (known as “Risk Centers”); and (ii) order attachment measures against the taxpayer, including freezing their bank accounts, ordering their clients to withhold any payments, taking assets into custody, and publicly registering a garnishment measure on their movable and immovable property.”); **CER-2**, Bullard I, ¶ 84 (“In turn, when SUNAT assessments become final and definitive administrative acts, SUNAT may impose coercive measures on the tax debtor’s assets to cover the debt. At that moment, therefore, the assessments also become enforceable administrative acts (or acts subject to coercive action) that the administrative entity can enforce directly, affecting the taxpayer’s pecuniary interest.”) (emphasis omitted); **CER-7**, Bullard II, ¶ 79 (“Under Peruvian law, the *enforceability* of assessments relates to the Government’s power to take action to collect them.”) (citing **CA-14**, Tax Code, Article 115).

¹⁰⁸⁰ **CER-2**, Bullard I, ¶ 84 (citing **CA-264**, Tax Tribunal Resolution No. 609-3-2000, File No. 2897-2000 (20 July 2000), p. 2). *See also CA-292*, Decision of the Constitutional Tribunal, File No. 0015-2005-PI/TC (5 January 2006), ¶ 44 (“The enforceability of the administrative act, on the other hand, is a power inherent to the exercise of the function of the Public Administration and is directly related to the effectiveness of said act; in this sense, it enables the Administration to enforce by itself an administrative act issued by it, without judicial intervention, respecting the limits imposed by legal mandate, as well as to use means of coercion to enforce an administrative act and to count on the support of the public force for the execution of its acts when the administered party does not comply with its obligation and puts up *de facto* resistance.”).

Government, through the use of its public powers implemented the non-stabilized regime against SMCV.¹⁰⁸¹ Peruvian courts have recognized that, in the case of royalty and tax assessments, the contractual breach occurs when the assessments became final and enforceable. In the *Poderosa* case, the trial court held and, on appeal, the appellate court confirmed, that the alleged breaches of Poderosa’s mining stability agreement occurred when the Tax Tribunal issued its resolutions, which concluded the administrative review process.¹⁰⁸² Accordingly, the courts concluded that the Peruvian limitation period for breach of contract claims ran from the date of the Tax Tribunal resolutions.¹⁰⁸³

- (e) It is also on the date each Assessment became final and enforceable that SMCV incurred loss. It was only at that stage that the administration could no longer correct the Assessments and that SMCV was under an obligation to pay the Assessments or face coercive procedures.¹⁰⁸⁴
- (f) As a result, Freeport did not and could not have known about the breach and the incurred loss until each Assessment became final and enforceable.

221. Peru’s argument that Freeport “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

¹⁰⁸¹ **CER-2**, Bullard I, ¶ 85 (“Thus, when the SUNAT assessments become final, definitive, and enforceable administrative acts, the will of the State affects private parties’ legal and financial interests, the public administration is no longer able to control its own agencies’ acts, and the administrative process is powerless to change the acts’ legal effects on private parties.”) (emphasis omitted); *id.* ¶ 89 (“In the absence of such [a final and enforceable assessment] the judicial organs must reject the creditor’s claim as inadmissible, and therefore SMCV would not have had the right to file judicial claims for breach of contract.”); **CER-7**, Bullard II, ¶ 75 (“In the case of stability agreements, the Government fails to deliver what it had promised when it adopts *final, definitive, and enforceable* administrative acts that apply to the mining company a regime other than the stabilized regime under a stability agreement.”); *id.* ¶ 78 (“Peru breached these obligations when, through the use of its public power, it *applied* to SMCV a regime different from the one guaranteed in the Stability Agreement—which cannot occur until the non-stabilized regime is *actually implemented* against SMCV.”).

¹⁰⁸² **CER-7**, Bullard II, ¶ 81 (citing **CA-385**, Civil Appellate Court, Case File No. 956-2007, Decision (20 November 2007), pp. 2-3).

¹⁰⁸³ **CA-384**, Trial Court No. 43, File No. 41531-2006.79, Decision (8 May 2007), pp. 2-3.

¹⁰⁸⁴ **CER-8**, Hernández II, ¶ 110 (“[O]nce SUNAT’s assessment become final and enforceable (i) SUNAT and the Tax Tribunal can no longer correct it on their own (but can only do so if ordered by a Court); and (ii) SUNAT can initiate coercive proceedings to collect the assessed amounts.”); **CER-7**, Bullard II, ¶ 84 (“SMCV suffered a pecuniary loss when the SUNAT Assessments became *final, definitive, and enforceable*. That is the date on which Peru *adopted* each SUNAT Assessment as a final administrative act even if that date represents the culmination of a process that started when SUNAT initially rendered each Assessment. That is also the date in which the pecuniary loss was certain and real because SMCV now had an enforceable obligation to pay those Assessments pursuant to the Tax Code, and the Government could use its public powers to activate the legal mechanisms for compulsory collection.”). *See also* **CER-2**, Bullard I, ¶ 89; **CER-3**, Hernández I, § II.

(in this case, proceedings before SUNAT’s Claims Division or the Tax Tribunal) to toll the limitations period” is bizarre in two respects.¹⁰⁸⁵

(a) Freeport does not argue that the administrative review process before SUNAT’s Claims Division and the Tax Tribunal “tolled” the limitation period. Instead, Freeport argues that the limitation period only starts to run when each Assessment became final and enforceable because Freeport and SMCV could not have had knowledge of the breach and the loss before that point.¹⁰⁸⁶

(b) Moreover, neither SUNAT nor the Tax Tribunal are “courts”—they are administrative agencies of the MEF. As Peru’s own witness, President Olanos-Silva explains, “[t]he Tax Tribunal is not part of the Judiciary.”¹⁰⁸⁷ Nor is SUNAT’s Claims Division. Thus, Peru’s reliance on the tribunal’s conclusion in *Apotex v. USA*, that “the limitation period . . . is not tolled by litigation, or court decisions,” is entirely misplaced.¹⁰⁸⁸

222. *Finally*, Peru argues that, if the limitation period commences only when assessments become final and enforceable against SMCV, “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.”¹⁰⁸⁹ This argument too makes no sense. Any claims already time-barred by the three-year limitation period under Article 10.18.1 would also be time-barred under the far shorter periods for challenging assessments under the Peruvian Tax Code—20 working days for filing challenges before SUNAT and 15 working days for filing challenges before the Tax Tribunal.¹⁰⁹⁰ Thus, a claimant with “untimely claims” could not make them timely by commencing administrative review proceedings.

¹⁰⁸⁵ Counter-Memorial ¶¶ 433.

¹⁰⁸⁶ Memorial ¶¶ 352-53.

¹⁰⁸⁷ **RWS-5**, Olanos Silva, ¶ 6. *See also, e.g.*, Counter-Memorial ¶¶ 246, 249-50 (noting SUNAT’s “administrative powers and responsibilities” and including SUNAT in the “administrative stage” of tax challenges); **RWS-4**, Bedoya, ¶ 7 (acknowledging SUNAT’s “administrative” character).

¹⁰⁸⁸ Counter-Memorial ¶ 433 (citing **RA-7**, *Apotex v. USA*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013) (Davidson, Smith, Landau) (“*Apotex v. USA* Award on Jurisdiction”), ¶ 328. *See also* Counter-Memorial ¶¶ 422, 434.

¹⁰⁸⁹ Counter-Memorial ¶ 432.

¹⁰⁹⁰ **CA-14**, Tax Code, Article 137(2) (“In the case of claims against Assessment Resolutions, Penalty Resolutions, resolutions ruling on refund requests, resolutions ordering the cancellation of a general or special installment plan and any acts directly related to the assessment of the tax debt, they will be submitted by the unextendable deadline of twenty (20) business days reckoned from the business day following the one on which notice of the appealed act or resolution was served. If claims are not filed against the resolutions ordering the cancellation of a general or special installment plan and against the acts related to the assessment of the debt by the aforementioned deadline, said resolutions and acts will become final.”); *id.* Article 146 (“The appeal of the

iii. Each Final and Enforceable Royalty or Tax Assessment Gave Rise to a Separate Breach of the Stability Agreement

223. Peru’s argument that all of the 36 Assessments constituted a *single* breach of the Stability Agreement with a *single* limitation period likewise fails. Peru bases this argument on the assertion that “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,’”¹⁰⁹¹ and then claims that each of the Assessments is part of “a series of similar or related actions” “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.”¹⁰⁹²

224. However, as Peru concedes, the limitation period in Article 10.18.1 commences when each government action gives rise to an “independent,” “self-standing cause of action.”¹⁰⁹³ Under Peruvian law, each of the Assessments gave rise to an independent cause of action for breach of the Stability Agreement on the dates they became final and enforceable against SMCV. Moreover, investment treaty authorities, including those that Peru relies on, demonstrate that government actions that give rise to independent causes of action constitute separate breaches with separate limitation periods, even when they are based on similar or related government actions.

225. *First*, Peru’s argument is completely divorced from the text of Article 10.18.1. To start with, Article 10.18.1 refers to the limitation period for a “claim,” not for “a series of similar or related” claims.¹⁰⁹⁴ Moreover, as explained above, Article 10.18.1 requires knowledge of breach and loss or damages that has been *incurred* and not breach and loss or damages that might occur in the future.¹⁰⁹⁵ But Peru argues that SMCV should have brought a claim in 2009 for future royalty and tax assessments that

resolution before the Tax Tribunal must be made within fifteen (15) business days following the one on which notice whereof was served by means of a substantiated brief.”).

¹⁰⁹¹ Counter-Memorial ¶ 421.

¹⁰⁹² Counter-Memorial ¶ 429 (citation omitted).

¹⁰⁹³ Counter-Memorial ¶ 420 (citations omitted).

¹⁰⁹⁴ **CA-10**, TPA, Article 10.18.1. *See also CWS-12*, Herrera, ¶ 23 (“Article 10.18.1 specifically frames the limitations period as applying to a ‘claim’ and ties the relevant trigger date for each claim to the claimant’s knowledge of both the breach that forms the basis for the claim and of the loss or damage incurred Conversely, [a] claim-by-claim approach would not allow an investor to divide a claim arising from the same breach into multiple claims to extend the limitations period. [A] claim-by-claim approach was consistent with Article 10.18.1’s main objective of preventing stale claims.”); **CER-11**, Sampliner, ¶ 24 (“At the same time, we did not intend to prevent claims challenging new measures that give rise to independent causes of action and distinct losses simply because they relate to measures a host State imposed that may be time-barred.”). *But see* Counter-Memorial ¶ 429.

¹⁰⁹⁵ *See supra* ¶¶ 216-219.

had not yet been rendered, for royalty and tax debts that had not yet been incurred, because SMCV should have known that Peru would breach the Stability Agreement with each final and enforceable Assessment over the coming 11 years. Peru's interpretation of Article 10.18.1 thus would have the perverse effect of encouraging investors to bring claims before they are ripe for adjudication, contrary to the express terms of Article 10.18.1 of the TPA which requires the investor's actual or constructive knowledge of the breach and that the investor "has incurred loss or damage."¹⁰⁹⁶

226. *Second*, Peru's argument also completely disregards that under Peruvian law each Assessment is a separate administrative act that, once it becomes final and enforceable, creates a separate cause of action for breach of the Stability Agreement.¹⁰⁹⁷ Under Peruvian law, each assessment was a unique, separate, and independent administrative act based on specific facts and related to a specific past fiscal period, which does not have legal effects on, or determine the outcome of, subsequent assessments.¹⁰⁹⁸ In particular:

- (a) SMCV was required to self-assess taxes independently for each fiscal period.¹⁰⁹⁹ SUNAT conducted audits of each self-assessment and notified SMCV of separate assessments for royalties, taxes, penalties or interest for each fiscal period.¹¹⁰⁰

¹⁰⁹⁶ **CA-10**, TPA, Article 10.18.1; **CER-11**, Sampler, ¶ 25 (citing **CA-405**, *Mesa Power Group LLC v. Canada*, PCA Case No. 2012-17, Submission of the United States of America (25 July 2014), ¶ 4 ("NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party 'has breached' certain obligations, and that the investor 'has incurred loss or damage by reason of, or arising out of, that breach.' Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been incurred, provided that six months has elapsed from the events giving rise to the claim. No claim based solely on speculation as to future breaches or future loss may be submitted.")).

¹⁰⁹⁷ **CER-7**, Bullard II, ¶ 88 ("SUNAT assessments are unique, as they refer to specific charges and fiscal periods. Moreover, they comprise distinct collection and challenge procedures. Thus, SMCV could have brought separate contract claims for breach of contract for each SUNAT Assessment irrespective of whether they are factually or legally related.").

¹⁰⁹⁸ **CER-2**, Bullard I, ¶ 88 ("Each assessment constituted a separate administrative act that determined and quantified SMCV's liability for an administrative charge or tax, for a specific period of time, and on the basis of concrete facts. For this reason, SMCV had to pay each of these obligations separately for each fiscal year."); **CER-8**, Hernández II, ¶ 123 ("[E]ach Assessment was based on a unique set of facts and concerned separate fiscal periods. Moreover, each Royalty and Tax Assessment is independent because (i) the legal effects of one did not extend to any others; (ii) the Assessments that were issued first did not determine the outcome of the subsequent Assessments; and (iii) SMCV had to challenge each Assessment independently before SUNAT and the Tax Tribunal, and SUNAT and the Tax Tribunal had to resolve each of SMCV's challenges independently. For these reasons, which I explain in further detail below, I consider that each Royalty and Tax Assessment is unique, separate, and independent.").

¹⁰⁹⁹ **CER-8**, Hernández II, ¶ 124 ("SMCV's self-assessments were based on specific facts, which varied from one fiscal period to another. For example, if in fiscal period 1, SMCV reported higher profits than in fiscal period 2, then it paid higher taxes; if in fiscal period 3, the company reported lower profit than in fiscal period 4, it

- (b) Article 77 of the Tax Code required SMCV to file administrative challenges for each Assessment with SUNAT’s Claims Division and the Tax Tribunal.¹¹⁰¹ Likewise, each of SUNAT’s resolutions denying SMCV’s requests for reconsideration and each Tax Tribunal resolution confirming the Assessments corresponded to the specific assessments that SMCV challenged.¹¹⁰²
- (c) None of SUNAT’s or the Tax Tribunal’s resolutions had any binding or precedential effect dictating the results of future assessments or resolutions.¹¹⁰³ SUNAT and the Tax Tribunal can apply the same provisions of the Royalty Law or the Tax Code to the same taxpayer differently in successive decisions, as they have done on numerous occasions.¹¹⁰⁴ As President Olano-Silva observes,¹¹⁰⁵ Article 154 of the Tax Code expressly recognizes that the Tax Tribunal may issue contradictory criteria in similar cases.¹¹⁰⁶ If it does so, the President of the Tax Tribunal is authorized to call an *en banc* session of the Tax Tribunal to decide which criteria should prevail and issue a precedent of mandatory compliance—but the Tax Tribunal did not issue any precedents of mandatory compliance in any of SMCV’s administrative challenges or confirm any of the

paid lower taxes. The facts based on which SMCV self-assessed and paid taxes from 2006 to 2013 were, therefore, unique for each fiscal period and determined the taxes SMCV paid.”).

¹¹⁰⁰ **CER-8**, Hernández II ¶ 125 (“SUNAT also issued the Royalty and Tax Assessments based on specific facts, which varied from one fiscal period to another.”) (citing **CA-14**, Tax Code, Articles 75-77).

¹¹⁰¹ **CA-14**, Tax Code, Article 77. See **CER-8**, Hernández II ¶ 128 (“For example, SMCV could not have challenged the first Royalty or Tax Assessment and argued that based on this single challenge, all subsequent Royalty and Tax Assessments should be considered as challenged.”).

¹¹⁰² See **CER-8**, Hernández II ¶ 128.

¹¹⁰³ **CER-8**, Hernández II ¶ 127 (“SUNAT could have arrived at a different legal conclusion in each assessment, for example, as a result of a change in position or by order of the Tax Tribunal. Thus, SMCV could not have anticipated the content of any particular royalty or tax assessment based on SUNAT’s interpretation of the mining provisions in its first-issued assessment.”).

¹¹⁰⁴ **CER-8**, Hernández II ¶ 126 (“Each Royalty and Tax Assessment is an *independent* administrative act because the legal effects of one did not extend to the other. For example, if SUNAT issues an assessment for fiscal period 1, it does not automatically mean that SUNAT will issue an assessment for fiscal period 2. Further, a decision from the Tax Tribunal annulling or revoking an assessment does not annul nor revoke other assessments.”) (citing **CA-415**, Tax Tribunal Resolution No. 09894-8-2017 (November 9, 2017); **CA-416**, Tax Tribunal Resolution No. 09892-8-2017 (November 9, 2017); **CA-418**, Tax Tribunal Resolution No. 00779-3-2018 (January 30, 2018) (confirming SUNAT’s resolutions for tax periods 2009-2012 and annulling SUNAT’s resolution for tax periods 2005-2008 in three related cases concerning the same taxpayer, tax, and activity)).

¹¹⁰⁵ **RWS-5**, Olano Silva, ¶ 10 (“When cases present contradictory criteria . . . the President of the Tribunal must submit the matter for debate in the Plenary Chamber to decide what criteria will prevail, which become the criteria that must be observed by the Tribunal.”) (citing **CA-14**, Tax Code, Article 154).

¹¹⁰⁶ **CA-14**, Tax Code, Article 154.

Assessments based on a precedent of mandatory compliance.¹¹⁰⁷ Nor did SUNAT or the Tax Tribunal ever indicate that they were bound by the 2006-2007 or 2009 Royalty Assessments in deciding SMCV's challenges to any of the subsequent assessments.

- (d) Even after SUNAT notified SMCV of the 2006-2007 Royalty Assessments, the Government continued to confirm that the Concentrator was stabilized and that SMCV would have a "very strong argument for prevailing before the Tax Tribunal."¹¹⁰⁸

227. *Third*, Freeport could not have acquired knowledge of the loss or damage resulting from any of Peru's breaches of the Stability Agreement until each of the Assessments became final and enforceable.¹¹⁰⁹

- (a) Peru's argument that all of the Assessments became "immediately due and owing," once SUNAT notified SMCV of the 2006-2007 Royalty Assessments on 18 August 2009, is absolutely wrong as a matter of Peruvian law.¹¹¹⁰ Peru cannot seriously argue that a taxpayer must pay future tax assessments that have not yet been rendered and that relate to fiscal periods that have not yet even started to run. As explained above in Section III.A.1, SMCV did not incur loss or damage as a result of each Assessment until it became final and enforceable.

- (b) Freeport could not have acquired knowledge of future tax assessments for subsequent fiscal periods from the 2006-2007 or 2009 Royalty Assessments.¹¹¹¹ Article 10.18.1 requires "loss or damage" to have been "incurred" and therefore does not support Peru's attempt to hold Freeport to the standard of having knowledge that loss or damage "would" accrue from future Government conduct.¹¹¹² See Section III.A.1 above.

228. *Fourth*, Peru's argument that all of the Assessments constitute a single breach of the Stability Agreement with a single limitation period finds no support in investment treaty authorities, which consistently recognize that separate limitation periods apply to independent causes of action even

¹¹⁰⁷ *Id.*

¹¹⁰⁸ Memorial ¶¶ 174, 182-95, 408; CWS-11, Torreblanca I, ¶¶ 80-81.

¹¹⁰⁹ Memorial ¶ 352.

¹¹¹⁰ Counter-Memorial ¶ 427.

¹¹¹¹ CER-8, Hernández II ¶ 126 ("[I]f SUNAT issues an assessment for fiscal period 1, it does not automatically mean that SUNAT will issue an assessment for fiscal period 2.").

¹¹¹² CA-10, TPA, Article 10.18.1. *But see* Counter-Memorial ¶ 424 ("Claimant (and SMCV) knew at [the time that SUNAT notified SMCV of the 2006-2008 Royalty Assessment] 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.") (emphasis added).

when those causes of action result from a “series of similar or related actions by a respondent state.”¹¹¹³
For example:

- (a) In *Eli Lilly v. Canada*, a Canadian court invalidated the claimant’s pharmaceutical patent based on the judge-made “promise utility doctrine” before the cut-off date.¹¹¹⁴ The claimant alleged that subsequent decisions by the Canadian courts invalidating two different patents based on the same doctrine after the cut-off date violated NAFTA.¹¹¹⁵ Canada argued that the claims were time-barred because they were “actually a challenge to the judiciary’s alleged adoption of the promise utility doctrine” before the cut-off date, not to the decisions of the Canadian courts invalidating two of claimant’s patents after the cut-off date.¹¹¹⁶ In rejecting Canada’s attempt to “re-characterize Claimant’s case,”¹¹¹⁷ the tribunal observed that the claimant did not “allege that the promise utility doctrine itself in the abstract is a violation of NAFTA Chapter Eleven,” but rather challenged the respondent’s invalidation of its patents after the cut-off date.¹¹¹⁸ Moreover, the tribunal treated separate claims challenging separate decisions by the Canadian judiciary *applying the same doctrine* as distinct causes of action.¹¹¹⁹ Like the claimant in *Eli Lilly*, Freeport does not allege that SUNAT’s theoretical “adoption” of the novel and restrictive “interpretation” of the Stability Agreement would itself, “in the abstract”, constitute a breach of the Stability Agreement.¹¹²⁰ Rather, Freeport alleges as breaches of the Stability Agreement each final and enforceable Assessment failing to apply the Stability Agreement to SMCV’s entire Mining Unit after the cut-off date.
- (b) In *Nissan v. India*, the tribunal considered the timeliness of Nissan’s claims that India’s repeated defaults on its payment obligations under a Memorandum of Understanding (“MoU”) breached the umbrella clause and FET provisions of the CEPA.¹¹²¹ The defaults

¹¹¹³ Counter-Memorial ¶ 421 (citing **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 81).

¹¹¹⁴ **CA-411**, *Eli Lilly v. Canada* Award, ¶¶ 5, 121, 126.

¹¹¹⁵ **CA-411**, *Eli Lilly v. Canada* Award, ¶¶ 5, 126, 162.

¹¹¹⁶ **CA-411**, *Eli Lilly v. Canada* Award, ¶¶ 5, 121, 126.

¹¹¹⁷ **CA-411**, *Eli Lilly v. Canada* Award, ¶ 165.

¹¹¹⁸ **CA-411**, *Eli Lilly v. Canada* Award, ¶ 164.

¹¹¹⁹ **CA-411**, *Eli Lilly v. Canada* Award, ¶ 167 (“[A]ny loss suffered by Claimant *before* the date of the alleged breach [of the Zyprexa and Straterra Patents] with respect to [the Raloxifene Patent] is irrelevant to the application of [NAFTA’s limitation provision].”) (emphasis in original).

¹¹²⁰ **CA-411**, *Eli Lilly v. Canada* Award, ¶¶ 5, 121, 163-64. *But see* Counter-Memorial ¶ 429.

¹¹²¹ **CA-243**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction (29 April 2019) (Hobér, Khehar, Kalicki) (“*Nissan v. India* Decision on Jurisdiction”), ¶ 328. *See also id.* ¶ 61

spanned across the cut-off date but, similar to Freeport, Nissan submitted claims only with respect to defaults that occurred after the cut-off date.¹¹²² The tribunal rejected the same argument that Peru makes here, that “Nissan is inappropriately attempting to ‘base its claims on those actions from a series of similar and related actions that postdate the critical date in order to bypass the limitation clause of an investment treaty.’”¹¹²³

- (c) The tribunal in *Bilcon/Clayton v. Canada* assessed environmental measures concerning the claimant’s quarry and marine terminal project that spanned across the cut-off date.¹¹²⁴ Canada contended that all of the claims were barred by the limitation provision in the NAFTA because Canada adopted some of the measures before the cut-off date.¹¹²⁵ The tribunal concluded that each of the measures were “distinct and completed events, specifically brought about by executive officials in relation to the project rather than of general application.”¹¹²⁶ Therefore, the tribunal found it “possible and appropriate . . . to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits.”¹¹²⁷ Here too, each of the Assessments is a “distinct and completed event” that breached the Stability Agreement when it became final and enforceable.
- (d) In *Grand River*, the claimants challenged as a NAFTA breach a Master Settlement Agreement between U.S. tobacco producers and 46 U.S. state governments requiring the states to enact escrow statutes before the cut-off date.¹¹²⁸ The tribunal concluded that claims challenging related, complementary legislation that the state governments adopted after the cut-off date were not time-barred.¹¹²⁹ Thus, *Grand River* supports Freeport’s

(“Notwithstanding paragraph 8, no investment dispute may be submitted to conciliation or arbitration set forth in paragraph 4, if more than three years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1.”).

¹¹²² CA-243, *Nissan v. India* Decision on Jurisdiction, ¶ 327.

¹¹²³ CA-243, *Nissan v. India* Decision on Jurisdiction, ¶¶ 299, 313.

¹¹²⁴ CA-278, *Bilcon/Clayton v. Canada* Award, ¶¶ 281, 305 (exercising jurisdiction over the claimants’ FET claims based on the environmental board’s decision-making process and final decision since the relevant State conduct occurred after the cut-off date).

¹¹²⁵ CA-278, *Bilcon/Clayton v. Canada* Award, ¶¶ 246–47.

¹¹²⁶ CA-278, *Bilcon/Clayton v. Canada* Award, ¶ 281.

¹¹²⁷ CA-278, *Bilcon/Clayton v. Canada* Award, ¶ 266.

¹¹²⁸ RA-4, *Grand River v. USA* Decision on Jurisdiction, ¶¶ 22–24.

¹¹²⁹ RA-4, *Grand River v. USA* Decision on Jurisdiction, ¶¶ 84–94.

position that independent limitation periods apply to independent causes of action. Contrary to Peru’s assertion, the *Grand River* tribunal did not conclude that the claims challenging the escrow statutes were time-barred merely because they were factually or legally related to the Master Settlement Agreement.¹¹³⁰ The tribunal concluded that “[a]ll of the 46 concerned states adopted such legislation” before the cut-off date.¹¹³¹ Moreover, *Grand River* is distinguishable on the grounds that, in this case, there was no government action that pre-destined each of the Assessments—in *Grand River*, the escrow statutes were “required” under the Master Settlement Agreement and obligated the state governments to “precisely replicat[e] a draft law annexed to the [Agreement],” which made the claimants “subject to [the] clear and precisely quantified statutory obligation” that the claimants challenged in the arbitration.¹¹³² Thus, the tribunal’s ruling that treating each escrow statute as a separate breach “seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state” is not only mere *dicta*, it is inapposite.¹¹³³

229. *Finally*, the investment treaty decisions on which Peru relies, which reject claimants’ attempts to bring time-barred conduct within the temporal jurisdiction of the tribunal by alleging “continuing” or “composite act” breaches, are inapposite.¹¹³⁴ Contrary to the claimants in these cases, Freeport has not alleged a continuing or composite act breach in an attempt to hold Peru liable for Government actions that occurred before the cut-off date. Rather, Freeport alleges independent breaches

¹¹³⁰ Counter-Memorial ¶ 421.

¹¹³¹ **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 81.

¹¹³² **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶¶ 12, 80, 82.

¹¹³³ **RA-4**, *Grand River v. USA* Decision on Jurisdiction, ¶ 81.

¹¹³⁴ Counter-Memorial ¶¶ 420-22, 429-30, 433-34, 437, 441-42, 461. *See, e.g.*, **RA-7**, *Apotex v. USA* Award on Jurisdiction, ¶ 325 (rejecting claims that a regulatory denial before the cut-off date and court decisions after the cut-off date were all part of a “‘single continuous’ set of underlying factual bases leading to the Respondent’s breach” of FET after the cut-off date); **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 155 (“[T]he essential acts alleged to constitute breaches of Articles 1102(3) and 1105(1) were completed by September 2012, three months before the critical date the Claimant, subject to an argument as to continuing breach, did not really argue otherwise.”); **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶ 97 (“The Claimant gives a general overview of the facts, noting that although the Exploitation Concession was granted in 2009, the Respondent has refused to grant the Environmental License and/or explain how the Project should be modified for the Claimant to benefit from its asset. In the Claimant’s view, this constitutes a continuing violation of the Fair and Equitable Treatment standard.”); **RA-2**, *Spence International Investments LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016) (Kantor, Vinuesa, Bethlehem) (“*Spence v. Costa Rica* Award”), ¶ 146 (“[T]he Claimants contend that it is manifest that the delays in the payment of compensation as required by Article 10.7.2 are delays that can be traced to post-10 June 2010, i.e., conduct after 10 June 2010, and/or are delays that amount to a continuing violation that straddles 10 June 2010 and/or are delays that form part of a composite act, an actionable component of which take place after 10 June 2010.”).

of the Stability Agreement based on independent causes of action arising *after* the cut-off date from each final and enforceable Assessment. As reflected in the investment treaty decisions, including *Infinito Gold v. Costa Rica*, the Tribunal thus must assess the timeliness of Freeport’s claims by reference to the actual “breach[es] alleged” in Freeport’s pleadings.¹¹³⁵ In any event, Peru’s authorities recognize that independent causes of action possess separate limitation periods.¹¹³⁶

(a) In *Infinito Gold*, the claimant alleged that the “combined operation” of five government measures restricting its mining rights resulted in the cancellation of the claimant’s mining project.¹¹³⁷ The respondent argued that “a claimant cannot invoke the last act in a chain or series of events, on the ground that the breach crystallized then.”¹¹³⁸ The tribunal concluded that the claimant had not properly alleged or established a composite breach and “thus assess[ed] the measures as simple breaches.”¹¹³⁹ This Tribunal should similarly assess the timeliness of each of the simple breaches that Freeport alleges. Moreover, consistent with Freeport’s position here, the *Infinito Gold* tribunal concluded that the claims based on the five measures were not time-barred even though they related to similar government measures restricting the claimant’s mining rights prior to the cut-off date.¹¹⁴⁰

(b) In *Resolute Forest Products*, the tribunal rejected the claimant’s argument that Canada’s measures supporting a competing paper mill were “continuing breaches” of the FET and National Treatment provisions of the NAFTA “which continued after the critical date,” because the measures were “perfected” and “implemented” before the cut-off date.¹¹⁴¹ Thus, Freeport’s claims are entirely consistent with *Resolute Forest Products*—each of

¹¹³⁵ **CA-412**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction (4 December 2017) (Kaufmann-Kohler, Hanotiau, Stern) (“*Infinito Gold v. Costa Rica* Decision on Jurisdiction”), ¶ 185 (“[I]t is the Claimant’s prerogative to formulate its claims as it sees fit.”) *See also* **CA-20**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections (13 March 2020) (Kalicki, Townsend, Douglas (dissenting in part on other grounds)), ¶¶ 220-21 (holding that the central inquiry is “what particular breach has been alleged” by the claimant, based on the “operative pleading” and subsequent clarifications by the claimant).

¹¹³⁶ *See, e.g.*, **RA-7**, *Apotex v. USA* Award on Jurisdiction, ¶¶ 325, 333 (disaggregating claims and recognizing that there is “no time-bar difficulty” with respect to two of claimant’s denial of justice claims).

¹¹³⁷ **RA-1**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) (Kaufmann-Kohler, Hanotiau, Stern) (“*Infinito Gold v. Costa Rica* Award”), ¶ 225.

¹¹³⁸ **RA-1**, *Infinito Gold v. Costa Rica* Award, ¶ 185.

¹¹³⁹ **RA-1**, *Infinito Gold v. Costa Rica* Award, ¶ 230.

¹¹⁴⁰ **RA-1**, *Infinito Gold v. Costa Rica* Award, ¶¶ 255-56, 260, 263, 276 (finding that the measures were not time-barred even though “initial failure[s],” “original inconsistency” arose before the cut-off date because the alleged breaches could not occur until certain acts were final).

¹¹⁴¹ **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶¶ 156-58.

the Assessments (except the 2006-07 and 2008 Royalty Assessments, for which SMCV does not submit claims for breach of the Stability Agreement) was “implemented” and “perfected” after 28 February 2017, when they became final and enforceable. Moreover, consistent with Freeport’s position that a series of similar or related actions can give rise to independent causes of action with independent limitation periods, the *Resolute Forest Products* tribunal rejected the respondent’s time-bar objection to the expropriation claim even though it was based on the very same measures.¹¹⁴²

(c) *Spence* involved a law Costa Rica adopted before the cut-off date authorizing the expropriation of private property to create an offshore ecological park.¹¹⁴³ Also before the cut-off date, the Costa Rican Attorney General issued a “binding legal interpretation” indicating that the park extended inland and would, therefore, result in the expropriation of claimants’ residential properties.¹¹⁴⁴ The claimants argued that their expropriation claims under the CAFTA-DR were not time-barred because “delays in [] payment” occurred after the cut-off date and were part of a continuing breach that straddled the cut-off date and a composite act that crystallized after the cut-off date.¹¹⁴⁵ The claimants also argued that their minimum standard of treatment claims were based on “process failures” and “unjust results” that occurred after the cut-off date.¹¹⁴⁶ The tribunal held that the claims were time-barred because the conduct occurring after the cut-off date “traced back” to, was “firmly rooted” in, and was “dependent” on conduct that occurred before the cut-off date, including the adoption of the law and the Attorney General’s binding interpretation.¹¹⁴⁷ In this case, Peru has never issued a “binding legal interpretation” of the Stability Agreement that predestined any of the Assessments.¹¹⁴⁸ Moreover, consistent with Freeport’s position, the *Spence* tribunal recognized that measures that are “independently actionable,” give rise to separate limitation periods.¹¹⁴⁹

(d) In *Corona Materials*, the tribunal recognized that each “standalone ‘measure,’” “separate breach of the Treaty,” or “separate action,” would give rise to a separate limitation

¹¹⁴² **RA-5**, *Resolute Forest v. Canada* Decision on Jurisdiction, ¶ 163.

¹¹⁴³ **RA-2**, *Spence v. Costa Rica* Award, ¶ 37.

¹¹⁴⁴ **RA-2**, *Spence v. Costa Rica* Award, ¶¶ 37-38, 174.

¹¹⁴⁵ **RA-2**, *Spence v. Costa Rica* Award, ¶ 146.

¹¹⁴⁶ **RA-2**, *Spence v. Costa Rica* Award, ¶¶ 229-32.

¹¹⁴⁷ **RA-2**, *Spence v. Costa Rica* Award, ¶¶ 245, 252, 264, 269-70.

¹¹⁴⁸ *See supra* ¶¶ 105, 112, 117-19.

¹¹⁴⁹ **RA-2**, *Spence v. Costa Rica* Award, ¶ 222.

period.¹¹⁵⁰ However, the tribunal rejected the claimant’s argument that the failure of the Ministry to render a decision on the claimant’s motion for reconsideration of the denial of the claimant’s environmental permit before the cut-off date constituted a continuing breach of the CAFTA-DR after the cut-off date.¹¹⁵¹ Freeport does not allege a continuing breach based on a failure to render a decision with respect to any of the Assessments but, instead, alleges that each decision that became final and enforceable after the cut-off date breached the Stability Agreement. Additionally, the permit denial in *Corona Materials* is distinguishable from SUNAT’s notification of each Assessment to SMCV because it was “not a mere notification of the decision; it further set[] out a clear indication of the decision’s final character insofar as the environmental authorities were concerned, by their indicating the ‘closure of [Corona’s] file.’”¹¹⁵² By contrast, SUNAT’s notification of each Assessment lacked final character and did not result in the closure of the administrative file for each Assessment but, instead, was a step in the administrative process by which each Assessment obtained final character.

- (e) In *Apotex v. USA*, the claimant argued that final administrative decisions by the United States Federal Drug Administration before the cut-off date and subsequent court decisions rejecting claimant’s challenges to those decisions were all part of a “‘single, continuous set’ of underlying factual bases leading to the Respondent’s breach” of the NAFTA.¹¹⁵³ Unlike the claimant in *Apotex*, Freeport does not argue a continuing breach. Moreover, consistent with Freeport’s position, the *Apotex* tribunal held that the claims based on the court decisions were “analytically distinct” and, therefore, gave rise to independent causes of action that were not time-barred, even though they “would require at least some consideration of the prior administrative and judicial decisions.”¹¹⁵⁴

2. Freeport’s Claims for Breach of Article 10.5 of the TPA Are Timely

230. As Freeport explained in the Memorial, Freeport acquired knowledge of each of Peru’s breaches of Article 10.5 of the TPA after 28 February 2017.¹¹⁵⁵ Peru argues that “[a]lmost all of

¹¹⁵⁰ RA-3, *Corona Materials v. Dominican Republic Award on Preliminary Objections*, ¶¶ 210-11.

¹¹⁵¹ RA-3, *Corona Materials v. Dominican Republic Award on Preliminary Objections*, ¶¶ 95-97, 230-31.

¹¹⁵² RA-3, *Corona Materials v. Dominican Republic Award on Preliminary Objections*, ¶ 222.

¹¹⁵³ RA-7, *Apotex v. USA Award on Jurisdiction*, ¶¶ 124-27, 313.

¹¹⁵⁴ RA-7, *Apotex v. USA Award on Jurisdiction*, ¶¶ 333-34.

¹¹⁵⁵ Memorial ¶¶ 426-29.

Claimant’s claims of breach of Article 10.5 of the TPA” fall outside the Tribunal’s jurisdiction.¹¹⁵⁶ Peru’s arguments here too lack and basis in law or fact.

i. Freeport’s Article 10.5 Claims Based on Breach of Legitimate Expectations, Arbitrary Actions, Inconsistent and Non-Transparent Action, and Lack of Due Process are Timely

231. As explained in the Memorial, the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments breached Peru’s obligations under Article 10.5 to refrain from frustrating Freeport and SMCV’s legitimate expectations, engaging in arbitrary, inconsistent, and non-transparent actions, and violating SMCV’s due process rights on the dates upon which each assessment became final and enforceable.¹¹⁵⁷ As reflected in Table A of the Memorial, each of those Assessments became final and enforceable after 28 February 2017. Therefore, Freeport could not have acquired knowledge of Peru’s breaches or the resulting loss or damage before that date.¹¹⁵⁸

232. Peru argues that Freeport’s Article 10.5 claims are time-barred because, like Freeport’s Stability Agreement claims, they are based on a “series of similar or related actions by a respondent state” that Freeport should have acquired knowledge of “on August 18, 2009 (when SMCV was notified of the first Royalty Assessment against it for the years 2006-2007) or, at the latest, by September 15, 2009 (when SMCV challenged SUNAT’s decision regarding the 2006-2007 Royalty Assessment through an administrative proceeding).”¹¹⁵⁹ These objections fail on the same grounds as Peru’s time-bar objection to Freeport’s Stability Agreement claims set forth above in Section III.A.1.

233. The authorities confirm that a government decision does not give rise to cause of action for breach of an investment treaty until it is final and enforceable.¹¹⁶⁰ For example, the tribunal in *Mobil II* distinguished between the respondent’s adoption of guidelines imposing performance requirements and

¹¹⁵⁶ Counter-Memorial ¶ 483.

¹¹⁵⁷ Memorial ¶ 426, Table A.

¹¹⁵⁸ Memorial ¶ 426, Table A.

¹¹⁵⁹ Counter-Memorial ¶¶ 447, 449.

¹¹⁶⁰ See, e.g., **RA-45**, *Mercer International, Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award (6 March 2018) (Vicuna, Douglas, Veeder), ¶¶ 3.81–3.83 (rejecting argument that the Canada’s utilities commission breached a pricing contract when the contract was formally “accepted for filing,” and holding that the breach occurred only when the contract “took effect” “under its applicable law”); **RA-3**, *Corona Materials v. Dominican Republic* Award on Preliminary Objections, ¶¶ 219-22 (finding that the alleged breach occurred on the date that the Environmental Ministry “formally rejected” claimant’s application for an environmental lease, a rejection that “clear[ly] indicated . . . the decision’s *final character*”) (emphasis added); **RA-1**, *Infinito v. Costa Rica* Award, ¶¶ 241, 247 (finding that the applicable cut-off date for the limitation period did not occur until the challenged annulment of claimant’s mining concession was “*definitive*” and “*permanent*” under Costa Rican law”) (emphasis added).

its subsequent enforcement of the guidelines in breach of the NAFTA.¹¹⁶¹ The tribunal explained that it was not until “the Guidelines *were actually enforced* (albeit with retrospective effect) against Mobil . . . that Mobil could have acquired knowledge that they would be enforced” and that the claimant “could not have known that the Guidelines would have been enforced in the future and that it would incur loss as a result of their future enforcement.”¹¹⁶²

234. Thus, the standard for determining when causes of action for breach of the TPA arose is the same as that for determining when a cause of action for breach of the Stability Agreement arose.¹¹⁶³ For the same reasons set forth above in Section III.A.1, Freeport accordingly could not have acquired knowledge of Peru’s breaches and the resulting damage until each Assessment became final and enforceable.

- (a) It was only when each Assessment became final and enforceable that it gave rise to a cause of action for breach of Article 10.5 of the TPA.¹¹⁶⁴ Prior to that moment, it was still possible that the Government would annul or modify each Assessment before it took effect.¹¹⁶⁵ Moreover, SMCV did not incur loss or damage until each Assessment became final and enforceable against SMCV because it was only then that SMCV had an

¹¹⁶¹ CA-420, *Mobil II v. Canada* Decision on Jurisdiction, ¶ 172.

¹¹⁶² CA-420, *Mobil II v. Canada* Decision on Jurisdiction, ¶¶ 152, 172 (emphasis added). *See also id.* ¶ 152 (“Canada’s approach, which elides the promulgation of the 2004 Guidelines with their subsequent enforcement, is thus an over-simplification.”).

¹¹⁶³ *See also* CA-243, *Nissan v. India* Decision on Jurisdiction, ¶ 328 (applying the same standard to determine when both FET and umbrella clause causes of action arose). *Cf. RA-30, Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 June 2009) (Caron, Hubbard, Young), ¶ 332 (“Presumably because of this common underlying logic, these international arbitral awards are in congruence with the domestic takings law of the United States, which holds that a court needs a ‘final, definitive position’ of the administrative agency to evaluate whether a governmental act has effected a taking.”).

¹¹⁶⁴ CA-420, *Mobil II v. Canada* Decision on Jurisdiction, ¶ 152.

¹¹⁶⁵ CER-7, Bullard II, ¶ 82 (“[I]n the case at hand, SMCV had no enforceable obligation to pay the SUNAT Assessments at the time of notification because the tax administration itself—through the corresponding challenges—could have changed or reversed them before they became *final, definitive, and enforceable*.”); CER-3, Hernández I, ¶ 26 (“If the taxpayer files a request for reconsideration, the assessments and fines do not become final and enforceable and, therefore, SUNAT cannot initiate enforcement proceedings to compel the collection of the debt If the taxpayer pays the debt . . . and later files a request for reconsideration, the assessments or fines likewise do not become final and enforceable because they are being challenged.”); *id.* ¶ 30 (“If the taxpayer files a challenge [to the Tax Tribunal], this prevents the assessments or fines from being final and enforceable.”); *id.* ¶ 41 (listing all dates SUNAT assessments and fines become final and enforceable); CER-8, Hernández II, ¶ 109 (“SMCV did not suffer any loss until the Royalty and Tax Assessments became *final and enforceable* because SMCV did not have an obligation to pay the Royalty and Tax Assessments until they became *final and enforceable*” because “SUNAT and the Tax Tribunal could correct the Assessments” before that point).

obligation to pay the Assessment and SUNAT had the right to take action to collect the assessed amount.¹¹⁶⁶

- (b) As the investment treaty authorities discussed above in Section III.A.1.iii show, the 2009, 2010-2011, Q4 2011, 2012, and 2013 Royalty Assessments each gave rise to an independent cause of action for breach of Article 10.5, with a separate limitation period.

ii. Freeport’s Article 10.5 Claims Based on Due Process Violations are Timely

235. Peru concedes that Freeport’s claims for breach of Article 10.5 based on due process violations in the Tax Tribunal proceedings in the 2009 and 2010-2011 Royalty Cases are timely.¹¹⁶⁷ However, Peru argues that Freeport’s due process claims based on the Tax Tribunal proceedings in the 2006-2007 and 2008 Royalty Cases are time-barred “[b]ecause 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” so “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.”¹¹⁶⁸ Peru is wrong.

236. As Freeport explained, it was only in 2019 when SMCV began investigating the origin of the 2006-2007 and 2008 Royalty Decisions in preparation for filing this arbitration, that Freeport became aware that President Olanos-Silva and Ms. Villanueva had improperly interfered in the resolution of those cases.¹¹⁶⁹ And only in 2021, as a result of a request for access to public information, did SMCV receive

¹¹⁶⁶ **CER-3**, Hernández I, ¶ 42 (“Once the assessments and fines become final and enforceable, SUNAT can initiate coercive procedures to collect the debt.”). *See also CER-8*, Hernández II, ¶ 109 (“SMCV therefore could not have suffered any loss until SMCV’s obligation to pay the Assessments materialized, which happened only once the Assessments became final and enforceable” because “as Mr. Bravo and Mr. Picón acknowledge, SUNAT, the alleged creditor, could not demand full compliance—that is, coercively collect the assessed amounts”); **CA-364**, *Pope & Talbot v. Canada* Award on Preliminary Motion, ¶ 12 (“The critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur.”); **CA-420**, *Mobil II v. Canada* Decision on Jurisdiction, ¶ 154 (“It is impossible to know that loss or damage has been incurred until that loss or damage actually has been incurred.”).

¹¹⁶⁷ Counter-Memorial ¶ 454.

¹¹⁶⁸ Counter-Memorial ¶ 453. Freeport maintains that the final and enforceable assessments of 2006-2007 and 2008 royalties and penalties and interest breached the Stability Agreement and Peru’s obligations under Article 10.5 to refrain from frustrating Freeport and SMCV’s legitimate expectations and engaging in arbitrary, inconsistent, and non-transparent actions, but does not submit those claims because they fall outside the limitation period. However, Freeport’s claims that the due process violations in the 2006-2007 and 2008 Royalty Cases breached Article 10.5 are timely because Freeport did not acquire knowledge of those breaches until after the cut-off date.

¹¹⁶⁹ **CWS-11**, Torreblanca I, ¶ 92 (“We had no inkling of [President Olanos-Silva and Ms. Villanueva’s] interference until 2019, when we began investigating who had drafted the Tax Tribunal’s decision in the 2008 royalty case,

from the Government email correspondence of President Olano Silva, which exposed the full extent of the due process violations.¹¹⁷⁰

237. Peru’s argument that Freeport “necessarily” knew of the due process violations upon receipt of the decisions themselves is wholly unfounded.¹¹⁷¹ The fact of Ms. Villanueva’s initials, “uv,” on the work route standing alone is hardly sufficient for SMCV to have had knowledge that the President of the Tax Tribunal, who reports directly to the MEF, used her personal assistant to inappropriately interfere in the outcome of SMCV’s challenge—*i.e.*, to have knowledge of the facts sufficient to constitute a due process breach. Likewise, the fact that copy-pasting between the 2006-2007 and 2008 decisions was the result of improper interference and influence by the President remained concealed. Peru’s argument that SMCV should have found out sooner that, behind closed doors, Peru failed to comply with its due process obligations, is absurd. Under fundamental principles of fairness, SMCV cannot be faulted for Peru’s own lack of transparency and Peru should not be allowed to avoid the due process claims because it effectively managed to conceal its due process violations.

and were shocked to learn of the full extent of the Tax Tribunal President’s interference when in early 2021 we obtained documents that the Government made available under Peru’s freedom of information act.”).

¹¹⁷⁰ **Ex. CE-1092**, SMCV, Request for Access to Information (10 February 2021); **Ex. CE-1094**, SMCV, Request for Access to Information (5 March 2021); **Ex. CE-1093**, Email from the MEF Document Management and User Services Office to Adriana Lucia Chavez Alvarez (24 February 2021, 2:55 PM PET) (informing SMCV that its request for access to President Olano Silva’s emails from 1 January 2010 to 31 December 2015 has been granted); **Ex. CE-648**, Email from Úrsula Villanueva Arias to Zoraida Alicia Olano Silva (22 March 2013, 4:02 PM PET (confirming that President Olano Silva and Ms. Villanueva discussed preliminary conclusions on the 2008 Royalty Case before hearing); **Ex. CE-651**, Email from Zoraida Alicia Olano Silva to Carlos Hugo Moreano Valdivia (May 21, 2013, 10:47 AM PET) (Chamber No. 10’s presiding *vocal*, Mr. Moreano Valdivia, sent an email to President Olano Silva saying that his chamber was “informed that Ursula Villanueva made a draft that was returned to Chamber 1”); **Ex. CE-652**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (22 May 2013 8:58 AM PET) (objecting to President Olano Silva’s usurpation of Chamber No. 10’s role and complaining about the lack of transparency surrounding the adoption of Chamber No. 1’s resolution); **Ex. CE-650**, Email from Carlos Hugo Moreano Valdivia to Zoraida Alicia Olano Silva (21 May 2013, 10:05 AM PET) (noting that Chamber No. 1 and Chamber No. 10 “will coordinate”); **Ex. CE-653**, Email from Licette Isabel Zúñiga Dulanto to Zoraida Alicia Olano Silva (22 May 2013, 9:55 AM PET) (“As I spoke with Luis Cayo before the first session, they were in agreement to confirm and it seemed to us that the terms of the resolution were quite clear . . . so we agreed that after the session I would send them a copy of the draft to coordinate [the 2008 and 2006-2007 resolutions].”); **Ex. CE-654**, Email from Luis Gabriel Cayo Quispe to Zoraida Alicia Olano Silva and Licette Isabel Zúñiga Dulanto (24 May 2013, 8:31 AM PET) (President Olano Silva and Ms. Zúñiga called Mr. Cayo, *vocal ponente* of Chamber No. 10, to meet to discuss SMCV’s case); **Ex. CE-655**, Email from Zoraida Alicia Olano Silva to Luis Gabriel Cayo Quispe and Licette Isabel Zúñiga Dulanto (24 May 2013, 10:23 AM PET) (“Do you have a file number 1889-2012 [the 2009 Royalty Case], which is also on the same subject?”).

¹¹⁷¹ Counter-Memorial ¶ 451.

iii. Freeport’s Article 10.5 Claims Based on Peru’s Failure to Waive Penalties and Interest Are Timely

238. As Freeport explained in the Memorial, each of Peru’s breaches of Article 10.5 for arbitrarily refusing to waive penalties and interest on the Assessments occurred after 28 February 2017.¹¹⁷² Peru argues that Freeport knew or should have known of all of the Government’s breaches for failure to waive penalties and interest on the Royalty Assessments on 22 April 2010, when SUNAT’s Claims Division notified SMCV of its resolution rejecting SMCV’s Request for Reconsideration of the 2006-2007 Royalty Assessment.¹¹⁷³ Peru also reprises its argument that each failure to waive penalties and interest on the subsequent Royalty Assessments does “not give rise to separate breaches” because they constituted a “single act” and were part of a “series of similar or related actions” all “based on the same provisions of the Mining Law and Regulations and on [its] same interpretation of the 1998 Stabilization Agreement.”¹¹⁷⁴ Peru does not challenge the timeliness of Freeport’s claims for Peru’s failure to waive penalties and interest on the Tax Assessments, instead relying on its argument that those claims are barred by the tax exclusion in Article 22.3.1 of the TPA.¹¹⁷⁵ Freeport addresses Peru’s objections based on Article 22.3.1 separately in Section III.D. Peru’s arguments lack any basis.

239. ***Failure to Waive Penalties and Interest on the 2006-07 and 2008 Royalty Assessments.*** As explained in the Memorial, Peru breached Article 10.5: (i) on 21 July 2017 when the Supreme Court notified SMCV of its decision arbitrarily and unreasonably refusing to consider *de novo* SMCV’s entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments; and (ii) on 10 October 2017 when the Appellate Court notified SMCV of its decision arbitrarily and unreasonably refusing to consider *de novo* SMCV’s entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments.¹¹⁷⁶ There is no merit to Peru’s argument that Freeport’s “true complaint is about the fact that SMCV was required to pay penalties and interest” and, therefore, the limitation period should run from the time when SUNAT first assessed penalties and interest on the 2006-2007 and 2008 Royalties.¹¹⁷⁷

¹¹⁷² Memorial ¶ 427, Table B.

¹¹⁷³ Counter-Memorial ¶ 459.

¹¹⁷⁴ Counter-Memorial ¶¶ 460-62.

¹¹⁷⁵ Counter-Memorial ¶¶ 455-58, 463.

¹¹⁷⁶ Memorial ¶¶ 230, 233, 427, Table B. *See also id.* ¶¶ 234-39 (explaining that two justices on the Supreme Court voted to annul the Appellate Court’s decision for failure to interpret the proper scope of Article 170 of the Tax Code, including whether the Tax Tribunal should have assessed SMCV’s entitlement waiver of penalties and interest but ultimately, the Supreme Court failed to render a decision before SMCV withdrew its appeal because it lacked the necessary 4-1 majority to render a decision in a cassation case) (citing **Ex. CE-739**, Supreme Court, Decision, No. 18174-2017, 2006/07 Royalty Assessments (20 November 2018), pp. 46-47, ¶ 2.15).

¹¹⁷⁷ Counter-Memorial ¶ 460.

Freeport's complaint is that the Contentious Administrative Courts were required to consider SMCV's entitlement to waiver *de novo* and their arbitrary failure to do so resulted in "self-standing" breaches that occurred once those decisions were notified to SMCV.¹¹⁷⁸ It is well-established in the authorities, including *Apotex*,¹¹⁷⁹ which Peru relies on, that judicial conduct can give rise to a cause of action for breach of the minimum standard of treatment independent from a breach resulting from the underlying conduct that is the subject of the judicial proceedings.¹¹⁸⁰

240. ***Failure to Waive Penalties and Interest on the 2009, 2010-11, 2011/Q4, 2012, 2013 Royalty Assessments and the Tax Assessments.*** For the reasons set forth above in Section III.A.1, Peru's breaches for failure to waive penalties and interest on the remaining assessments occurred when each assessment of penalties and interest became final and enforceable. All of the Assessments, including the assessments of penalties and interest, were distinct Government actions that became final and enforceable pursuant to the administrative process described above in Section III.A.1. Therefore, for the same reasons described above, each assessment of penalties and interest gave rise to an independent cause of action for breach of Article 10.5 when it became final and enforceable against SMCV. It was not until each assessment of penalties and interest became final and enforceable that SMCV had an obligation to pay the assessment and SUNAT was authorized to enforce it. Freeport could not have acquired knowledge of Peru's breaches of Article 10.5 of the TPA for failing to waive penalties and interest, or the resulting loss or damage, until each of those breaches occurred.

iv. Freeport's Article 10.5 Claims Based on Peru's Failure to Reimburse GEM Payments are Timely

241. The Parties agree that Freeport's claims for breach of Article 10.5 of TPA based on Peru's failure to reimburse SMCV for Q4 2012 to Q4 2013 GEM payments are timely because Peru's denial of SMCV GEM reimbursement request occurred on 22 March 2019.¹¹⁸¹

¹¹⁷⁸ Memorial ¶ 427.

¹¹⁷⁹ **RA-7**, *Apotex v. USA* Award on Jurisdiction, ¶¶ 333-34 (finding that claims based on "judicial decisions" and "prior administrative and judicial decisions" present separate breaches and losses because they are "two types of claim [that] are clearly analytically distinct").

¹¹⁸⁰ *See, e.g.*, **CA-195**, *Deutsche Bank* Award, ¶ 420 (distinguishing between, *inter alia*, separate breaches of the minimum standard of treatment, including conduct that "does not offend judicial propriety" and complies with "due process," and conduct that is "arbitrary"); **CA-245**, *Glencore* Award, ¶ 1319 ("It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard."); **CA-237** *Rumeli* Award, ¶¶ 618-19 (considering claimants' administrative due process and judicial conduct claims as separate, independent breaches of the fair and equitable treatment obligation but ultimately rejecting the judicial conduct claims on the merits).

¹¹⁸¹ Counter-Memorial ¶ 464.

B. ARTICLE 10.18.4 DOES NOT APPLY BECAUSE SMCV DID NOT SUBMIT CLAIMS FOR BREACHES OF THE STABILITY AGREEMENT TO A PERUVIAN ADMINISTRATIVE TRIBUNAL OR TO ANY OTHER BINDING DISPUTE SETTLEMENT PROCEDURE

242. As Freeport explained in the Memorial, Article 10.18.4 of the TPA does not bar Freeport’s claims for breaches of the Stability Agreement because SMCV did not submit claims for breaches of the Stability Agreement “to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.”¹¹⁸² Rather, SMCV submitted administrative challenges to the validity of the majority of the Assessments to two agencies of the MEF—SUNAT’s Claims Division and the Tax Tribunal.¹¹⁸³

243. Article 10.18.4, which is commonly referred to as a “fork-in-the-road” provision, states:

No claim may be submitted to arbitration . . . for breach of an investment agreement under Article 10.16.1(a)(i)(C) or Article 10.16.1(b)(i)(C) . . . if the claimant (for claims brought under 10.16.1(a)) or the claimant or the enterprise (for claims brought under 10.16.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure.

For greater certainty, if a claimant elects to submit a claim of the type described in subparagraph (a) 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.¹¹⁸⁴

244. Peru argues that Article 10.18.4 bars Freeport’s claims for breaches of the Stability Agreement that are based on assessments that SMCV challenged before SUNAT’s Claims Division or the Tax Tribunal—*i.e.* all of Freeport’s claims for breaches of the Stability Agreement except those “based on the 2013 Income Tax and Additional Income Tax Assessments, and the 2012 Temporary Tax on Net Assets Assessment.”¹¹⁸⁵ Peru asserts that SUNAT’s Claims Division and the Tax Tribunal qualify as “administrative tribunal[s]” and “binding dispute settlement procedure[s]” under Article 10.18.4 and that Article 10.18.4 applies to SMCV’s administrative challenges because they rested on the same “fundamental basis” as Freeport’s claims for breaches of the Stability Agreement.¹¹⁸⁶

245. Peru’s interpretation of Article 10.18.4 would have the absurd result of requiring investors to submit SUNAT royalty or tax assessments to international arbitration without having them

¹¹⁸² Memorial ¶ 357 (citing CA-10, TPA, Article 10.18.4).

¹¹⁸³ See Annex A: Administrative Proceedings.

¹¹⁸⁴ Ex. CA-10, TPA, Article 10.18.4.

¹¹⁸⁵ Counter-Memorial ¶ 497.

¹¹⁸⁶ Counter-Memorial ¶¶ 500-501, 505.

reviewed first through the normal administrative process within MEF. Specifically, an investor would have to forgo its right to request SUNAT to reconsider its assessment and the Tax Tribunal to review and annul the assessment—thus depriving the Government of the opportunity to reconsider, and where appropriate correct, a SUNAT assessment. Moreover, given the extremely short deadlines for pursuing administrative review,¹¹⁸⁷ Peru’s interpretation would leave investors with an unreasonably short time-frame to choose between administrative proceedings or to pursue international arbitration under the TPA.¹¹⁸⁸

246. Unsurprisingly, this is not what the TPA provides. *First*, by its plain terms, Article 10.18.4 does not apply unless SMCV previously submitted a “claim” for any of the “the same alleged breach[es]” of the Stability Agreement that Freeport submits here.¹¹⁸⁹ Peru concedes that SMCV *never submitted* claims for breaches of the Stability Agreement in any forum.¹¹⁹⁰ Peru’s objection fails on this ground alone. The “fundamental basis” test that Peru proposes finds no support in the plain terms of Article 10.18.4, the negotiating history of the TPA, or investment treaty authorities.

¹¹⁸⁷ See **CA-14**, Tax Code, Article 137 (“In the case of claims against Assessment Resolutions, Penalty Resolutions . . . and any acts directly related to the assessment of the tax debt, they will be submitted by the unextendable deadline of twenty (20) business days reckoned from the business day following the one on which notice of the appealed act or resolution was served.”); *id.* Article 146 (“The appeal of the resolution before the Tax Tribunal must be made within fifteen (15) business days following the one on which notice thereof was served by means of a substantiated brief.”); **CER-8**, Hernández II ¶¶ 113, 116 (“After SUNAT notifies a taxpayer of an assessment, the taxpayer has 20 business days to challenge it before SUNAT itself through a request for reconsideration” and “[i]f SUNAT denies the taxpayer’s request for reconsideration, the taxpayer has 15 business days to challenge SUNAT’s denial of its request for reconsideration before the Tax Tribunal—the last administrative instance on tax and royalty disputes.”).

¹¹⁸⁸ *But see CA-108*, *Occidental Exploration & Production Co. v. Ecuador*, LCIA Case No. UN3467, Award (1 July 2004) (Orrego Vicuña, Brower, Sweeney) (“*Occidental Award*”), ¶¶ 60–61 (“[T]he Ecuadorian Tax[] Law requires the taxpayer to apply to the courts within the brief period of twenty days . . . [before] the resolution becomes final and binding The Tribunal is of the view that in this case the investor did not have a real choice. Even if it took the matter instantly to arbitration, . . . its right to object to the adverse decision . . . would have been considered forfeited if the application before the local courts were not made within the period mandated by the Tax Code.”); **CA-400**, Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, p. 93–94 § 3.141 (OUP 2013) (recognizing that that fork-in-the-road provisions are not intended to put investors “in a position where they would have to exercise their choice in favour of one or the other option in the face of rigid deadlines and looming immediate disadvantages”).

¹¹⁸⁹ **Ex. CA-10**, TPA, Article 10.18.4. See **CA-389**, *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5 (17 November 2008) (Crawford, Eizenstat, Sureda), ¶ 70 (“This understanding of the Tribunal is confirmed by the wording in Article 10.18(4). This paragraph *excludes claims for certain breaches if such claims* have been previously submitted to the administrative tribunals or courts of the respondent”) (interpreting Article 10.18.4 of the DR-CAFTA) (emphasis added).

¹¹⁹⁰ Counter-Memorial ¶ 505 (“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.”) (emphasis added).

247. *Second*, Peru’s argument fails on the independent ground that neither proceedings before SUNAT’s Claims Division nor the Tax Tribunal qualify as proceedings before “an administrative tribunal” or “binding dispute settlement procedures” under Article 10.18.4 of the TPA. Neither of these administrative bodies are competent to resolve claims for breach of an investment agreement and, therefore, cannot provide the “other binding dispute settlement procedures” that Article 10.18.4 contemplates. Moreover, neither of these administrative agencies qualify as an administrative tribunal under Article 19.5.1 of the TPA.¹¹⁹¹

1. SMCV Did Not Previously Submit Claims for Breaches of the Stability Agreement

248. Peru concedes that “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,” not claims for the “same alleged breach[es]” of the Stability Agreement that Freeport submits in this arbitration.¹¹⁹² That concession alone is decisive.

249. But Peru argues that Article 10.18.4 bars Freeport’s claims for breaches of the Stability Agreement under the so-called “fundamental basis” test, a vague standard that Peru describes, among others, as an inquiry into whether: SMCV’s administrative challenges and Freeport’s claims for breach of the Stability Agreement “rest on the same fundamental basis . . . and the exact same claimed legal rights;”¹¹⁹³ SMCV “challenged the same State measures . . . on the very same legal basis as is asserted here;”¹¹⁹⁴ SMCV’s administrative challenges “derived from the same factual bases” as Freeport’s claims for breach of the Stability Agreement;¹¹⁹⁵ and 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.”¹¹⁹⁶ None of these iterations of the “fundamental basis” test find any support in the text of Article 10.18.4. Peru argues in the alternative that, if the Tribunal rejects the “fundamental basis” test, it

¹¹⁹¹ See **Ex. CA-10**, TPA, Article 19.5.1 (“Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Agreement. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.”).

¹¹⁹² Counter-Memorial ¶ 505 (emphasis added); **Ex. CA-10**, TPA, Article 10.18.4.

¹¹⁹³ Counter-Memorial ¶ 505.

¹¹⁹⁴ Counter-Memorial ¶ 496. See also *id.* ¶ 514 (“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.”).

¹¹⁹⁵ Counter-Memorial ¶ 516.

¹¹⁹⁶ Counter-Memorial ¶ 516.

should apply the triple-identity test, which Peru maintains is met here.¹¹⁹⁷ Peru’s attempt to rewrite Article 10.18.4 fails.

250. *First*, Peru’s “fundamental basis” test finds no support in the express terms of Article 10.18.4, which unequivocally bars claims only if the claimant or the enterprise has previously submitted a “claim” for “the same alleged breach.”¹¹⁹⁸ Article 10.18.4 does not refer to the “same fundamental basis.” Peru also argues that “the language of Article 10.18.4(a) focuses on the subject matter of the dispute”¹¹⁹⁹ but it does not. The terms “dispute” and “subject matter” appear nowhere in the text of Article 10.18.4(a).¹²⁰⁰ The triple-identity test is equally unsupported by the text of Article 10.18.1 and, in any event, is not met here for the reasons set forth above in Section II.B.1—SMCV did not seek a decision holding Peru liable for breaches of the Stability Agreement and ordering payment of corresponding damages (*petitum*) or make claims arising from Peru’s breaches of the Stability Agreement governed by Peruvian civil law (*causa petendi*).¹²⁰¹

251. The narrow application of Article 10.18.4 to the previous submission of a “claim” for the “same alleged breach” can be contrasted with the more broadly worded waiver requirement in Article 10.18.2, which requires a claimant to waive the right to continue “any proceeding *with respect to any measure* alleged to constitute a breach” of an investment agreement.¹²⁰² If Article 10.18.4 applied more broadly to any proceeding “with respect to any measure[s]” that Freeport alleges to constitute breaches of the Stability Agreement, it would use the broader language in Article 10.18.2.¹²⁰³ Moreover, if Article 10.18.4 applied to claims “with respect to any measure alleged to constitute a breach, as Peru effectively argues, the waiver requirement under Article 10.18.2 would be rendered entirely meaningless—all claims “with respect to any measure alleged to constitute a breach” that the investor had previously submitted would be excluded from arbitration and there would be no need to waive the right to continue proceedings for those claims before submitting them to arbitration. Instead, the TPA is clear that only those claims submitted that allege the *same breach* cannot be submitted to arbitration, whereas other claims “with

¹¹⁹⁷ Counter-Memorial ¶ 507.

¹¹⁹⁸ **Ex. CA-10**, TPA, Article 10.18.4.

¹¹⁹⁹ Counter-Memorial ¶ 511. *See also id.* ¶ 516 (“[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.”).

¹²⁰⁰ **Ex. CA-10**, TPA, Article 10.18.4(a).

¹²⁰¹ **CER-7**, Bullard II, ¶¶ 63-66.

¹²⁰² **CA-10**, TPA, Article 10.18.2 (emphasis added).

¹²⁰³ **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 214 (“As noted above, the CEPA does not extend the definition of an ‘investment dispute’ to all disputes arising out of similar facts, or involving measures motivated by the same policy concerns, as those alleged to violate the substantive obligations of the CEPA.”).

respect to any measure alleged to constitute a breach” can be submitted to arbitration provided that the claimant withdraws the claims from other fora before initiating the international arbitration. Here, the Parties agree that SMCV did not previously submit any “alleged breach[es]” of the Stability Agreement for binding dispute resolution. SMCV’s claims therefore are not barred under Article 10.18.4.

252. *Second*, Peru’s interpretation of Article 10.18.4 is also inconsistent with the intent of the TPA parties. As Mr. Sampliner testifies, Article 10.18.4 was “an intentionally narrowly drawn exception to the general rule of broad access to dispute settlement for alleged breaches of investment agreements.”¹²⁰⁴ The U.S. delegation rejected the Andean proposal for an exclusive forum selection clause on the grounds that it “could be interpreted to apply to claims in domestic fora that did not allege an identical breach to the breach that an investor submitted for international arbitration.”¹²⁰⁵ Ultimately, the U.S. and Peruvian delegation reached a compromise based on the clear understanding that Article 10.18.4 of the TPA would apply only to the previous submission of “the ‘same alleged breach.’”¹²⁰⁶

253. *Finally*, investment tribunals have consistently rejected arguments attempting to expand fork-in-the-road provisions beyond their express terms to import a “fundamental basis,” “triple identity,” or “same dispute” standard.

¹²⁰⁴ **CER-11**, Sampliner, ¶ 28; *See also id.* (“Providing broad access to dispute settlement for breaches of investment agreements was a key element of the U.S. IIA program.”); **CA-375**, U.S. Model BIT (2004) (containing no fork-in-the-road provisions); **CWS-12**, Herrera ¶ 26 (“Throughout the negotiations, the U.S. team sought broad access to the Investment Chapter’s dispute settlement mechanism including for breach of investment agreement claims.”) (citing **Ex. CE-1061**, MINCETUR, Round II Summary (Atlanta, 14 to 18 June 2004), p. 25 (“The US wishes the investor to have the option of accessing the chapter’s dispute resolution mechanism, even in the event that an internal lawsuit has been heard in local courts.”); **Ex. CE-1077**, MINCETUR, Round X Summary (Guayaquil, 6-10 June 2005), p. 22 (noting that the U.S. considered claims for breach of an investment agreement a “sensitive issue” because of “situations that affect various US companies in [Peru]”); **Ex. CE-1075**, Email from David Weiner to Carlos Herrera *et. al.* (9 November 2005) (“We cannot agree to include in the FTA language that seeks to limit the scope of the entities with which an investor may conclude an investment agreement to those ‘national authorities’ that have jurisdiction over all of a party’s territory.”)).

¹²⁰⁵ **CER-11**, Sampliner, ¶¶ 34-35; **CA-10**, TPA, Article 10.18.2. *See also CWS-12*, Herrera ¶ 28 (“However, the U.S. team maintained that the phrase ‘a claim of a breach of the disciplines contained under Section A’ in the Andean proposal was different from the language they had agreed in the CAFTA-DR and resisted the proposal on the grounds that it could result in materially different outcomes.”).

¹²⁰⁶ **CER-11**, Sampliner, ¶ 35 (“By ‘same alleged breach,’ we meant exactly that—an identical claim for breach of an investment agreement I do not recall the Peruvian delegation expressing a contrary interpretation of the U.S. proposal.”); **CWS-12**, Herrera ¶ 28 (“The U.S. team explained that similar claims would not be covered by Article 10.18.4 but only claims for breaches identical to those alleged in dispute settlement under the Investment Chapter Thus, the U.S. and Peruvian delegations agreed to the fork-in-the-road provisions in Article 10.18.4 and Annex 10-G in the TPA with the clear understanding that they applied only to previous proceedings involving the ‘same alleged breaches’ of the substantive obligations in Section A of the TPA or of an investment agreement that an investor sought to submit for international arbitration.”).

- (a) The tribunal in *Corona v. Dominican Republic*, acknowledged that “a claim . . . in a Dominican court, for asserted violations of Dominican law” would not trigger the fork-in-the-road in the DR-CAFTA, which is identical to Annex 10-G of the TPA, explaining:

[t]he Claimant would have fallen afoul of this provision if [the claimant or its enterprise] had submitted a claim in the local courts for the “same alleged breach” (*i.e.*, a breach of Section A of Chapter 10 of DR-CAFTA) as in the present proceeding. If [the claimant or its enterprise] had submitted an administrative contentious proceeding which did not invoke DR-CAFTA’s Chapter 10, it would not have run afoul of Article 10.18.4.¹²⁰⁷

- (b) In *Nissan*, the respondent argued that claims for breaches of the Comprehensive Economic Partnership Agreement (“CEPA”) were barred because the claimant’s subsidiary had filed local court proceedings alleging breaches of domestic law.¹²⁰⁸ The tribunal rejected the argument because the fork-in-the-road provision in the CEPA applied to previous “proceedings for the resolution of the ‘investment dispute’” and the CEPA did not define “investment dispute . . . in terms of the legal basis of the claim,” but rather as “an alleged breach of any obligation under” the CEPA.¹²⁰⁹ The tribunal explained,

there is no need for the Tribunal to take any position in the doctrinal debate as to whether a “triple identity” test or “fundamental basis” test might be appropriate *in the absence* of expressly defined treaty terms, to achieve what a tribunal otherwise might intuit to have been the “object and purpose” of the Contracting Parties in including a fork-in-the-road clause (*e.g.*, minimizing parallel proceedings or avoiding possibly inconsistent results). The use of specific defined terms leaves no textual ambiguity for the Tribunal to resolve in this fashion.¹²¹⁰

¹²⁰⁷ **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, (31 May 2016) (Dupuy, Thomas, Mantilla-Serrano) (“*Corona v. Dominican Republic Award*”), ¶¶ 267-69 (concluding that fork-in-the road for alleged breaches of the treaty was “clearly intended to deal with the situation in certain civil law countries where international treaties have direct effect and thus an alleged breach of an international treaty can form a cause of action under the domestic law of such States”) (emphasis omitted).

¹²⁰⁸ **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶¶ 172-73.

¹²⁰⁹ **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶¶ 61, 172, 211.

¹²¹⁰ **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 215 (emphasis in original).

Similarly, Article 10.28 of the TPA defines “investment agreement” and Article 10.18.4 is limited to breaches of an investment agreement.¹²¹¹ Thus, there is “no textual ambiguity for the Tribunal to resolve.”¹²¹²

- (c) In *Kappes v. Guatemala*, the tribunal interpreted Annex 10-E of the CAFTA-DR, which is identical to Annex 10-G of the TPA and, therefore, mirrors the framework established in Article 10.18.4 and Annex 10-G of the TPA. The tribunal concluded that “Annex 10-E by its plain terms attaches only where the local court action already has ‘alleged *that breach of an obligation under Section A,*’ i.e., the same alleged Treaty breach as the U.S. investor seeks to assert under DR-CAFTA.”¹²¹³

254. The only three cases that Peru cites in support of the “fundamental basis” test, *Pantechniki v. Albania*, *H&H v. Egypt*, and *Supervision y Control S.A. v. Costa Rica*, are plainly distinguishable because the tribunals in those cases interpreted treaty language that referred to a “dispute” not a “claim” for the “same alleged breach” as Article 10.18.4 does.¹²¹⁴ The decision of the tribunal in *Supervision y Control S.A.* is further distinguishable because it also based its ruling on the conclusion that the two claims were for the “the same cause of action.”¹²¹⁵ Moreover, Peru is simply wrong when it suggests that tribunals have “increasingly” applied the “fundamental basis” test since it emerged in *Pantechniki*.¹²¹⁶ The great majority of tribunals to consider its application have expressly rejected it.¹²¹⁷

¹²¹¹ See **CA-10**, TPA, Article 10.28, Article 10.18.4.

¹²¹² **CA-243**, *Nissan v. India* Decision on Jurisdiction, ¶ 215.

¹²¹³ **CA-20**, *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections (13 March 2020) (Kalicki, Townsend, Douglas (dissenting in part on other grounds)), ¶ 142 (emphasis in original).

¹²¹⁴ Compare **Ex. CA-10**, TPA Article 10.18.4, with **RA-13**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award (6 May 2014) (Gharavi, Heiskanen, Cremades), ¶ 362 (interpreting Article VII(3)(a) of the US-Egypt BIT which states that an investor may submit a dispute for international arbitration if it “has not brought *the dispute* before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a Party to the dispute”) (emphasis added); **RA-12**, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson) (“*Pantechniki* Award”), ¶ 53 (interpreting Article 10(2) of the Albania-Greece BIT which provides that an investor “may submit *the dispute* either to the competent court of the Contracting Party, or to an international arbitration tribunal”) (emphasis added); **CA-228**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (18 January 2017) (Romero, Klock, Wobeser) (“*Supervision y Control SA* Award”), ¶ 135 (interpreting Article XI.3 of the Spain-Costa Rica BIT which states, “[i]f the investor has submitted *the dispute* to a competent court of the Party in whose territory the investment was made, it may, in addition, resort to the arbitral tribunals referred to in this article, if such national court has not issued a judgment. In the latter case, the investor shall adopt any measures that are required for the purpose of permanently desisting from the court case then underway”) (emphasis added).

¹²¹⁵ **CA-228**, *Supervision y Control SA* Award, ¶¶ 311, 316.

¹²¹⁶ Counter-Memorial ¶ 506. See also **CA-228**, *Supervision y Control SA* Award, ¶ 308 (stating that the fundamental basis test has been “used in various cases” but citing only **RA-12**, *Pantechniki* Award).

For example, the tribunal in *Khan Resources v. Mongolia* expressly rejected the respondent’s argument that the “fundamental basis” test applied to the interpretation of the fork-in-the-road provision in the ECT explaining that

the test for the application of fork in the road provisions should not be too easy to satisfy, as this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal.¹²¹⁸

2. SMCV Did Not Submit Claims to an Administrative Tribunal or to Binding Dispute Resolution Procedures

255. Peru’s objection also fails on the independent grounds that neither proceedings before SUNAT’s Claims Division nor the Tax Tribunal qualify as proceedings before “an administrative tribunal” or “binding dispute settlement procedures” under Article 10.18.4(a) of the TPA. Peru argues that SUNAT’s Claims Division and the Tax Tribunal qualify as “administrative tribunals” under Article 10.18.4(a) because they are “administrative dispute settlement proceedings that resolve disputes over

¹²¹⁷ See, e.g., **CA-397**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction (25 July 2012) (Fortier, Hanotiau, Williams) (“*Khan Resources v. Mongolia* Decision on Jurisdiction”), ¶ 390 (rejecting fundamental basis test); **CA-406**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014), ¶¶ 338-62 (same); **CA-108**, *Occidental Award*, ¶¶ 43-63 (same); **CA-393**, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009) (Schwebel, Poncet, Fortier), ¶¶ 598-600 (same); **CA-374**, *Azurix Corp v. The Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) (Martins, Lalonde, Sureda), ¶¶ 86-92 (same).

¹²¹⁸ **CA-397**, *Khan Resources v. Mongolia* Decision on Jurisdiction, ¶ 391. See also **CA-400**, Hanno Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, p. 95 § 3.143 (OUP 2013) (“There is, however, another argument in favour of a narrow understanding of the ‘cause of action’ requirement—namely the possibility that signatories to an IIA may have wanted to allow investors first to resort to a local or contractual forum with regard to non-treaty claims before exercising their option under a treaty’s dispute resolution clause. If fork in the road provisions were applied too generously, this might force an investor—contrary to the intention of a treaty’s signatories—to play what is often [his] best litigation card too early.”). Cf. **CA-377**, Christoph Schreuer, *Travelling the BIT route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 240 (2004) (“[A] decision in favour of domestic courts cannot lightly be presumed.”); **CA-381**, *Pan American Energy LLC et al. v. Argentina*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections (27 July 2006) (van den Berg, Stern, Caflisch), ¶¶ 154-57 (“[T]ribunals do not assume lightly that choices of forum have been made by claimant parties in favour of the host State’s judicial system. They are undoubtedly right. If the contrary were true, there would be little use in setting up international arbitral procedures for investment disputes.”).

royalty and tax assessments.”¹²¹⁹ Additionally, Peru argues that proceedings before SUNAT’s Claims division and the Tax Tribunal constitute “binding dispute resolution procedures” under Article 10.18.4(a) of the TPA because they result in binding administrative decisions.¹²²⁰ Peru’s arguments are meritless.

i. SUNAT’s Claims Division and the Tax Tribunal Do Not Provide the Binding Dispute Settlement Procedures Article 10.18.4(a) Contemplates

256. Peru argues that proceedings before SUNAT’s Claims Division and the Tax Tribunal constitute “binding dispute resolution procedures” under Article 10.18.4 of the TPA because they are part of “administrative dispute settlement proceedings” and “decisions rendered during each phase of these proceedings are binding on the challenging party, in this case, SMCV.”¹²²¹ Peru is wrong. Under Article 10.18.4, a claim is barred only if a claim for the same alleged breach of the investment agreement or investment authorization was submitted to an adjudicative body competent to resolve contract claims for breach of an investment agreement—a qualification that neither SUNAT’s Claims Division nor the Tax Tribunal meet.¹²²²

257. The application of Article 10.18.4 solely to adjudicative bodies competent to resolve claims for breach of an investment agreement is clear when the term “other binding dispute settlement procedures” is read in the context of Article 10.18.4 as a whole. Article 10.18.4 presents investors a choice between dispute settlement under Chapter 10 of the TPA and alternative adjudicative fora. The alternatives would be asymmetrical if the contemplated adjudicative bodies were incompetent to resolve contract claims for breach of an investment agreement. As Mr. Herrera and Mr. Sampliner confirm, the term “other binding dispute resolution procedures” was only intended to encompass proceedings before bodies competent to resolve claims for breach of an investment agreement.¹²²³ Under Article 62 of the

¹²¹⁹ Counter-Memorial ¶ 500. *See also id.* ¶ 501 (“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.”); *id.* ¶ 503 (“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.”).

¹²²⁰ Counter-Memorial ¶¶ 500-503.

¹²²¹ Counter-Memorial ¶ 500.

¹²²² *See, e.g., CA-424, Jin Hae Seo v. Republic of Korea*, HKIAC Case No. HKIAC/18117, Concurring Opinion of Benny Lo (24 September 2019), ¶ 14 (interpreting Treaty claim fork-in-the-road provision in US-Korea FTA identical to Annex 10-G of the TPA and concluding that “in order for Annex 11-E to be triggered, the allegation of breach must be made in a court or administrative tribunal of Korea that is competent to adjudicate upon that allegation and grant relief for it”).

¹²²³ **CER-11**, Sampliner, ¶ 35 (“Accordingly, the U.S. delegation intended the references to ‘administrative tribunal[s],’ ‘court[s] of the respondent,’ and ‘other binding dispute settlement procedure[s],’ to refer only to adjudicative bodies competent to resolve contractual claims for breach of an investment agreement.”);

Peruvian Constitution, contract claims “can only be resolved by arbitration or through a judicial proceeding.”¹²²⁴ “[O]ther binding dispute resolution procedures” therefore contemplates arbitration proceedings, for example, pursuant to an arbitration clause in an investment agreement.¹²²⁵

ii. SUNAT’s Claims Division and the Tax Tribunal are Not Administrative Tribunals

258. Peru bases its argument that SUNAT’s Claims Division and the Tax Tribunal qualify as “administrative tribunals” on a Cambridge English Dictionary definition.¹²²⁶ Even if a dictionary definition from a common law jurisdiction with an entirely different legal system from Peru’s were instructive on this point, it could not override the specific qualifications for what constitutes an administrative tribunal under Article 19.5.1 of the TPA, which Peru ignores entirely. Article 19.5.1 states that:

Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of *final administrative actions* regarding matters covered by this Agreement. Such tribunals shall be impartial and *independent of the office or authority entrusted with administrative enforcement* and shall not have any substantial interest in the outcome of the matter.¹²²⁷

Thus, under the TPA, an “administrative tribunal:” (i) must have the ability to review final administration actions; (ii) must be impartial; (iii) must be independent from the authority that enforces administrative

CWS-12, Herrera ¶ 29 (“Consistent with our understanding that Article 10.18.4 applied only to claims alleging the exact same breach of an investment agreement or investment authorization that an investor submitted for arbitration, the Peruvian delegation understood that the terms ‘administrative tribunal’ and ‘binding dispute settlement procedure’ referred to adjudicative bodies competent to resolve claims for breach of an investment agreement or investment authorization.”).

¹²²⁴ **CA-53**, Political Constitution of Peru (1993), Article 62.

¹²²⁵ **CWS-12**, Herrera ¶ 31 (“[T]he Peruvian delegation understood that other ‘binding dispute settlement procedure’ primarily contemplated contract-based arbitration. Investment agreements often contained arbitration clauses. Thus, a provision that would cover claims previously submitted to contract-based arbitration was consistent with the position of the Andean States that ‘the dispute resolution mechanism set forth in each specific investment agreement should prevail’ because it is “based on the negotiation framework of each agreement . . . , the equilibrium of which cannot be altered by the entry into force of the FTA.”) (citing **Ex. CE-1073**, MINCETUR, Round VIII Summary (Washington, 14-18 March 2005), p. 14 (noting the Andean states’ agreement that “the dispute resolution mechanism set forth in each specific investment agreement should prevail; this position is based on the negotiation framework of each agreement (concluded under the protection of internal regulations of each State), the equilibrium of which cannot be altered by the entry into force of the FTA.”).

¹²²⁶ Counter-Memorial ¶ 501 (citing **RE-167**, “Administrative Tribunal,” *Cambridge English Dictionary*).

¹²²⁷ **CA-10**, TPA, Article 19.5.1 (emphasis added). *See also id.* Article 10.2.1 (“In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.”).

decision; and (iv) must not have a substantial interest in the outcome of the administrative action. Neither SUNAT’s Claims Division nor the Tax Tribunal meet this definition, as they do not have the ability to review final administrative action or independence from the MEF—the authority entrusted with administrative enforcement of royalty and tax decisions.

259. *First*, SUNAT’s Claims Division and the Tax Tribunal do not have the ability to review final administrative decisions. This alone is fatal to Peru’s argument. In royalty and tax matters, SUNAT’s Claims Division is the second-instance administrative decision-maker and the Tax Tribunal is the final-instance administrative decision-maker.¹²²⁸ There is no merit to Peru’s argument that record evidence and “Claimant’s own words confirm its understanding that the Tax Tribunal is an administrative tribunal.”¹²²⁹ All of the evidence that Peru identifies merely confirms that the Tax Tribunal is the final-instance administrative decision-maker and, therefore, incapable of “review and, where warranted, correction of *final administrative actions*,” as required under Article 19.5.1 of the TPA.¹²³⁰ Freeport’s description in the Memorial of the Tax Tribunal as an organ of “Peru’s Ministry of Economy and Finance (‘MEF’) that serves as the final administrative appeal for royalty and tax matters” is entirely consistent with that conclusion.¹²³¹

260. Article 148 of the Peruvian Constitution and Article 157 of the Tax Code entrust review of final royalty and tax decisions to the contentious-administrative courts, which, unlike SUNAT and the Tax Tribunal, are part of the Peruvian judiciary.¹²³² This demonstrates that it is the contentious-

¹²²⁸ See **CA-14**, Tax Code, Article 135 (authorizing SUNAT to consider requests for reconsideration); *id.* Article 101 (authorizing the Tax Tribunal to “[h]ear and rule *in the last resort administratively* on appeals against Tax Administration Resolutions”) (emphasis added); *id.* at art. 157 (“The resolution of the Tax Tribunal exhausts the administrative channel.”); **CA-08**, Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (25 January 2007), Article 5 (stating that the Tax Tribunal decides appeals in the “last administrative instance”); **CA-366**, Organic Law of the MEF, Legislative Decree No. 183 (12 June 1981), Article 38. (stating that “[t]he Tax Tribunal *decides at the final administrative level* claims regarding tax assessment or collection”); **RE-6**, Integrated Text of the Regulation for the Organization and Functions of the Ministry of Economy and Finance (23 July 2020), Article 16, Regulations on the Organization and Functions of the Ministry of Economy and Finance (“The Tax Tribunal is the decision-making body of the Ministry that constitutes the last administrative instance in tax and customs matters, at the national level.”).

¹²²⁹ Counter-Memorial ¶¶ 501-502.

¹²³⁰ **CA-10**, TPA, Article 19.5.1 (emphasis added).

¹²³¹ Counter-Memorial ¶ 502 (citing Memorial ¶ 15).

¹²³² **CA-53**, Political Constitution of Peru (1993), Article 148 (“Administrative resolutions that would definitively end a case may be appealed through a contentious administrative action.”); **CA-239**, Law of the Contentious Administrative Procedure, approved by Law No. 27584 and whose Single Unified Text was approved by Supreme Decree No. 011-2019-JUS (4 May 2019), Article 1 (“The contentious administrative action envisaged in Article 148 of the Political Constitution is intended to ensure legal control by the Judiciary of the actions of public administration that are subject to administrative law, as well as effective safeguarding of the rights and interests of those parties [*administrados*]”); **CA-14**, Tax Code, Article 157 (“The resolution of the Tax Tribunal exhausts the administrative channel. Said resolution may be challenged through the Contentious-

administrative courts, not SUNAT’s Claims Division and the Tax Tribunal, that qualify as “administrative tribunals” under Article 10.18.4.¹²³³

261. *Second*, SUNAT’s Claims Division and the Tax Tribunal are not “independent of the office or authority entrusted with administrative enforcement.”¹²³⁴ To the contrary, it is undisputed that SUNAT’s Claims Division and the Tax Tribunal are part of the “authority entrusted with administrative enforcement” of royalty and tax decisions—the MEF.¹²³⁵ SUNAT is not only part of the MEF and “subject to the technical guidelines” of the MEF, it is the division of the MEF entrusted with administrative enforcement of royalty and tax decisions.¹²³⁶ Moreover, as Peru and President Olanos-Silva observe, the Tax Tribunal is “an administrative agency of the MEF.”¹²³⁷ Additionally:

- (a) SUNAT and the Tax Tribunal cooperate closely with the other organs of the MEF on a range of matters related to royalty and tax enforcement, including legislative proposals and information sharing.¹²³⁸

Administrative Procedure, which will be governed by the rules contained in this Code and, supplementally, by Law No. 27584, Law Regulating the Contentious-Administrative Procedure.”).

¹²³³ **CWS-12**, Herrera ¶ 30 (“In this context, I understood that an election under Article 10.18.4 would typically be made by submitting breaches of an investment agreement to the civil courts, the part of the judiciary that resolves breach of contract claims governed by civil law. However, I believed that the contentious-administrative courts, the part of the judiciary that reviews final administrative decisions in Peru also fit the description of ‘administrative tribunals’ in Article 19.5.1 of the TPA, which provides that they ‘shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.’”).

¹²³⁴ **CA-10**, TPA, Article 19.5.1.

¹²³⁵ **CA-10**, TPA, Article 19.5.1. *See* **RE-6**, Integrated Text of the Regulation for the Organization and Functions of the Ministry of Economy and Finance (23 July 2020), Article 16; **CA-08**, Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (25 January 2007), Article 5; **CA-250**, MEF Internal Regulations, Ministerial Resolution 213-2020/EF/41 (24 July 2020), Article 16.

¹²³⁶ **CA-145**, Organic Law of the Executive Branch, Law No. 29158 (18 December 2007), Article 33; **CA-14**, Tax Code, Article 59 (“The Tax Administration verifies the accomplishment of the taxable event, identifies the tax debtor, indicates the tax base and the amount of the tax.”). *See also* **CA-14**, Tax Code, Article 50 (establishing the jurisdiction of SUNAT over administration of internal taxes and customs duties); *id.* Articles 55-82 (provisions governing SUNAT powers and procedure).

¹²³⁷ **RWS-5**, Olanos Silva, ¶ 6. *See also* **RE-6**, Integrated Text of the Regulation for the Organization and Functions of the Ministry of Economy and Finance (23 July 2020), Article 16, (“The Tax Tribunal is a decision-making body of the Ministry.”); **CA-14**, Tax Code, Article 53 (listing SUNAT and Tax Tribunal as administrative organs of the tax administration); Counter-Memorial ¶ 501 (“The Tax Tribunal is a statutorily empowered decision-making body within the MEF.”).

¹²³⁸ *See* **CA-14**, Tax Code, Article 101(7) (“The powers of the Tax Tribunal are Propose to the Minister of the Economy and Finance any regulations it deems necessary to cover deficiencies in the legislation on tax and customs legislation.”); **CA-08**, Law No. 28969, Law that Authorizes SUNAT to Implement Provisions that Facilitate the Administration of Royalties (25 January 2007), Article 5.3 (authorizing the Tax Tribunal to “propose to the Minister of Economy and Finance any regulations it deems necessary to cover deficiencies in the legislation on mining royalties”); **CE-607**, Interview with President Olanos: The Tax Tribunal Must Be

- (b) As explained in the Memorial, the majority of the *vocales* are former employees of SUNAT;¹²³⁹ the MEF is part of the Commission that appoints *vocales*;¹²⁴⁰ the President of Peru must renew the *vocales* terms every three years, taking into account the recommendation of the Commission, and has broad discretion in deciding whether to do so;¹²⁴¹ the Commission’s renewal recommendation is based on performance factors, which must be approved by the MEF;¹²⁴² and the President of Peru and the MEF have discretion to dismiss any *vocal* for “negligence, incompetence or immorality.”¹²⁴³

Perceived as an Entity with Transparent Procedures and Decisions, 278 Tax Analysis Review 7 (March 2011), ¶ 5 (“Also, in coordination with the Ministry of the Economy and Finance, legislative proposals are being reviewed and promoted in order to allow greater efficiency in the TF’s work and expedite the reduction of the case backlog with a view to resolving disputes in a timely manner.”); *id.* ¶ 11 (“[W]e have inter-institutional collaboration agreements signed with SUNAT and SAT and, within the framework of said agreements, the development of computer applications to enable the TF and the Tax Administrations to access shared information online is being pursued.”); **CE-634**, *Balance and Perspectives of the Tax Court’s Actions*, Interview with Zoraida Olano Silva, Presiding Judge of the Tax Court, *Revista Análisis Tributario* No. 289 (2012), ¶ 16 (quoting the Tax Tribunal as stating “we are currently coordinating with the MEF the legislative proposals raised by the TF and that it has seen fit to revisit them for processing, which if approved will complement and improve the results achieved as a result of the new Chambers and their specialization.”).

¹²³⁹ **CWS-6**, Estrada I, ¶ 18 (“It had always been normal to encounter *vocales* who had previously worked at SUNAT, but after the new appointments, former SUNAT employees became the clear majority of the *vocales* and the trend continued in the following years. Currently, as shown in Appendix B, 22 of the 33 *vocales*—that is, over 65%—previously worked at SUNAT.”); *id.* Appendix B.

¹²⁴⁰ **CER-3**, Hernández I, ¶ 180 (“The *vocales* are appointed and ratified through a multi-step process overseen by the President of the Republic, the MEF, and a commission created for this purpose. The commission is made up of (i) a representative of the MEF, who chairs the commission and has the tie-breaking vote; (ii) the President of the Tax Tribunal; (iii) the dean of the law school of the oldest public university; and (iv) the dean of the law school of the oldest private university (the “Commission”).”) (citing **CA-14**, Tax Code, Article 99; **CA-232**, Supreme Decree that approves the criteria for the appointment and ratification of the *vocales* of the Specialized Chambers of the Tax Tribunal as well as for the appointment of resolvers, complaint-handling secretaries and reporting secretaries of said tribunal, Supreme Decree No. 180-2017-EF (21 June 2017), Article 4).

¹²⁴¹ **CER-3**, Hernández I, ¶ 180 (“The *vocales* serve three-year terms, which can be extended an unlimited number of times by the President of the Republic, taking into account the recommendation of the Commission, as reviewed by the MEF.”) (citing **CA-14**, Tax Code, Article 99; **CA-232**, Supreme Decree that approves the criteria for the appointment and ratification of the *vocales* of the Specialized Chambers of the Tax Tribunal as well as for the appointment of resolvers, complaint-handling secretaries and reporting secretaries of said tribunal, Supreme Decree No. 180-2017-EF (21 June 2017), Articles 26, 27).

¹²⁴² **CER-3**, Hernández I, ¶ 180 (“To have their term extended, the Commission must favorably evaluate the performance of the *vocales*,” under evaluation criteria approved by the MEF) (citing **CA-232**, Supreme Decree that approves the criteria for the appointment and ratification of the *vocales* of the Specialized Chambers of the Tax Tribunal as well as for the appointment of resolvers, complaint-handling secretaries and reporting secretaries of said tribunal, Supreme Decree No. 180-2017-EF (21 June 2017), Article 16.5).

¹²⁴³ **CER-3**, Hernández I, ¶ 181 (citing **CA-14**, Tax Code, Supreme Decree No. 133-2013-EF (June 22, 2013), Article 99; **CA-232**, Supreme Decree that approves the criteria for the appointment and ratification of the *vocales* of the Specialized Chambers of the Tax Tribunal as well as for the appointment of resolvers, complaint-handling secretaries and reporting secretaries of said tribunal, Supreme Decree No. 180-2017-EF (21 June 2017), Article 3).

- (c) As explained in the Memorial, the Tax Tribunal is not financially independent from the MEF. The Tax Tribunal’s budget is capped at a percentage of SUNAT’s collections meaning that the greater SUNAT’s collections, the greater the budget available to grant raises and bonuses to Tax Tribunal *vocales*.¹²⁴⁴

262. For the above reasons, Freeport’s claims for breaches of the Stability Agreement have been properly submitted to arbitration. Article 10.18.4 of the TPA does not bar Freeport’s claims because SMCV did not previously submit claims for breaches of the Stability Agreement to an administrative tribunal or to binding dispute resolution procedures.

C. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS* BECAUSE FREEPORT’S CLAIMS DO NOT REQUIRE RETROACTIVE APPLICATION OF THE TREATY.

263. Peru argues that “almost all” of Freeport’s claims are barred by the general rule against the retroactive application of treaties, reflected in Article 28 of the VCLT and Article 10.1.3 of the TPA.¹²⁴⁵ Article 28 of the VCLT provides that:

Unless 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 or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹²⁴⁶

Article 10.1.3 of the TPA reiterates the non-retroactivity rule, stating that “[f]or 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.”¹²⁴⁷

¹²⁴⁴ **CA-43**, General Law on the National Superintendence of Tax Administration, Legislative Decree No. 501 (29 November 1988), Article 12(a) (“The following are the resources the National Superintendence of Tax Administration has at its disposal: a. Two percent (2%) of all taxes collected by the Public Treasury that, by definition, constitute its own income.”); **CA-52**, Organic Law on the National Superintendence of Customs, Decree Law No. 26020 (19 December 1992), Article 14(a) (“The National Superintendency of Customs will finance its budget with the product of the following revenues: a. Three percent (3%) of the total tax revenues collected by CUSTOMS for the Public Treasury, which will be considered as self-generated revenues.”). *See also* **CWS-6**, Estrada I, ¶ 20 (“[T]he more SUNAT collected, the greater the budget available for bonuses.”); **CWS-17**, Estrada II ¶ 18 (same).

¹²⁴⁵ Counter-Memorial ¶ 469. *See also id.* at ¶¶ 470, 472 (“The TPA itself confirms the applicability of this rule.”).

¹²⁴⁶ **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 28 (“Unless 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 or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”).

¹²⁴⁷ **CA-10**, TPA, Article 10.1.3.

264. According to Peru, the non-retroactivity rule applies because the “*sine qua non*” of the Assessments—“the Peruvian government’s interpretation of the Mining Law and Regulations and the scope of the 1998 Stabilization Agreement,” “expressed *inter alia* in the June 2006 Report,”—“clearly pre-dates the TPA’s entry into force.”¹²⁴⁸ Peru’s argument is wrong in law and in fact. Freeport does not allege that the June 2006 Report or any of the other acts or facts pre-dating 1 February 2009 that Peru references constituted breaches of the Stability Agreement or Article 10.5 of the TPA.¹²⁴⁹ The acts and facts that Freeport alleges constituted breaches are the final and enforceable Assessments, arbitrary decisions refusing to waive penalties and interest, due process violations in the Tax Tribunal proceedings, and arbitrary decision denying SMCV’s GEM reimbursement request, which all undisputedly post-date 1 February 2009. Therefore, Freeport does not seek to “bind” Peru in relation to any act or fact which took place prior to the TPA’s entry into force.

265. First, Peru’s references to the “*sine qua non* . . . of State acts”¹²⁵⁰ thoroughly confuses the applicable legal principles. Jurisdiction under the TPA is not determined by that standard. The TPA provides, as relevant here, that “*claims* that the respondent has breached . . . an obligation under Section A . . . or . . . an investment agreement” may be submitted to arbitration and that the TPA “applies to *measures* adopted or maintained by a Party relating to” a protected investor and investment.¹²⁵¹ Under the non-retroactivity rule, there can be no breach of an obligation under Section A or arbitrable breach of an investment agreement until the TPA entered into force. Hence, the relevant analysis is whether any of the “measures,” as defined in the TPA, that Freeport alleges breached the Stability Agreement or Article 10.5 are an “act or fact that took place or [a] situation that ceased to exist before the date of entry into

¹²⁴⁸ Counter-Memorial ¶¶ 474, 479, 482, 487. See also Counter-Memorial ¶ 472 (“[T]he 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.”); *id.* ¶ 479 (arguing that the Stability Agreement claims are “‘deeply and inseparably rooted’ in SUNAT’s and MINEM’s interpretation of the Agreement and the underling laws and regulations”); *id.* ¶ 482 (arguing that the Royalty and Tax Assessment claims are “‘deeply and inseparably rooted’ in Peru’s interpretation of the 1998 Stabilization Agreement, which . . . was definitively stated no later than in MINEM’s June 2006 report”); *id.* ¶ 483 (“Almost all of Claimant’s claims for breach of Article 10.5 of the TPA . . . are also ‘deeply and inseparably’ rooted in the same facts or acts that took place before the TPA entered into force.”); *id.* ¶¶ 489, 491 (arguing that claims arising out of Peru’s failure to waive penalties and interest on the Royalty and Tax assessments are “rooted in acts or facts” “that occurred before the TPA entered into force”); *id.* ¶ 492 (arguing that claims arising out of Peru’s failure to refund the GEM overpayments are “rooted in acts or facts that occurred before the TPA entered into force”).

¹²⁴⁹ See Counter-Memorial ¶ 481, Table 3.

¹²⁵⁰ Counter-Memorial ¶¶ 482, 487.

¹²⁵¹ CA-10, TPA, Articles 10.1.1, 10.16.1.

force.”¹²⁵² Tribunals addressing this question have repeatedly recognized that the non-retroactivity rule only applies if the measure alleged to constitute a breach pre-dates the treaty’s entry into force.¹²⁵³

266. *Second*, as a factual matter, Freeport does not claim that Peru breached the Stability Agreement or Article 10.5 of the TPA through “any act or fact that took place . . . before the date of entry into force of the Treaty.”¹²⁵⁴ Peru’s attempt to mischaracterize Freeport’s case is inconsistent with Peru’s concession that it is the Assessments that are at “the heart of Claimant’s claims.”¹²⁵⁵ Freeport does not allege that the *expressly non-binding* June 2006 Report or any of the other government reports and memoranda Peru identifies in Table 3 breached the Stability Agreement or Article 10.5 of the TPA.¹²⁵⁶ Under Article 10.16.1 of the TPA, Freeport could not even have submitted claims that those acts breached the Stability Agreement or the TPA because Freeport and SMCV did not “incur” loss or damage from them.¹²⁵⁷ Freeport alleges that: (i) each final and enforceable Assessment breached the Stability Agreement on the dates identified in Table A of the Memorial; (ii) each final and enforceable Royalty Assessment breached Article 10.5 of the TPA on the dates identified in Table A of the Memorial; (iii) the arbitrary failure of the Supreme Court to consider *de novo* SMCV’s entitlement to a waiver of penalties and interest on the 2008 Royalty Assessments and the arbitrary failure of the Appellate Court to consider *de novo* SMCV’s entitlement to a waiver of penalties and interest on the 2006-2007 Royalty Assessments breached Article 10.5 of the TPA on 21 July 2017 and 10 October 2017, respectively, when the courts

¹²⁵² **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 28; **CA-10**, TPA, Art. 10.1.3.

¹²⁵³ See **RA-2**, *Spence v. Costa Rica* Award, ¶ 240 (recognizing that the non-retroactivity rule does not bar “a post-entry into force act or fact addressed to the Claimants on which they can rely to found a cause of action” such as post-entry into force “orders or other regulatory measures imposing legal consequences on the Claimants”); **RA-6**, *Mondev* Award, ¶ 70 (“[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.”). See also **CER-11**, *Sampliner*, ¶ 39 (“[T]he intent of Article 2.3 of the Model BIT was to include within the temporal jurisdiction of an ISDS tribunal any government measure adopted after an IIA enters into force which is, by itself, sufficient to constitute a breach of an IIA or investment agreement, irrespective of whether the measure relates to acts or facts that predate the entry into force of the IIA.”).

¹²⁵⁴ **CA-49**, Vienna Convention on the Law of Treaties (23 May 1969), Article 28; **CA-10**, TPA, Article 10.1.3.

¹²⁵⁵ Counter-Memorial ¶ 474.

¹²⁵⁶ See **CE-534**, MINEM, Report No. 156- 2006-MEM/OGJ (16 June 2006) (“[N]ot[ing] that, in view of the nature of the query, this report has *only* the status of a *referential opinion* and lacks binding force for the bodies of competent jurisdiction [*solo el carácter referencial de una opinión y carece de fuerza vinculante para los órganos competentes*] that, such as SUNAT, enjoy the legal prerogative of collecting mining taxes and royalties”) (emphasis added); Counter-Memorial ¶ 481, Table 3.

¹²⁵⁷ **CA-10**, TPA, Article 10.16.1(a)(ii) (“[T]he claimant, on its own behalf, may submit to arbitration under this Section a claim . . . that the claimant has incurred loss or damage.”); *id.* Article 10.16.1(b)(ii) (“[T]he 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 . . . that the claimant has incurred loss or damage.”).

notified SMCV of their decisions;¹²⁵⁸ (iv) each of the remaining arbitrary failures to waive penalties and interest breached Article 10.5 of the TPA on the dates identified in Table B of the Memorial; and (v) Peru's arbitrary refusal to reimburse Q4 2011 to Q3 2012 GEM payments for activities related to the Concentrator breached Article 10.5 of the TPA on 22 March 2019 when SUNAT notified SMCV of its decision rejecting SMCV's reimbursement request. Each of these measures occurred long after 1 February 2009.

267. *Third*, Peru's interpretation of Article 10.1.3 is inconsistent with the intent of the TPA parties. The U.S. interagency group that developed the 2004 Model BIT and standard FTA investment chapter that the TPA was based on "did not intend Article 2.3 to preclude claims . . . solely because the challenged measures relate to acts or facts that occurred prior to the entry into force."¹²⁵⁹ In the TPA negotiations, the parties abandoned an early Andean proposal for a non-retroactivity provision expressly limiting Chapter 10 to "*disputes* over facts and acts that may arise after the entry into force of the Agreement" because the reference to disputes was "unacceptably broad."¹²⁶⁰ Instead, they adopted what became Article 10.1.3 with the understanding that it would not preclude "would not apply to bar claims simply because the challenged measures related to acts or facts that gave rise to a dispute before the TPA entered into force so long as the challenged measures themselves occurred after the entry into force."¹²⁶¹

268. *Fourth*, Peru's argument fails on its own terms and demonstrates that Peru's "*sine qua non* . . . of [] State acts" standard is unworkable.¹²⁶² The June 2006 Report is *expressly non-binding* so the interpretation that it contains cannot be the "*sine qua non*" of the Assessments.¹²⁶³ Peru's witness, Ms. Bedoya, a SUNAT auditor who was involved in preparing the 2006-2007 and 2008 Royalty Assessments, testifies that SUNAT's resolutions were based on an "independent legal analysis" and that

¹²⁵⁸ Memorial ¶¶ 230, 233, 427, Table B.

¹²⁵⁹ CER-11, Sampliner, ¶ 39.

¹²⁶⁰ CWS-12, Herrera, ¶ 33 (quoting Ex. CE-1062, US-Andean FTA Draft (19 July 2004), p. 2 (emphasis added)) (citing Ex. CE-1060, MINCETUR, Round I Summary (Cartagena, 18-19 May 2004), p. 26); CER-11, Sampliner, ¶ 40 (citing Ex. Ex. CE-1060, MINCETUR, Round I Summary (Cartagena, 18 to 19 May 2004), pp. 25-27; Ex. CE-1061, MINCETUR, Round II Summary (Atlanta, 14 to 18 June 2004), pp. 23-25). The TPA was first negotiated as a free trade agreement between the U.S. and the "Andean" states, Colombia, Peru, and Ecuador, who formed a bloc to negotiate jointly with the U.S. See CWS-12, Herrera, ¶ 15; CER-11, Sampliner, ¶¶ 17-18.

¹²⁶¹ CWS-12, Herrera ¶ 35. See also CER-11, Sampliner ¶ 39 ("We did not intend Article 2.3 to preclude claims challenging government measures adopted after entry into force of an IIA simply because those measures related to acts or facts that occurred prior to entry into force.").

¹²⁶² Counter-Memorial ¶¶ 482, 487.

¹²⁶³ CE-534, MINEM, Report No. 156- 2006-MEM/OGJ (16 June 2006) ("[N]ot[ing] that, in view of the nature of the query, this report has *only* the status of a *referential opinion* and lacks binding force for the bodies of competent jurisdiction that, such as SUNAT, enjoy the legal prerogative of collecting mining taxes and royalties.") (emphasis added).

SUNAT merely consulted the June 2006 Report.¹²⁶⁴ Peru cannot credibly claim that the June 2006 Report was the *sine qua non* of SUNAT’s assessments, much less the Tax Tribunal’s resolutions confirming them. In any event, the non-retroactivity rule would not apply under Peru’s incorrect standard even if the interpretation in the June 2006 Report was the “*sine qua non*” of the Assessments because, as the later-issued Assessments demonstrate, that interpretation is not a “situation that ceased to exist” before 2009.¹²⁶⁵ Moreover, Peru concedes that the non-retroactivity rule does not apply to “Claimant’s TPA Article 10.5 claims based on alleged due process violations,”¹²⁶⁶ but offers no explanation for why the June 2006 Report is the *sine qua non* for other breaches that are unquestionably not based on the interpretation in the June 2006 Report, including: (i) the Tax Tribunal’s arbitrary failure to waive penalties and interest;¹²⁶⁷ (ii) the Supreme Court and the Appellate Court’s arbitrary failures to consider *de novo* SMCV’s entitlement to a waiver of penalties and interest in the 2008 and 2006-2007 Royalty Cases;¹²⁶⁸ or (iii) SUNAT’s arbitrary refusal to reimburse GEM payments.¹²⁶⁹

269. Finally, as investment tribunals have uniformly recognized, the fact that acts or facts pre-dating the TPA are relevant to Peru’s breaches does not make those breaches fall outside the Tribunal’s temporal jurisdiction. The Tribunal can and should take into account the factual background against which the complained-of measures took place in assessing the merits of claims that those measures breached the Stability Agreement and the TPA—but that does not disqualify those measures from the Tribunal’s temporal jurisdiction.¹²⁷⁰ Unsurprisingly, *Spence v. Costa Rica*, the only case Peru relies on for

¹²⁶⁴ **RWS-4**, Bedoya ¶¶ 2, 16, 44-45.

¹²⁶⁵ **CA-49**, Vienna Convention on the Law of Treaties, Article 28; **CA-10**, TPA, Article 10.1.3.

¹²⁶⁶ Counter-Memorial ¶ 483.

¹²⁶⁷ See Memorial ¶ 215; (citing **CA-14**, Tax Code, Articles 127, 129; **CA-18**, Law of Administrative Procedure, No. 27444 (2019), Article 5.4); **CA-14**, Tax Code, Article 170.

¹²⁶⁸ See Memorial ¶ 411 (citing Hernández §VIII.A); **CA-14**, Tax Code, Article 170.

¹²⁶⁹ See Memorial ¶ 424 (citing **CA-14**, Tax Code, Article 44(5); **CA-39**, Civil Code, Article 1993).

¹²⁷⁰ See, e.g., **CA-285**, *Eco Oro* Decision on Jurisdiction, Liability and Directions on Quantum, ¶ 360 (“[A]s Eco Oro relies only on post-15 August 2011 measures, that is sufficient to f[i]nd jurisdiction over those measures: the Tribunal does not have jurisdiction to determine whether prior acts are compatible with the FTA, although it is entitled to have regard to those acts in establishing the facts as they occurred after 15 August 2011, including the state of mind of the Parties, and the expectations they may have had at that time.”); **CA-99**, *Tecmed* Award, ¶ 66 (“[I]t should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force.”) (emphasis in original); **RA-11**, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) (Irrazabal, Greenberg, Vinuesa), ¶ 84 (“[E]vents or situations prior to the entry into force of the treaty may be relevant as antecedents to disputes arising after that date.”); **RA-6**, *Mondev* Award, ¶ 70 (“[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.”).

its non-retroactivity objection, is in accord.¹²⁷¹ The *Spence* tribunal concluded that the identically-worded “CAFTA Article 10.1.3 does not preclude it from having regard to pre-CAFTA entry into force conduct for purposes of determining whether there was a post-entry into force breach” subject only to the limitation that “pre-entry into force conduct cannot be relied upon to establish the breach in circumstances in which the post-entry into force conduct would not otherwise constitute an actionable breach in its own right.”¹²⁷² The *Spence* case is otherwise completely inapposite. There, the claimant alleged that Costa Rica’s failures to pay compensation for a pre-entry into force expropriation constituted post-entry into force breaches.¹²⁷³ The tribunal found that it lacked temporal jurisdiction because the post-entry into force actions were not “orders or other regulatory measures imposing legal consequences on the Claimants.”¹²⁷⁴ That is clearly not the case here—the Assessments, arbitrary decisions refusing to waive penalties and interest, and arbitrary decision denying SMCV’s GEM reimbursement request are “orders or other regulatory measures imposing legal consequences on” Freeport and SMCV giving rise to “actionable breach[es] in [their] own right.”¹²⁷⁵

270. For the above reasons, each of Freeport’s Stability Agreement and Article 10.5 claims is timely, and each of Peru’s temporal jurisdiction objections must be denied.

D. ARTICLE 22.3.1 DOES NOT APPLY TO PENALTIES AND INTEREST ON THE TAX ASSESSMENTS

271. The Parties are agreed that Article 22.3.1, which provides that “[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures,”¹²⁷⁶ does not bar Freeport’s Stability Agreement claims, including those based on the Tax Assessments and the penalties and interest, or Freeport’s Article 10.5 claims based on the Royalty Assessments and the penalties and interest.¹²⁷⁷ However, Peru argues that Article 22.3.1 bars Freeport’s Article 10.5 claims for failure to waive penalties and interest on the Tax Assessments because “SUNAT’s decisions not to waive penalties and interest that

¹²⁷¹ Counter-Memorial ¶ 472.

¹²⁷² **RA-2**, *Spence v. Costa Rica* Award, ¶ 217.

¹²⁷³ See **RA-2**, *Spence v. Costa Rica* Award, ¶ 229.

¹²⁷⁴ **RA-2**, *Spence v. Costa Rica* Award, ¶ 240.

¹²⁷⁵ **RA-2**, *Spence v. Costa Rica* Award, ¶ 217.

¹²⁷⁶ **CA-10**, TPA, Article 22.3.1.

¹²⁷⁷ See Counter-Memorial ¶¶ 456-58; *id.* n. 938 (“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.”); **RER-3**, Bravo and Picón, ¶ 52 (“[I]t is clear that a royalty does not qualify as a tax or contribution, but rather as compensation.”); **RWS-7**, Cruz, ¶ 8 (noting that the royalty is “[an] economic consideration”).

had accrued on its Tax Assessments are ‘taxation measures’ within the meaning of the TPA.”¹²⁷⁸ Peru’s argument appears to be based solely on the assertion that “SUNAT obligated SMCV to pay penalties and interest on the Tax Assessments,” *i.e.*, that the penalties and interest are connected to taxation measures.¹²⁷⁹ Yet, Peruvian law directly contradicts Peru’s characterization of penalties and interest as taxation measures and investment treaty authorities demonstrate that the tax exclusion does not apply to measures merely because they are connected to taxation measures.

272. As Peru observes, Article 1.3 of the TPA defines “measure” to “include[] any law, regulation, procedure, requirement, or practice.”¹²⁸⁰ Peru concludes that this means “‘measure’ is . . . broader than ‘law.’”¹²⁸¹ However, this conclusion is of little consequence because the critical question is what constitutes “taxation.” As Peru recognizes, the TPA does not define that term.¹²⁸² Thus, the tribunal must look to Peruvian law to determine whether a Government measure constitutes “taxation.” As the Tax Tribunal and the Constitutional Tribunal have recognized, Peruvian law defines a tax as a “monetary obligation, set out in law, *which does not constitute a penalty for an unlawful action* . . . that must be paid by the person that is in the situation determined by the law.”¹²⁸³ The Tax Code recognizes three categories of obligations falling within that definition: (i) taxes (*impuestos*), which are “monetary obligations triggered by a specific set of circumstances determined by the State . . . based on the taxpayer’s economic capacity;” (ii) contributions, which are “monetary obligations triggered by the benefits a taxpayer receives from public works or services;” and (iii) fees, which are “monetary obligations triggered by a public service the State provides the taxpayer or by a permit the State issues to the taxpayer.”¹²⁸⁴ The “purpose of taxes is to fund the provision of public goods and services and help redistribute wealth to fight social inequality.”¹²⁸⁵

¹²⁷⁸ Counter-Memorial ¶ 458.

¹²⁷⁹ Counter-Memorial ¶ 458.

¹²⁸⁰ **CA-10**, TPA, Article 1.3.

¹²⁸¹ Counter-Memorial ¶ 457 (quoting **RA-9**, *Canfor Corporation et al. v. United States of America*, UNCITRAL, Decision on Preliminary Question (6 June 2006), ¶ 258).

¹²⁸² Counter-Memorial ¶ 457; **CA-10**, TPA, Article 22.3.1.

¹²⁸³ **CER-8**, Hernández II, ¶ 132 (quoting **CA-354**, Geraldo Ataliba, *TAX INCIDENCE HYPOTHESIS* (1987), p. 37 (emphasis added)) (citing **CA-378**, Constitutional Court Decision, Case No. 3303-2003-AA/TC (28 June 2004), p. 3; **CA-365**, Tax Tribunal Resolution No. 889-5-2000 (October 27, 2000), p. 4. (“The collection is not a penalty for an unlawful action, which implies that the mandatory relationship mentioned above arises as a result of the law’s will, such obligation does not result from the application of a penalty for a wrongful conduct.”)).

¹²⁸⁴ **CER-8**, Hernández II, ¶ 133.

¹²⁸⁵ **CER-8**, Hernández II, ¶ 130.

273. Neither penalties nor interest on tax assessments constitute taxation under Peruvian law. *First*, penalties are not taxation under Peruvian law. As recognized by the Constitutional Court and the Tax Tribunal, the Peruvian law definition of taxes expressly excludes penalties and, accordingly, penalties are not classified as one of the three categories of taxes in the Tax Code.¹²⁸⁶ The Tax Tribunal has recognized that penalties and taxes are independent obligations arising from “administrative acts of a different nature, intent, content, purpose and legal consequence” and that, unlike taxes, penalties serve a punitive purpose.¹²⁸⁷ The purpose of penalties is not to “fund the provision of public goods and services and help redistribute wealth” but “to punish taxpayers that break tax regulations and deter future violations.”¹²⁸⁸ *Second*, interest on tax assessments is not taxation under Peruvian law. Interest is not classified as one of the three categories of taxes under the Tax Code and is an obligation “separate and independent” from a tax assessment.¹²⁸⁹ Moreover, as the Constitutional Court has repeatedly recognized, interest serves a distinct function from taxes—the purpose of interest is to “compensate the Government for the loss of the use of money as a result of the taxpayer’s default.”¹²⁹⁰

274. If the TPA parties intended Article 22.3.1 to apply to any measures connected to taxation measures, they would have used language to that effect. But Article 22.3.1 is limited to measures that constitute taxation. As investment tribunals interpreting tax exclusions in other treaties have confirmed,

¹²⁸⁶ **CER-8**, Hernández II, ¶¶ 132, 136 (citing **CA-378**, Constitutional Court Decision, Case No. 3303-2003-AA/TC (June 28, 2004), p. 3 (distinguishing between taxes and their “coercive nature” and “penalt[ies] for an unlawful action”); **CA-365**, Tax Tribunal Resolution No. 889-5-2000 (October 27, 2000), p. 4; **CA-394**, Tax Tribunal Resolution No. 04170-1-2011 (16 March 2011), p. 4).

¹²⁸⁷ **CER-8**, Hernández II, ¶¶ 136, 137 (quoting **CA-394**, Tax Tribunal Resolution No. 04170-1-2011 (16 March 2011), pp. 4-5).

¹²⁸⁸ **CER-8**, Hernández II, ¶¶ 130, 135, 139 (citing **CA-361**, Ramón Valdés Costa, *TAX LAW COURSE* (1996), p. 77 (explaining that “taxes...have their *ratio legis* in the need to obtain resources to cover the normal and essential expenses of society,” while “surcharges and penalties, in the idea inherent in the concept of legal norm, that whoever violates it, must be subject to a sanction”). *See also* **CA-14**, Tax Code, Article 165 (“The infringement will be determined in an objective manner and will be *punished* by administrative penalties, including fines, the confiscation of goods, the temporary confinement of vehicles, the temporary closing of establishments or offices run by independent professionals and the suspension of valid licenses, permits, concessions or authorizations granted by State entities for the performance of activities or public services.”) (emphasis added).

¹²⁸⁹ **CER-8**, Hernández II, ¶ 141.

¹²⁹⁰ **CER-8**, Hernández II, ¶ 140 (citing **CA-39**, Peruvian Civil Code, Legislative Decree No. 295 (24 July 1984), Article 1242; **CA-402**, Silvia Núñez Riva, *When to pay tax moratory interest?*, 43 *LAW AND SOCIETY* (2014), p. 231 (explaining that the moratory interest “fulfills an economic function, which is to repair the delay in the execution of an obligation”); **CA-429**, Constitutional Court Decision, Case No. 02169-2016-PA/TC (19 April 2022), p. 11 (holding that “[t]he purpose of charging moratory interest on tax debts is aimed at encouraging its payment on time, as well as compensating the tax creditor for the delay on the collection of the debt”); **CA-428**, Constitutional Court Decision, Case No. 2036-2021-PA/TC (7 December 2021), p. 26; **CA-427**, Constitutional Court Decision, Case No. 05289-2016-PA/TC (11 November 2021), p. 19; **CE-189**, Constitutional Court Decision, Case No. 04532-2013-PA/TC (16 August 2018), p. 7).

government measures, including penalties, do not qualify as “taxation measures” merely because they are connected to taxation measures.

- (a) In *Nissan v. India*, the tribunal explained that “not . . . every instance of governmental authority imposing monetary obligations . . . is . . . a ‘tax’” and “the fact that a government ministry or department may impose *finés or penalties* as punishment for proscribed conduct . . . does not make these actions necessarily ‘taxation measures.’”¹²⁹¹ The tribunal rejected the respondent’s argument that “‘provided a matter is sufficiently clearly connected to a taxation law or regulation,’ it is a ‘taxation measure.’”¹²⁹² Instead, the tribunal called for a “more nuanced inquiry,” which includes an assessment of the “*purpose* of the relevant acts, including whether they were motivated principally by tax objectives.”¹²⁹³ Similarly, in this case, the fact that penalties and interest are connected to taxation measures does not make them taxation measures. An inquiry into the purpose of penalties and interest in Peruvian law reveals that penalties serve a punitive purpose and interest serves a compensatory purpose—purposes which are entirely different from the purpose of taxation, which is to fund public goods and services and redistribute wealth.
- (b) The tribunal in *Murphy v. Ecuador (II)* interpreting the tax exclusion in the US-Ecuador BIT that applied more broadly than Article 22.3.1 to “matters of taxation,” explained that “certain types of *finés*, fees, or special contributions may be required payments to the government but not constitute a tax.”¹²⁹⁴ In concluding that, the exclusion did not apply to Ecuador’s windfall levy on oil profits,¹²⁹⁵ the tribunal observed statements by government officials that the levy was not a tax,¹²⁹⁶ the “stated purpose of the law was to amend certain oil contracts held by certain oil companies,”¹²⁹⁷ and “[t]he revenue earned by the State under Law 42 was classified as non-tax revenue.”¹²⁹⁸ Similarly, in this case, the Tax Tribunal and the Constitutional Court have stated that penalties are not taxes and serve a distinct purpose from taxes,¹²⁹⁹ the Constitutional Court has stated that interest on

¹²⁹¹ CA-243, *Nissan v. India* Decision on Jurisdiction, ¶ 385 (emphasis added).

¹²⁹² CA-243, *Nissan v. India* Decision on Jurisdiction, ¶ 386.

¹²⁹³ CA-243, *Nissan v. India* Decision on Jurisdiction, ¶ 386 (emphasis in original).

¹²⁹⁴ CA-279, *Murphy* Partial Final Award, ¶¶ 191-92 (emphasis added).

¹²⁹⁵ CA-279, *Murphy* Partial Final Award, ¶ 192.

¹²⁹⁶ CA-279, *Murphy* Partial Final Award, ¶¶ 168-169.

¹²⁹⁷ CA-279, *Murphy* Partial Final Award, ¶ 190.

¹²⁹⁸ CA-279, *Murphy* Partial Final Award, ¶ 190.

¹²⁹⁹ CER-8, Hernández II, ¶¶ 132, 136 (citing CA-378, Constitutional Court Decision, Case No. 3303-2003-AA/TC (June 28, 2004), p. 3 (distinguishing between taxes and their “coercive nature” and “penalt[ies] for an

tax assessments serve a distinct purpose from taxes,¹³⁰⁰ and penalties and interest are not classified as taxes under the Peruvian Tax Code.¹³⁰¹

275. For the above reasons, Article 22.3.1 does not bar Freeport’s claims that Peru’s failure to waive penalties and interest on the Tax Assessments breached Article 10.5 of the TPA.

E. THE STABILITY AGREEMENT IS AN INVESTMENT AGREEMENT BECAUSE SMCV RELIED ON THE STABILITY AGREEMENT IN ESTABLISHING THE CONCENTRATOR INVESTMENT

276. As Freeport explained in the Memorial, the Stability Agreement is an investment agreement under Article 10.28 of the TPA, upon which SMCV “relied” when “establishing or acquiring” the covered investment in the Concentrator.¹³⁰² Therefore, Freeport is entitled to submit breaches of the Stability Agreement on behalf of SMCV under Article 10.16.1(b)(i)(C) of the TPA in this arbitration. Peru does not seriously contest that SMCV relied on the Stability Agreement in establishing the Concentrator investment. Instead, Peru argues that “for the purpose of bringing a claim for breach of [the Stability] Agreement” Freeport “must show that *it* relied on [the Stability] Agreement in establishing or acquiring a covered investment.”¹³⁰³ However, Peru misreads Article 10.16.1. Freeport must only show that SMCV relied on the Stability Agreement to submit a claim for breach of the Stability Agreement on behalf of SMCV under 10.16.1(b)(i)(C). In any event, even if Article 10.16.1(b)(i)(C) did require the reliance of the claimant, which it does not, Freeport would be entitled to invoke the reliance of its predecessor-in-interest, Phelps Dodge, whose reliance Peru also does not seriously contest.

277. Peru argues that “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.”¹³⁰⁴ Peru further argues that, “[i]n contrast, the TPA does not require such reliance in a situation where a claimant is submitting a

unlawful action”); **CA-365**, Tax Tribunal Resolution No. 889-5-2000 (October 27, 2000), p. 4; **CA-394**, Tax Tribunal Resolution No. 04170-1-2011 (16 March 2011), p. 4).

¹³⁰⁰ **CER-8**, Hernández II, ¶ 140 (citing **CA-429**, Constitutional Court Decision, Case No. 02169-2016-PA/TC (19 April 2022), p. 11 (holding that “[t]he purpose of charging moratory interest on tax debts is aimed at encouraging its payment on time, as well as compensating the tax creditor for the delay on the collection of the debt”); **CA-428**, Constitutional Court Decision, Case No. 2036-2021-PA/TC (7 December 2021), p. 26 (same); **CA-427**, Constitutional Court Decision, Case No. 05289-2016-PA/TC (11 November 2021), p. 19 (same); **CE-189**, Constitutional Court Decision, Case No. 04532-2013-PA/TC (16 August 2018), p. 7 (same)).

¹³⁰¹ **CER-8**, Hernández II, ¶¶ 138, 143.

¹³⁰² Memorial ¶¶ 290-99.

¹³⁰³ Counter-Memorial ¶ 524 (emphasis added). *See also id.* ¶ 519 (“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’), the 1998 Stabilization Agreement is not an ‘investment agreement’ under the TPA.”).

¹³⁰⁴ Counter-Memorial ¶ 521.

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.”¹³⁰⁵ Peru sustains this argument by completely ignoring the definition of “investment agreement” in Article 10.28, contorting Article 10.16.1 beyond recognition, and attempting to defeat entirely the intent of the TPA parties. The only sensible reading of Article 10.16.1 is that a claimant must show either: (i) that the claimant relied on an investment agreement to bring claims for breach of that investment agreement under Article 10.16.1(a)(i)(C); or (ii) that the enterprise that it owns or controls relied on an investment agreement to bring claims for breach of that investment agreement on behalf of the enterprise under Article 10.16.1(b)(i)(C).

278. Article 10.16.1(b) of the TPA provides for claims brought on behalf of an enterprise the claimant owns or controls, for breach of an investment agreement.¹³⁰⁶ Article 10.28 defines “investment agreement” as:

a written agreement between a national authority 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 other than the written agreement itself.¹³⁰⁷

279. The definition of investment agreement includes a disjunctive reference to reliance—it refers to the reliance of the “covered investment” *or* the “investor.” Thus, Article 10.28 establishes parallel reliance requirements for parallel investment agreements: (i) investment agreements with an “investor;” and (ii) investment agreements with a “covered investment.” The TPA defines a “claimant” as an “investor” and a “covered investment” as, *inter alia*, an “enterprise.”¹³⁰⁸ Thus, the definition of an investment agreement can also be read as:

a written agreement between a national authority of a Party and a [enterprise] or a [claimant], on which the [enterprise] or the [claimant] relies in establishing or acquiring a covered investment other than the written agreement itself.¹³⁰⁹

280. In this case, the “claimant” is Freeport and the “enterprise” is SMCV.¹³¹⁰ Peru argues that the “covered investment” is the “‘Cerro Verde production unit,’ and the ‘Mining and Beneficiation

¹³⁰⁵ Counter-Memorial ¶ 521.

¹³⁰⁶ CA-10, TPA, Article 10.16.1(b).

¹³⁰⁷ CA-10, TPA, Article 10.28.

¹³⁰⁸ CA-10, TPA, Articles 1.3, 10.28.

¹³⁰⁹ CA-10, TPA, Article 10.28.

¹³¹⁰ See Counter-Memorial ¶¶ 524-25.

Concessions.”¹³¹¹ But Peru misconstrues Freeport’s case. The covered investment that SMCV established or acquired in reliance on the Stability Agreement is the Concentrator.¹³¹²

281. Article 10.16.1 incorporates the terms “investment agreement” and “covered investment” contained in the definition of investment agreement. It provides:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

- (i) that the respondent has breached
- ...
- (C) an investment agreement;

(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
- ...
- (C) an investment agreement;

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(1)(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.¹³¹³

282. Thus, Article 10.16.1 establishes parallel mechanisms for an investor to submit claims for breach of an investment agreement: (i) “on its own behalf” under Article 10.16.1(a)(i)(C); or (ii) “on behalf of an enterprise . . . that the claimant owns or controls” under Article 10.16.1(b)(i)(C).¹³¹⁴ The parallel mechanisms for investment agreement claims under Article 10.16.1(a)(i)(C) and Article 10.16.1(b)(i)(C) incorporate by reference and perfectly mirror the two types of investment agreements defined in Article 10.28; those to which a claimant is a party and those to which an enterprise is a party.¹³¹⁵

¹³¹¹ Counter-Memorial ¶ 525.

¹³¹² See Memorial ¶ 297.

¹³¹³ CA-10, TPA, Article 10.16.1.

¹³¹⁴ CA-10, TPA, Article 10.16.1; CER-11, Sampliner, ¶ 43.

¹³¹⁵ See CA-10, TPA, Article 10.28.

283. The final paragraph of Article 10.16.1, or the *chausette*, applies to both Article 10.16.1(a)(i)(C) and Article 10.16.1(b)(i)(C).¹³¹⁶ It provides that, to bring a claim for breach of the investment agreement, the subject matter of the claim and the claimed damages must directly relate to the covered investment (here the Concentrator) “that was established or acquired . . . in reliance on the relevant investment agreement.”¹³¹⁷ The term “covered investment that was established or acquired . . . in reliance on the relevant investment agreement” mirrors the definition of investment agreement in Article 10.28.¹³¹⁸ Article 10.16.1 nowhere establishes an additional reliance requirement that is not reflected in Article 10.28. In particular, these terms do not require reliance by the claimant for a claim it brings on behalf of the enterprise—a requirement that does not exist in the definition of Article 10.28. Thus, to bring claims under Article 10.16.1(b), Freeport must show that the subject matter of the claim and the claimed damages directly relate to the Concentrator that SMCV established or acquired in reliance of the Stability Agreement. Peru does not dispute that the subject matter of the claim and the claimed damages directly relate to the Concentrator. Nor does Peru seriously contest that SMCV relied on the Stability Agreement in establishing the Concentrator investment.

284. The drafting history of Articles 10.16.1 and 10.28 of the TPA further confirms that Peru’s argument is baseless. Articles 10.16.1 and 10.28 are identical to the investment agreement provisions that the U.S. team proposed during the TPA negotiations and intended to have the same effect as the identical provisions in the 2004 U.S. Model BIT.¹³¹⁹ The 2004 U.S. Model BIT updated the investment agreement provisions in the 1994 U.S. Model BIT.¹³²⁰ The 1994 U.S. Model BIT allowed claims for breach of an investment agreement, provided only “that the party to the investment agreement relied on the investment

¹³¹⁶ CER-11, Sampliner, ¶ 45.

¹³¹⁷ CA-10, TPA, Article 10.16.1.

¹³¹⁸ CER-11, Sampliner, ¶ 47.

¹³¹⁹ CER-11, Sampliner, ¶ 44; compare CA-10, TPA, Article 10.28 (“[I]nvestment agreement means a written agreement between a national of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor”) and *id.* Article 10.16.1, with CA-375, 2004 U.S. Model BIT, Article 1 (“[I]nvestment agreement’ means a written agreement between a national of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor.”) and Article 24.1.

¹³²⁰ CER-11, Sampliner, ¶ 44; compare CA-375, 2004 U.S. Model BIT, Article 1 (“[I]nvestment agreement’ means a written agreement between a national of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor”), with CA-390, Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), Appendix G, 1994 U.S. Model BIT, Article I(h) (“[I]nvestment agreement’ means a written agreement between the national authorities of a Party and a covered investment or a national or company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company relies upon in establishing or acquiring a covered investment.”).

agreement in establishing a covered investment.”¹³²¹ As Mr. Sampliner explains, the U.S. interagency group that developed the 2004 U.S. Model BIT did not intend to “modify the reliance requirement in the 1994 Model BIT,” to require a claimant to show that it relied on an investment agreement to which an enterprise it owned or controlled was a party.¹³²² “That would mean that investment agreement claims on behalf of an enterprise would be limited to investments that the enterprise made after the investor acquired it” which would be contrary to interagency group’s “objective[s] of providing broad access to ISDS for investment agreement claims and . . . promoting investment in foreign enterprises.”¹³²³ Mr. Herrera specifically inquired about the reference to reliance in the final paragraph of Article 10.16.1 during the TPA negotiations and the U.S. team explained that: “(i) if the claims were on behalf of the investor under Article 10.16.1(a)(i)(C), it was required that the investor relied on the investment agreement; and (ii) if the claims were on behalf of an enterprise that the investor owned or controlled under Article 10.16.1(b)(i)(C), it was required that the enterprise relied on the investment agreement.”¹³²⁴ Mr. Herrera explains that this interpretation “seemed reasonable” to the Peruvian delegation “because it would not make sense to require an investor to show that it relied on an agreement it was not a party to in order to bring claims concerning a covered investment that the enterprise may have made before the investor acquired the enterprise.”¹³²⁵

285. Finally, even if Peru’s tortured interpretation of Article 10.16.1 could be credited, which it clearly should not, Freeport has properly submitted claims for breach of an investment agreement under Article 10.16.1(b)(i)(C) because Phelps Dodge, Freeport’s predecessor-in-interest, relied on the Stability Agreement when establishing or acquiring the Concentrator investment. As investment treaty authorities have recognized, corporate successors inherit all legal interests of their predecessors.¹³²⁶ Peru does not seriously dispute that Phelps Dodge relied on the Stability Agreement and, as the record demonstrates:

¹³²¹ **CER-11**, Sampliner, ¶ 44 (citing **CA-390**, Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), Appendix G, 1994 U.S. Model BIT, Article 1(h), 9).

¹³²² **CER-11**, Sampliner, ¶¶ 44-45; *see also* **CA-375**, 2004 U.S. Model BIT, Article 24.1.

¹³²³ **CER-11**, Sampliner, ¶ 45.

¹³²⁴ **CWS-12**, Herrera ¶ 38. *See also id.* ¶ 37 (citing **Ex. CE-1069**, Email from D. Weiner to C. Herrera re: Consultas (31 January 2005) (“How should the last sentence of [Article 10.16.1] (. . . ‘in reliance on the relevant investment agreement’) be interpreted?”); **Ex. CE-1071**, MINCETUR, Round VII Summary (Cartagena, 7-11 February 2005), pp. 31-32, 35, 37 (recording that the parties discussed draft TPA Article 15.1, which became Article 10.16.1 in the TPA); **Ex. CE-1082**, MINCETUR, Round XIII Summary (Washington D.C., 14-22 November and 5-7 December 2005), p. 56 (same)).

¹³²⁵ **CWS-12**, Herrera, ¶ 38.

¹³²⁶ *See, e.g., CA-404, Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014) (Oreamuno, Godoy, Hanotiau), ¶ 145 (finding that “[t]he transmission of legal rights [of ownership] could occur without affecting protection of the investment under the [France-Peru BIT], provided that the other requirements of that treaty were met”).

- (a) Phelps Dodge assigned “great importance” to SMCV’s Stability Agreement during the company’s assessment of SMCV and before moving ahead with the Concentrator investment.¹³²⁷ The Phelps Dodge Board “based its approval” to invest in the Concentrator based on the company’s understanding that the “Stability Agreement’s guarantees would apply to the Concentrator.”¹³²⁸
- (b) Phelps Dodge’s contemporaneous reliance is further reflected in the 2004 Feasibility Study and the September 2004 Updated Feasibility Study, which assumed that the stabilized regime would apply to SMCV through December 31, 2013.¹³²⁹

286. For the above reasons, Freeport’s Stability Agreement claims brought on behalf of SMCV under Article 10.16.1(b) of the TPA have been properly submitted to arbitration.

¹³²⁷ **CWS-8**, Morán I, ¶ 14; **CWS-19**, Morán II, ¶ 6. *See also* Memorial ¶¶ 290-99 (citing **CWS-5**, Davenport I, ¶¶ 30, 40 (testifying that the Stability Agreement was of “paramount importance” to Phelps Dodge as it considered whether to invest in the Concentrator, and that Phelps Dodge’s Board assumed that the Stability Agreement’s guarantees would apply to the investment); *supra* ¶¶ 90, 101, 147.

¹³²⁸ **CWS-8**, Morán I, ¶ 29. *See also* Memorial ¶¶ 290-99 (citing **CWS-11**, Torreblanca I, ¶ 27) (testifying that SMCV’s Board approved the Concentrator conditioned on the approval of SMCV’s request to expand the Beneficiation Concession, which it understood would extend the Stability Agreement’s guarantees to the investment).

¹³²⁹ *See Ex. CE-20*, Fluor Canada Ltd., Feasibility Study: Cerro Verde Primary Sulfide Project (May 2004), Vol. IV, pp. 14-16; **Ex. CE-459**, Fluor, SMCV Primary Sulfide Project Feasibility Study Project Update (September 2004), p. 48.

IV. FREEPORT IS ENTITLED TO RECOVER SUBSTANTIAL DAMAGES

287. In the Memorial, Freeport and its damages experts, Dr. Spiller and Ms. Chavich, established damages to SMCV as of 19 October 2021 in the amount of US\$909 million, inclusive of 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 of the Memorial, and penalties and interest; (ii) Peru’s breaches of Article 10.5 resulting from Peru’s failure to afford due process in relation to the final and enforceable 2006-2007 and 2008 Royalty Assessments and penalties and interest; (iii) Peru’s breaches of Article 10.5 with respect to the final and enforceable 2009, 2010-2011, 4Q 2011, 2012, and 2013 Royalty Assessments and penalties and interest; and (iv) Peru’s breaches of Article 10.5 resulting from its arbitrary failure to waive the extraordinarily punitive penalties and interest (the “Main Claim”).¹³³⁰

288. In the alternative, Freeport, Dr. Spiller, and Ms. Chavich established damages to SMCV as of 19 October 2021 in the amount of US\$682.1 million, inclusive of pre-Award interest, assuming that Peru: (i) breached Article 10.5 of the TPA by arbitrarily failing to waive the extraordinarily punitive penalties and interest; (ii) breached Article 10.5 of the TPA by failing to fully reimburse SMCV for Q4 2012 to Q4 2013 GEM payments related to the Concentrator that SMCV made based on the understanding that the Stability Agreement protected the entire Cerro Verde Mining Unit from royalties and new taxes; and (iii) breached the Stability Agreement by arbitrarily imposing various liabilities on SMCV that are inconsistent with Peru’s flawed interpretation of the Stability Agreement, as well as Peruvian and international law (the “Alternative Claim”).¹³³¹

289. In Dr. Spiller and Ms. Chavich’s second report (the “Second Spiller-Chavich Report”), they have updated their damages calculation to US\$942.4 million for the Main Claim and US\$719.9 million for the Alternative Claim, inclusive of pre-Award interest, as of 13 September 2022.¹³³² As in their first report (the “First Spiller-Chavich Report”), Dr. Spiller and Ms. Chavich conclude that the lost cash flows to SMCV resulting from Peru’s unlawful conduct are equivalent to the lost cash flows to SMCV’s equity holders.¹³³³ Accordingly, they assess damages for both the Main Claim and the Alternative Claim using a “free cash flows to equity” (“FCFE”) approach—they model the dividend distributions that SMCV would have made but-for Peru’s unlawful conduct and adjust the but-for

¹³³⁰ Memorial ¶¶ 440, 453, Table C; **CER-1**, Expert Report of Pablo T. Spiller and Carla Chavich (“Spiller-Chavich I”), ¶¶ 6, 99, Table 1, Table 4.

¹³³¹ Memorial ¶¶ 457, 461, Table E; **CER-1**, Spiller-Chavich I, ¶¶ 6, 114-116, Table 1, Table 7, Table 8.

¹³³² **CER-6**, Reply Expert Report of Pablo T. Spiller and Carla Chavich (“Spiller-Chavich II”), ¶¶ 5, 27, 33, Table 4, Table 8.

¹³³³ **CER-6**, Spiller-Chavich II, ¶¶ 3, 37-38, n. 3; **CER-1**, Spiller-Chavich I, ¶ 82; Memorial ¶ 439.

dividends to present value as of 13 September 2022 using a rate equivalent to SMCV’s cost of equity, compounded annually.¹³³⁴ Tables 1 and 2 below reflect Dr. Spiller and Ms. Chavich’s updated assessment of SMCV’s damages for the Main Claim and the Alternative Claim, respectively.

Table 1: Main Claim as of 13 September 2022¹³³⁵

USD Million	Nominal Payments	Nominal Mitigation	Nominal Tax Savings	Nominal Net Losses	Interest on Short-Term Deposits	Nominal Lost Cash Flows	Dividend Payment Date	Update/Discount to September 13, 2022	Damages to SMCV as of September 13, 2022
	[a]	[b]	[c]	[d] = [a] + [b] + [c]	[e]	[f] = [d] + [e]	[g]	[h] = [f] x Cost of Equity	[i] = [k] + [j]
2012	0.7	-	-	0.7	0.0	0.7	Apr-18	0.3	1.0
2013	13.8	(11.5)	-	2.4	0.1	2.5	Apr-18	0.9	3.3
2014	111.4	(1.0)	(9.3)	101.1	1.4	102.5	Apr-18	36.9	139.3
2015	35.3	(0.5)	(5.7)	29.2	0.3	29.5	Apr-18	10.6	40.1
2016	31.7	(0.3)	(5.8)	25.7	0.2	25.9	Apr-18	9.3	35.2
2017	112.2	(27.8)	(7.0)	77.5	0.3	77.7	Apr-18	28.0	105.7
2018	53.6	(93.3)	26.0	(13.7)	0.3	(13.4)	Apr-19	(3.4)	(16.8)
2019	233.9	(7.2)	(46.9)	179.8	1.7	181.5	Apr-21	17.8	199.3
2020	153.7	(6.3)	(18.3)	129.1	0.4	129.4	Apr-21	12.7	142.1
2021	435.1	(55.7)	(85.8)	293.6	0.7	294.3	Apr-22	8.5	302.8
Jan-2022 - Sep-2022	0.5	-	(0.0)	0.4	0.1	0.6	Apr-23	(0.0)	0.6
Outstanding Liabilities	33.2	-	(6.3)	26.9	0.0	26.9	Apr-23	(1.3)	25.6
Oct-2022 - 2026	-	(39.1)	-	(39.1)	(0.1)	(39.2)	Apr-23 - Apr-27	3.1	(36.0)
Total	1,215.3	(242.6)	(159.2)	813.5	5.5	819.0		123.4	942.4

Table 2: Alternative Claim as of 13 September 2022¹³³⁶

USD Million	Nominal Payments	Nominal Mitigation	Nominal Tax Savings	Nominal Net Losses	Interest on Short-Term Deposits	Nominal Lost Cash Flows	Dividend Payment Date	Update/Discount to September 13, 2022	Damages to SMCV as of September 13, 2022
	[a]	[b]	[c]	[d] = [a] + [b] + [c]	[e]	[f] = [d] + [e]	[g]	[h] = [f] x Cost of Equity	[i] = [f] + [h]
2012	0.4	-	-	0.4	0.0	0.4	Apr-18	0.1	0.6
2013	10.5	-	-	10.5	0.2	10.7	Apr-18	3.9	14.6
2014	51.1	-	(6.2)	44.9	0.6	45.5	Apr-18	16.4	61.9
2015	20.9	-	(3.4)	17.5	0.2	17.7	Apr-18	6.4	24.1
2016	18.8	-	(3.4)	15.3	0.1	15.5	Apr-18	5.6	21.0
2017	61.2	-	(3.0)	58.2	0.2	58.4	Apr-18	21.0	79.4
2018	32.0	(0.4)	(1.5)	30.1	0.3	30.4	Apr-19	7.7	38.0
2019	181.1	-	(34.6)	146.5	1.5	148.0	Apr-21	14.5	162.5
2020	84.3	-	(10.8)	73.5	0.2	73.7	Apr-21	7.2	80.9
2021	236.6	-	(3.6)	232.9	0.5	233.4	Apr-22	6.8	240.2
Jan-2022 - Sep-2022	0.2	-	-	0.2	0.1	0.3	Apr-23	(0.0)	0.3
Outstanding Liabilities	1.6	-	(0.4)	1.2	0.0	1.2	Apr-23	(0.1)	1.2
Oct-2022 - 2026	-	(5.4)	-	(5.4)	(0.0)	(5.4)	Apr-23 - Apr-27	0.6	(4.8)
Total	698.7	(5.8)	(66.9)	626.0	3.9	629.9		90.1	719.9

290. As they did in the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich demonstrate the reasonableness of their damages assessment by calculating damages to SMCV under a “free cash flows to the firm” (“FCFF”) methodology, using three alternative rates to update SMCV’s nominal losses: (i) SMCV’s WACC; (ii) Peru’s cost of debt; and (iii) the rates that would apply to the reimbursement of SMCV’s nominal lost cash flows under Peruvian law (the “Reimbursement Approach”). As reflected below in Table 3, Dr. Spiller and Ms. Chavich’s damages assessment under the FCFE methodology produces values well within the range of the values derived from applying the three alternative rates under

¹³³⁴ CER-6, Spiller-Chavich II, ¶¶ 3, 23, 27, 33, 57, Table 4, Table 8; CER-1, Spiller-Chavich I, ¶¶ 82, 96, 98; Memorial ¶¶ 439, 453.

¹³³⁵ CER-6, Spiller-Chavich II, Table 4.

¹³³⁶ CER-6, Spiller-Chavich II, Table 8.

the FCFE methodology. In fact, the present value adjustments based on SMCV’s cost of equity are lower than those calculated using SMCV’s WACC or the Reimbursement Approach.

Table 3: Main Claim – Damages to SMCV as of 13 September 2022¹³³⁷

USD Million	Main Claim		Alternative Claim	
	Nominal Net Losses	Damages to SMCV as of September 13, 2022	Nominal Net Losses	Damages to SMCV as of September 13, 2022
Approach				
FCFE (Updated/Discounted @ Cost of Equity)*	813.5	942.4	626.0	719.9
FCFF (Discounted @ WACC)**				
- Updated @ WACC	813.5	1,043.1	626.0	785.6
- Updated @ Peru’s Cost of Debt	813.5	898.6	626.0	684.4
- Updated @ Reimbursement Rates	813.5	1,030.2	626.0	786.3

291. In its Counter-Memorial, Peru asserts that it “does not resist [Freeport’s] approach” to calculating damages.¹³³⁸ Rather, Peru contends that Freeport’s damages calculation improperly: (i) includes liabilities that SMCV has not yet paid; (ii) assumed “that in the but-for scenario, SMCV would have almost immediately distributed 100 percent of the Assessments as dividends to its shareholders;” (iii) used SMCV’s cost of equity as the pre-Award interest and discount rate; (iv) “ignored SMCV’s failure to mitigate its damages;” (v) “included damages related to certain Tax Assessments . . . that . . . are precluded by the TPA;” and (iv) makes “certain other errors.”¹³³⁹ Based on these alleged “defects” Peru and its damages expert, Ms. Isabel Kunsman, claim that damages should be lowered by 86.8% for the Main Claim and 89.6% for the Alternative Claim.¹³⁴⁰ Peru’s attempt to reduce damages to a fraction of the losses that SMCV suffered is without merit.

A. THE OUTSTANDING LIABILITIES RESULT IN DAMAGES TO SMCV

292. As explained in the Memorial and in the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich included US\$36.9 million in Outstanding Liabilities in their calculation of nominal losses to SMCV, as of 19 October 2021.¹³⁴¹ To account for additional payments that SMCV has made since the First Spiller-Chavich Report, the Second Spiller-Chavich Report updates that figure to US\$33.2 million in Outstanding Liabilities, as of 13 September 2022.¹³⁴² The still Outstanding Liabilities consist of

¹³³⁷ CER-6, Spiller-Chavich II, Table 1.

¹³³⁸ Counter-Memorial ¶ 27.

¹³³⁹ Counter-Memorial ¶ 774.

¹³⁴⁰ RER-5, Kunsman, Table 2.

¹³⁴¹ Memorial ¶ 442 (citing CER-1, Spiller-Chavich I, ¶ 86, Figure 7).

¹³⁴² CER-6, Spiller-Chavich II, ¶¶ 12, 43, Appendix C.

additional PTU liabilities and represent only 3% of damages.¹³⁴³ As they did in the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich assume that the Outstanding Liabilities are paid as of the date of the Second Spiller-Chavich Report.¹³⁴⁴ Peru objects to Dr. Spiller and Ms. Chavich’s inclusion of the Outstanding Liabilities in the damages calculation on the grounds that damages resulting from the Outstanding Liabilities have not “materialized” and may never materialize.¹³⁴⁵ Peru’s argument is plainly wrong.

293. The Outstanding Liabilities result in damages to SMCV. Peru does not and cannot deny that SMCV is under an obligation to pay the Outstanding Liabilities and is subject to compulsory collection processes in Peru until the Outstanding Liabilities are discharged in full. Peru does not explain when, in its view, liabilities “materialize,” nor does it provide any authority supporting its view that *existing* liabilities do not result in damages until the liabilities are discharged.¹³⁴⁶

294. Peru’s argument that “SMCV will continue to withhold payment and . . . pay these outstanding liabilities only if Perú prevails” is based on a fundamental misconception about the nature of this investment treaty proceeding.¹³⁴⁷ SMCV’s obligation to discharge liabilities that are enforceable under Peruvian law is not contingent on the Tribunal’s Award because Freeport has not sought and cannot seek the annulment of the Royalty and Tax Assessments in this proceeding.¹³⁴⁸ Therefore, SMCV will remain under an obligation to pay the Outstanding Liabilities irrespective of the Tribunal’s Award.

B. ALL OF THE DISPUTED PAYMENTS WOULD HAVE BEEN DISTRIBUTED AS DIVIDENDS

295. In the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich assumed that, based on SMCV’s dividend distribution policies, history, and financial position during the relevant times, SMCV would have distributed all of the disputed payments resulting from Peru’s breaches of the Stability Agreement and the TPA as dividends starting in 2018.¹³⁴⁹ According to Peru, “these assumptions are unsupported by the record” because:¹³⁵⁰ (i) “[t]he fact that SMCV distributed some dividends in these

¹³⁴³ CER-6, Spiller-Chavich II, ¶¶ 8(i), 43, Appendix C.

¹³⁴⁴ CER-1, Spiller-Chavich I, ¶ 86; CER-6, Spiller-Chavich II, ¶ 12, n. 62, 65.

¹³⁴⁵ Counter-Memorial ¶ 781 (citing RER-5, Kunsman, ¶ 65).

¹³⁴⁶ Counter-Memorial ¶ 781 (citing RER-5, Kunsman, ¶ 65).

¹³⁴⁷ Counter-Memorial ¶ 780.

¹³⁴⁸ CA-10, TPA, Article 10.26 (“Where a tribunal makes a final award against a respondent, the tribunal may award separately or in combination, only (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.”).

¹³⁴⁹ CER-1, Spiller-Chavich I, ¶¶ 93-95, Table 4, Table 8.

¹³⁵⁰ Counter-Memorial ¶ 784.

years does not prove that SMCV distributed all available cash for each of the distributions;”¹³⁵¹ (ii) “neither Claimant nor its experts discuss SMCV’s distribution policies;”¹³⁵² and (iii) “[n]either 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.”¹³⁵³ Peru’s arguments are wholly without merit.

296. *First*, Peru’s arguments are of little consequence because SMCV has incurred damages as a result of Peru’s wrongful conduct irrespective of whether the disputed payments would have been distributed as dividends.¹³⁵⁴ As explained in the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich compute damages to SMCV using a Free Cash Flows to Equity (“FCFE”) approach by assessing nominal lost cash flows to equity (*i.e.* but-for dividend distributions) and adjusting those cash flows to present value using SMCV’s cost of equity.¹³⁵⁵ The soundness of Dr. Spiller and Ms. Chavich’s assessment using the FCFE approach, including their assumptions concerning SMCV’s but-for dividend distributions, is reflected by the fact that Dr. Spiller and Ms. Chavich compute damages to SMCV in a similar range using the FCFE approach, and in fact, compute higher damages using SMCV’s WACC or the Reimbursement Approach to update nominal losses.¹³⁵⁶

297. *Second*, there is no merit to Peru’s assertion that Freeport is required to show that SMCV would have been “mandate[d]” to distribute the disputed payments as dividends.¹³⁵⁷ The soundest assumption is that SMCV would have distributed available cash as dividends unless it was prevented from doing so. Peru and Ms. Kunsman cannot dispute that basic proposition. In fact, Ms. Kunsman admits that “in my experience project companies like SMCV, will distribute excess cash flows as dividends.”¹³⁵⁸ As explained in the Memorial and both Spiller-Chavich Reports, a review of SMCV’s corporate governance provisions, Peruvian law, and SMCV’s financial position during the relevant times reveal that nothing would have prevented SMCV from distributing the disputed payments as dividends.¹³⁵⁹ Peru does not dispute that SMCV’s Amended and Restated Corporate By-Laws placed no

¹³⁵¹ Counter-Memorial ¶ 786.

¹³⁵² Counter-Memorial ¶ 787.

¹³⁵³ Counter-Memorial ¶ 788.

¹³⁵⁴ **CER-6**, Spiller-Chavich II, ¶ 38.

¹³⁵⁵ **CER-1**, Spiller-Chavich I, ¶ 115, Table 8, Table 9.

¹³⁵⁶ **CER-1**, Spiller-Chavich I, ¶¶ 6, 83-84, 100-105, 116-17, Table 1, Table 5, Table 6, Table 9; **CER-6**, Spiller-Chavich II, ¶¶ 3, 28-30, 34-35, 61, Table 1, Table 6, Table 10.

¹³⁵⁷ Counter-Memorial ¶ 786.

¹³⁵⁸ **RER-5**, Kunsman, ¶ 107.

¹³⁵⁹ See Memorial ¶¶ 447-49; **CER-1**, Spiller-Chavich I, ¶¶ 93-95; **CER-6**, Spiller-Chavich II, ¶¶ 36-37, Figure 1, Appendix G ¶ 84-87.

relevant limitations on SMCV's ability to distribute the disputed payments as dividends during the relevant times.¹³⁶⁰ Nor does SMCV's dividend policy.¹³⁶¹ Moreover, as a Peruvian company listed on the *Bolsa de Valores de Lima* (Lima Stock Exchange), SMCV is required to file its dividend policies with the *Superintendencia del Mercado de Valores* (previously known as the *Comisión Nacional Supervisora de Empresas y Valores*), Peru's national securities regulator.¹³⁶² Therefore, Peru's argument that it has been deprived of information relevant to disputing Dr. Spiller and Ms. Chavich's dividend distribution assumptions is not credible.¹³⁶³

298. *Third*, there is no merit to Peru's assertion that Freeport is required to show that SMCV distributed "all available cash" as dividends during the relevant times.¹³⁶⁴ The relevant question, which Ms. Torreblanca answers in the affirmative, is whether SMCV would have distributed as dividends amounts corresponding to the disputed payments.¹³⁶⁵ As Dr. Spiller and Ms. Chavich explain, during the relevant times, SMCV continued to distribute dividends while making the disputed payments.¹³⁶⁶ Thus, the soundest assumption is that SMCV would have done with the additional cash it would have had but-for Peru's breaches what it actually did with available cash during the relevant times, that is, distribute dividends.¹³⁶⁷ Ms. Kunsman speculates that SMCV may not have distributed all of the disputed payments as dividends because "there are various considerations by the board of directors in determining dividend distributions."¹³⁶⁸ However, Dr. Spiller and Ms. Chavich already account for these considerations by basing their model on SMCV's actual dividend payment dates.¹³⁶⁹ Moreover, in the but-for world there can never be absolute certainty, and absolute certainty is not the applicable standard. Peru and Ms.

¹³⁶⁰ **Ex. CE-480**, SMCV, Amended and Restated Corporate By-Laws (2005), Article 50 ("Dividends 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.").

¹³⁶¹ **Ex. CE-934**, SMCV, Dividend Distribution Policy (12 December 2003) ("Aims at using the Company's profits to allow the continuous growth of Cerro Verde and compliance with all its obligations, including its financial obligations, before a distribution of dividends takes place. According to this policy, and after applying these profits for the fulfillment of said obligations and financing its growth opportunities, the Board of Directors of Cerro Verde will periodically review the cashflow projection with the Company's Management and, if appropriate, it could propose to the Shareholders' Meeting a payment of dividends in a determined amount.").

¹³⁶² *See CA-299*, Securities Market Law, Legislative Decree No. 861 (22 October 1996), Article 85 ("Companies with publicly offered securities . . . must have a dividend distribution policy . . . [A]pproval of such policy and its amendment, if applicable, shall be notified at least 30 days before its application.").

¹³⁶³ Counter-Memorial ¶ 788 (citing **RER-5**, Kunsman, ¶ 87).

¹³⁶⁴ Counter-Memorial ¶ 786.

¹³⁶⁵ **CWS-21**, Torreblanca II, ¶ 49.

¹³⁶⁶ **CER-6**, Spiller-Chavich II, ¶ 37, Appendix G ¶ 84.

¹³⁶⁷ **CER-6**, Spiller-Chavich II, ¶¶ 6, 37, Appendix G ¶ 84-86.

¹³⁶⁸ **RER-5**, Kunsman, ¶ 86.

¹³⁶⁹ **CER-6**, Spiller-Chavich II, Appendix G ¶ 87; **CER-1**, Spiller-Chavich I, ¶¶ 93-94.

Kunsman ignore the standard “well settled” in investment treaty jurisprudence,¹³⁷⁰ under which it is “enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.”¹³⁷¹

299. *Finally*, there is no merit to Peru’s argument that “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.”¹³⁷² As explained in the Memorial and both Spiller-Chavich Report, Dr. Spiller and Ms. Chavich’s assumptions are based on an analysis of SMCV’s financial situation during the relevant times, including SMCV’s actual dividend distribution practices.¹³⁷³ In the Second Spiller-Chavich Report, Dr. Spiller and Ms. Chavich expand their analysis of SMCV’s financial situation during the relevant times.¹³⁷⁴ As Dr. Spiller and Ms. Chavich explain, from 2006 to 3Q 2010, SMCV distributed available cash as dividends.¹³⁷⁵ In “Q4 2010, SMCV stopped paying dividends to accumulate cash to finance an expansion.”¹³⁷⁶ SMCV resumed dividend distributions in April 2018, after the expansion was complete, and has paid dividends each year thereafter, except 2020 due to global uncertainty resulting from the COVID-19 pandemic.¹³⁷⁷ Thus, because SMCV has distributed available cash during the relevant times, Dr. Spiller and Ms. Chavich’s assumption that SMCV would have distributed all of the disputed payments as dividends beginning in 2018 is sound.¹³⁷⁸ Peru provides no grounds to support its speculative claim that SMCV would have done something else with the additional cash it would have had but-for Peru’s breaches of the Stability Agreement and the TPA.

¹³⁷⁰ **CA-47**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (Jiménez de Aréchaga, El Mahdi, Pietrowski) (El Mahdi dissenting on other grounds), ¶ 215 (“[I]t is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss had been incurred.”).

¹³⁷¹ **CA-219**, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, Judgment, I.C.J. Reports 2018, ¶ 35 (citing *Story Parchment Company v. Paterson Parchment Paper Company*, 282 U.S. 555 (1931)).

¹³⁷² Counter-Memorial ¶ 788.

¹³⁷³ Memorial ¶¶ 447-49 (citing **CER-1**, Spiller-Chavich I, ¶¶ 93-95).

¹³⁷⁴ **CER-6**, Spiller-Chavich II, Appendix G, ¶ 84.

¹³⁷⁵ **CER-6**, Spiller-Chavich II, Appendix G ¶ 84(a).

¹³⁷⁶ **CER-6**, Spiller-Chavich II, Appendix G ¶ 84(b).

¹³⁷⁷ **CER-6**, Spiller-Chavich II, Appendix G ¶ 84(c).

¹³⁷⁸ **CER-6**, Spiller-Chavich II, ¶¶ 36-37, Appendix G, ¶¶ 84-87; *see CA-202*, *TECO Award*, ¶¶ 335-36, 716, 742 (awarding lost dividends with no discussion of dividend distribution policy and history); **CA-139**, *LG&E Award*, ¶¶ 59-61, 78, 107 (awarding lost dividends based on dividend distribution history); **CA-149**, *Duke Energy Award*, ¶¶ 455-458, 462, 483 (awarding past and future lost dividends based on historical dividend practices).

C. SMCV’S COST OF EQUITY IS THE APPROPRIATE PRE-AWARD INTEREST AND DISCOUNT RATE

300. In the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich used a rate equivalent to SMCV’s cost of equity to adjust SMCV’s but-for dividend distributions to present value and discount future depreciation resulting from SMCV’s adoption of a non-stabilized depreciation schedule for so-called “Concentrator-related assets” in 2012.¹³⁷⁹ Peru and Ms. Kunsman argue that both of these applications of SMCV’s cost of equity are “inappropriate.”¹³⁸⁰ As explained below, Peru’s arguments are meritless.

1. SMCV’s Cost of Equity Is the Appropriate Rate to Adjust SMCV’s Losses to Present Value

301. In the Memorial, Freeport explained that Peru’s breaches of the Stability Agreement and the TPA have effectively caused SMCV to delay dividend distributions to its shareholders.¹³⁸¹ Freeport further explained that Dr. Spiller and Ms. Chavich used SMCV’s cost of equity to adjust the but-for dividend distributions to present value because it is the rate of return that SMCV is expected to pay to its shareholders to compensate them for the delay in dividend distributions.¹³⁸² Applying this approach, Dr. Spiller and Ms. Chavich made a US\$96.6 million adjustment to SMCV’s damages for the Main Claim and a US\$51.6 million adjustment for the Alternative Claim as of 19 October 2021.¹³⁸³ In the Second Spiller-Chavich Report, they update those figures to US\$123.4 million for the Main Claim and US\$90.1 million for the Alternative Claim as of 13 September 2022.¹³⁸⁴

302. Peru and Ms. Kunsman contest using SMCV’s cost of equity as the pre-Award interest rate arguing that it results in overcompensation because “there is no evidence that, but for the Assessments, SMCV’s equity holders would have earned the interest rate Claimant proposes.”¹³⁸⁵ Peru and Ms. Kunsman also argue that using SMCV’s cost of equity is inconsistent with Article 10.7.3 of the TPA, which states that pre-award interest on damages for expropriation should be calculated using a “commercially reasonable rate.”¹³⁸⁶ Peru and Ms. Kunsman propose “a 1-Year US Treasury Bill (US T-

¹³⁷⁹ **CER-1**, Spiller-Chavich I, ¶¶ 88(b), ¶ 90, Table 3, ¶ 97, Appendix E.

¹³⁸⁰ Counter-Memorial ¶ 789. *See also* **RER-5**, Kunsman, ¶¶ 86-96, 102-105.

¹³⁸¹ Memorial ¶¶ 439, 447; **CER-1**, Spiller-Chavich I, ¶ 96.

¹³⁸² Memorial ¶ 451. *See also* **CER-1**, Spiller-Chavich, I ¶ 96.

¹³⁸³ **CER-1**, Spiller-Chavich I, ¶¶ 99, 115, Table 4, Table 8.

¹³⁸⁴ **CER-6**, Spiller-Chavich II, ¶¶ 27, 33, Table 4, Table 8.

¹³⁸⁵ Counter-Memorial ¶ 790. *See also* **RER-5**, Kunsman, ¶¶ 99-108.

¹³⁸⁶ **CA-10**, TPA, Article 10.7.3.

Bill) rate plus 2%, compounded annually to calculate pre-award interest.”¹³⁸⁷ Peru and Ms. Kunsman fundamentally misunderstand the justification for using SMCV’s cost of equity as the pre-Award interest rate and why it is the most commercially reasonable rate under the circumstances.

303. *First*, speculation about what SMCV’s shareholders would have done with the dividends they would have received but-for Peru’s breaches is wholly irrelevant. Again, Dr. Spiller and Ms. Chavich calculate *damages to SMCV* by calculating the present value of lost cash flows to equity.¹³⁸⁸ Peru’s breaches resulted in a delay in the distribution of dividends that SMCV’s shareholders expected to receive. SMCV is expected to compensate its shareholders for that delay at a rate equivalent to SMCV’s cost of equity because that is the rate that SMCV’s shareholders would have required to willingly accept a delay in dividend distributions from SMCV. There is no merit to Peru’s argument that SMCV’s cost of equity is not a commercially reasonable rate “in these circumstances.”¹³⁸⁹ It is the most commercially reasonable rate “in these circumstances” because it is based on rates observable in the market and most closely corresponds to reality.¹³⁹⁰

304. Peru’s argument is based on the incorrect assumption that “under Claimant’s theory of damages, the money to which pre-award interest is to be applied is money that would have been in Freeport’s pocket, not in SMCV’s.”¹³⁹¹ From SMCV’s perspective, it has been forced to delay dividend distributions due to Peru’s breaches.¹³⁹² Thus, under Freeport’s theory of damages, the earnings that SMCV’s shareholders expected to receive from their investment in SMCV is money that they have been forced to retain in SMCV’s “pocket,” and, therefore, SMCV is expected to pay its shareholders returns at the rate they would have required to voluntarily retain monies in SMCV.¹³⁹³ Because Peru fails to appreciate this basic proposition, Peru argues that “reinvesting any capital back into SMCV’ . . . would be illogical—it would mean SMCV distributing the money to *inter alia* Claimant, Claimant paying taxes on dividends received, and then turning around and giving the after-tax money right back to SMCV.”¹³⁹⁴ Dr. Spiller and Ms. Chavich do not model a but-for scenario in which SMCV distributed dividends to its shareholders which were then taxed and then reinvested in SMCV. Rather, they model the but-for

¹³⁸⁷ Counter-Memorial ¶ 803 (citing **RER-5**, Kunsman, ¶ 115).

¹³⁸⁸ *See, e.g.*, **CER-1**, Spiller-Chavich I, ¶ 82.

¹³⁸⁹ Counter-Memorial ¶ 793. *See also id.* at ¶¶ 790-91.

¹³⁹⁰ **CER-6**, Spiller-Chavich II, ¶ 59.

¹³⁹¹ Counter-Memorial ¶ 793.

¹³⁹² Memorial ¶ 451; **CER-1**, Spiller-Chavich I ¶ 96.

¹³⁹³ Memorial ¶ 451; **CER-1**, Spiller-Chavich I ¶ 96.

¹³⁹⁴ Counter-Memorial ¶ 794 (citing **RER-5**, Kunsman, ¶ 105).

scenario that most closely corresponds to reality—SMCV’s shareholders suffered a delay in the dividend distributions they expected from SMCV.¹³⁹⁵

305. *Second*, Peru’s and Ms. Kunsman’s argument that the delay in the receipt of dividends from SMCV was a “short-term” investment is inconsistent with the record. The delay in dividends resulting from Peru’s breaches was a long-term investment. SMCV began making the disputed payments almost a decade ago.¹³⁹⁶ SMCV’s shareholders would have required compensation at a rate corresponding to SMCV’s cost of equity to willingly delay expected returns until the Valuation Date.¹³⁹⁷

306. *Third*, Peru’s proposal to calculate interest using “a 1-Year US Treasury Bill (US T-Bill) rate plus 2%, compounded annually to calculate pre-award interest” would undercompensate SMCV.¹³⁹⁸ This rate would undercompensate SMCV because it does not correspond to the rate of return SMCV is expected to pay its shareholders on their investment in SMCV.¹³⁹⁹ In addition, Peru’s proposed rate is particularly inappropriate here, because it is lower than the applicable rates under the Reimbursement Approach, which Peru would be bound to apply to royalty and tax refunds under Peruvian law, and which Ms. Kunsman selectively applies to discount future Depreciation Mitigation.¹⁴⁰⁰

307. *Finally*, Peru fails in its attempts to distinguish the decisions Freeport cited in the Memorial supporting the cost of equity approach.¹⁴⁰¹

(a) Peru mischaracterizes *ConocoPhillips v. Venezuela*, arguing 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.”¹⁴⁰² Nowhere in the award did the *ConocoPhillips* tribunal make findings about what the claimants would actually have done with the delayed dividends. Rather, the tribunal rejected the same arguments that Peru makes here that “it

¹³⁹⁵ **CER-6**, Spiller-Chavich II, n. 84 (“The effect of delaying dividends could be equated to a reinvestment of business earnings instead of distribution, for which a minimum return of the cost of equity would be required.”).

¹³⁹⁶ See **CER-1**, Spiller-Chavich I, n. 101, Figure 6, Figure 7 and Table 4; **CER-6**, Spiller-Chavich II, Annex No. 1, Compass Lexecon Updated Damage Valuation Model, “Main Claim FCF” Tab (showing disputed payments starting in 2012).

¹³⁹⁷ **CER-1**, Spiller-Chavich, I ¶ 96; **CER-6**, Spiller-Chavich II, ¶¶ 58-60.

¹³⁹⁸ Counter-Memorial ¶ 803 (citing **RER-5**, Kunsman, ¶ 115).

¹³⁹⁹ **CER-6**, Spiller-Chavich II, ¶¶ 58-60; **CER-1**, Spiller-Chavich I, ¶¶ 96, 98.

¹⁴⁰⁰ Memorial ¶ 455(c) (citing **CA-14**, Peruvian Tax Code, Peruvian Tax Code, Supreme Decree No. 133-2013-EF (22 June 2013), Article 38 (establishing the interest rate due on excess payments of taxes, royalties, penalties, and Statutory Interest; **CER-3**, Hernández I, ¶¶ 47-50)); Counter-Memorial ¶ 807 (citing **RER-5**, Kunsman, ¶ 123); **CER-6**, Spiller-Chavich II.

¹⁴⁰¹ Memorial ¶ 452 (citing **CA-193**, *Phillips Petroleum Award*; **CA-242**, *ConocoPhillips Award*).

¹⁴⁰² Counter-Memorial ¶ 799.

cannot be known what the Claimants would have willingly chosen to do with dividends from the Projects in a but-for world” and that “pre-award interest should be based on a short-term, risk-free rate, reflecting the borrowing costs that the Claimants would normally expect to incur on a commercial basis in a ‘but-for’ world.”¹⁴⁰³ As the tribunal explained, “*as a matter of fact*, these dividends remained part of the Projects’ resources and were undoubtedly used in support of the Projects’ operation.”¹⁴⁰⁴ Here too, the dividends that SMCV’s shareholders expected to receive, “[a]s a matter of fact . . . remained part of” SMCV’s resources and were used to make the disputed payments.¹⁴⁰⁵ The *ConocoPhillips* tribunal ordered pre-award interest at the cost of equity of the shareholders’ investment because “the appropriate rate must be set at a level at which the investor expects to retain a profit, by keeping the amount corresponding to the dividends within the Projects.”¹⁴⁰⁶ The tribunal further explained that “[t]he profit resulting from the dividends, as they remained in the Projects, cannot be compared to the costs for short-term borrowing of money on the market.”¹⁴⁰⁷

- (b) Peru makes no attempt to distinguish the tribunal’s decision in *Phillips v. Petroleos de Venezuela*, concluding that awarding interest at a rate equivalent to the cost of equity of the projects the claimant invested in was “widely recognized” and necessary to satisfy the full reparation standard.¹⁴⁰⁸ The tribunal rejected the respondent’s argument that “any damage payable to Claimants may only be subject to interests at LIBOR rate.”¹⁴⁰⁹ As is the case here, the wrongful conduct resulted in an effective delay of dividend distributions and, as a result, it was unnecessary for the tribunal to discuss the shareholder’s actual investment opportunities.¹⁴¹⁰
- (c) Peru’s attempt to distinguish the award in *Vivendi II v. Argentina* is equally unavailing.¹⁴¹¹ Peru erroneously argues that *Vivendi II* does not support awarding interest at SMCV’s cost of equity because the tribunal in that case “rejected” the claimants’ *calculation* of the

¹⁴⁰³ CA-242, *ConocoPhillips* Award, ¶¶ 794, 803.

¹⁴⁰⁴ CA-242, *ConocoPhillips* Award, ¶ 811 (emphasis added); *see also id.* at ¶ 810 (“[T]he fact is that the amounts corresponding to each of the Claimants’ share of dividends remained in the Projects.”).

¹⁴⁰⁵ CA-242, *ConocoPhillips* Award, ¶ 811.

¹⁴⁰⁶ CA-242, *ConocoPhillips* Award, ¶ 818.

¹⁴⁰⁷ CA-242, *ConocoPhillips* Award, ¶¶ 809, 815.

¹⁴⁰⁸ CA-193, *Phillips Petroleum* Award, ¶¶ 294-95.

¹⁴⁰⁹ CA-193, *Phillips Petroleum* Award, ¶¶ 289; 295.

¹⁴¹⁰ CA-193, *Phillips Petroleum* Award, ¶ 295.

¹⁴¹¹ Counter-Memorial ¶ 800; Memorial ¶ 452, n. 1285.

rate of return.¹⁴¹² However, the tribunal did not question whether the claimants were entitled to interest at a rate corresponding to the return they reasonably expected to earn and expressly factored “the anticipated 11.7% rate of return on investment reflected in the Concession Agreement” into the calculation of pre-award interest.¹⁴¹³ In this case, Dr. Spiller and Ms. Chavich’s calculation of SMCV’s cost of equity is un rebutted.

308. Peru’s reliance on the Senechal and Gotanda article that Freeport cited in the Memorial is misplaced. Peru claims that its approach is consistent with the conclusion in that article that the appropriate pre-award interest rate “depends on the investment type, the business governance structure of the claimant and respondent (whether the business is privately or publicly held), the proportion of debt (leverage), the tax environment, etc.”¹⁴¹⁴ However, Peru’s proposal is inconsistent with that conclusion. Peru and Ms. Kunsman do not account for the risk associated with an investment in SMCV. That is precisely what Dr. Spiller and Ms. Chavich consider in computing the recovery necessary to compensate SMCV for the delay in distributing dividends to its shareholders resulting from Peru’s breaches of the Stability Agreement and the TPA.¹⁴¹⁵

2. Cost of Equity Is the Proper Discount Rate for Future Depreciation Mitigation

309. In the First Spiller-Chavich Report, Dr. Spiller and Ms. Chavich calculated US\$166.1 million in losses that SMCV has mitigated or will mitigate by adopting a tax depreciation schedule applying non-stabilized depreciation rates to the so-called “Concentrator-related assets” beginning in fiscal year 2012.¹⁴¹⁶ The non-stabilized tax depreciation schedule has resulted in increased Income Tax and PTU obligations between 2006 and 2013, but also lower Income Tax and PTU obligations afterwards (the “Depreciation Mitigation”).¹⁴¹⁷ Dr. Spiller and Ms. Chavich “discount future Depreciation Mitigation at the cost of equity to reflect its value as of the Valuation Date.”¹⁴¹⁸ In the Second Spiller-Chavich Report, Dr. Spiller and Ms. Chavich make adjustments to the Depreciation Mitigation, including adjustments based on SUNAT’s final resolution of SMCV’s 2014 and 2015 amended tax declarations

¹⁴¹² Counter-Memorial ¶ 800 (citing **CA-140**, *Vivendi Award II*, ¶ 9.2.7). *See also* **CA-140**, *Vivendi Award II*, ¶ 8.3.5 (“Claimants faced significant challenges and we conclude that they have failed to establish with a sufficient degree of certainty that the Tucumán concession would have been profitable.”).

¹⁴¹³ **CA-140**, *Vivendi Award II*, ¶ 9.2.8.

¹⁴¹⁴ Counter-Memorial ¶ 801 (citing **CA-152**, T. J. Senechal & J. Y. Gotanda, *Interest as Damages*, 47 COLUMBIA J. TRANSNAT’L L., p. 521 (2009)).

¹⁴¹⁵ **CER-6**, Spiller-Chavich II, ¶¶ 23-24, 57-61, Appendix D; **CER-1**, Spiller-Chavich I, ¶¶ 91-98, Appendix M.

¹⁴¹⁶ Memorial ¶ 444(b) (citing **CER-1**, Spiller-Chavich I, ¶ 88(b), Appendix E.1).

¹⁴¹⁷ **CER-6**, Spiller-Chavich II, ¶ 18.

¹⁴¹⁸ **CER-6**, Spiller-Chavich II, ¶ 52.

filed after the First Spiller-Chavich Report, in which SUNAT permitted SMCV to apply a higher depreciation rate than before.¹⁴¹⁹ They conclude that SMCV has mitigated or will mitigate US\$166.4 million in damages as a result of the non-stabilized tax depreciation schedule.¹⁴²⁰

310. Peru and Ms. Kunsman argue that it is improper to discount the Depreciation Mitigation at SMCV's cost of equity because "this approach 'assumes that the cash flows related to the future Depreciation Mitigation has the risk equivalent to SMCV's operations,' when, in reality, . . . 'the risk profile of the cash flows related to the depreciation offset is significantly lower than the risk profile of SMCV.'"¹⁴²¹ According to Peru and Ms. Kunsman, "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."¹⁴²² Peru and Ms. Kunsman are wrong. As Dr. Spiller and Ms. Chavich explain, SMCV's ability to deduct future depreciation is linked to its capacity to generate income, which originates from its mining operations in Peru and, therefore, is subject to mining operating risks.¹⁴²³ In other words, if SMCV does not generate income, there will be no future Income Tax or PTU liabilities to reduce with depreciation deductions. Therefore, the appropriate discount rate should be tied to SMCV's operations, which is why the cost of equity is more appropriate than SUNAT's statutory rate for tax reimbursements.¹⁴²⁴ In any event, even under Ms. Kunsman's flawed approach, the statutory reimbursement rate she uses is wrong. Ms. Kunsman uses the statutory rate for voluntary overpayments which is half the 0.50% monthly rate for overpayments, such as SMCV's, that result from SUNAT assessments.¹⁴²⁵

D. SMCV DID NOT FAIL TO MITIGATE DAMAGES

311. As explained in the Memorial and both Spiller-Chavich Reports, SMCV undertook substantial efforts to mitigate the damages resulting from Peru's breaches of the Stability Agreement and the TPA and did, in fact, mitigate substantial damages.

¹⁴¹⁹ **CER-6**, Spiller-Chavich II, ¶ 19, n. 26; **Ex. CE-1030**, Amended Income Tax Return for 2014 (29 November 2021); **Ex. CE-1032**, Amended Income Tax Return for 2015 (30 December 2021).

¹⁴²⁰ **CER-6**, Spiller-Chavich II, ¶ 21.

¹⁴²¹ Counter-Memorial ¶ 806 (citing **RER-5**, Kunsman, ¶ 121).

¹⁴²² Counter-Memorial ¶ 807 (citing **RER-5**, Kunsman, ¶ 123).

¹⁴²³ **CER-6**, Spiller-Chavich II, ¶ 54.

¹⁴²⁴ **CER-6**, Spiller-Chavich II, ¶¶ 52, 54.

¹⁴²⁵ **CER-6**, Spiller-Chavich II, ¶ 53, n. 76 (citing **Ex. CA-14**, Tax Code, Supreme Decree 133-2013-EF (22 June 2013), Article 38(a)).

- (a) SMCV challenged most of the Assessments in the administrative review process before SUNAT’s Claims Division and the Tax Tribunal.¹⁴²⁶
- (b) SMCV paid several Income Tax and GST Assessments before challenging them before SUNAT’s Claims Division to receive discounts under the “scaled penalty regime” (*regimen de gradulidad*), which did not apply to royalties.¹⁴²⁷
- (c) SMCV entered into deferral and installment plans for all Royalty Assessments, except Q4 2011, which it paid directly, to reduce interest due.¹⁴²⁸
- (d) SMCV entered into deferral and installment plans for all SMT Assessments.¹⁴²⁹ Additionally, after the Government created the deferral and installment (or “RAF”)

¹⁴²⁶ Memorial, **Annex A**: Administrative Proceedings (listing SMCV’s challenges of the Royalty and Tax Assessments before SUNAT and the Tax Tribunal); **CER-1**, Spiller-Chavich I, n. 30, 58, 61, 62, 66, 84, 171, 172 (SMCV’s Requests for Reconsideration of the Assessments before SUNAT’s Claims Division); *id.* n. 64, 66, 84, 101, 205, 207 (SMCV’s challenges of SUNAT’s resolutions upholding the Assessments before the Tax Tribunal).

¹⁴²⁷ **CER-1**, Spiller-Chavich I, ¶ 72, n. 101; **CER-3**, Hernandez I, § II.B; **CER-8**, Hernandez II, ¶ 100 (citing **Ex. CE-669**, SMCV, Payment Receipt (GST 2009); **Ex. CE-674**, SMCV, Payment Receipt (GST 2010); **Ex. CE-798**, SMCV, Payment Receipt (Income Tax for 2013); **Ex. CE-799**, SMCV, Payment Receipt (Income Tax for 2013, Assessment No. 012-003-0113991); **Ex. CE-862**, SMCV 2011 Income Tax Payment Receipt Order 957156446; **Ex. CE-995**, SMCV, Payment Receipts (GST 2008 Penalty Resolutions Nos. 052-002-0005682, 052-002-0005679, 052-002-0005683, 052-002-0005684, 052-002-0005691, 052-002-0005686, 052-002-0005692, 052-002-0005693, 052-002-0005687, 052-002-0005685, 052-002-0005664, 052-002-0005680) (22 November 2013); **Ex. CE-994**, SMCV, Payment Receipt (Income Tax for 2008 Penalty Resolution No. 052-002-0005884) (26 September 2013); **Ex. CE-1001**, SMCV, Payment Receipt (Income Tax for 2009 Penalty Resolution No. 052-002-0006238) (24 November 2014)). *See also CER-6*, Spiller-Chavich II, ¶¶ 63-64.

¹⁴²⁸ Memorial ¶¶ 216, 256, 263, 442(a); **CER-1**, Spiller-Chavich I, ¶¶ 33-35, 37, Appendix B; **CER-3**, Hernandez I, § II.B; **CER-8**, Hernandez II, ¶ 100 (citing **Ex. CE-99**, SUNAT Resolution No. 0510170003363 (October 10, 2013); **Ex. CE-664**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans (2006-07, 2008 Royalty Assessments) (October 4, 2013); **Ex. CE-733**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2009 Royalty Assessments, (October 26, 2018); **Ex. CE-734**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2010/11 Royalty Assessments (October 30, 2018); **Ex. CE-735**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2009 Royalty Assessments, (October 30, 2018); **Ex. CE-736**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2010/11 Royalty Assessments, (October 31, 2018); **Ex. CE-751**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2012 Royalty Assessments, (February 19, 2019); **Ex. CE-763**, SMCV, Request Under Protest to Enter Into Deferral and Installment Plans, 2012 Royalty Assessments, (February 19, 2019); **Ex. CE-753**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2012 Royalty Assessments, (February 25, 2019); **Ex. CE-760**, SUNAT, Approval of SMCV’s Deferral and Installment Plans, 2013 Royalty Assessments) (July 1, 2019)).

¹⁴²⁹ Memorial ¶¶ 287, 442(a); **CER-1**, Spiller-Chavich I, ¶ 137, Table 24, ¶ 140, Table 26, ¶ 141, Table 27, ¶ 142, Table 28; **CER-3**, Hernandez I, § II.B; **CER-8**, Hernandez II, ¶ 100 (citing **Ex. CE-759**, SMCV Request Under Protest to Enter into Deferral and Installment Plans (SMT for 2013) (June 25, 2019); **Ex. CE-764**, 1SMCV Request Under Protest to Enter into Deferral and Installment Plans (SMT for Q4 2011-12) (August 13, 2019); **Ex. CE-760**, SUNAT Approval of SMCV’s Deferral and Installment Plans (SMT for 2013) (July 1, 2019); **Ex. CE-765**, SUNAT Approval of SMCV’s Deferral and Installment Plans (SMT for Q4 2011-12) (August 16, 2019)). *See also CER-6*, Spiller-Chavich II, ¶¶ 63-64.

regime during the pandemic offering lower interest rates, SMCV entered into RAF plans for the Q4 2011-2013 SMT Assessment.¹⁴³⁰

(e) SMCV obtained a reimbursement of US\$76.3 million in GEM payments for the Q4 2012 to Q4 2013 period.¹⁴³¹

(f) SMCV avoided losses of US\$166.4 by adopting a tax depreciation schedule applying non-stabilized depreciation rates to the so-called “Concentrator-related assets” beginning in fiscal year 2012.¹⁴³²

312. Peru and Ms. Kunsman argue that SMCV’s mitigation of damages was insufficient because SMCV had a duty to mitigate the Penalties and Statutory Interest after first receiving each type of assessment (*e.g.* the 2006-2007 Royalty Assessments, the Q4 2011 SMT Assessment, etc.) by: (i) paying royalties and taxes according to SUNAT’s methodology for subsequent fiscal periods under protest; and (ii) amending tax returns for previous fiscal periods according to SUNAT’s methodology and making additional payments under protest.¹⁴³³

313. SMCV did not have an obligation to mitigate the damages caused by Peru’s breaches. The damages here are not lost profits or out-of-pocket expenses paid to third parties—they are Penalties and Statutory Interest that *SMCV had to pay to Peru* as a result of Peru’s breaches of the Stability Agreement and the TPA. Moreover, a significant portion of the Penalties and Statutory Interest accrued not because of SMCV’s failure to preemptively pay the Assessments, but as a result of Peru’s own delays in issuing the Assessments and,¹⁴³⁴ as Peru admits, because of its own delays in resolving SMCV’s administrative challenges.¹⁴³⁵ Under basic principles of fairness, Peru should not be permitted to retain its ill-gotten gains as a result of its breaches because SMCV’s efforts to prevent Peru from not obtaining a windfall were allegedly insufficient.

¹⁴³⁰ Memorial ¶¶ 287, 442(a); **CER-1**, Spiller-Chavich I, ¶¶ 44-47, Figure 3, ¶¶ 139-43, Table 26, Table 27, Table 28, Table 29; **CER-3**, Hernandez I, § II.B; **CER-8**, Hernandez II, ¶ 100 (citing **Ex. CE-786**, SUNAT Approval of RAF Regime (SMT for Q4 2011-2013)).

¹⁴³¹ Memorial ¶ 444(a); **CER-1**, Spiller-Chavich I, ¶¶ 76-77, n. 109, Table 2, ¶ 88(a); Memorial ¶¶ 264, 424(a); Counter-Memorial ¶ 239.

¹⁴³² **CER-6**, Spiller-Chavich II, ¶ 21; Memorial ¶ 444(d) (citing **CER-1**, Spiller-Chavich I ¶¶ 85(b), 87, 88(a), Table 2, Table 3, Appendix E.1; **Ex. CE-746**, SUNAT, Resolution No. 012 180 0018113/SUNAT (GEM for Q4 2012) (18 December 2018) (approving and ordering SMCV’s GEM reimbursement request); **Ex. CE-747**, SUNAT, Resolution No. 012 1800018114/SUNAT (GEM for 2013) (18 December 2018) (same)).

¹⁴³³ Counter-Memorial ¶ 808; **RER-5**, Kunsman, ¶¶ 127-133.

¹⁴³⁴ Memorial ¶¶ 417-19 (citing **CER-1**, Spiller and Chavich I, ¶ 87, Figure 7).

¹⁴³⁵ Counter-Memorial ¶ 747 (“[D]uring 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 Tax Tribunal was extraordinarily high. Thus, it simply took time for the Tax Tribunal to process all of the cases before it. There was nothing nefarious about the delay, nor was it specific to SMCV.”); *id.* ¶ 809.

314. Investment treaty authorities confirm that the mitigation defense is inapplicable here.

- (a) As the tribunal in *Cairn v. India* explained, a “mitigation defence is difficult to prove” and requires evidence to show that a claimant’s conduct . . . was unreasonable, abusive or against its own economic interests.”¹⁴³⁶ As recognized in *Magyar v. Hungary*, it is not for the tribunal to “speculate whether the Claimants would have exercised a better business judgement.”¹⁴³⁷ As explained above in Section II.C.4.v, SMCV’s conduct was manifestly reasonable—not only was SMCV under no obligation to pay the Assessments prior to challenging them, “taxpayers *usually* do not” do so.¹⁴³⁸
- (b) As the tribunal in *Unión Fenosa Gas v. Egypt* explained, “the test is to be applied as at the relevant time, without the benefit of hindsight.”¹⁴³⁹ Yet, Peru’s mitigation defense rests solely on speculation with the benefit of hindsight. As explained in the Memorial and above in Section II.C.4.v, even after SUNAT notified SMCV of the 2006-2007 Royalty Assessments, the Government continued to confirm that the Concentrator was stabilized and that SMCV would have a “very strong argument for prevailing before the Tax Tribunal.”¹⁴⁴⁰
- (c) None of the authorities Peru cites have actually reduced damages based on a failure to mitigate and confirm that doing so is not appropriate here because SMCV did make substantial efforts to mitigate damages,¹⁴⁴¹ did not “cause the damage,”¹⁴⁴² was not under

¹⁴³⁶ **CA-426**, *Cairn v. India* Award, ¶ 1888 (“A mitigation defence is difficult to prove.”).

¹⁴³⁷ **CA-425**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award (13 November 2019) (Kaufmann-Kohler, Alexandrov, Haneffeld), ¶ 427.

¹⁴³⁸ **CER-8**, *Hernandez II*, ¶ 100.

¹⁴³⁹ **CA-421**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award (31 August 2018) (Veeder, Rowley, Clodfelter), ¶ 427.

¹⁴⁴⁰ See Memorial ¶¶ 174, 182-95; **CWS-11**, *Torreblanca I*, ¶¶ 80-81.

¹⁴⁴¹ **RA-85**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award of 14 March 2003, ¶ 482 (noting that the claimant and its subsidiary “did their utmost to overcome the consequences of the” respondent’s breaches, including “applying for initiation of administrative proceedings” and “addressing the Czech Parliament”).

¹⁴⁴² **RA-85**, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award of 14 March 2003, ¶ 482 (noting that the claimant and its subsidiary did not “cause the damage” and were “therefore, not liable” under Czech law for the “injury incurred”); **RA-86**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003, ¶ 10.6.4(4) (noting that the taking of the claimants’ property “was in no way due to the ‘neglect’ of the Claimants).

an obligation to take the mitigating actions that Peru proposes,¹⁴⁴³ and Freeport’s “explanations” for why SMCV did not do so are not only “plausible,” but compelling.¹⁴⁴⁴

(d) As the tribunal in *AIG Capital Partners v. Kazakhstan* explained, the duty to mitigate damages is not intended to “encourage Governments to breach with impunity solemn provisions of an international treaty and weaken the protection of foreign investors – which such a treaty is expressly designed to safeguard.”¹⁴⁴⁵ Yet, that is the precise effect Peru seeks to achieve here by imposing on SMCV a duty that required it to take extraordinary steps to prevent Peru from wrongfully extracting Penalties and Statutory Interest.

E. DR. SPILLER AND MS. CHAVICH PROPERLY INCLUDED DAMAGES FOR TAX ASSESSMENTS

315. Peru argues that “Claimant has improperly included in its FET claim (and, therefore, its damages calculation) certain penalties and interest relating to Tax Assessments against SMCV” because “Article 22.3 of the TPA expressly excludes taxation measures from the scope of protection under the TPA.”¹⁴⁴⁶ However, as explained above in Section III.D, penalties and interest do not constitute “taxation measures” under the TPA and, therefore, Article 22.3 does not bar Freeport’s claims that Peru’s failure to waive the penalties and interest on the Tax Assessments breached Article 10.5 of the TPA.

316. Additionally, Peru argues that “Claimant also made certain tax adjustments in calculating its damages for its alternative claim” relating to “Claimant’s argument in Section III.Q of its Memorial that the non-stabilized regime was improperly applied to certain Leaching Project activities,” but that “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.”¹⁴⁴⁷ Peru’s argument is simply bizarre. As Peru acknowledged in paragraph 611 of the Counter-Memorial,¹⁴⁴⁸ Freeport asserted in the Memorial that “Peru breached . . . the Stability Agreement when certain of its Tax

¹⁴⁴³ **RA-86**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003, ¶ 10.6.4 (noting that the claimant was under “no contractual obligation to accept an offer of an alternative site”).

¹⁴⁴⁴ **RA-87**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award of 12 April 2002, ¶ 170.

¹⁴⁴⁵ **RA-86**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award of 7 October 2003, ¶ 10.6.4(5).

¹⁴⁴⁶ Counter-Memorial ¶ 811.

¹⁴⁴⁷ Counter-Memorial ¶¶ 812-13 (emphasis omitted).

¹⁴⁴⁸ Counter-Memorial ¶ 611 (“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.”) (citing Memorial ¶¶ 348-50).

Assessments became final and enforceable for the independent reason that Peru arbitrarily applied the non-stabilized regime to assets and activities that enjoyed stability even under Peru’s own flawed interpretation of the stability agreement.”¹⁴⁴⁹ In the same paragraph, Peru asserted that it “addresses the substance of these allegations in Sections II.I and III.B.2.d” of the Counter-Memorial.¹⁴⁵⁰ However, Section II.I is a sub-chapter in the “Factual Background” of the Counter-Memorial and section III.B.2.d does not exist. Peru and Ms. Kunsman then reduce damages for the Alternative Claim by US\$27.6 million on the grounds that Article 22.3 of the TPA bars Freeport’s claims that those final and enforceable Tax Assessments breached Article 10.5 of the TPA.¹⁴⁵¹ But Freeport alleged that those final and enforceable Tax Assessments breached the *Stability Agreement*, not Article 10.5, and includes damages for those breaches in the Alternative Claim.¹⁴⁵² Peru concedes that Article 22.3 does not bar Freeport from alleging that taxation measures breached the *Stability Agreement*.¹⁴⁵³ Therefore, it is the “basis” upon which Peru seeks to exclude from the Alternative Claim damages based on the application of the non-stabilized regime to the Leaching Facility that is “unclear,” not the “basis [upon which] Claimant believes it is entitled to damages for these adjustments.”¹⁴⁵⁴

F. PERU’S OTHER CRITICISMS OF DR. SPILLER AND MS. CHAVICH’S VALUATION ARE WRONG, IRRELEVANT, OR INCONSEQUENTIAL

317. Peru and Ms. Kunsman allege two additional errors with respect to specific calculations in the First Spiller-Chavich Report, which are both inconsequential.

- (a) *First*, Peru and Ms. Kunsman maintain that short-term interest earned between any given dividend declaration date and the dividend distribution date, would not have been paid out on that dividend distribution date, as the First Spiller-Chavich Report assumes, but on the following dividend distribution date.¹⁴⁵⁵ “[T]o reduce areas of disagreement” for the Tribunal’s benefit, Dr. Spiller and Ms. Chavich implement this adjustment resulting in a

¹⁴⁴⁹ Memorial ¶ 351 (citing *id.* ¶¶ 348-49 (arguing that Peru applied the non-stabilized regime to activities “that under the Government’s own novel interpretation were clearly stabilized”).

¹⁴⁵⁰ Counter-Memorial ¶ 611.

¹⁴⁵¹ Counter-Memorial ¶ 813 (citing **RER-5**, Kunsman, ¶ 94).

¹⁴⁵² Memorial ¶ 351; **CER-6**, Spiller-Chavich II, ¶¶ 2, 31; **CER-1**, Spiller-Chavich I, ¶¶ 79, 107.

¹⁴⁵³ See Counter-Memorial ¶¶ 456-58, 468.

¹⁴⁵⁴ Counter-Memorial ¶ 813.

¹⁴⁵⁵ **RER-5**, Kunsman, ¶¶ 15, 91; Counter-Memorial ¶ 814, n. 1673 (“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.”).

reduction of damages of 0.002% for the Main Claim and 0.003% for the Alternative Claim.¹⁴⁵⁶

- (b) *Second*, Peru and Ms. Kunsman note that SMCV paid 2011 AIT in December 2017 not October 2012.¹⁴⁵⁷ Dr. Spiller and Ms. Chavich correct this clerical error in their model,¹⁴⁵⁸ resulting in a reduction of damages of less than 0.01%.¹⁴⁵⁹

318. Additionally, Peru “warn[s] the Tribunal” that “Claimant’s damages are [partially] duplicative of those requested by SMM Cerro Verde Netherlands B.V. (“SMM Cerro Verde”) in ICSID Case No. ARB/20/14.”¹⁴⁶⁰ However, as Peru acknowledges in the same paragraph, this warning is premature because the tribunal in the SMM Cerro Verde Arbitration has not yet rendered an award.¹⁴⁶¹

¹⁴⁵⁶ **CER-6**, Spiller-Chavich II, ¶ 22.

¹⁴⁵⁷ Counter-Memorial ¶ 815 (citing **RER-5**, Kunsman, ¶¶ 125-26).

¹⁴⁵⁸ **CER-6**, Spiller-Chavich II, ¶ 13, n. 15, 55.

¹⁴⁵⁹ **RER-5**, Kunsman, ¶¶ 14, 80, Table 18, n. 15, Annex No. 1, Compass Lexecon Updated Damage Valuation Model, “Summary” Tab, “2011 AIT Payment Date” Toggle to “Corrected in Both Claims (Spiller Chavich II”).

¹⁴⁶⁰ Counter-Memorial ¶ 776.

¹⁴⁶¹ Counter-Memorial ¶ 776 (“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 outcome.”).

V. REQUESTED RELIEF

319. Freeport and SMCV are entitled to be restored to the situation they would have been in but for Peru's breaches of the Stability Agreement and the TPA. To this end, Freeport respectfully requests the Tribunal to issue an award:

- A. Dismissing Peru's objections to jurisdiction and declaring that it has jurisdiction over Freeport's claims;
- B. Declaring that Peru breached the Stability Agreement;
- C. Declaring that Peru breached Article 10.5 of the TPA;
- D. Ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's illegal acts, valued at US\$942.4 million as of 13 September 2022, and subject to updating closer to the date of the Award (the "Main Claim").
- E. In the alternative to D, ordering Peru to pay monetary damages to SMCV in an amount that would wipe out all the consequences of Peru's arbitrary failure to waive penalties and interest in breach of Article 10.5 of the TPA; arbitrary refusal to reimburse SMCV for the Q4 2011 to Q3 2012 GEM payments in breach Article 10.5 of the TPA; and arbitrary application of the non-stabilized regime to assets and activities that enjoyed stability even under Peru's own flawed interpretation of the Stability Agreement, valued at US\$719.9 million as of 13 September 2022, and subject to updating closer to the date of the Award (the "Alternative Claim").
- F. Ordering Peru to pay annually compounding post-award interest on Freeport's and SMCV's damages and losses at a rate equal to SMCV's cost of equity running from the date of the Award to the date full payment of those amounts is made;
- G. Ordering Peru to pay all the costs of the arbitration, as well as Freeport's and SMCV's attorneys' fees and expenses in an amount to be determined by such means as the Tribunal may direct;
- H. Declaring that all amounts paid by Peru are net of any Peruvian taxes or other fiscal obligations and ordering Peru to indemnify Freeport and SMCV with respect to any Peruvian tax imposed on such amounts; and
- I. Ordering any other such relief as the Tribunal may deem just and appropriate in the circumstances.

320. Freeport reserves its rights to amend or supplement this Reply and Counter-Memorial on Jurisdiction, including the requested relief and the amounts claimed, and to seek further relief for additional breaches arising from Peru's past, present, or future conduct.

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