

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Freeport-McMoRan Inc.

v.

Republic of Peru

(ICSID Case No. ARB/20/8)

PROCEDURAL ORDER NO. 3
Decision on Documentary Evidence Issues

Members of the Tribunal

Dr. Inka Hanefeld, President of the Tribunal
Prof. Dr. Guido Santiago Tawil, Arbitrator
Mr. Bernardo M. Cremades, Arbitrator

Assistant to the Tribunal

Ms. Charlotte Matthews

Secretary of the Tribunal

Ms. Marisa Planells-Valero

14 March 2023

Freeport-McMoRan Inc. v. Republic of Peru
(ICSID Case No. ARB/20/08)

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The Tribunal hereby issues its Decision on Documentary Evidence Issues to address the Parties' requests set out in the Claimant's letters dated 31 January 2023, 28 February 2023, and 7 March 2023 and the Respondent's letters dated 24 February 2023, 27 February 2023, and 4 March 2023.

- In **Section A**, the Tribunal recalls the procedural history of the Parties' respective requests;
- In **Section B**, the Tribunal sets out the Parties' positions on the Parties' respective requests;
- In **Section C**, the Tribunal sets out its considerations and decisions on the Parties' respective requests, and
- In **Section D**, the Tribunal sets out the Tribunal's order.

I. SECTION A - PROCEDURAL HISTORY

1. On 17 June 2021, the Tribunal issued Procedural Order No. 1 (**PO1**).
2. On 20 October 2021, the Claimant submitted its Memorial.
3. On 5 May 2022, the Respondent filed its Counter-Memorial on the Merits and Memorial on Jurisdiction dated 4 May 2022.
4. On 6 June 2022, the Parties submitted their Replies to the other Party's Document Production Requests (**DPRs**) in the form of Redfern Schedules in accordance with PO1 and the Updated Procedural Timetable as per the revised Annex A to PO1 dated 21 April 2022.
5. On 4 July 2022, the Tribunal issued Procedural Order No. 2 on the Parties' DPRs (**PO2**).
6. On 14 September 2022, the Claimant submitted its Reply and Counter-Memorial on Jurisdiction dated 13 September 2022.
7. On 9 November 2022, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction dated 8 November 2022.
8. On 17 December 2022, the Claimant filed its Rejoinder on Jurisdiction dated 16 December 2022.
9. On 31 January 2023, the Claimant wrote a letter to the Tribunal regarding "*Respondent Peru's failure to comply with obligation to produce documents pursuant to Claimant's Document Requests Nos. 1(d) and 10.*"¹ The Claimant sought the following relief:

¹ Claimant's letter to the Tribunal dated 31 January 2023, p. 1.

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“[...] Freeport respectfully requests that the Tribunal:

- a. Order Peru to produce, pursuant to Claimant’s Document Request No. 1(d), copies of the 105 documents Peru produced in response to Document Request No. 1(a) in the SMM Cerro Verde arbitration by 7 February 2023;*
- b. Order Peru to produce by 7 February 2023 all other documents responsive to Claimant’s Document Request No. 1(d);*
- c. Grant Freeport leave to submit as evidence the full audio recording of the Mining Royalties Forum.*

Freeport reserves all rights, including the right to apply to the Tribunal for leave to submit into the record prior to the Hearing any new documents or information that Respondent produces pursuant to Claimant’s Document Request No. 1(d).”²

10. On 1 February 2023, the Tribunal invited the Respondent to provide its comments regarding the Claimant’s letter dated 31 January 2023 by 10 February 2023.
11. On the same day, the Respondent requested that it be allowed to respond by 24 February 2023, allowing the Respondent one week to prepare its response following the close of the *SMM Cerro Verde* hearing, to which the Claimant indicated that it had no opposition thereto.
12. On 2 February 2023, the Tribunal granted the extension sought by the Respondent to reply to the Claimant’s letter dated 31 January 2023.
13. On 24 February 2023, the Respondent filed its comments in reply to the Claimant’s letter dated 31 January 2023. The Respondent requested the Tribunal to *“reject all of Claimants requests both on the basis that they are untimely as well as on the basis that Claimant’s requests lack merit.”³*
14. On the same day, the Claimant requested leave to submit a reply to the Respondent’s letter dated 24 February 2023 by 28 February 2023.
15. On 27 February 2023, the Tribunal granted the Claimant leave to submit additional comments on the Respondent’s communication of 24 February 2023 by 28 February 2023. The Respondent was also afforded the opportunity to reply to the Claimant’s additional comments by 4 March 2023.

² Claimant’s letter to the Tribunal dated 31 January 2023, p. 10.

³ Respondent’s letter to the Tribunal dated 24 February 2023, p. 10.

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16. Also on 27 February 2023, the Respondent wrote a letter to the Tribunal seeking “to exclude from the record new factual exhibits submitted by Claimant with its Rejoinder on Jurisdiction on December 16, 2022, and [...] seek[ing] leave from the Tribunal to submit new exhibits pursuant to Section 17.3 of Procedural Order No. 1.”⁴ The Respondent requested the following relief:

*Respondent respectfully requests that the Tribunal strike from the record twelve new exhibits Claimant inappropriately added to the record with its Rejoinder on Jurisdiction even though the documents do not support Claimant’s jurisdictional arguments. In addition, although Respondent would be entitled to seek to exclude the 2006 Mining Council Resolution from the record on the basis that Claimant inappropriately included the document with its Rejoinder on Jurisdiction even though it never referenced or cited the document in that submission, Respondent instead seeks leave from the Tribunal to introduce on the record five new documents which provide the context in which the 2006 Mining Council Resolution was issued. Respondent also seeks leave from the Tribunal to introduce those responsive documents for impeachment purposes. Further, Respondent seeks leave from the Tribunal to introduce four additional documents which are responsive to new documents added to Claimant’s Rejoinder submission or which Respondent inadvertently omitted from its Rejoinder submission. In light of the special circumstances described above, Respondent respectfully requests that the Tribunal grant Respondent’s application to introduce new exhibits on the record pursuant to Section 17.3 of Procedural Order No. 1.*⁵

17. On 1 March 2023, the Claimant submitted comments dated 28 February 2023 to the Respondent’s communication of 24 February 2023. The Claimant sought the following relief:

[...] Freeport respectfully requests that the Tribunal:

(a) Order Peru to produce, pursuant to Claimant’s Document Request No. 1(d), copies of the 105 documents Peru produced in response to Document Request No. 1(a) in the SMM Cerro Verde arbitration by 1 April 2023;

(b) In the alternative to (a) above, order Peru to produce, pursuant to Section 17.4 of PO1 and ICSID Arbitration Rule 34(2)(a), copies of the 105 documents Peru produced in response to Document Request No. 1(a) in the SMM Cerro Verde arbitration by 1 April 2023;

⁴ Respondent’s letter to the Tribunal dated 27 February 2023, p. 1.

⁵ Respondent’s letter to the Tribunal dated 27 February 2023, pp. 9-10.

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(c) Grant Freeport leave to submit as evidence the full audio recording of the Mining Royalties Forum.

Freeport reserves all rights, including the right to apply to the Tribunal for leave to submit into the record prior to the Hearing any additional documents including documents that Respondent produces pursuant to Claimant's Document Request No. 1(d) or a Tribunal's order pursuant to Section 17.4 of PO1 and ICSID Arbitration Rule 34(2)(a).⁶

18. On 4 March 2023, the Respondent submitted additional comments in response to the Claimant's letter dated 28 February 2023. The Respondent requested the Tribunal to "*reject all of Claimant's requests both on the basis that they lack merit as well as on the basis that they are untimely.*"⁷

19. On 8 March 2023, the Claimant submitted comments dated 7 March 2023 on the Respondent's letter dated 27 February 2023. The Claimant sought the following relief:

[...] Freeport respectfully requests that the Tribunal:

(a) deny Respondent's application to exclude from the record the following documents that Freeport submitted with its Rejoinder on Jurisdiction:

- 1. CE-1096, Directoral Resolution No. 158-78-EM-DGM (Cujajone EAU) (Annex A) (6 June 1978)*
- 2. CE-1097, Directoral Resolution No. 011-93-EM-DGM (Toquepala EAU) (Annex B) (13 January 1993)*
- 3. CE-1104, Jorge Picón, The Truth about Mega Tax Disputes vs. Mega Companies. The Constitutional Tribunal Has Resolved (15 November 2018)*
- 4. CE-1107, SENACE Maps in Yanacocha's MEIA - Chaupiloma Dos (two pits) (January 2019)*
- 5. CE-1110, Jorge Picón, Tax Mega Disputes in Peru (13 December 2019)*
- 6. CE-1118, INGEMMET Satellite MAP - Chaupiloma Dos (two pits) (16 November 2022)*
- 7. CE-1114, Jorge Bravo, Taxes: Misinformation and Mistaken Targets (24 August 2021)*

⁶ Claimant's letter to the Tribunal dated 28 February 2023, p. 10.

⁷ Respondent's letter to the Tribunal dated 4 March 2023, p. 9.

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8. *CE-1122, Mining Council Resolution N° 224 2006-MEM/CM (17 October 2006);*
(b) in the alternative to (a) above, admit the eight documents identified in (a) pursuant to Section 17.3 of PO1; and
(c) deny Respondent’s application for leave to submit new documents into the record.
Freeport reserves all rights including the right to seek leave to introduce new exhibits and authorities pursuant to Sections 17.3, 17.4, or 25.1 of PO1.

20. On the same day, the Respondent requested leave to submit a reply to the Claimant’s letter dated 7 March 2023.
21. On 9 March 2023, the Tribunal advised the Parties that it did not see a need to open a further round of submissions on the issues raised in the Respondent’s communication of 8 March 2023 as it was sufficiently briefed on all aspects relevant to its decision.

II. SECTION B - THE PARTIES’ POSITIONS

A. The Claimant’s position

1. *The Claimant’s requests relating to its DPRs Nos. 1(d) and 10*
22. The Claimant is of the view that the Respondent has failed to comply with its document production obligations pursuant to PO2. According to the Claimant, this became apparent due to the Respondent’s allegedly belated production of documents pursuant to the tribunal’s orders in the *SMM Cerro Verde* proceedings and the new exhibits that the Respondent submitted with its Rejoinder and Reply on Jurisdiction dated 8 November 2022.
23. **With respect to the Claimant’s DPR No. 1(d):** The Claimant submits that the Respondent’s recent production of documents in the *SMM Cerro Verde* arbitration confirm that the Respondent is withholding documents covered by the Tribunal’s order on the Claimant’s DPR No. 1(d) that are materially relevant to this dispute. Specifically, the Claimant submits that the Tribunal ordered Peru to produce SUNAT documents “*directly discussing whether mining stability agreements applied to investments within a concession or mining unit that were not part of the investment plan that qualified the mining company to obtain the mining stability agreement,*” *i.e.* a similar order to the one ordered by the tribunal in the *SMM Cerro Verde* arbitration and which Peru only finally complied with in unredacted form on 6 December 2022 and 11 January 2023. The Claimant is of the view that the 105 documents produced in the *SMM Cerro Verde* arbitration on 6 December 2022 and 11 January 2023 are responsive to the Claimant’s DPR No. No. 1(d) and should accordingly be produced in this arbitration. However, the Claimant submits that the

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Respondent has produced only one document in response to the Claimant's DPR No. 1(d), *i.e.* an alleged June 2006 internal SUNAT report assessing the scope of SMCV's 1998 Stability Agreement authored by Ms. Gabriela Bedoya on which the Respondent relies heavily in its Rejoinder.

24. The Claimant asserts that its DPR No. 1(a) was identical to the corresponding request in the *SMM Cerro Verde* arbitration, pursuant to which the *SMM Cerro Verde* tribunal ordered production of “*all resolutions and reports (not including drafts) for each identified stability agreement which evidence the manner in which the fiscal, legal and administrative regimes were applied to projects within such mining concession/unit.*” While this Tribunal did not grant the Claimant's DPR No. 1(a), as it considered it overly broad, it granted the Claimant's DPR No. 1(d) and the Claimant submits that documents directly discussing the scope of stability agreements are captured by both the Claimant's DPRs Nos. 1(a) and 1(d).
25. The Claimant submits that since it has had the opportunity to review the unredacted documents in the *SMM Cerro Verde* arbitration, it can confirm that they “*directly discuss[] whether mining stability agreements applied to investments within a concession or mining unit that were not part of the investment plan that qualified the mining company to obtain the mining stability agreement.*”⁸ The Claimant thus requests that the Tribunal order production of the unredacted documents responsive to the Claimant's DPR 1(d) from the *SMM Cerro Verde* arbitration.
26. If the Tribunal has any doubts about whether the documents are responsive and should have been produced, the Claimant suggests that the Tribunal order their production *in camera* for the Tribunal's inspection, as the *SMM Cerro Verde* tribunal did.
27. In any event, even if the Tribunal concludes that the documents are not responsive to the Claimant's DPR No. 1(d), the Claimant submits that fundamental principles of fairness and justice compel their production pursuant to Section 17.4 of PO1, which provides that the “*Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).*” The Claimant argues that the documents not only bear on the critical merits issue of whether stability agreements apply to mining units or investment projects, they also concern the very stability agreements that the Respondent has affirmatively argued SUNAT applied only to investment projects in its submissions.
28. The Claimant also argues that contrary to the Respondent's contention, Article 85 of the Peruvian Tax Code does not govern document disclosure obligations in this proceeding and, therefore, cannot provide a basis for the Respondent to redact or withhold documents that it is obligated to produce. Although Article 10.28 of the TPA includes “*information that is [...] protected from disclosure under a Party's law*” in its definition of “*protected*

⁸ Claimant's letter to the Tribunal dated 31 January 2023, p. 7 referring to PO2 dated 4 July 2022, Appendix 1, pp. 10-11, 14.

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information,” Article 10.21 of the TPA only protects that information from disclosure to the public under the TPA’s transparency rules, which the Claimant does not seek.

29. Finally, contrary to the Respondent’s contention, the Claimant submits that it did not violate Section 25.1 of PO1. The Claimant draws a distinction between two situations: i.e., the situation in which a party wishes to submit documents from the *SMM Cerro Verde* arbitration into the record as exhibits or authorities, where prior leave is required, from the situation in which a party refers to or annexes documents from the *SMM Cerro Verde* arbitration when it engages in procedural correspondence, where prior leave is not required.
30. **With respect to the Claimant’s DPR No. 10:** The Claimant avers that the Respondent exhibited for the first time in its Rejoinder a selective excerpt of an audio recording of remarks of the former Minister of Energy and Mines Fernando Sánchez Albavera made at the 11 March 2004 Mining Royalties Forum before the Peruvian Congress but did not produce the full audio recording, which is responsive to the Claimant’s DPR No. 10. According to the Claimant, Peru rejected the Claimant’s request for production of the full audio recording of the Forum in this proceeding but, subsequently, disclosed it in the *SMM Cerro Verde* arbitration. The Claimant submits that basic principles of procedural fairness require that the Claimant be permitted to exhibit the full audio recording to put the selectively excerpted remarks the Respondent filed with its final written submission in their appropriate context.
31. The Claimant argues that it may request leave from the Tribunal to submit such document on the basis of Section 25.1 of PO1. The Claimant submits two reasons for which its request should be permitted. First, according to the Claimant, the Respondent’s failure to produce the full audio recording of the 11 March 2004 Mining Royalties Forum is a violation of its document production obligations pursuant to the Claimant’s DPR No. 10. Second, the Claimant submits that the introduction of the full audio recording is in the interests of procedural fairness as the recording is directly relevant and material to the Parties’ dispute about the intent of the drafters of the provisions of the Mining Law at issue in this proceeding. In particular, the recording provides the necessary context to rebut the Respondent’s argument in the Rejoinder that Minister Sánchez Albavera intended Peru’s regime for mining stability to apply more narrowly than Chile’s regime to specific investment projects.
32. The Claimant sustains that its request for leave is timely. According to the Claimant, it was not apparent that there was a full recording of the Forum up until the Respondent’s Rejoinder, where the Respondent exhibited other selective snippets of the full recording. Only after 16 December 2022, when Peru finally produced the full recording in the *SMM Cerro Verde* arbitration, could Freeport obtain the recording and seek to exhibit it in this proceeding.

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2. *The Respondent's requests relating to the exclusion and addition of evidence*
33. The Claimant submits that the Respondent's application to exclude from the record exhibits the Claimant submitted with its Rejoinder on Jurisdiction is unfounded and should be denied.
34. According to the Claimant, the exhibits the Respondent seeks to exclude supports the Claimant's arguments responding to the Respondent's jurisdictional objections. The Claimant also submits that it was compelled to introduce exhibits in the Rejoinder on Jurisdiction because the Respondent introduced for the first time in its Rejoinder and Reply on Jurisdiction new arguments and evidence concerning the Respondent's application of third-party stability agreements that the Respondent should properly have introduced in its Counter-Memorial and Memorial on Jurisdiction. The Claimant contends that in its Rejoinder and Reply on Jurisdiction, the Respondent raised two new arguments and presented new evidence to support its defense that it had consistently interpreted the Mining Law and Regulations to limit stability guarantees to specific investment projects set forth in a feasibility study. The Claimant submits that the Respondent also relied on these new arguments and evidence to support its objection that the Claimant's claims for breaches of the Stability Agreement are barred by the limitation provision in Article 10.18.1 of the TPA because the Claimant allegedly knew or should have known of the alleged breaches and loss before the cut-off date. The Claimant submits that the exhibits it submitted were responsive to the Respondent's arguments. In particular, the Claimant submits that Exhibits CE-1096 and CE-1097 show that Southern Peru's Cuajone and Toquepala EAUs are each made up of several mining concessions, while Exhibit CE-1062 states that "*the benefits granted by [SPCC's 1994 stability agreement] applie[d] to the 'Toquepala' and 'Cuajone' EAUs,*" and clearly shows that stability guarantees apply to mining units, not specific investment projects. The Claimant explains that while it submitted Exhibit CE-1062 with the Rejoinder on Jurisdiction and included it in its index of exhibits, it inadvertently omitted it from footnote 154. However, according to the Claimant, this is not a valid basis to exclude it from the record. In addition, the Claimant introduced Exhibits CE-1107 and CE-1118 to respond to the Respondent's new arguments in the Rejoinder and Reply on Jurisdiction concerning Yanacocha's Chaupiloma Dos concession. According to the Claimant, these exhibits show that is clear that each of these stability agreements applied to a different EAU.
35. The Claimant submits that it was also justified in exhibiting recordings of Mr. Picón, the Respondent's tax expert, concerning the nature of penalties and interest under Peruvian law in its Rejoinder on Jurisdiction. The Claimant submits that the recordings support Freeport's argument that penalties and interest do not constitute taxation measures under Article 22.3.1 of the TPA because they are distinct from taxes under Peruvian law.

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36. The Claimant is thus of the view that the Tribunal should dismiss the Respondent's application to exclude CE-1096, CE-1097, CE-1107, CE-1122, CE-1118, CE-1104, CE-1110, and CE-1114. Notwithstanding its position that it was justified in introducing the exhibits, the Claimant does not oppose the Respondent's application to exclude Exhibits CE-1119, CE-1120, CE-1121, CE-1112, and CE-1113 from the record.
37. The Claimant adds that in any event, the exhibits at issue are also admissible under Section 17.3 of PO1. The Claimant submits that for basic reasons of fairness, it should be entitled to submit evidence in response to the new arguments made by the Respondent in its Rejoinder and Reply on Jurisdiction and the new arguments raised by Mr. Bravo and Mr. Picón in their second expert report.
38. The Claimant further argues that the Respondent's application for leave to introduce new exhibits into the record should be denied because there are no "*special circumstances*" justifying the Respondent's belated attempt to submit the exhibits into the record now. More specifically:
39. With respect to the documents related to Southern Peru's Stabilization Agreement, the Claimant's submission of CE-1062, the 2006 Mining Council Resolution, which was responsive to the Respondent's Article 10.18.1 argument, cannot justify the Respondent's attempt to belatedly submit five more documents weeks before the hearing. The Claimant also submits that the Respondent has had ample opportunity to submit evidence seeking to impeach Mr. Flury's testimony in its written submissions. In addition, contrary to the Respondent's suggestions, the Claimant is not familiar with the documents and would thus be prejudiced by their introduction into the record at such a late stage.
40. With respect to the documents related to the appointment and retention of Tax Tribunal *vocales*, the Claimant contends that the Tribunal should deny the Respondent's request because such documents are not responsive to any new evidence or arguments that arose only after the Respondent's final written submission. Moreover, the letters that the Respondent seeks leave to introduce are Government documents that have been in the Respondent's possession since before the Rejoinder and Reply on Jurisdiction.
41. With respect to Resolution No. 095-014-0000747/SUNAT dated 20 May 2009, the Claimant submits that the Respondent has been in possession of the full resolution from the outset of the arbitration and should have submitted the full resolution in its Counter-Memorial and Memorial on Jurisdiction. Instead, the Respondent waited until the Rejoinder and Reply on Jurisdiction to exhibit cherry-picked excerpts of the resolution that it believes support its case, depriving the Claimant of the opportunity to adduce responsive evidence.
42. With respect to Freeport McMoRan Inc.'s 2007 Form 10K, the Claimant submits that the Respondent failed to submit the document with its submissions and also failed to include the document in its index. The sole reference to the document is buried in a figure in Mr.

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Rablovsky's second expert report, which does not discuss the Claimant's contemporaneous characterization of the Concentrator Project. According to the Claimant, the Respondent should have submitted the 10K in its first written submission if it believed it was relevant. Instead, the Claimant states that the Respondent waited until over three months after the fact to seek to remedy its omission.

B. The Respondent's position

1. *The Claimant's requests relating to the Claimant's DPRs Nos. 1(d) and 10*
43. The Respondent submits that it fully complied with PO2 and produced to the Claimant all documents that the Tribunal ordered the Respondent to produce. The Respondent is of the view that the Claimant's request is neither proper, well-founded, or timely.
44. **With respect to the Claimant's DPR No. 1(d):** The Respondent contends that the Claimant's request is made in violation of Section 25.1 of PO1 because the Claimant quoted, cited, and attached correspondence and procedural orders from the *SMM Cerro Verde* arbitration. In any event, the Respondent argues that the Tribunal is not bound by nor should it follow the same procedural decisions made by the tribunal in the *SMM Cerro Verde* case and that the Tribunal should disregard the Claimant's references to the *SMM Cerro Verde* arbitration.
45. The Respondent further submits that documents responsive to the Claimant's DPR No. 1(a) are not responsive to the Claimant's DPR 1(d). The Respondent sustains that documents "*relating to the application*" of certain stabilization agreements do not necessarily "*directly discuss[]*" the question of "*whether mining stability agreements applied to investments within a concession or mining unit that were not part of the investment plan that qualified the mining company to obtain the mining stability agreement.*"⁹ The Respondent contends that none of the documents that the Respondent produced in the *SMM Cerro Verde* arbitration "*directly discuss[]*" the specific question covered by Request No. 1(d) in this proceeding. Those documents simply show SUNAT's various audits of certain mining companies on the multiple tax issues arising out of their operations, which were related in part to the general application of their stabilization agreement.
46. The Respondent adds that the Claimant's request is untimely and that the Claimant could and should have raised its complaints regarding the Respondent's document production seven months ago when the Respondent produced responsive documents to the Claimant pursuant to PO2. In addition, the timing of the production of the unredacted versions of certain documents in the *SMM Cerro Verde* arbitration is entirely irrelevant. In any event, the redacted versions of the documents produced in the *SMM Cerro Verde* arbitration were

⁹ Respondent's letter to the Tribunal dated 24 February 2023 referring to PO2 dated 4 July 2022, Appendix 1, pp. 2 *et seq.* and PO2 dated 4 July 2022, ¶ 11.

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produced eight months ago and the Claimant’s counsel could have assessed at that time whether the documents produced in this arbitration were sufficient and, if not, could have sent a letter to the Tribunal seeking production of additional documents. The Respondent also notes that while the Claimant’s counsel in this arbitration sent a letter to the Respondent in August 2022 complaining that documents produced to *SMM Cerro Verde* in response to SMM’s Request No. 1(a) should have been produced to the Claimant in this arbitration in response to the Claimant’s Request No. 1(d), it did not raise the issue before the Tribunal until now.

47. According to the Respondent, while the Tribunal may order the production of documents anyway under Section 17.4 of PO1 pursuant to ICSID Arbitration Rule 34(2), the Tribunal need not exercise that power as the Tribunal already considered and ruled on the Claimant’s DPRs.
48. Finally, the Respondent submits that even if the Tribunal were to rule that the Respondent should produce the documents in question, it would be obligated under Article 85 of the Peruvian Tax Code to produce them with redactions. In addition, the information to be redacted qualifies as “*protected information*” under Article 10.28 of the US-Peru TPA and the Respondent should not be required to disclose information that is specifically protected under its own laws. The Respondent further recalls the provision in Article 22.4 of the TPA. Even if the Tribunal decided to order the Respondent to disclose the protected information, in accordance with its own laws, the Respondent could only disclose the information in this arbitration after being specifically authorized to do so via a Supreme Decree, a process which would likely take approximately two to three months.
49. **With respect to the Claimant’s DPR No. 10:** The Respondent submits that it fulfilled its document production obligations as the Respondent agreed to produce, in relevant part: “[*a*]udio or video recordings of the MINEM presentation to Congress on 11 March 2004.” There was thus never a request, an agreement, or an order to produce the entire audio recording of the whole of the Mining Royalties Forum of 11 March 2004, which was a three-hour event in which multiple presentations were made by multiple different stakeholders and experts before Congress. None of the other presentations at the event was responsive to Claimant’s document request. The Respondent submits that it thus did not produce the full three-hour recording of the entire Forum event to the Claimant.
50. In addition, the Respondent sustains that the Claimant’s application is untimely. If the Claimant had wanted to request the full audio recording of the three hours of presentations made at the 2004 Mining Royalties Forum, it should have made that request on 16 May 2022 in its document production requests or, at the latest, prior to the submission of its Reply brief in September 2022. The Respondent also submits that under Section 17.3 of PO1, a party must identify “*justified circumstances*” in order to submit new evidence to the record, which the Claimant has not done.

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51. In any event, the Respondent asserts that the recording submitted on the record fully and completely responds to the allegations made by the Claimant in its Reply and does not selectively excerpt comments made by the former Minister out of context. In the recording on the record, Former Minister Sánchez Albavera clearly states that he and Vice Minister Polo prepared Legislative Decree 708 and that when they were preparing the Legislative Decree, they analyzed Chile’s regulations and found that they were a “*bit excessive.*”

2. *The Respondent’s requests relating to the exclusion and addition of evidence*

52. The Respondent submits that the Claimant’s Rejoinder on Jurisdiction improperly included as exhibits twelve new documents and video recordings (i.e. Exhibits CE-1096, CE-1097, CE-1107, CE-1118, CE-1119, CE-1120, CE-1121, CE-1104, CE-1110, CE-1112, CE-1113, and CE-1114) whose contents are completely unrelated to the Claimant’s jurisdictional arguments and requests that the Tribunal strike them from the record. According to the Respondent, Exhibits CE-1096, CE-1097, CE-1107, CE-1118, CE-1119, CE-1120, and CE-1121 are cited in the context of the Claimant’s argument that “*the Mining Law and Regulations clearly extended stability guarantees to concessions or mining units and that is how Perú consistently applied the Mining Law and Regulations before its volte face.*”¹⁰ However, the Respondent submits that none of these documents refer to stability guarantees or to the Respondent’s application of those stability guarantees. With respect to Exhibits CE-1104, CE-1110, CE-1112, CE-1113, and CE-1114, the Respondent submits that these are cited in the context of the Claimant’s argument that “*Peru does not contest that penalties and interest serve a distinct ‘purpose’ from taxes in Peruvian law*”¹¹ but do not speak to the purpose of penalties and/or interest in the context of taxation.

53. According to the Respondent, the Claimant also inappropriately submitted with its Rejoinder on Jurisdiction a thirteenth new exhibit (i.e. Exhibit CE-1122, which is a 2006 Mining Council Resolution related to the Stabilization Agreement of Southern Peru) that is also not related to any of the Claimant’s jurisdictional arguments and is not even mentioned or cited in its submission or any of its accompanying witness statements or expert reports. Although the Respondent would be entitled to have that document stricken from the record, the Respondent does not seek to exclude that one document from the record so long as the Respondent is permitted to add to the record four additional documents of its own that are necessary to put the Claimant’s new exhibit into context in accordance with Section 17.3 of PO1. The Respondent also seeks to use such documents to impeach the testimony of one of the Claimant’s witnesses. The Respondent thus seeks leave from the Tribunal to admit documents that would demonstrate that Southern Peru and MINEM understood that a mining stabilization agreement applies exclusively to the mining investment project for which a stabilization agreement is entered into, as described in the

¹⁰ Claimant’s Rejoinder on Jurisdiction dated 16 December 2022, ¶ 33(d).

¹¹ Claimant’s Rejoinder on Jurisdiction dated 16 December 2022, ¶ 83(a).

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feasibility study that forms an integral part to a stabilization agreement. Such documents are:

- a letter from Southern Peru's President and signed by the Claimant's witness dated 15 August 1994, which allegedly demonstrates Southern Peru's own understanding of the scope of its Stabilization Agreement;
- a letter from Southern Peru to MINEM dated 5 May 2004, which allegedly gives context to the Mining Council Resolution and the parameters of the issue that was put before the Mining Council for decision;
- Report No. 190-2005-MEM-DGM/PDM dated 5 May 2005, which allegedly clarifies the scope of Southern Peru's Stabilization Agreement benefits and provides context for the 2006 Mining Council Resolution;
- Maps of the Toquepala and Cujajone EAUs, which allegedly compare them to the new EAUs that Southern Peru wanted to include in the Stabilization Agreement and illustrate the differences in EAUs and thereby put into context the 2006 Mining Council Resolution.

54. The Respondent submits that the admission of these documents would not cause any prejudice to the Claimant, as they are all documents with which the Claimant's local counsel and witness (Mr. Hans Flury) are familiar. The Respondent further contends that not admitting the documents would severely prejudice the Respondent and its ability to fully present its case, as the documents directly contradict both the Claimant's Exhibit CE-1122 and the Claimant's claims in this arbitration as a whole.

55. The Respondent also applies pursuant to Section 17.3 of PO1 for leave of the Tribunal to add four documents to the record. In light of certain new exhibits that the Claimant introduced into the record with its Rejoinder on Jurisdiction in relation to the appointment and retention of Tax Tribunal *vocales*, the Respondent seeks to add to the record contemporary correspondence between the Tax Tribunal and the MEF and between the MEF and certain law school deans in Peru allegedly showing that the selection and reappointment of any vocal is conducted through an impartial process, so that the Tribunal has a more accurate and complete picture of the facts. Specifically, the Respondent seeks to introduce Letter No. 723-2022-EF/10.01 and Letter No. 001-2022-Comisión D.S. 180-2017-EF. The Respondent submits that not allowing it the right to submit these documents on the record would be prejudicial to the Respondent and its ability to fully present its case.

56. The Respondent also seeks to add to the record two documents that the Respondent inadvertently omitted from the set of exhibits that accompanied its Rejoinder submission. Specifically, the Respondent seeks to add:

- the full Resolution No. 095-014-0000747/SUNAT dated 20 May 2009 as only excerpts of it are contained in Exhibit RE-193. According to the Respondent, the additional excerpts further show SUNAT's position that mining stabilization agreements apply

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exclusively to the mining investment projects for which the agreement is entered into and that have been outlined in the corresponding feasibility study. The Respondent sustains that the Claimant's counsel has had the complete document since June 2022, when the Respondent produced the document to the claimant in the *SMM Cerro Verde* arbitration.

- Freeport McMoran Inc. 2007 Form 10K, which the Respondent's expert Mr. Ralbovsky cites in his second expert report. According to the Respondent, Mr. Ralbovsky discussed that SEC filing because it demonstrates the Claimant's contemporaneous characterization of the Concentrator Project (i) as separate and independent from the Leaching Project; and (ii) as substantially larger both in terms of volume of production and value. The Claimant would not be prejudiced by the addition of this exhibit because the form is a publicly available document to which the Claimant has online access, it is the Claimant's own regulatory filing with which it is necessarily familiar, and Mr. Ralbovsky has already summarized the key information from the document in his Report.

III. SECTION C - THE TRIBUNAL'S CONSIDERATIONS

57. This Decision as well as each of the considerations set out below are based upon the Tribunal's current and non-prejudicial understanding of the case. In particular, these considerations should not be taken as any indication of the Tribunal's views regarding the Tribunal's jurisdiction and/or the merits of the case. At this juncture, the Tribunal takes no position on the ultimate relevance or probative value of the documents commented upon by the Parties in their respective requests. However, for the reasons set out below, the Tribunal orders the Parties to produce the documents as directed by virtue of this Decision.

A. The Tribunal's general considerations

58. At this juncture, only weeks ahead of the Hearing, the Tribunal's principal concern is that the Parties are given a full opportunity to be heard at the Hearing. The Tribunal finds that such right entails both the right for a Party to present its case in full to the Tribunal and the right for the other Party to comment on any evidence adduced to the record.

59. At this point in time, and as anticipated, the Tribunal is not in a position to decide on the ultimate relevance and probative value of any of the evidence discussed by the Parties prior to the Hearing. Rather, the Tribunal considers the Hearing to be the opportunity for the Parties to test the evidence and present their cases. In this regard, the Tribunal notes that both Parties have presented requests for additional evidence to be added to the record, which the Parties respectively consider relevant to the core of their case theories. The Respondent also seeks to exclude some of the Claimant's evidence.

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60. The Tribunal notes that PO1 provides three separate grounds in relation to the submission of evidence outside of the Parties' written submissions and the document production phase.

61. First, the Tribunal recalls that Section 17.3 of PO1 provides as follows:

Neither Party shall be permitted to submit additional or responsive documents after the filing of its respective last pre-hearing written submission, unless the Tribunal determines that special circumstances exist based on a reasoned written request followed by observations from the other Party.

62. Second, the Tribunal also recalls that Section 25.1 of PO1 provides as follows:

*Each Party may submit written submissions, transcripts, recordings, witness statements, expert reports, produced documents, orders, awards and decisions from the SMM Cerro Verde arbitration in this Proceeding subject to a written reasoned request and leave from the Tribunal in this Proceeding.*¹²

63. Third, the Tribunal recalls that pursuant to Section 17.4 of PO1, ICSID Rule 34(2) and Article 43 of the ICSID Convention, tribunals enjoy *ex officio* discretion to call upon parties to produce documents at any stage of the proceeding. Specifically, Section 17.4 of PO1 provides:

The Tribunal may call upon the Parties to produce documents or other evidence in accordance with ICSID Arbitration Rule 34(2).

64. ICSID Arbitration Rule 34(2) provides:

*The Tribunal may, if it deems it necessary at any stage of the proceeding:
(a) call upon the parties to produce documents, witnesses and experts; [...]*

65. The Tribunal notes that both Parties are in agreement as to the Tribunal's authority to summon supplementary evidence pursuant to Section 17.4 of PO1.¹³

66. In light of the above, the Tribunal finds it most appropriate to assess both Parties' requests in light of Section 17.4 of PO1 and the Tribunal, thus, will not address the specificities and requirements of Sections 17.3 and 25.1 of PO1 pleaded by the Parties. The Tribunal's discretion to call upon the Parties to produce additional evidence is informed, among others, by concepts of specificity, relevance, and materiality taking guidance on the 2020 IBA Rules on the Taking of Evidence in International Arbitration. With respect to the notion of specificity, the Tribunal notes that all documents respectively sought by the Parties are clearly identified. With respect to relevance and materiality, the Tribunal, at this juncture, does not issue a view on the ultimate relevance and materiality of the documents respectively sought by the Parties. Rather, the Tribunal finds it appropriate to rely on one or the other Party's position that the document is relevant and material and to consider

¹² PO1 dated 17 June 2023, Section 25.1.

¹³ Claimant's letter to the Tribunal dated 28 February 2023, p. 4; Respondent's letter to the Tribunal dated 4 March 2023, pp. 4-5.

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whether the Parties' requested documents hold the potential of further assisting the Tribunal's understanding of the factual matrix prior to the Hearing.

67. In addition, in assessing the Parties' respective requests, the Tribunal accords due importance to the Parties' right to be heard. In this regard, with respect to the documents that the Tribunal orders to be submitted to the record, the Tribunal notes that the Parties will have the opportunity to comment on those documents at the Hearing and/or in later post-hearing submissions, if required. Should the Parties, in addition, wish to submit additional written comments to those documents in advance of the Hearing, the Parties are invited to confer on the sequence of such comments, as well as their timing, and inform the Tribunal about their agreement or unilateral positions by **18 March 2023**.
68. Moreover, the Tribunal has carefully assessed the Parties' arguments on confidentiality and redaction based on Articles 10.21, 10.28 and 22.4 of the TPA and Article 85 of the Peruvian Tax Code.
69. In light of these general considerations, the Tribunal turns to the Parties' respective requests.

B. The Tribunal's decision on the Claimant's request relating to the production of documents in relation to its DPR No. 1(d)

70. The Tribunal does not find it useful to assess whether the documents sought by the Claimant in relation to its DPR No. 1(d) are indeed responsive to its DPR No. 1(d). Rather, the Tribunal finds that the issue for its consideration is whether the documents sought to be added to the record hold the potential of assisting the Tribunal's understanding of the case.
71. The Claimant submits that the documents it seeks on the basis of its DPR No. 1(d) bear on the critical merits issue of whether stability agreements apply to mining units or investment projects and also concern the very stability agreements that the Respondent has argued SUNAT applied only to investment projects in its submissions. The Respondent submits that such documents only show SUNAT's audits of certain mining companies on the multiple tax issues arising out of their operations, which were related in part to the general application of their stabilization agreement.
72. The Tribunal notes that at least one of the Parties finds the documents material and relevant at this late stage of the proceedings and in the light of the developments in the parallel *SMM Cerro Verde* arbitration. Hence, at least in the eyes of one of the Parties, they hold the potential of assisting the Tribunal's understanding of the scope of stability agreements relevant for this case.
73. While the number of documents sought by the Claimant is substantial, the Tribunal notes that the evidence sought is part of the record of the parallel *SMM Cerro Verde* case and

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Counsel in both cases are thus familiar with such documents and they are at the Respondent's disposal.

74. The Tribunal also notes that the Respondent has objected to the production of such documents on the basis of Article 10.28 of the TPA and Article 85 of the Peruvian Tax Code.
75. With respect to the Respondent's objection under Article 10.28 of the TPA, the Tribunal recalls that such provision defines "*protected information*" as "*confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.*" Such provision is a definition and does not create in itself any rights or obligations upon the Parties. It provides *inter alia* that a Party's domestic law is relevant in determining what constitutes "*protected information.*" Article 10.21 of the TPA, which governs the transparency of arbitral proceedings, provides rules concerning "*protected information.*" Article 10.21 of the TPA, however, only protects information from disclosure to the public and non-disputing parties. As such, while the Tribunal recognizes that the Respondent may designate the information it seeks to redact as "*protected information*" on the basis of Article 85 of the Peruvian Tax Code and Article 10.21 of the TPA, Article 10.21 of the TPA does not form the basis for an objection to the production of documents or otherwise release the Respondent from the obligation of producing such information in this proceeding.
76. The Tribunal further notes that the Respondent has recalled that Article 22.4 of the TPA further specifies that "*[n]othing in this Agreement shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.*" While the Tribunal accepts that Article 22.4 of the TPA constitutes an exception to the transparency regime envisaged in the TPA, the Tribunal finds that the Respondent has not clearly formulated an objection on such basis or shown how the disclosure of the documents to the other Party and the Tribunal would impede law enforcement, or otherwise be contrary to the public interest, or would prejudice the legitimate commercial interests of particular enterprises, public or private.
77. Accordingly, the Tribunal rejects the Respondent's objections to the disclosure of the documents sought by the Claimant.
78. The Tribunal further notes that while the Claimant submits that the documents produced in the *SMM Cerro Verde* proceedings were only disclosed to a limited number of participants

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in the parallel proceedings,¹⁴ the Respondent has not made any request to this effect in these proceedings.

79. Finally, the Tribunal understands that an exceptional authorization mechanism via Supreme Decree is necessary under Article 85 of the Peruvian Tax Code for the Respondent to produce the unredacted documents but that such mechanism does not come into play for the production of the redacted documents.
80. In light of these considerations, the Tribunal orders the Respondent to submit to the record the 105 documents produced in the *SMM Cerro Verde* arbitration on 6 December 2022 and 11 January 2023 with redactions to the extent required under Article 85 of the Peruvian Tax Code by **18 March 2023**. The Tribunal further orders the Respondent to submit to the record the same documents in unredacted form at **the earliest date possible** for the Respondent. In this regard, the Tribunal orders the Respondent to undertake its best efforts to submit such documents in unredacted form **prior to the commencement of the Hearing**. The Tribunal understands that the redacted information that the Respondent will eventually disclose qualifies as “*protected information*” under the TPA and will thus be protected from disclosure to the public and the non-disputing party. In accordance with Article 10.21.2, the Tribunal is circulating a Hearing Confidentiality Protocol to ensure the protection of any protected information used during the Hearing, for the Parties’ consideration. Once adopted, such Protocol will be incorporated as Annex A to Procedural Order No. 3.

C. The Tribunal’s decision on the Claimant’s request relating to the production of documents in relation to its DPR No. 10

81. With respect to the full audio recording of the 11 March 2004 Mining Royalties Forum, the Tribunal, again, does not find it relevant to address whether such audio recording is responsive to the Claimant’s DPR No. 10. Rather, the Tribunal notes that by the Respondent’s submission, the full audio recording sheds light on the scope of stability agreements. According to the Respondent, the audio recording “*disproves Claimant’s claims in this arbitration by showing that (i) Claimant knew or should have known about the limited scope of the 1998 Stabilization Agreement before it invested in Perú; and (ii) MINEM has always had the same position regarding the scope of stabilization agreements.*”¹⁵
82. Accordingly, the Tribunal finds that the full audio recording would assist its understanding on the scope of the 1998 Stabilization Agreement.

¹⁴ Claimant’s letter to the Tribunal dated 31 January 2023, p. 6.

¹⁵ Respondent’s letter to the Tribunal dated 24 February 2023, p. 8.

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83. In light of these considerations, the Tribunal orders the Claimant to produce the full audio recording of the 11 March 2004 Mining Royalties Forum.

D. The Tribunal's decision on the Respondent's requests relating to the exclusion of evidence to the record

84. The Tribunal notes that the Respondent seeks the exclusion of evidence allegedly unrelated to jurisdiction which the Claimant submitted with its Rejoinder on Jurisdiction dated 16 December 2022, i.e. Exhibits CE-1096, CE-1097, CE-1107, CE-1118, CE-1119, CE-1120, CE-1121, CE-1104, CE-1110, CE-1112, CE-1113, and CE-1114.

85. However, the Tribunal notes that the Claimant has clearly articulated that such exhibits are directly relevant to the Claimant's arguments responding to the Respondent's jurisdictional objections.¹⁶ In this regard, the Tribunal is not willing to strike any evidence from the record prior to the Hearing which could be of relevance with respect to the Respondent's jurisdictional objections. The Tribunal nevertheless takes note that the Claimant does not oppose the Respondent's application to exclude Exhibits CE-1119, CE-1120, CE-1121, CE-1112, and CE-1113 from the record.

86. In light of these considerations, the Tribunal rejects the Respondent's request to exclude Exhibits CE-1096, CE-1097, CE-1107, CE-1118, CE-1104, CE-1110, and CE-1114 from the record and takes note of the Parties' agreement to exclude Exhibits CE-1119, CE-1120, CE-1121, CE-1112, and CE-1113 from the record.

E. The Tribunal's decision on the Respondent's requests relating to the addition of evidence to the record

87. First, the Tribunal notes that while the Respondent alleges that Exhibit CE-1122 was inappropriately submitted with the Claimant's Rejoinder on Jurisdiction and could be stricken from the record, the Respondent does not request its exclusion but instead seeks leave to introduce four exhibits which would provide additional context to Exhibit CE-1122. Specifically, the Respondent seeks the introduction into the record of:

- a letter from Southern Peru's President and signed by the Claimant's witness dated 15 August 1994, which allegedly demonstrates Southern Peru's own understanding of the scope of its Stabilization Agreement;
- a letter from Southern Peru to MINEM dated 5 May 2004, which allegedly gives context to the Mining Council Resolution and the parameters of the issue that was put before the Mining Council for decision;
- Report No. 190-2005-MEM-DGM/PDM dated 5 May 2005, which allegedly clarifies the scope of Southern Peru's Stabilization Agreement benefits and provides context for the 2006 Mining Council Resolution;

¹⁶ Claimant's letter to the Tribunal dated 7 March 2023, pp. 2 *et seq.*

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- Maps of the Toquepala and Cuajone EAUs, which allegedly compare them to the new EAUs that Southern Peru wanted to include in the Stabilization Agreement and illustrate the differences in EAUs and thereby put into context the 2006 Mining Council Resolution.
88. The Tribunal will not delve into the issue of whether the Claimant's Exhibit CE-1122 was properly submitted to the record. Rather, the Tribunal's concern is whether the four documents sought to be added to the record by the Respondent hold the potential of shedding further light on issues that one of the Parties considers crucial in this arbitration. The Tribunal cannot exclude that they do as the Respondent submits that such documents are informative as to the scope of mining stabilization agreements.
89. In light of these considerations, the Tribunal orders the Respondent to submit such documents to the record.
90. Second, the Tribunal notes that the Respondent seeks the admission of Letter No. 723-2022-EF/10.01 and Letter No. 001-2022-Comisión D.S. 180-2017-EF, which allegedly shed light on the selection and reappointment process of *vocales*. The alleged partiality of *vocales* is an issue which is part of the Claimant's case and the Tribunal would thus be assisted by admitting to the record the two letters referred to by the Respondent.
91. In light of these considerations, the Tribunal orders the Respondent to submit such documents to the record.
92. Third, with respect to the two documents which the Respondent says it inadvertently omitted from the set of exhibits that accompanied its Rejoinder submission (*i.e.* Resolution No. 095-014-0000747/SUNAT dated 20 May 2009 and Freeport McMoran Inc.'s 2007 Form 10K), the Tribunal notes that the documents have either already been submitted in part or explicitly referred to and relied on in the proceedings.¹⁷ The Tribunal finds that both the efficient pursuit of the proceedings as well as the Tribunal's understanding of the factual matrix justifies that the (full) exhibits be provided to the record of the arbitration.
93. In light of these considerations, the Tribunal orders the Respondent to submit such documents to the record.

IV. SECTION D - THE TRIBUNAL'S ORDER

94. In light of the foregoing considerations and pursuant to Section 17.4 of PO1, the Tribunal:

¹⁷ RE-193, SUNAT, Intendency Resolution No. 095-014-0000747/SUNAT (20 May 2009) (excerpts); RER-09, Second Report of Stephen Rabovsky, September 16, 2022, at paras. 78-80, Figure 2.

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- a. Orders the Respondent to submit to the record the 105 documents produced in the *SMM Cerro Verde* arbitration on 6 December 2022 and 11 January 2023 in both redacted and unredacted form as specified in para. 80 above;
- b. Orders the Claimant to submit to the record the full audio recording of the 11 March 2004 Mining Royalties Forum;
- c. Rejects the Respondent's request to exclude Exhibits CE-1096, CE-1097, CE-1107, CE-1118, CE-1104, CE-1110, and CE-1114 from the record;
- d. Takes note of the Parties' agreement to exclude Exhibits CE-1119, CE-1120, CE-1121, CE-1112, and CE-1113 from the record;
- e. Orders the Respondent to submit to the record the letter from Southern Peru's President and signed by the Claimant's witness dated 15 August 1994;
- f. Orders the Respondent to submit to the record the letter from Southern Peru to MINEM dated 5 May 2004;
- g. Orders the Respondent to submit to the record Report No. 190-2005-MEM-DGM/PDM dated 5 May 2005;
- h. Orders the Respondent to submit to the record the maps of the Toquepala and Cujone EAUs;
- i. Orders the Respondent to submit to the record Letter No. 723-2022-EF/10.01 and Letter No. 001-2022-Comisión D.S. 180-2017-EF;
- j. Orders the Respondent to submit to the record the full Resolution No. 095-014-0000747/SUNAT dated 20 May 2009 and Freeport McMoran Inc.'s 2007 Form 10K.

95. The documents ordered to be produced should be submitted to the record as soon as practicable, preferably before **18 March 2023**, except as provided under para. 80 above, in order to ensure that the Parties and the Tribunal can take note of the documents well in advance of the Hearing.

[signed]

Dr. Inka Hanefeld
President of the Tribunal
Date: 14 March 2023