BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Republic of Perú,
Respondent.

Case N° ARB/20/8

Respondent's Comments on the United States' Non-Disputing Party Submission

April 7, 2023

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TABLE OF CONTENTS

I. INTRODUCTION

1. Pursuant to Annex A to Procedural Order No. 1, Perú hereby submits its comments ("Comments") on the United States' February 24, 2023 Non-Disputing Party Submission (the "U.S. Submission"). In these Comments, Perú assesses the United States' interpretation of certain provisions of the U.S.-Perú Trade Promotion Agreement (the "TPA") applicable in this arbitration and explains how those provisions, properly interpreted (which proper interpretation, Respondent submits, is consistent with the U.S. Submission), apply to this case.

2. In Section II, Perú addresses the United States' interpretation of the TPA provisions relating to this Tribunal's jurisdiction over claims asserted by Freeport-McMoRan Inc. ("Claimant"). Those provisions are Article 10.18.1, which establishes the TPA's limitations period for submitting claims; Article 22.3.1, which carves out taxation measures from the scope of most of the TPA's obligations; Article 10.1.3, which provides that the TPA does not apply retroactively; and Article 10.16, which governs claims that may be submitted to arbitration under the TPA. As Perú demonstrates, the United States' interpretation of these provisions reinforces Respondent's conclusion that the Tribunal lacks jurisdiction over nearly all of Claimant's claims.

3. In Section III, Perú discusses the United States' interpretation of Article 10.5 of the TPA, which provides that the TPA Parties shall accord covered investments the customary international law minimum standard of treatment. The United States' interpretation of Article 10.5 of the TPA accords with Perú's. As Respondent has shown in its written submissions, Claimant has failed to prove that the fair and equitable treatment ("FET") protections on which it seeks to rely in these proceedings have crystallized into customary international law. Thus, Claimant's claims fall well short of establishing a breach of Article 10.5.

4. To focus its analysis on the interpretations offered by the United States, Perú does not recite all of the arguments that it has asserted in its pleadings. To the extent Perú does not explicitly reference arguments raised in its pleadings in these Comments, it of course maintains those arguments and incorporates them by reference.

II. THE UNITED STATES' SUBMISSION CONFIRMS THAT THIS TRIBUNAL LACKS JURISDICTION OVER NEARLY ALL OF CLAIMANT'S CLAIMS

5. As Perú explained in its Counter-Memorial on the Merits and Memorial on Jurisdiction ("Respondent's Counter-Memorial") and Rejoinder on the Merits and Reply on Jurisdiction ("Respondent's Rejoinder"), this Tribunal lacks jurisdiction over nearly all of Claimant's claims.[1] The U.S. Submission reinforces this conclusion. First, the vast majority of Claimant's claims are time-barred, because Claimant failed to file its claims related to the National Superintendency of Customs and Tax Administration's ("SUNAT" for its acronym in Spanish) Royalty and Tax Assessments within the three-year limitations period set in Article 10.18.1 of the TPA (subsection A). Second, the penalties and interest imposed on Sociedad Minera Cerro Verde S.A.A. ("SMCV") for its failure to pay taxes identified in SUNAT's Tax Assessments constitute taxation measures, which are excluded from the scope of Article 10.5 of the TPA under Article 22.3.1 of the TPA. Thus, the Tribunal may not exercise jurisdiction over Claimant's claims related to those penalties and interest (subsection B).

6. Third, almost all of Claimant's claims are outside the Tribunal's jurisdiction, because the claims of alleged breaches of the stabilization agreement signed between SMCV and Perú's Ministry of Mines and Energy ("MINEM") on February 13, 1998 (the "1998 Stabilization Agreement") and of the TPA are based on acts and facts that took place before the TPA entered into force, violating Article 10.1.3 of the TPA (subsection C). Finally, Claimant has failed to show that it relied on the 1998 Stabilization Agreement when it acquired its covered investments; thus, Article 10.16.1 forecloses the Tribunal from exercising jurisdiction over Claimant's claims for alleged breaches of that Agreement (subsection D).

A. A CLAIMANT MUST BRING A CLAIM UNDER CHAPTER TEN OF THE U.S.-PERÚ TPA WITHIN THREE YEARS OF THE DATE WHEN THE CLAIMANT FIRST KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED BREACH AND THAT LOSS OR DAMAGE HAS BEEN INCURRED AS A RESULT OF THAT ALLEGED BREACH (ARTICLE 10.18.1 OF THE TPA)

7. Below, Perú first reviews the United States' interpretation of the limitations period established in Article 10.18.1 of the TPA (subsection 1). Next, Perú explains how,

[1] *See* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, May 4, 2022 ("Respondent's Counter-Memorial"), at Section III; Respondent's Rejoinder on the Merits and Reply on Jurisdiction, November 8, 2022 ("Respondent's Rejoinder"), at Section III.

consistent with the U.S. interpretation, Claimant's claims alleging breaches of the 1998 Stabilization Agreement fail to comply with that limitations period (subsection 2). Perú concludes by explaining that, again consistent with the U.S. interpretation, Claimant's claims that Perú breached Article 10.5 of the TPA are likewise barred by that limitations period (subsection 3).

1. The Limitations Period Established by Article 10.18.1 of the TPA

8. Article 10.18.1 of the TPA provides as follows:

> 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. l(a)) or the enterprise (for claims brought under Article 10.16.l(b)) has incurred loss or damage.[2]

9. As the United States explains in its Non-Disputing Party Submission, this provision "imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute,"[3] which is rooted in the respondent state's consent to arbitrate.[4] It is therefore a "clear and rigid" jurisdictional requirement that cannot be "suspen[ded]," "prolong[ed]," or otherwise "qualifi[ed]."[5] Moreover, as part of its burden to establish the tribunal's jurisdiction, a claimant must prove that it has complied with the limitations period for each claim that it submits to arbitration.[6]

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[2] Exhibit CA-10, United States-Peru Trade Promotion Agreement, signed April 12, 2006, entered into force February 1, 2009 ("U.S.-Perú TPA"), at Art. 10.18.1 (emphasis added).

[3] Submission of the United States of America, February 24, 2023 ("U.S. Submission"), at para. 8 (citing, *inter alia*, Exhibit RA-3, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections In Accordance with Article 10.20.5 of the DR-CAFTA, May 31, 2016 ("*Corona Materials v. Dominican Republic*, Award on Preliminary Objections"), at para. 280; Exhibit RA-2, *Spence International Investments LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, October 25, 2016 ("*Spence v. Costa Rica*, Interim Award"), at paras. 235-36). The United States cites the *Spence v. Costa Rica*, Interim Award as the *Berkowitz* Interim Award. Both awards refer to the same case (*i.e.*, ICSID Case No. UNCT/13/2). For consistency with its pleadings, Perú continues to refer to this award as "*Spence v. Costa Rica*, Interim Award."

[4] *See* U.S. Submission at para. 8.

[5] U.S. Submission at para. 9 (internal quotation marks and footnote omitted).

[6] *See* U.S. Submission at para. 8 (citing Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at paras. 163, 239, 245-46).

10. For these reasons, a tribunal may exercise jurisdiction over a claimant's claims under the TPA only if the claimant has submitted those claims within three years of when the claimant first acquired, or should have first acquired, (1) knowledge of the alleged breach and (2) knowledge of the consequent loss incurred by the claimant (or, when the claimant is submitting a claim on behalf of an enterprise that it owns or controls, loss or damage suffered by that enterprise). As the U.S. Submission confirms, knowledge under Article 10.18.1 is assessed objectively—it measures what a similarly situated, reasonably prudent investor should have known.[7]

11. In its Non-Disputing Party Submission, the United States highlights that a claimant can first acquire knowledge of an alleged breach only once and only on a particular date.[8] Thus, knowledge of a breach and loss cannot be acquired on a recurring basis.[9] That remains true when a respondent's alleged transgressions involve a "continuing course of conduct" by the respondent state.[10] As the *Grand River v. United States* tribunal explained, when a claim arises from a "series of similar and related actions by a respondent state," a claimant may not "base its claim on the most recent transgression" in that series, "if it had knowledge of earlier breaches and injuries," in order to satisfy the limitations period requirement.[11] To hold otherwise would render the limitations period *inutile*[12] and thereby vitiate the TPA Parties' consent to arbitrate.

12. The knowledge-of-loss requirement imposed by Article 10.18.1 is equally rigid. As the United States explains, a claimant acquires knowledge of a loss when it becomes "liable or subject to" a loss or damage, "even if the amount or extent of that loss or damage cannot be

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[7] *See* U.S. Submission at para. 12 (citing Exhibit RA-4, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 ("*Grand River v. USA*, Decision on Jurisdiction"), at paras. 59, 66 (interpreting the analogous limitations period provision in the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR")); Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 209 (same)).

[8] *See* U.S. Submission at para. 9.

[9] *See* U.S. Submission at para. 9.

[10] U.S. Submission at para. 9 (citing Exhibit RA-5, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, at para. 158).

[11] Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81; U.S. Submission at para. 10 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81).

[12] *See* U.S. Submission at para. 10.

precisely quantified until some future date."[13] The phrasal verb "subject to" means "affected by or possibly affected by (something)."[14] It is uncontroversial that a royalty payment, tax payment, or fine is a type of loss from a claimant's perspective. Thus, when a claimant or enterprise learns that it is "subject to" a royalty payment, tax payment, or fine because of an alleged breach, that claimant or enterprise knows, or should know, that it has incurred a loss for purposes of Article 10.18.1 of the TPA.[15]

13. Unlike Claimant[16] and its expert Mr. Sampliner,[17] the United States does not take the position that a government measure must be "enforceable" for an investor to acquire knowledge of breach and loss arising from a measure.[18] The fact that the United States did not read an "enforceability" requirement into Article 10.18.1—despite reviewing a record replete with attempts by Claimant and Mr. Sampliner to do just that—underscores that Article 10.18.1 does not contain such a requirement.[19]

14. Perú agrees with the United States' interpretation of both the knowledge-of-breach and knowledge-of-loss requirements under Article 10.18.1 of the TPA.[20]

2. Claimant's Claims that Perú Breached the 1998 Stabilization Agreement Are Time-Barred

15. Under the United States' correct interpretation of Article 10.18.1 of the TPA explained above, it follows that all of Claimant's TPA claims alleging that Perú breached the 1998 Stabilization Agreement are time-barred. Below, Respondent shows that Claimant first

[13] U.S. Submission at para. 11 (citing Exhibit RA-6, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, at para. 87) (emphasis added).

[14] "Subject to," Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/subject%20to.

[15] *See* Respondent's Rejoinder at para. 728.

[16] *See, e.g.*, Claimant's Rejoinder on Jurisdiction, December 16, 2022 ("Claimant's Rejoinder on Jurisdiction"), at para. 12 ("Peru breached the Stability Agreement and SMCV incurred loss or damage when each Assessment became final and enforceable . . . .") (emphasis added).

[17] *See, e.g.*, Exhibit CER-14, Rejoinder Expert Report of Gary Sampliner, December 16, 2022, at para. 3(a) ("[A] claimant cannot acquire knowledge of a breach resulting from a government measure and that it has incurred loss or damage until the government measure is binding and enforceable in the host country . . . .") (emphasis added).

[18] *See* U.S. Submission at paras. 7-12.

[19] *See* Respondent's Rejoinder at para. 723 ("[Article 10.18.1] does not require a government act to become 'final and enforceable' (words that appear nowhere in Article 10.18.1) to trigger the limitations period.").

[20] *See* Respondent's Counter-Memorial at Section III.A; Respondent's Rejoinder at Section III.A.

learned of the alleged breaches of the 1998 Stabilization Agreement by SUNAT through the Royalty Assessment issued in August 2009 for the 2006 and 2007 fiscal years (the "2006-2007 Royalty Assessment") (subsection a). Respondent then explains that the 2006-2007 Royalty Assessment constituted the first Assessment in a series of similar and related government acts, meaning that, consistent with the United States' interpretation just explained, Claimant may not rely on later Assessments in that series to satisfy the limitations period in Article 10.18.1 of the TPA (subsection b).

a. Claimant First Learned of SUNAT's Alleged Breaches of the 1998 Stabilization Agreement and Consequent Loss through the 2006-2007 Royalty Assessment

16. To recall, Claimant alleges that a series of Royalty Assessments and Tax Assessments breached the 1998 Stabilization Agreement.[21] The gravamen of Claimant's investment-agreement claim is that Perú breached the 1998 Stabilization Agreement by not extending that Agreement's stability benefits to SMCV's Concentrator Project for processing primary sulfides from the Cerro Verde mine (the "Concentrator").[22] Claimant submitted its Notice of Arbitration on February 28, 2020.[23] To fall within the three-year limitations period imposed by Article 10.18.1, Claimant, therefore, could not have acquired knowledge of the alleged breaches and corresponding damage earlier than February 28, 2017 (*i.e.*, the cut-off date).

17. In fact, however, Claimant knew of Perú's alleged breaches of the 1998 Stabilization Agreement and SMCV's consequent loss years before the cut-off date. Specifically, Claimant first knew that SUNAT applied the non-stabilized regime to the Concentrator on August 18, 2009—allegedly in violation of the 1998 Stabilization Agreement—when SMCV was notified of the first Assessment from SUNAT for SMCV's failure to pay royalties with respect to the Concentrator according to the non-stabilized regime.[24] That Assessment explained that SUNAT was assessing penalties and statutory interest on SMCV

[21] *See*, *e.g.*, Claimant's Memorial, October 19, 2021 ("Claimant's Memorial"), at para. 20.

[22] *See*, *e.g.*, Claimant's Memorial at paras. 20, 289.

[23] *See* Claimant's Notice of Arbitration, February 28, 2020 ("Claimant's Notice of Arbitration"), at cover page.

[24] *See* Claimant's Memorial at Annex A, p. 1 ("SUNAT Assessment Notified to SMCV: 18/08/09"); Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009).

because the Concentrator fell outside the scope of the 1998 Stabilization Agreement.[25] Moreover, that Assessment quantified SMCV's royalty obligations, as well as the corresponding penalties and interest that SMCV owed for failing to timely pay those obligations.[26] As Perú has explained, under Peruvian law, SMCV was immediately obligated to pay those amounts.[27] Thus, as of August 18, 2009, Claimant knew (1) that SUNAT had applied the non-stabilized regime to the Concentrator (allegedly breaching the 1998 Stabilization Agreement) and (2) that SMCV was subject to consequent financial obligations (the amount of the outstanding royalties, as well as corresponding penalties and interest).

18. Claimant contends that when SMCV was notified of the 2006-2007 Royalty Assessment, Claimant could not claim that SUNAT had breached the 1998 Stabilization Agreement, because the 2006-2007 Royalty Assessment was not "final and enforceable."[28] According to Claimant, the 2006-2007 Royalty Assessment—like the other Assessments that SMCV was issued—was final and enforceable only after the "conclusion of the administrative process for [that] assessment."[29] Thus, according to Claimant, SMCV could not allege a breach of the 1998 Stabilization Agreement until the Tax Tribunal had affirmed the Assessment.[30]

19. This argument misconstrues Article 10.18.1 of the TPA and is otherwise flawed. As noted above, the U.S. Submission does not read a requirement into Article 10.18.1 that only "final and enforceable" government measures can trigger knowledge of an alleged breach for purposes of the TPA. Perú has likewise established that, under Peruvian law, a party to a stabilization agreement can claim that SUNAT breached the stabilization agreement before an assessment becomes "final and enforceable," because the taxpayer is subject to an obligation to pay the assessed taxes and royalties from the moment SUNAT notifies the taxpayer of the

[25] *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 1 of PDF.

[26] *See* Exhibit CE-31, SUNAT 2006/07 Royalty Assessments, August 17, 2009 (notified to SMCV on August 18, 2009), at p. 2 of PDF.

[27] *See* Respondent's Rejoinder at para. 699; Exhibit RER-3, Expert Report of Jorge Bravo and Jorge Picón, May 4, 2022 ("First Bravo and Picón Report"), at para. 62; *see also* Exhibit RER-2, Expert Report of Rómulo Morales, May 4, 2022 ("First Morales Report"), at paras. 106-07.

[28] Claimant's Rejoinder on Jurisdiction at para. 20.

[29] Claimant's Rejoinder on Jurisdiction at para. 20.

[30] *See*, *e.g.*, Claimant's Rejoinder on Jurisdiction at para. 20.

corresponding assessment.[31] In this case, SMCV could have initiated a breach of contract claim when it was notified of the 2006-2007 Royalty Assessment.[32] That is because, under Peruvian law, assessments "are valid and effective from the time of notification,"[33] and because, as of the notification date, Claimant knew or should have known that SUNAT had taken a measure that allegedly violated the terms of the 1998 Stabilization Agreement.[34]

20. When SMCV was notified of the 2006-2007 Royalty Assessment, Claimant also knew or should have known that SMCV had suffered a loss or damage as a result of SUNAT's alleged breaches of the 1998 Stabilization Agreement. Specifically, under Article 76 of Perú's Tax Code, assessments "establish[] the existence of [a] tax credit or debt."[35] Thus, when SMCV was notified of the 2006-2007 Royalty Assessment, it became subject to a debt. As explained above, a claimant's knowledge that it is subject to a payment obligation (in this case, a royalty payment, tax obligation, or fine) meets the knowledge-of-loss criterion under Article 10.18.1 of the TPA, in line with the U.S. Submission's explanation of that criterion.

21. As with its argument about knowledge of the alleged breaches of the 1998 Stabilization Agreement, Claimant contends that, when SMCV was notified of the Assessments, it could not have known that SMCV incurred losses, because the Assessments were not "final and enforceable."[36] As Perú's tax experts explain, however, even if a particular royalty or tax debt is not enforceable while a taxpayer challenges the debt through administrative channels, the suspended enforceability of the debt "does not annul the payment obligation."[37] Thus, while Claimant spills ink about the fact that the enforceability of its royalty and tax debts was suspended while SMCV challenged them,[38] SMCV's administrative challenges of those debts

[31] *See* Respondent's Rejoinder at para. 716 (citing Exhibit RER-2, First Morales Report at para. 106; Exhibit RER-7, Second Expert Report of Rómulo Morales, November 3, 2022 ("Second Morales Report"), at paras. 99, 103).

[32] *See* Respondent's Rejoinder at para. 716 (citing Exhibit RER-2, First Morales Report at paras. 106, 108).

[33] Exhibit RER-2, First Morales Report at para. 98.

[34] *See* Exhibit RER-2, First Morales Report at paras. 97-98, 103.

[35] Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Art. 76. *See also* Exhibit RER-3, First Bravo and Picón Report at para. 61 (citing Exhibit CA-14, Peruvian Tax Code, Supreme Decree No. 133-2013-EF, June 22, 2013, at Arts. 59(b) and 76); Exhibit RER-2, First Morales Report at paras. 106-07).

[36] Claimant's Rejoinder on Jurisdiction at para. 23.

[37] Exhibit RER-3, First Bravo and Picón Report at para. 61 (emphasis added).

[38] *See, e.g.*, Claimant's Rejoinder on Jurisdiction at paras. 20-25.

did not extinguish the underlying obligations. To the contrary, SMCV remained subject to those debts. And, consistent with the United States' understanding of the provision, Claimant's actual or constructive knowledge of that fact meets the knowledge-of-loss criterion under Article 10.18.1 of the TPA.[39]

22. For these reasons, when SMCV was notified of the 2006-2007 Royalty Assessment, Claimant first knew that SUNAT allegedly breached the 1998 Stabilization Agreement and the TPA, and that SMCV suffered consequent losses, as of August 18, 2009. That was over seven years before the limitations period cut-off date of February 28, 2017.[40] Applying the U.S. Submission's approach to Article 10.18.1, which is fully consistent with Respondent's position, the above facts time-bar Claimant's claims for breaches of the 1998 Stabilization Agreement.

b. Because the Assessments Constitute a Series of Similar and Related Acts, Claimant Cannot Rely on Later Assessments in the Series to Satisfy the Limitations Period

23. As Perú explained in its Counter-Memorial and Rejoinder submissions, the Assessments issued against SMCV constituted a series of similar and related government acts.[41] That fact is fatal to Claimant's claims for breaches of the 1998 Stabilization Agreement. As explained above, and as reinforced in the U.S. Submission, when a government engages in a series of similar and related government acts, each of which may constitute a transgression, knowledge of the alleged breach and consequent loss attaches to the first act in that series.[42] To conclude otherwise would allow a claimant—like Freeport—to rely on the most recent act in the series to evade the limitations period.[43]

[39] *See* U.S. Submission at para. 11.

[40] Alternatively, as explained in Respondent's Rejoinder, there are three other sets of dates on which Claimant could have first acquired knowledge that SUNAT allegedly breached the 1998 Stabilization Agreement and that SMCV incurred consequent knowledge. *See* Respondent's Rejoinder at paras. 701-05 & Table 2. Each of these dates preceded the cut-off date by at least five years. *See id.* Thus, in any applicable scenario, Claimant first acquired, or should have first acquired, knowledge that SUNAT allegedly breached the 1998 Stabilization Agreement and caused SMCV consequent damage by at least five years in advance of the cut-off date.

[41] *See* Respondent's Counter-Memorial at para. 429; Respondent's Rejoinder at para. 700.

[42] *See* U.S. Submission at paras. 9-10.

[43] *See* U.S. Submission at para. 10 (citing Exhibit RA-4, *Grand River v. USA*, Decision on Jurisdiction at para. 81).

24. The Royalty and Tax Assessments issued against SMCV constitute just such a series of similar and related government acts. As Perú explained in its Rejoinder:

> SUNAT's Assessments against SMCV are similar and related acts because: (i) SUNAT performed the exact same act (issued an Assessment against SMCV's Concentrator Project), (ii) under the same regulatory framework (Article 83 of the Mining Law and Article 22 of the Mining Regulations), and (iii) based on the same interpretation of the scope of the same agreement (*i.e.*, the 1998 Stabilization Agreement covers only the Leaching Project, thus SMCV's Concentrator Project is not a stabilized project, and is therefore subject to royalty and tax assessments).[44]

25. Moreover, given that SUNAT's Assessments uniformly hinged on its interpretation of the 1998 Stabilization Agreement—as notified to SMCV on August 18, 2009 through the 2006-2007 Royalty Assessment—a reasonably prudent investor would have anticipated that SUNAT would continue to issue Assessments to SMCV on the same basis for the future fiscal years in which SMCV failed to file returns for the Concentrator according to the non-stabilized regime.[45] For these reasons, the knowledge of the alleged breaches and consequent loss that Claimant first acquired through SUNAT's notification to SMCV of the 2006-2007 Royalty Assessment on August 18, 2009 attached to the entire series of Assessments.

26. As a result, Article 10.18.1 required Claimant to submit its Notice of Arbitration by August 18, 2012 (*i.e.*, three years after SMCV was notified of the first Assessment). Yet Claimant waited until February 28, 2020 to do so. Applying the U.S. Submission's approach to Article 10.18.1, which is fully consistent with Respondent's position, the above facts about Claimant's knowledge of loss also time-bar Claimant's claims for breaches of the 1998 Stabilization Agreement.

3. Claimant's TPA Article 10.5 Claims Are Time-Barred

27. Article 10.18.1 of the TPA also bars this Tribunal from exercising jurisdiction over three sets of claimed breaches of Article 10.5 of the TPA.[46] *First*, the Tribunal lacks

[44] Respondent's Rejoinder at para. 733.

[45] *See* Respondent's Rejoinder at para. 734.

[46] As noted in Respondent's Rejoinder, a small subset of Claimant's claims for breaches of Article 10.5 of the TPA meet the limitations period established under Article 10.18.1: (a) certain alleged due process violations committed

jurisdiction over Claimant's claims that Perú frustrated its legitimate expectations, treated it arbitrarily, and treated it inconsistently and non-transparently for the same reasons that the Tribunal lacks jurisdiction over Claimant's claim for breaches of the 1998 Stabilization Agreement, under the United States' and Respondent's understanding of Article 10.18.1. Claimant tries to avoid that result by contending that the Tribunal has jurisdiction over these claims because SUNAT's Assessments did not become "final and enforceable" until after the cut-off date.[47] As explained above, however, Article 10.18.1 does not require a government measure be "final and enforceable" to give an investor knowledge of an alleged treaty breach and consequent loss, and the United States did not endorse any such construction of Article 10.18.1. Moreover, Claimant knew or should have known that SUNAT's Assessments allegedly breached the TPA and caused loss when SMCV was notified of SUNAT's 2006-2007 Royalty Assessment. And because this Assessment formed the first act in a series of similar and related government acts, the U.S. Submission reinforces the fact that Claimant's knowledge that this Assessment allegedly breached Article 10.5 of the TPA and caused loss attached to the entire series of Assessments.

28. *Second*, this Tribunal lacks temporal jurisdiction over Claimant's claims alleging that the Tax Tribunal violated Claimant's due process rights under TPA Article 10.5 when it adjudicated cases related to the 2006-2007 Royalty Assessment (the "2006-2007 Royalty Case") and 2008 Royalty Assessment (the "2008 Royalty Case").[48] SMCV was notified of the Tax Tribunal's decisions in both the 2006-2007 Royalty Case and the 2008 Royalty Case on June 20, 2013.[49] As of that date, Claimant must have known of the alleged TPA breaches and consequent losses from the Tax Tribunal's alleged due process violations, because, according to Claimant,

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by the Tax Tribunal; (b) the Contentions Administrative Appellate Court's alleged failure to review SMCV's waiver request related to the 2006-2007 Royalty Assessment *de novo*; and (c) SUNAT's alleged failure to refund GEM payments made from Q4 2011 through Q3 2012. *See* Respondent's Rejoinder at n.1395. Nonetheless, as discussed further in Section II.C below, Article 10.1.3 of the TPA bars the Tribunal from exercising jurisdiction over claims (b) and (c). And, in any event, all the claims fail on the merits, as explained in Section IV.B of Respondent's Rejoinder.

[47] Claimant's Rejoinder on Jurisdiction at para. 34.

[48] *See* Respondent's Rejoinder at para. 764.

[49] *See* Claimant's Memorial at para. 211 ("While the Tax Tribunal notified SUNAT of the resolution in the 2008 Royalty Case almost immediately, on 27 May 2013, it did not notify SMCV of either resolution until over three weeks later, on 20 June 2013."), Annex A, p. 1 ("Tax Tribunal Resolution Notified to SMCV: 20/06/13" (2006-2007 Royalty Case); "Tax Tribunal Resolution Notified to SMCV: 20/06/13" (2008 Royalty Case)).

the text of the decisions demonstrated that Ms. Villanueva drafted the 2008 Royalty Case decision,[50] and Ms. Villanueva's alleged drafting of that decision lies at the core of Claimant's due process claims related to the 2006-2007 and 2008 Royalty Cases.[51] Thus, Claimant had until June 20, 2016 to file those due process claims under the TPA's limitations period. Because Claimant waited until February 28, 2020 to file them, consistent with the U.S. Submission's explanation of Article 10.18.1's knowledge elements, those claims are time-barred under Article 10.18.1 of the TPA.

29. *Finally*, the Tribunal also lacks temporal jurisdiction over Claimant's penalties-and-interest claims related to the Royalty Assessments, for two interlocking reasons. First, Claimant first knew or should have known of the alleged breaches and loss caused by SUNAT's decision not to waive penalties and interest related to Royalty Assessments on April 22, 2010, when SUNAT informed SMCV that it had confirmed the 2006-2007 Royalty Assessment.[52] That was more than six years before the cut-off date of February 28, 2017. Second, as with the Royalty Assessments themselves, SUNAT's decisions to reject the requested penalties-and-interest waivers related to Royalty Assessments constituted a series of similar and related government acts: all were grounded in the same determination by SUNAT that the 1998 Stabilization Agreement does not apply to the Concentrator and the same regulatory framework created by the Mining Law and Regulations.[53] Thus, the knowledge of the alleged Article 10.5 breaches and consequent loss that Claimant acquired through SUNAT's notification of its decision on April 22, 2010 attached to the entire series of decisions rejecting penalties-and-interest waivers for Royalty Assessments. As a result, consistent with the U.S. Submission's explanation of how knowledge should be applied to a series of similar and related government actions under Article 10.18.1, all of Claimant's claims challenging SUNAT's decisions to reject its penalty-and-interest waiver requests related to Royalty Assessments are time-barred.

[50] *See* Respondent's Counter-Memorial at paras. 450-54 (citing Claimant's Memorial at paras. 200, 209-10); Respondent's Rejoinder at para. 757.

[51] *See* Respondent's Counter-Memorial at para. 450 (citing Claimant's Memorial at paras. 205, 209, 384, 390).

[52] *See* Respondent's Counter-Memorial at para. 459; Respondent's Rejoinder at para. 764.

[53] *See* Respondent's Rejoinder at para. 765.

B. THE TPA PRECLUDES CLAIMS THAT TAXATION MEASURES BREACHED ARTICLE 10.5 OF THE TPA (ARTICLE 22.3.1 OF THE TPA)

30. Article 22.3.1 of the TPA provides as follows: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures."[54] As the United States recognizes, the remainder of Article 22 does not contain an exception for the TPA Parties' Article 10.5 obligations; thus, a claimant may not assert that taxation measures breach Article 10.5.[55] In turn, Article 1.3 defines a "measure" to "include[] any law, regulation, procedure, requirement, or practice."[56] As the United States further explains, "Any 'practice' related to 'taxation' is therefore addressed by Article 22.3.1."[57] In other words, any practice related to taxation is a taxation measure shielded by Article 22.3.1. And, as the United States explains, under Article 22.3.1, a practice related to taxation includes the "enforcement or failure to enforce a tax."[58]

31. The United States' interpretation of Article 22.3.1 is fully consistent with that of Perú.[59] Moreover, the United States' interpretation squarely contradicts Claimant's assertion that, "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."[60] The United States—a TPA Party—explains that Article 22.3.1 applies to measures "related to" taxation, which include "enforcement or failure to enforce a tax."[61] Thus, Claimant's reading of Article 22.3.1 and its assertion about the intent of the TPA Parties are incorrect. Indeed, although Claimant asserts that Respondent relies on the "fundamentally flawed premise" that taxation measures refer to more than taxes,[62] given the United States' interpretation of Article 22.3.1, it is Claimant's premise that taxation measures are limited to taxes that is "fundamentally flawed." As the U.S.

[54] Exhibit CA-10, U.S.-Perú TPA at Art. 22.3.1.

[55] *See* U.S. Submission at para. 31.

[56] Exhibit CA-10, U.S.-Perú TPA at Art. 1.3 (emphasis added).

[57] U.S. Submission at para. 32 (emphasis added).

[58] U.S. Submission at para. 32.

[59] *See* Respondent's Rejoinder at paras. 772-75.

[60] Claimant's Reply and Counter-Memorial on Jurisdiction, September 13, 2022 ("Claimant's Reply"), at para. 274.

[61] U.S. Submission at para. 32.

[62] Claimant's Rejoinder on Jurisdiction at para. 78.

Submission confirms, Article 22.3.1 does indeed extend beyond the four corners of a tax assessment to the broader category of "taxation measures."

32. Under the correct interpretation of Article 22.3.1 that Perú and the United States share, it is clear that penalties and interest imposed because of a taxpayer's failure to pay its taxes are "taxation measures," on three grounds. First, the imposition of penalties and interest constitutes a measure for the enforcement of taxes. Second, the imposition of penalties and interest is a practice related to taxation. Third, the imposition of penalties and interest is a measure related to taxation. Likewise, SUNAT's refusal to waive these penalties and interest constitutes a practice or procedure related to taxation. That refusal therefore also qualifies as a taxation measure under Article 22.3.1 of the TPA.[63] Thus, this Tribunal lacks jurisdiction over Claimant's claims that SUNAT's refusal to waive penalties and interest related to Tax Assessments breached Article 10.5 of the TPA.[64]

C. THE TPA DOES NOT APPLY RETROACTIVELY (ARTICLE 10.1.3 OF THE TPA)

33. Article 10.1.3 of the TPA provides as follows: "For greater certainty, this Chapter does not bind any Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement."[65] This provision codifies the rule against retroactivity.[66] As the United States observes in its Submission,[67] in interpreting an identically worded provision of the Dominican Republic-Central America Free Trade Agreement ("CAFTA-DR"), the *Spence v. Costa Rica* tribunal concluded 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."[68]

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[63] *See* U.S. Submission at para. 32; Respondent's Rejoinder at para. 774.

[64] *See* Respondent's Rejoinder at para. 777.

[65] Exhibit CA-10, U.S.-Perú TPA at Art. 10.3 (emphasis added).

[66] *See* U.S. Submission at para. 2.

[67] *See* U.S. Submission at para. 2.

[68] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at para. 217; *see also* Exhibit RA-171, *Phosphates in Morocco*, 1938 P.C.I.J. (Ser. A/B) No. 74, Decision on Preliminary Objections (June 14), at pp. 23-26 (declining jurisdiction over the parties' dispute because the "source of the dispute" was based on "facts" that occurred before the date on which the French government's declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice was ratified).

34. Perú agrees with the United States' interpretation of Article 10.1.3 and its endorsement of the *Spence* tribunal's interpretation of the analogous CAFTA-DR provision. Moreover, as Perú has shown,[69] the *Spence* decision cited by the United States further explained that post-entry into force conduct does not constitute "an actionable breach in its own right" when it is "deeply and inseparably rooted" in pre-entry into force conduct.[70] Otherwise, the respondent state would be bound to "acts" or "facts" that predated the treaty's entry into force, contravening Article 10.1.3 of the TPA.

35. The Tribunal lacks jurisdiction over almost all of Claimant's claims on precisely this basis.[71] Specifically, the vast majority of the measures that Claimant alleges breached the 1998 Stabilization Agreement and Article 10.5 of the TPA—the Assessments, related penalties and interest, and unrefunded GEM payments—are deeply and inseparably rooted in an act that predated the TPA's 2009 entry into force: namely, MINEM's interpretation of the 1998 Stabilization Agreement and Mining Law and Regulations, which was established (by Claimant's own account) no later than June 2006 and was known to Claimant no later than June 2008.

36. In June 2006, well before the TPA's entry into force on February 1, 2009, MINEM issued a report (the "June 2006 Report") explaining its interpretation of the scope of the 1998 Stabilization Agreement and the Mining Law and Regulations.[72] The June 2006 Report established that the Concentrator fell outside the scope of the 1998 Stabilization Agreement and therefore was subject to royalty and tax payments according to the non-stabilized regime.[73]

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[69] *See* Respondent's Counter-Memorial at para. 472; Respondent's Rejoinder at para. 779.

[70] Exhibit RA-2, *Spence v. Costa Rica*, Interim Award at paras. 217, 298; *id* at para. 246 (concluding that claims did not allege "independently actionable breaches" because they were not "separable from the pre-entry into force conduct in which they are deeply rooted"); *id.* at para. 298 ("[A]s the Tribunal has observed in its preceding discussion, the alleged conduct on which the Claimants found the claims is deeply and inseparably rooted in the Respondent's pre-CAFTA entry into force conduct.").

[71] The sole exception is for certain claims of alleged due process violations under Article 10.5 of the TPA. *See* Respondent's Counter-Memorial at para. 454; Respondent's Rejoinder at para. 694, n.1395.

[72] *See* Exhibit CE-534, MINEM, Report No. 156-2006-MEM/OGJ, June 16, 2006.

[73] *See* Respondent's Rejoinder at para. 783. In fact, MINEM provided the interpretation contained in this report far earlier than June 2006. *See* Respondent's Rejoinder at Sections II.E and II.G. For the purpose of discerning the source of Claimant's claims, however, it is appropriate to focus on MINEM's June 2006 Report, as June 2006 is when Claimant alleges that MINEM first set forth its "novel" interpretation of the 1998 Stabilization Agreement. Claimant's Reply at para. 78.

Claimant asserts that this interpretation was the "*volte face*" that changed the government's interpretation of the scope of stabilization agreements generally and, in particular, SMCV's 1998 Stabilization Agreement, which the government continued to apply thereafter.[74] Notably, Claimant itself admits SMCV learned of this Report in June 2008[75]—almost a year before the TPA entered into force and almost twelve years before Freeport initiated this arbitration.

37. Indeed, Claimant asserts that all of SUNAT's Assessments challenged in this case originate from the interpretation contained in the June 2006 Report.[76] For example, Claimant contends that this interpretation "formed the basis for SUNAT's Assessments" that it claims breached the 1998 Stabilization Agreement and the TPA.[77] Claimant also asserts that, "[a]s soon as SUNAT had received [*inter alia*, the June 2006 Report], SUNAT initiated an audit of SMCV and issued its first Assessments only months later, explicitly acknowledging that it had relied on MINEM's designation that SMCV owed royalties for the Concentrator."[78] This sentence indicates that Claimant believed that the receipt of the June 2006 Report caused SUNAT to begin issuing assessments against SMCV. Finally, Claimant contends that the interpretation of stability guarantees set forth in the June 2006 Report served as the basis for subsequent confirmation of SUNAT's Assessments by the Tax Tribunal, the Contentious Administrative Appellate Court, and the Supreme Court.[79]

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[74] *See* Claimant's Memorial at paras. 142-44.

[75] *See* Exhibit CWS-11, Witness Statement of Julia Torreblanca, October 19, 2021, at para. 66.

[76] *See*, *e.g.*, Claimant's Memorial at paras. 13, 175-76, 280, 314; Claimant's Notice of Arbitration at paras. 52, 53, 57-58, 71.

[77] Claimant's Memorial at para. 314.

[78] Claimant's Memorial at para. 377(d) (emphasis added).

[79] *See* Claimant's Memorial at para. 212 ("[T]he Tax Tribunal's resolutions [upheld] the 2006-2007 and 2008 Royalty Assessments on the basis of Mr. Isasi's novel and restrictive interpretation . . . .") (emphasis added). *See also id.* at para. 213 ("[T]he Tax Tribunal's resolutions were based on a completely novel interpretation of the Mining Law and Regulations—in particular, the interpretation set forth in Mr. Isasi's June 2006 Report . . . .") (emphasis added); *id.* at para. 391(c) ("Chamber No. 1 issued Ms. Villanueva's resolution in the 2008 Royalty Case—which rejected SMCV's challenge based on the novel interpretation . . . .") (emphasis added); *id.* at para. 399 ("Ms. Villanueva again adopted the novel interpretation . . . .") (emphasis added); *id.* at para. 223 ("Echoing the novel interpretation first concocted by Mr. Isasi, and then adopted by SUNAT and the Tax Tribunal, the Appellate Court concluded that: . . . 'a future investment . . . will not be covered by the benefits of the Stability Agreement . . . .'") (emphasis added) (citing Exhibit CE-137, Appellate Court, Decision No. 7650-2013, 2008 Royalty Assessment, January 29, 2016, at para. 9); *id.* at para. 226 ("[T]he Supreme Court endorsed Mr. Isasi's novel interpretation of the scope of the stability guarantees . . . .") (emphasis added).

38. Moreover, the 2006-2007 Royalty Assessment, issued on August 17, 2009, concluded the auditing process that SUNAT initiated on May 30, 2008. More specifically, on June 2, 2008, SUNAT Arequipa sent an audit letter to SMCV informing it that SUNAT's records showed that SMCV had failed to pay royalties for the 2006-2007 fiscal periods for the sales of copper ore from the Concentrator.[80] Thus, SUNAT's assessment of royalties and taxes on the Concentrator was also deeply and inseparably rooted on another act that occurred well before the TPA's entry into force.

39. In short, Claimant's pleadings repeatedly establish that the interpretation of the 1998 Stabilization Agreement and the Mining Law and Regulations set forth in the June 2006 Report is the fulcrum for almost all of its claims. Likewise, SUNAT started auditing SMCV on its failure to pay royalties in May 2008. Almost all of Claimant's claims are therefore deeply and inseparably rooted in an act or fact that predated the TPA's entry into force. As a result, this Tribunal should decline jurisdiction over Claimant's claims. To conclude otherwise would bind Perú to acts or facts that occurred before the TPA's entry into force, contravening Article 10.1.3 of the TPA, the importance of which is emphasized in the U.S. Submission.

D. THE TPA REQUIRES INVESTORS ALLEGING BREACHES OF INVESTMENT AGREEMENTS TO HAVE RELIED ON THOSE AGREEMENTS WHEN ESTABLISHING OR ACQUIRING THEIR COVERED INVESTMENTS (ARTICLE 10.16.1)

40. Article 10.16.1 identifies the only types of claims that a claimant may submit to arbitration under the TPA. Specifically, Article 10.16.1(a) provides that a claimant may submit a claim that (1) a respondent state has breached the TPA, an investment authorization, or an investment agreement (such as the 1998 Stabilization Agreement) and (2) the alleged breach caused the claimant damage. Article 10.16.1(b) likewise provides that a claimant may submit a claim on behalf of an enterprise that it owns or controls that (1) a respondent state has breached the TPA, an investment authorization, or an investment agreement and (2) the alleged breach caused the enterprise damage.[81]

[80] *See* Exhibit CE-577, SUNAT, Inductive Letter No. 108052004279, May 30, 2008; Claimant's Memorial at para. 163.

[81] *See* Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1.

41. As the United States observes, the final paragraph of Article 10.16.1 imposes an additional condition on claims for alleged breaches of an investment agreement that are submitted on a claimant's own behalf or on behalf of an enterprise that the claimant owns or controls.[82] That paragraph provides as follows:

> [A] claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.[83]

42. Thus, regardless of whether a claimant is submitting a claim on its own behalf or on behalf of an enterprise for the alleged breach of an investment agreement, a claimant must prove that the covered investment (1) directly relates to its claim and the claimed damages and (2) was established or acquired (or sought to be established or acquired) in reliance on the investment agreement.[84] If a claimant fails to meet both of these conditions for claims alleging a breach of an investment agreement, then a tribunal—including this Tribunal—may not exercise jurisdiction over those claims. Perú agrees with the United States' interpretation of Article 10.16.1 of the TPA.[85]

43. Moreover, when a claimant submits a claim on behalf of an enterprise for breach of an investment agreement, the claimant—not the enterprise—must have relied on the investment agreement when acquiring the covered investment anchoring its claims.[86] This conclusion follows from the text of Article 10.16.1 and its ordinary meaning. First, as the U.S. Submission underscores, Article 10.16.1 prescribes the conditions that a claimant—not its enterprise, nor its predecessor-in-interest—must meet in order to submit a claim to arbitration, regardless of whether a claimant is submitting a claim on its own behalf or on behalf of an enterprise.[87] Indeed, Article 10.16.1 does not refer at all to conditions that an enterprise must

[82] *See* U.S. Submission at para. 6.

[83] U.S. Submission at para. 5 (citing Exhibit CA-10, U.S.-Perú TPA at Art. 10.16.1) (emphasis in the original).

[84] *See* U.S. Submission at para. 6.

[85] *See* Respondent's Counter-Memorial at para. 519; Respondent's Rejoinder at para. 856.

[86] *See* Respondent's Rejoinder at paras. 856, 861-67.

[87] *See* Respondent's Rejoinder at para. 861.

meet when a claimant submits a claim on behalf of that enterprise to arbitration. Thus, where the text of a provision focuses solely on conditions that a claimant must meet to submit a claim to arbitration, it would be anomalous for the TPA Parties to have silently intended for an enterprise that a claimant owns or controls to be able to meet one of those conditions.

44. Second, the definition of "investment agreement" in Article 10.28 does not alter the meaning of Article 10.16.1's reliance requirement. Article 10.28's definition tracks the definition of "investment agreement" in Article 24.1 of the 2004 Model BIT,[88] on which Claimant acknowledges the TPA is based.[89] According to Vandevelde's *U.S. International Investment Agreements*, the term "investment agreement" in the 2004 Model U.S. BIT refers to "written agreements between an investor or a covered investment and a national authority of the host state upon which the investor relies in establishing an investment and that grants rights to the investor or covered investment."[90] Thus, Article 10.28's reference to "investment agreement" means an investment agreement on which a claimant or investor relies to establish or acquire its covered investment.[91] It follows that, for a covered investment to have been established or acquired "in reliance on the relevant investment agreement" under Article 10.16.1 of the TPA, the claimant—not the enterprise the claimant owns or controls—must have relied on the investment agreement.

45. Claimant has failed to prove this reliance. After repeatedly asserting in its Notice of Arbitration that it relied on the 1998 Stabilization Agreement to acquire its shares in SMCV, Claimant abandoned that assertion in its Reply.[92] That makes sense, because contemporaneous evidence shows that Claimant did not rely on the 1998 Stabilization Agreement when it

[88] *Compare* Exhibit CA-10, U.S.-Perú TPA at Art. 10.28 ('"[I]nvestment agreement' means a written agreement between a national authority 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 . . . .") (footnotes omitted), *with* Exhibit CA-375, 2004 U.S. Model BIT (same).

[89] *See* Claimant's Reply at para. 267.

[90] Exhibit RA-102, Kenneth J. Vandevelde, *U.S. International Investment Agreements* (2009) (excerpts), at p. 599 (emphasis added).

[91] Respondent's Rejoinder at para. 862.

[92] *See* Respondent's Rejoinder at para. 864.

indirectly acquired its interest in SMCV.[93] Claimant has not contested this point.[94] Indeed, the evidence suggests that Claimant would have acquired its position in SMCV regardless of whether the 1998 Stabilization Agreement existed.[95]

46. Even if the Tribunal were to decide that SMCV, instead of Claimant, could somehow meet Article 10.16.1's reliance requirement (it should not), Claimant has not proven that SMCV relied on the 1998 Stabilization Agreement when SMCV invested in the Concentrator.[96] First, Claimant has not established that SMCV performed adequate due diligence regarding the scope of the 1998 Stabilization Agreement before SMCV invested in the Concentrator; thus, SMCV did not know the precise scope of the Agreement and, accordingly, could not have relied on the scope it now purports prior to making its investment in the Concentrator.[97] Second, SMCV failed to put on the record any contemporaneous documentary evidence showing that the government of Perú confirmed SMCV's alleged understanding about the scope of the 1998 Stabilization Agreement prior to SMCV deciding to invest in the Concentrator.[98] Indeed, Phelps Dodge's 10-K filings with the Securities and Exchange Commission for fiscal years 2004 and 2005 show that SMCV and Phelps Dodge questioned whether SMCV would be required to pay royalties with respect to the Concentrator.[99] The Master Participation Agreement that SMCV entered into with creditors in 2005 evinced similar doubts about the scope of the 1998 Stabilization Agreement.[100] In short, Phelps Dodge and

[93] *See* Respondent's Rejoinder at para. 859 (citing Exhibit RE-111, Associated Press, "Freeport-McMoRan's Acquires Phelps Dodge, Becomes World's Largest Publicly-Traded Copper Company," *Fox News*, January 13, 2015, *available at* https://www.foxnews.com/story/freeport-mcmorans-acquires-phelps-dodge-becomes-worlds-largest-publicly-traded-copper-company; Exhibit RE-109, "Freeport-McMoRan to Buy Phelps Dodge for $25.9B," *Reliable Plant*, *available at* https://www.reliableplant.com/Read/3474/freeport-mcmoran-to-buy-phelps-dodge-for-$259b).

[94] *See* Claimant's Rejoinder on Jurisdiction at Section III.E; Respondent's Rejoinder at para. 881.

[95] *See* Respondent's Rejoinder at para. 857.

[96] *See* Respondent's Rejoinder at para. 877.

[97] *See* Respondent's Rejoinder at para. 877.

[98] *See* Respondent's Rejoinder at para. 877.

[99] *See* Exhibit CE-901, Phelps Dodge, SEC Form 10-K for 2004, March 7, 2005, at p. 80; Exhibit RE-184, Phelps Dodge, SEC Form 10-K for Fiscal Year 2005, February 26, 2006 (excerpts), at p. 83.

[100] *See* Exhibit CE-513, Master Participation Agreement, September 19, 2005, at Art. V (carving out from the definition of "material dispute" an assertion or determination that the 1998 Stabilization Agreement's stability benefits did not apply to all of SMCV's operations), Exhibit D (Art. I) (carving out from the definition of a *force majeure* event an assertion or determination that the 1998 Stabilization Agreement's stability benefits did not apply to all of SMCV's operations).

SMCV knew there was a significant risk that the 1998 Stabilization Agreement did not, in fact, apply to the Concentrator and yet SMCV went ahead and decided to invest in the Concentrator anyway.[101] Thus, SMCV could not have relied on the Stabilization Agreement when it decided to invest in the Concentrator.

47. In sum, Article 10.16.1 of the TPA provides that a claimant may submit a claim for breach of an investment agreement—whether on its own behalf or on behalf of an enterprise—to arbitration only if the claimant relied on that investment agreement when acquiring the covered investment that directly relates to the claim. Here, Claimant has failed to establish that it relied on the 1998 Stabilization Agreement to acquire its covered investments, so this Tribunal may not exercise jurisdiction over Claimant's claim on its own behalf or on SMCV's behalf for Perú's alleged breaches of the 1998 Stabilization Agreement. Even if the Tribunal were somehow to find that SMCV's reliance is relevant for the purposes of meeting Article 10.16.1's reliance requirement (it should not), Claimant has failed to prove that SMCV, in fact, relied on the 1998 Stabilization Agreement in establishing the Concentrator. Thus, as the U.S. Submission reinforces, Article 10.16.1 would still foreclose the Tribunal from exercising jurisdiction over Claimant's claim for breaches of the 1998 Stabilization Agreement.

III. THE UNITED STATES' SUBMISSION CONFIRMS THAT CLAIMANT'S CLAIMS FAIL TO ESTABLISH A BREACH OF THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT (ARTICLE 10.5 OF THE TPA)

48. The U.S. Submission reinforces the fact that Article 10.5 of the TPA prescribes the customary international law minimum standard of treatment. Below, Perú explains its agreement with the United States that this standard protects only obligations that have crystallized into customary international law (subsection A); that a claimant must prove a rule of customary international law by adducing evidence of widespread State practice and *opinio juris* (subsection B); that the concepts of legitimate expectations and transparency are not elements of FET under customary international law (subsection C); and that although FET under customary international law includes the obligation not to deny justice, that obligation applies only to action or inaction of the judicial branch of a government (subsection D).

[101] *See* Respondent's Rejoinder at Section II.D.3.

A. THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT INCLUDES ONLY RULES THAT HAVE CRYSTALIZED INTO CUSTOMARY INTERNATIONAL LAW

49. Article 10.5 of the TPA provides, in relevant part, as follows:

> 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.[102]

50. As the United States explains, these provisions evince the TPA Parties' intent to "establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5."[103] Article 10.5 therefore provides the minimum level of protection that the TPA Parties must accord foreign investors. As the *Glamis Gold v. United States* tribunal explained, "The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community."[104]

51. As the United States further explains, "The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts."[105] Under the customary international law minimum standard of treatment, the FET obligation includes the prohibition against denying "justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[106]

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[102] Exhibit CA-10, U.S.-Perú TPA at Art. 10.5 (emphasis added).

[103] U.S. Submission at para. 11.

[104] Exhibit RA-30, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, June 8, 2009 ("*Glamis Gold v. USA*, Award"), at para. 615; *see also* U.S. Submission at para. 105, n.24 (citing *Glamis Gold v. USA*, Award at para. 615).

[105] U.S. Submission at para. 14.

[106] Exhibit CA-10, U.S.-Perú TPA at Art. 10.5.2(a); *see also* U.S. Submission at para. 13.

52. Perú shares the United States' interpretation of Article 10.5. As Perú explained in its Counter-Memorial, "The language [in Article 10.5] could not be more explicit: the agreement to provide FET (and FPS) does not create substantive rights beyond those guaranteed under the customary international law minimum standard of treatment . . . ."[107] Likewise, as Perú observed in its Rejoinder, "by limiting its FET protections to the customary international law minimum standard of treatment, Article 10.5 only provides protections that have crystallized into customary international law."[108]

B. CLAIMANT BEARS THE BURDEN OF PROVING A PURPORTED OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW

53. As the United States explains, a claimant bears the burden of establishing that a given rule has crystallized into a rule of customary international law.[109] A claimant meets this burden by adducing evidence of (1) widespread State practice; and (2) *opinio juris*.[110] Annex 10-A to the TPA codifies the TPA Parties' shared understanding that rules of customary international law are proven by establishing these two elements.[111]

54. A claimant may establish widespread State practice through "relevant national court decisions or domestic legislation dealing with the particular issue alleged to be the norm of customary international law, as well as official declarations by relevant State actors on the subject."[112] By contrast, arbitral awards that interpret fair and equitable treatment under the customary international law minimum standard of treatment do not constitute State practice.[113] Thus, "a purported rule of customary international law based entirely on arbitral awards that lack

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[107] Respondent's Counter-Memorial at para. 617.

[108] Respondent's Rejoinder at para. 932.

[109] *See* U.S. Submission at para. 19 (citing Exhibit RA-50, *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266 (November 20), at p. 276; Exhibit RA-42, *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 I.C.J. 3 (February 20), at p. 43; Exhibit RA-30, *Glamis Gold v. USA*, Award at paras. 601-02).

[110] *See* U.S. Submission at para. 19.

[111] *See* U.S. Submission at para. 15.

[112] U.S. Submission at para. 16 (citing Exhibit RA-39, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 2012 I.C.J. 99 (February 3), at pp. 122-23; Exhibit RA-48, International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries (2018), Conclusion 6).

[113] *See* U.S. Submission at para. 31 (citing Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 605; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 2018 I.C.J. 507 (October 1), at p. 559, para. 162).

an examination of State practice and *opinio juris* fails to establish a rule of customary international law as incorporated by Article 10.5."[114] Similarly, treaties containing autonomous FET obligations do not constitute State practice.[115] As a result, a claimant may not discharge its burden to prove a purported rule of customary international law by relying on those awards.[116]

55. Perú shares the view of the United States (1) that a purported rule of customary international law must be proven through widespread State practice and *opinio juris*;[117] (2) that a claimant alleging that a TPA Party has violated a purported rule of customary international law protected by Article 10.5 of the TPA bears the burden of proving these elements;[118] and (3) that a claimant may not meet this burden by relying solely on arbitral awards that do not involve an examination of widespread State practice or *opinio juris*.[119]

56. Nonetheless, Claimant argues that the customary international law minimum standard of treatment contains purported rules—such as the alleged obligation to protect an investor's legitimate expectations—solely by reference to arbitral awards.[120] Claimant has avoided the necessary work of adducing evidence of State practice and *opinio juris* and hopes that the Tribunal will give it a free pass. As the United States recognizes and the *Cargill v. Mexico* tribunal explained, however, if a claimant does not prove a purported rule of customary

[114] U.S. Submission at para. 18.

[115] *See* U.S. Submission at para. 17.

[116] *See* U.S. Submission at para. 18.

[117] *See* Respondent's Rejoinder at para. 936 ("In other words, evidence of both State practice and *opinio juris* is necessary to show that a rule has crystallized into customary international law.") (citing Respondent's Counter-Memorial at para. 633).

[118] *See* Respondent's Rejoinder at para. 936 ("The burden is on the party seeking to rely on the rule (in this case, Claimant) to establish [State practice and *opinio juris*].") (citing Exhibit RA-43, *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, at Part IV, Chapter C, para. 26; Exhibit RA-29, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 (Redacted) ("*Cargill v. Mexico*, Award"), at para. 273; Exhibit RA-30, *Glamis Gold v. USA*, Award at para. 21); Exhibit RA-38, Michael Wood (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission, May 22, 2014, at paras. 22-23. As Perú also explained in its Rejoinder, this burden does not apply to denial of justice, as Article 10.5.2(a) expressly recognizes the obligation not to deny justice as a rule of customary international law. *See* Respondent's Rejoinder at para. 936; Exhibit CA-10, U.S.-Perú TPA at Art. 10.5.2(a).

[119] *See* Respondent's Rejoinder at paras. 936-38.

[120] *See* Respondent's Rejoinder at para. 937 (citing Claimant's Reply at para. 135).

international law, then a tribunal must hold that the claimant has "fail[ed] to establish the particular standard asserted."[121] Perú fully agrees.[122]

C. THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT DOES NOT INCLUDE THE CONCEPTS OF LEGITIMATE EXPECTATIONS OR TRANSPARENCY

57. As the United States explains, the FET obligation under the customary international law minimum standard of treatment does not protect the concept of legitimate expectations.[123] Thus, frustration of an investor's expectations does not breach Article 10.5 of the TPA.[124] That conclusion applies with equal force when an investor develops expectations on the basis of a contract.[125] Similarly, the FET obligation under customary international law does not require States to treat investors transparently.[126]

58. Perú fully agrees with the United States that the FET obligation under customary international law does not include a requirement to protect investors' legitimate expectations or to treat investors transparently.[127] As Perú explained in its Counter-Memorial, an investor "may develop its own expectations about the legal regime governing its investment," but those expectations "impose no obligations on the State under the customary international law minimum standard of treatment."[128] And, as Perú explained in its Counter-Memorial and

[121] Exhibit RA-29, *Cargill v. Mexico,* Award at para. 277; *see* U.S. Submission at para. 19 (citing Exhibit RA-29, *Cargill v. Mexico,* Award at para. 277).

[122] *See* Respondent's Rejoinder at para. 940.

[123] *See* U.S. Submission at para. 28.

[124] *See* U.S. Submission at para. 29.

[125] *See* U.S. Submission at para. 29, n.55 (citing Exhibit RA-170, *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, at para. 87; Exhibit CA-269, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 ("*Waste Management v. Mexico*, Award"), at para. 115).

[126] *See* U.S. Submission at para. 30 (citing *United Mexican States v. Metalclad Corp.*, [2001] 89 B.C.L.R. 3d 359, 2001 B.C.S.C. 664 (Can. B.C. S.C.), at paras. 68, 72; Exhibit RA-10, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, at para. 133; *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, NAFTA/ICSID Case No. UNCT/07/1, Award, March 31, 2010, at paras. 208, 231).

[127] *See* Respondent's Rejoinder at paras. 917-18.

[128] Respondent's Counter-Memorial at para. 634(a).

Rejoinder, the concept of an obligation to treat an investor transparently has also failed to crystallize into a rule of customary international law.[129]

59. Claimant has failed to adduce evidence of State practice and *opinio juris* necessary to prove otherwise.[130] Thus, the Tribunal's analysis of Claimant's legitimate expectations and transparency claims under Article 10.5 of the TPA should end there. Moreover, as Perú discusses in its Counter-Memorial and Rejoinder, Perú has accorded Claimant fair and equitable treatment in accordance with the customary international law minimum standard of treatment.[131]

60. Even assuming, *arguendo*, that the Tribunal were to find that customary international law protects the concepts of legitimate expectations and transparency (it should not), Claimant's legitimate expectations and transparency claims still fail for the reasons explained in Respondent's Counter-Memorial and Rejoinder.[132]

D. THE CUSTOMARY INTERNATIONAL LAW MINIMUM STANDARD OF TREATMENT PROTECTS AGAINST A DENIAL OF JUSTICE ONLY WITH RESPECT TO JUDICIAL MEASURES

61. The United States explains that the TPA's FET obligation explicitly recognizes only one rule that has crystallized into customary international law: "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[133] The United States further observes that, under customary international law, denial of justice concerns measures taken by the judicial branch of a respondent state.[134]

62. The U.S. Submission makes clear that the threshold for a tribunal to find that the behavior of a respondent state amounts to a denial of justice is high.[135] Such behavior would

[129] *See* Respondent's Counter-Memorial at para. 634(c).

[130] *See* Respondent's Counter-Memorial at para. 634(a), (c); Respondent's Rejoinder at para. 935.

[131] *See* Respondent's Counter-Memorial at Section IV.B.2; Respondent's Rejoinder at Section IV.B.2.

[132] *See* Respondent's Counter-Memorial at paras. 643-47, 656-60; Respondent's Rejoinder at paras. 971-78, 988-97.

[133] U.S. Submission at para. 23 (citing TPA at Article 10.5.2(a)).

[134] *See* U.S. Submission at para. 23 (citing Edwin M. Borchard, *The Diplomatic Protection Of Citizens Abroad Or The Law Of International Claims*, 1919, at p. 330; J.L. Brierly, *The Law Of Nations*, 1963, at pp. 286-87).

[135] *See* U.S. Submission at paras. 23-25.

include, for example, denying foreigners access to courts.[136] Conversely, "erroneous domestic court decisions, or misapplications or misinterpretation of domestic law, do not in themselves constitute a denial of justice under customary international law."[137] Moreover, "it is well-established that international arbitral tribunals, such as those established by disputing parties under U.S.-Peru TPA Chapter Ten, are not empowered to be supranational courts of appeal on a court's application of domestic law."[138]

63. Perú agrees with the United States' interpretation of the denial of justice standard incorporated in Article 10.5.2(a) of the TPA. For example, as Perú explained in its Rejoinder, a denial of justice "occurs not where a State makes a mistake, but where a State fails to create and maintain a system of justice that assures that foreign investors do not face injustice and are not deprived of the right to correct an injustice."[139] Moreover, Perú agrees with the United States that arbitral tribunals established under the TPA do not sit as international appellate courts.

64. Here, as Claimant acknowledges, it has not asserted a denial of justice claim with respect to the Tax Tribunal decisions.[140] This makes sense. As the U.S. Submission makes clear, only final judicial measures are actionable as denial of justice claims under Article 10.5.[141] Of course, Claimant has no final judicial measures to challenge, because SMCV has not pursued any domestic remedies regarding the alleged Tax Tribunal due process violations—that is, SMCV did not appeal most of the Tax Tribunal decisions (on due process grounds, or on any grounds at all) to Perú's courts, and, when it did appeal some Tax Tribunal decisions, SMCV did

[136] *See* U.S. Submission at para. 23 (citing Edwin M. Borchard, *The Diplomatic Protection Of Citizens Abroad Or The Law Of International Claims*, 1919, at p. 63; Harvard Research Draft, "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners," 23 *American Journal of International Law*, 131, 1929, at p. 134, Art. 9).

[137] U.S. Submission at para. 24 (citing Harvard Research Draft, "The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners," 23 *American Journal of International Law*, 131, 1929, at p. 134, Art. 9; Jan Paulsson, *Denial of Justice in International Law*, 2015, at p. 81; Patrick Dumberry, *The Fair And Equitable Treatment Standard: A Guide To NAFTA Case Law On Article 1105*, 2013, at p. 229; Exhibit RA-82, Christopher Greenwood, "State Responsibility for the Decisions of National Courts," in *Issues of State Responsibility Before International Judicial Institutions* (Malgosia Fitzmaurice, *et al*. eds.) (2004), at p. 61).

[138] U.S. Submission at para. 26 (citing Exhibit RA-18, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (redacted), August 25, 2014, ("*Apotex Holdings v. United States*, Award") at para. 278; Exhibit CA-269, *Waste Management v. Mexico*, Award at para. 129).

[139] Respondent's Rejoinder at para. 960 (emphasis added).

[140] *See* Claimant's Reply at para. 143.

[141] *See* U.S. Submission at para. 27.

not claim any due process violations. Instead, Claimant has tried to submit its due process claims against the Tax Tribunal through the back door by alleging that the Tax Tribunal's actions constitute due process violations that are unfair and inequitable, allegedly inconsistent with Article 10.5 of the TPA. In any event, the United States notes that the customary international law minimum standard of treatment prescribed by Article 10.5 permits denial of justice claims only with respect to acts or omissions by the judicial branch of government.[142] Here, the due process violations that Claimant alleges are based on events in Peru's administrative branch, not its judicial branch of government.[143]

65. Nor has Claimant otherwise brought a denial of justice claim against Perú's judicial branch. Respondent must nonetheless stress that Claimant is in effect using this arbitration to relitigate the scope of the 1998 Stabilization Agreement (even though it has not framed its denial of justice claim as such). That issue has already been resolved by Perú's highest court—the Supreme Court—which concluded, as a matter of Peruvian law, that the 1998 Stabilization Agreement covers only SMCV's Leaching Project and not the Concentrator Project. That decision still stands in Perú. And, as the U.S. Submission makes clear, tribunals constituted under Chapter Ten of the TPA "are not empowered to be supranational courts of appeal on a court's application of domestic law."[144] Thus, this Tribunal must not second-guess the Supreme Court's decision and its interpretation or application of Peruvian law with respect to the scope of the 1998 Stabilization Agreement.

[142] *See* U.S. Submission at para. 23.

[143] For the reasons explained in Section IV.B.2.a(iv) of Respondent's Counter-Memorial and Section IV.B.2.a.(iv) of Respondent's Rejoinder, all of Claimant's due process claims fail as breaches of Article 10.5 of the TPA.

[144] U.S. Submission at para. 52 (citing Exhibit RA-18, *Apotex Holdings v. United States*, Award at para. 278; Exhibit CA-269, *Waste Management v. Mexico*, Award at para. 129).

IV. CONCLUSION

66. As Perú has explained in these Comments, and consistent with Perú's written submissions in these proceedings, the U.S. Submission illustrates that, under a correct interpretation of Article 10.18.1, Article 22.3.1, Article 10.1.3, and Article 10.16.1 of the TPA, this Tribunal lacks jurisdiction over nearly all of Claimant's claims. Moreover, also consistent with Perú's submissions, the U.S. Submission shows that Claimant has failed to establish that the concepts of legitimate expectations and transparency form part of the customary international law minimum standard of treatment prescribed by Article 10.5, or that the conditions required to meet a denial of justice claim, which does form part of the customary international law minimum standard of treatment, have been met in this case.

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